IN THE SUPREME COURT STATE OF NEVADA

GAVIN COX and MINH-HAHN COX, Husband and Wife,	)	
	)	Supreme Court No. 76422
Appellants,	)	District Court No.:
	)	A-14-705164-C
vs.	)	
	)	
MGM GRAND HOTEL, LLC; DAVID COPPERFIELD aka DAVID S. KOTKIN; BACKSTAGE EMPLOYMENT AND REFERRAL, INC.; DAVID COPPERFIELD'S DISAPPEARING, INC.; TEAM CONSTRUCTION MANAGEMENT, INC.; and BEACHERS LV, LLC	)	
	)	
Respondents.	)	
	)	

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The law firms representing Appellants GAVIN COX and MINH-HAHN COX ("Appellants") in the District Court and in this Court are MORELLI LAW FIRM, PLLC and HARRIS & HARRIS. The undersigned counsel of record certifies that no other persons or entities as described in NRAP 26.1(a) must be disclosed.

DATED this 11th day of June, 2019

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By: 

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JURISDICTIONAL STATEMENT

Gavin Cox and Minh-Hahn Cox (collectively "Appellants") filed a Complaint against MGM Grand Hotel, LLC ("MGM Grand"), David Copperfield, aka David S. Kotkin ("Copperfield"), Backstage Employment and Referral, Inc. ("Backstage"), David Copperfield's Disappearing, Inc. ("DCDI"), and Team Construction Management ("Team Construction") (collectively "Respondents"), for personal injuries arising from a fall that Mr. Cox suffered on November 12, 2013, when he was an audience member selected to participate in the "13 Illusion" during the David Copperfield Show at the MGM Grand Hotel. *See Joint Appendix ("JA") JA 000001-011.* This is an Appeal from a defense jury verdict in the Eighth Judicial District Court, Judge Mark R. Denton (the "District Court"), and various trial and post-trial orders and rulings. A bifurcated jury trial in this matter began on April 3, 2018. On May 29, 2018, after a seven-week trial on liability only, the jury found that Respondents MGM Grand, Copperfield, and DCDI were all negligent, but inexplicably attributed comparative fault entirely to Mr. Cox without any record evidence as to his fault. *JA 005920-5923.* Appellants sought relief from the jury verdict and filed a Notice of Appeal and Case Appeal Statement on July 11, 2018. *JA 006260-6294.*

Appellants subsequently made a Motion for Judgment as a Matter of Law, or, alternatively, for a New Trial. *JA 005925-6259.* A hearing was held on

August 23, 2018. *JA 006497-6552.* By Decision dated September 17, 2018 and Order dated October 18, 2018, the District Court denied Appellants' motion. *JA 006553-6559; JA 006560-6561.* A Notice of Entry of said Order was filed on October 23, 2018. *JA 006562-6566.* On May 6, 2019, the District Court entered an Order granting Appellants' Motion for Certification of Judgment and made an express determination certifying that, pursuant to NRCP 54(b), the October 18, 2018 Order is a final judgment from which an appeal may be taken. *JA 006624-6626.* Appellants filed an Amended Notice of Appeal and Case Appeal Statement. *JA 006567-6585.* On March 28, 2019, the Supreme Court issued an Order Granting Motion which treated the parties' stipulation extending the time for filing briefs as a joint motion for extension of time and granted said motion. *JA 006597-6598.* Appellants had until June 11, 2019 to timely file and serve the Opening Brief and Appendix, making the within Appeal timely.

ROUTING STATEMENT

Pursuant to NRAP 3A(b)(1) and (2) (allowing for appeal from a final judgment and from an order denying a motion for a new trial), this Court has appellate jurisdiction over this case. This Court should retain jurisdiction because pursuant to NRAP 17(a)(12), Appellants seek interpretation and clarification of matters raising as principal issues questions of statewide public importance. The public policy concerns at issue are unfairness in the proceedings and violations of

NRS 50.085(3) and of basic, well-established evidentiary principles concerning impeachment which could affect every court proceeding in this State.

Should the Supreme Court decide not to retain jurisdiction over this case, the Court of Appeals has jurisdiction. Pursuant to NRAP 17(b)(7), "[a]ppeals from postjudgment orders in civil cases" are presumptively assigned to the Court of Appeals. Also, pursuant to NRAP 17(b)(5), "[a]ppeals from a judgment . . . of $250,000 or less in a tort case" are presumptively assigned to the Court of Appeals. This Appeal falls under both subsections.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL.

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY ADMITTING SUB ROSA SURVEILLANCE VIDEOS OF MR. COX DURING THE LIABILITY PORTION OF TRIAL AND WHETHER THE RESULTING PREJUDICE DENIED APPELLANTS A FAIR TRIAL.

WHETHER THE DISTRICT COURT ERRED IN SUBMITTING THE ISSUE OF COMPARATIVE NEGLIGENCE TO THE JURY WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SUCH A CHARGE.

WHETHER THE JURY'S MANIFEST DISREGARD OF THE DISTRICT COURT'S INSTRUCTIONS AND APPLICABLE LAW RESULTED IN AN INCONSISTENT VERDICT THAT WARRANTS A NEW TRIAL.

WHETHER THE DISTRICT COURT'S FAILURE TO INFORM THE JURY OF THE TRUE REASONS FOR ITS DECISION TO CANCEL THE JURY VIEW WAS INCONSISTENT WITH SUBSTANTIAL JUSTICE AND PREVENTED APPELLANTS FROM HAVING A FAIR TRIAL.

STATEMENT OF CASE AND STATEMENT OF RELEVANT FACTS

On the night of November 12, 2013, Gavin Cox was selected from the audience during a David Copperfield Show at the MGM Grand in Las Vegas to participate in the "13 Illusion." While participating in the "runaround" portion of the illusion, Mr. Cox fell and sustained serious and permanent personal injuries.

Specifically, while visiting Las Vegas, Gavin Cox and his wife decided to attend a David Copperfield show. The final act of the show was the "13 Illusion." During the 13 Illusion, up to 13 audience members are selected at random when large balls are thrown into the audience while music plays. When the music stops, the 13 people holding balls are the participants in the illusion. Gavin was led to the stage by Backstage employees and seated with the other participants in a large prop which had two rows of chairs. Gavin was given no information as to what he could expect. No instructions were given. No waivers were signed. Gavin was given no indication at all as to what was about to occur. A large curtain was draped around the prop to cover it from audience view. Suddenly, and without warning, stagehands appeared through a trap door in the prop and hurried the participants off-stage through the trap door. Gavin was the last participant and was immediately instructed to run by Backstage and MGM Grand employees. Gavin was given the impression that if he did not run as fast as he could, the 13 Illusion would fail. Gavin was hurried through a dark corridor,

through multiple hallways, through a set of doors, and was suddenly outside of the MGM Grand building where it was dark. Gavin was then told to run around two corners by Backstage and MGM Grand employees. While turning the second corner, there was an unexpected ramp, on which Gavin slipped and fell. The area around the ramp was covered in construction dust. Gavin was never warned about the sudden incline of the ramp, which the evidence at trial showed violated the Nevada Building Code at the time of the accident. *See JA 003031-3059.*

The David Copperfield Show is performed at the MGM Grand. All of the relevant events leading to Gavin's injuries took place on the premises owned by MGM Grand. Copperfield owns and produces his show. He operates under the business name David Copperfield Disappearing, Inc. Copperfield is the owner, President, and sole employee of DCDI. Copperfield admits he is responsible for the production of the 13 Illusion and that he personally designed and determined the path the participants followed to complete the illusion. However, Copperfield requires assistance to be able to complete his performances. As such, he has a contract with Backstage Employment who exists solely to provide personnel to assist Copperfield with his performances. The Backstage employees are provided to meet Copperfield's unique needs for each illusion and are expected to follow Copperfield's directions. Additionally, there are also MGM Grand employees acting as stage hands during the "runaround" portion of the 13 Illusion. The

MGM Grand employees were expected to follow all of Copperfield's directions. *See JA 000920-0972, 000988-0999, 001136, 001155-1156; JA 001185, 001211-1212, 001239-1240, 001264-1265, 001277; JA 001576.*

A bifurcated liability trial began on April 3, 2018. On May 4, 2018, after Appellants rested their case-in-chief, counsel for Backstage Employment, in the presence of the jury and without any prior notice, made an oral motion for a jury view of the relevant portions of the MGM Grand property pursuant to NRS 16.100. *JA 003853-3854.* This request, made in the presence of the jury, was patently improper and done for the express purpose of placing Appellants in the untenable position of opposing the request at the risk of intimating to the jury that they had something to hide. Moreover, as the District Court noted, Appellants were not given any notice or opportunity to brief the oral motion. Nevertheless, argument regarding the proposed jury view was held that same day outside the presence of the jury during which Appellants stated their strenuous objections due to, among other reasons, the fact that the entire outdoor portion of the "runaround" route had been significantly structurally altered and, as such, the accident conditions could not be accurately recreated. *See JA 003936-3938, 003943-3946.* Over Appellants' numerous objections, the District Court granted the request for a jury view and informed the jury of the same. *See JA 003964-3967, 003971.*

Appellants filed an Emergency Petition for Writ of Mandamus in the Supreme Court. *JA 004004-4067.* Appellants argued the District Court abused its discretion in permitting the jury view in light of the substantially different condition of the subject area and because permitting it would irreparably taint the jury and substantially prejudice Appellants. On May 7, 2018, the Court of Appeals issued an Order Denying Petition for Writ of Mandamus solely on procedural grounds. *JA 004068-4070.* However, the court issued a substantive dissent. Justice Silver noted "the irreparable harm petitioners may face with regard to this unfair procedure after resting their case." Justice Silver concluded she would "prohibit[] the jurors from viewing the scene at this late juncture of trial as being untimely and unfair." *JA 004068-4070.*

On May 8, 2018, the District Court reversed its decision and denied the request for a jury view. Prior to the decision, Appellants' counsel played a video for the court that was recorded just the night before. *JA 004077-4079.* The video showed Respondents, in preparation for the jury view, had literally hired a crew of power washers to clean up the outdoor portion of the "runaround" in an attempt to falsely convince the jury the route was clean and safe on the night of Mr. Cox's accident. The video also showed Respondents' counsel was actually present while the power washing and cleaning was taking place and thus knew the accident scene was being further altered. *JA 004077-4079.* Despite providing

video proof of this unethical conduct, the court stopped Appellants from playing the video any further and would not even acknowledge it. *JA 004077-4079.*

Outside the presence of the jury, the District Court, in acknowledgment of, and in agreement with Justice Silver's dissent, stated the reasoning for its reconsideration included: (1) the fact that the Respondents' request for the jury view came only after Appellants had rested their case; (2) that substantial changes had been made to the premises; and (3) that the substantial changes would likely ring a bell that could not be unrung in the minds of the jurors. *JA 004079-4080.* The District Court even quoted directly from Justice Silver's dissent and noted that the points Justice Silver made in her dissent "have significance." *JA 004080-4081, 004083, 004096-4097.* Ultimately, the District Court, on reconsideration, denied Respondents' motion for a jury view. *JA 004095, 004102.* Yet, when the District Court informed the jury it was cancelling the previously confirmed jury view, it did not give the jury *any* of the above-mentioned reasons for changing its mind. Instead, the District Court simply stated that it "has determined that this is not conducive — this case is not conducive to" a jury view. *JA 004118.*

The next error was made when, although the issues of liability and damages were bifurcated, the District Court, over Appellants' objection, permitted Respondents to introduce sub rosa surveillance footage of Mr. Cox during their liability case. *JA 004708-4715, 004718-4719; JA 005033-5035.*

Over Appellants' strenuous objections, counsel for Backstage Employment argued that the sub rosa surveillance videos were admissible to "impeach[ ] [Mr. Cox's] conduct" in the courtroom. *JA 004709-4715; JA 004971-4973.* Specifically, Backstage proffered the sub rosa surveillance videos *solely* to "rebut" the "fact that, on the way to the witness stand, [Mr. Cox] held onto the marshal's arm" and that "on the way back from the witness stand, he held onto [Appellants' counsel] Mr. Morelli." *JA 004710-4711.* Counsel for MGM Grand then piled on and argued that the videos were admissible because "the credibility or believability of a witness should be determined by his manner *upon the stand*" and "the law anticipates the ability to impeach credibility through mannerisms." *JA 005062-5065.* Yet, at no time during their cross-examination of Mr. Cox did *any* of the Respondents *ever* question Mr. Cox about the need to walk with assistance in or out of the courtroom and his actions clearly did not take place while he was on the stand. In deeming the surveillance videos admissible, the District Court illogically stated: "I consider that whatever has happened in open court is fair game. And, accordingly, I'll permit the video." *JA 005067.*

Immediately after this incorrect ruling, Appellants' counsel requested permission to call a medical expert to at least adequately explain and rebut the sub rosa surveillance videos, but the request was denied. *JA 005067-5068.* Specifically, the District Court, in an apparent rush to finish the case, said: "I'm

not talking about doctors coming in or that kind of thing. We're not going to get into that. We've got to conclude this – the evidence in this case. All right?" *JA 005068*. Thereafter, Respondents were permitted to admit into evidence and show the jury six (6) surveillance video clips of Mr. Cox taken outside the courtroom at various times before and during trial which simply showed him slowly walking outside while not holding onto anyone for assistance. *JA 005068-5070.* Respondents contrasted these surveillance clips with the courtroom footage of Mr. Cox approaching and leaving the witness stand with minor assistance in an apparent attempt to show the jury that he was faking his injuries — which were not even at issue during the liability phase of trial. *JA 005068-5070.*

At the close of Respondents' case, Appellants moved pursuant to Rule 50(a)(1) for judgment as a matter of law to dismiss the affirmative defense of comparative negligence and asked that the jury not be read the comparative negligence charge. *JA 005147-5154.* The basis of Appellants' motion was that Respondents never proffered any evidence to establish that Mr. Cox was in any way comparatively negligent. The District Court cursorily denied the motion, saying only: "Lots of things for the jury to consider, and comparative negligence is one of them. So the motion is denied." *JA 005154.*[1]

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1 Regarding comparative negligence, the District Court gave the following instruction: Defendants claim that plaintiff's own negligence contributed to his accident. To succeed on this claim, the *defendants must prove both the following*:

Compounding this error, during closing arguments, counsel for Respondents were allowed to make several completely improper statements. By far the most egregious was Mr. Popovich, counsel for MGM Grand, who said:

> The Friday before the long break, you all saw videotape of Mr. Cox. You saw him in this court -- again, with these cameras -- being helped up to the witness stand. You saw him being helped back down from the witness stand based on my experience with jurors, I'm sure you have observed him for many weeks in this courtroom. When, during testimony, he needed to go outside for any reason, he was assisted by his son. When he stood for you to go in and out, he would often stand using some hard physical assistance, steadied by a hand, something like that. **Now, Mr. Cox, it is true, never gave verbal testimony that "I can walk without assistance." And he never gave verbal testimony that he couldn't stand without some physical assistance like leaning on anything**. So the subsequent video you were shown of Mr. Cox walking in 2016 for exercise, 2017 for exercise, after or before court days here, during this trial when you could observe him here, and then you see him when you're -- when you, this jury, is not around, well, that is evidence that impacts Mr. Cox's credibility. You can compare what you saw on the surveillance videotape to what you observed in this courtroom, and you can decide whether that looks consistent or whether it looks very inconsistent. Now, the part that plays into this jury instruction is the failure to produce stronger evidence. After those videos were played, plaintiffs were in their rebuttal case. **And they had the opportunity to put Mr. Cox up here and tell us why**

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1. That plaintiff was negligent; 2. That plaintiff's negligence was a proximate cause of Gavin Cox's accident. The plaintiffs may not recover damages if Mr. Cox's comparative negligence is greater than the negligence of the combined negligence of all the defendants in this case. *However, if Gavin Cox was negligent, the plaintiffs may still recover a reduced sum so long as his comparative negligence was not greater than the negligence of the combined negligence of all the defendants*. If you determine that the plaintiffs are entitled to recover, you shall return a special verdict indicating the percentage of negligence attributable to each party. *JA 005257-5258*; *see also* Jury Instruction No. 22.

> **he hasn't been deceiving this jury from day one, why he hasn't been manipulating this jury from day one right here, witness stand. Let's get some more truth. Snicker all they want; they're caught and they know it**. Okay? So they have the ability to produce stronger evidence. They just let it slide and hoped Mr. Morelli could smooth it out. **That evidence didn't come in related to injuries because that is a Phase 2 issue. That evidence came in to let you assess Mr. Cox's credibility. But does he have any left? I don't think so. He's been manipulating this jury from day one with every move he made. You shouldn't believe a word that comes out of his mouth because the only reason to do that is the green box at the end. He just wants a payoff.**
> MR. MORELLI: Jesus
> MR. POPVICH: Yeah, "Oh, Jesus." That's right, Mr. Morelli. You should be praying because this jury saw what they saw.

JA 005466-5469 (emphasis added). Appellants' counsel objected to the highly improper statements in Mr. Popovich's closing and argued that said statements constituted "incredibly prejudicial" misconduct in violation of Rule of Professional Conduct 3.4(e) and pursuant to the Lioce v. Cohen, 124 Nev. 1 (2008) and Centeno-Alvares v. Coe, Case No. A510230, 2008 WL 8177830 (Nev. Dist. Ct. 2008) decisions. *JA 005488-5492, 005555-5561.* Appellants' counsel requested that the District Court admonish Mr. Popovich to the jury pursuant to Lioce. *JA 005488-5492, 005557-5561, 005564-5567.*[2]

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2 Specifically, Appellants requested the following admonishment, based on language from Gunderson v. D.R. Horton, Inc., 319 P.3d 606 (2014): "Members of the jury, during Mr. Popovich's closing arguments, he stated that Gavin Cox is only here because of, quote, the green box at the end, and he, quote, just wants a payoff, end quote. Those comments were impermissible, and I admonish you to disregard those comments and dismiss them from your mind. You may not use

The District Court denied the request to admonish the jury and Mr. Popovich pursuant to Lioce and Gunderson, saying: "I'm not inclined to use the term 'misconduct' or 'impropriety' or anything like that." *JA 005560, 005568-5571.* The District Court stated: "So I'm not going to get into misconduct or violations of rules of professional responsibility or anything like that. I'm going to just allude to the fact that there was an objection, that I've sustained it, and telling them to disregard the comment. Okay?" *JA 005571.* The District Court gave the following instruction:

> Members of the jury, during Mr. Popovich's closing arguments, he stated that Gavin Cox is here because of the "green box at the end," and he "just wants a payoff." Those comments were objected to and the Court has sustained the objection, and I admonish you to disregard those comments and to dismiss them from your mind. You may not use those comments in coming to your decision in this case and must decide this case solely based on the evidence and the law.

JA 005577-5578.

Ultimately, the jury correctly found that MGM Grand, Copperfield, and DCDI *were all negligent*, but inexplicably found that said negligence was not a proximate cause of Mr. Cox's accident. Throughout the trial, Appellants presented a plethora of evidence that the above-mentioned parties negligently designed and implemented the 13 Illusion. Specifically, Copperfield and DCDI

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those comments in coming to your decision in this case and must decide this case solely based on the evidence and the law." *JA 005561.*

designed the 13 Illusion's runaround route, which was also approved by MGM Grand. *JA 000945, 000988; JA 001263-1265, 001277-1278.* This approved runaround route had unknowing audience participants, including Mr. Cox, *JA 000970, 000993,* running, *JA 001086*; *JA 001293-1294, 001312*, an unknown route outside of the MGM Grand in the dark at night, *JA 001039*, and up a hidden incline that violated the applicable Building Code at the time of Mr. Cox's fall. *JA 001211, 001238; JA 004319-4320.* Moreover, it was undisputed that none of the participants, including Mr. Cox, were ever warned about the incline, even though multiple defense witnesses testified that it would have been prudent to do so. *JA 001048; JA 001212, 001345-1346; JA 002641-2642.* Furthermore, the type of harm — a participant falling during the runaround — was admittedly foreseeable, *JA 001089*, and Respondents were on notice of previous participants who had fallen during the runaround portion of the illusion at MGM Grand. *JA 001093; JA 002922-2952; JA 005040-5058.* Nor did Respondents ever proffer any evidence to establish that Mr. Cox was in any way comparatively negligent. Accordingly, a finding of negligence on the part of the Respondents would necessarily require a finding of causation and the jury's verdict was inconsistent and incorrect from the evidence presented. On May 29, 2018, after a seven-week trial on liability, the jury correctly found MGM Grand, Copperfield, and DCDI

were all negligent, but inexplicably attributed comparative fault entirely to Mr. Cox without any record evidence as to his fault. *JA 005920-5923.*

SUMMARY OF THE ARGUMENT

As a result of the District Court's numerous errors, the Respondents' misconduct, and the jurors' manifest disregard of the District Court's instructions and the evidence, the Appellants were denied a fair trial. This tapestry of errors was woven together to bring about an improper result that was inconsistent with substantial justice and the evidence presented at trial. As will be shown below, these errors were all linked and ruined Appellants' ability to receive a fair trial. Each error on its own could reverse this case but, collectively, the prejudice is so overwhelming that it is clear Appellants did not receive a fair trial. For these reasons, a new trial is warranted and the District Court abused its discretion in denying Appellants' motion for the same.

First, the District Court violated basic, well-established evidentiary principles and NRS 50.085(3) by improperly permitting Respondents to introduce severely prejudicial sub rosa surveillance videos during the liability phase of the bifurcated trial. There was no evidentiary basis for admitting the videos during the liability phase, it was directly counter to numerous rules, and with their admission Respondents were improperly permitted to support their false narrative that Mr. Cox was faking or exaggerating his injuries. All of the Respondents

worked in concert throughout the trial to push this false narrative and the District Court's errors furthered their goal. The District Court compounded its error by refusing to permit Appellants to present limited medical expert testimony on the issue of Mr. Cox's injuries, solely to rebut the improper sub rosa surveillance videos. The severely prejudicial effect of the surveillance videos was further compounded when multiple Respondents were permitted to speak at length in their closing arguments about the videos, how they allegedly affected Mr. Cox's credibility, and the Appellants' purported failure to rebut them.

The District Court then failed to give the necessary admonishments for the patently improper statements that counsel for MGM Grand, Copperfield, and Backstage made in their closing arguments. The misconduct of MGM Grand's counsel unquestionably prejudiced the jury against Appellants because he blatantly told the jurors that Mr. Cox is a liar who "just wants a payoff." The District Court's curative instruction to the jury — wherein it merely stated that said attorney's comments were objected to and should be disregarded but failed to advise the jury about the "impropriety of counsel's conduct" and failed to "reprimand or caution counsel against such misconduct" — was directly contrary to what Lioce requires and was wholly insufficient to eliminate the severely prejudicial effect of the misconduct.

The District Court further erred in failing to make the requisite specific findings on the record during the oral argument of, and in its September 17, 2018 Decision on, Appellants' motion for a new trial. *JA 006497-6561.* Pursuant to Lioce, the District Court was required to make specific findings, applying the standards described in Lioce to the facts of this case. As the District Court failed to properly analyze and make specific findings about the claims of attorney misconduct that Appellants made in their motion for a new trial, this case must at an absolute minimum be remanded for that purpose.

The District Court also erred: (1) in denying Appellants' Rule 50(a) motion as to Respondents' comparative negligence affirmative defense; (2) in charging the jury on comparative negligence; and (3) in including comparative negligence on the verdict sheet. Respondents were required to establish that comparative negligence was a bona fide issue before the NRS 41.141(2) jury instruction could be given. They utterly failed to do so. Respondents proffered absolutely no evidence whatsoever that Mr. Cox was in any way negligent or that he contributed to his fall. As there was absolutely no evidence that Mr. Cox acted unreasonably or contributed to his fall, it was impossible for Respondents to meet their burden on the issue of comparative negligence and the issue should have never been submitted to the jury. By improperly submitting the issue to the jury even though it was "not a viable defense," the District Court improperly permitted

the jurors to focus on Mr. Cox's conduct and created the opportunity for the jurors to reach an inconsistent verdict, which is exactly what occurred.

Moreover, based on all the relevant facts adduced at trial, including that there was absolutely no evidence of any intervening force between the negligence of MGM Grand, Copperfield, and DCDI, and Mr. Cox's fall, if the jury had correctly applied the law and the District Court's instructions, it would have been impossible for the jury to find an absence of proximate cause and it would have been impossible for them to reach their inconsistent verdict, namely that: MGM Grand, Copperfield, and DCDI *were all negligent*, but that their negligence was not *a* proximate cause of Mr. Cox's accident. Because the jurors could not have reached their inconsistent verdict if they had properly applied the District Court's instruction on proximate cause and the relevant law, the District Court was obligated to grant a new trial.

Lastly, by refusing to provide the jury with the true reasons for cancelling the previously confirmed jury view, the District Court severely prejudiced Appellants. The District Court's failure to explain the actual reasoning for its decision to cancel the jury view, after Respondents had requested the jury view in the jury's presence, was inconsistent with substantial justice and prevented Appellants from having a fair trial, especially in a trial where the credibility of the Appellants was improperly and repeatedly attacked.

STANDARD OF REVIEW

"[T]his court upholds a jury verdict if there is substantial evidence to support it, but will overturn it if it was clearly wrong from all the evidence presented." Allstate Ins. Co. v. Miller, 125 Nev. 300, 308 (2009) (emphasis added). Substantial evidence is that which "a *reasonable* mind might accept as adequate to support a conclusion." Bally's Grand Employees' Fed. Credit Union v. Wallen, 105 Nev. 553, 556 (1989) (quotation omitted) (emphasis in original). Where substantial evidence does not exist to support the jury's findings, reversal is necessary. See Soper v. Means, 111 Nev. 1290, 1294 (1995).

"Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the opposing party has failed to prove a sufficient issue for the jury, so that his claim cannot be maintained under the controlling law." Nelson v. Heer, 123 Nev. 217, 222 (2007). This Court reviews orders denying motions for judgment as a matter of law de novo. Id. at 223.

Moreover, NRCP 59(a) permits the grant of a new trial when errors affect a party's ability to receive a fair trial. That Rule provides, in pertinent part:

> A new trial may be granted to all or any of the parties on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party...(5) Manifest disregard by the jury of the

> instructions of the court... or, (7) Error in law occurring at the trial and objected to by the party making the motion.

Nev. R. Civ. P. 59. "[A]n order granting or denying a new trial motion [pursuant to NRCP 59] is reviewed for an abuse of discretion." Nelson, 123 Nev. at 223.

This Court reviews questions of law de novo. Birth Mother v. Adoptive Parents, 118 Nev. 972, 974 (2002). Statutory interpretation is a question of law which this Court reviews de novo. *Id.* When this Court reviews a district court's interpretation of court rules, a de novo review applies. Marquis & Aurbach v. Dist. Ct., 122 Nev. 1147, 1156 (2006).

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY ADMITTING SUB ROSA SURVEILLANCE VIDEOS OF MR. COX DURING THE LIABILITY PORTION OF THE TRIAL AND THE RESULTING PREJUDICE DENIED APPELLANTS A FAIR TRIAL.

The District Court's ruling admitting the sub rosa surveillance videos of Mr. Cox during the liability portion of trial to impeach Mr. Cox's unsworn conduct in the courtroom while not even on the witness stand constitutes reversible error: (1) because the information depicted in the videos goes only to damages, not to liability; (2) because you cannot impeach a witness' *conduct* in the courtroom; you can only impeach *sworn testimony* and at no time did Mr. Cox testify that he always needs assistance while walking; (3) because Mr. Cox's walk to and from the witness stand cannot constitute "statements" pursuant to NRS

51.045; (4) because the admission of the sub rosa videos violated NRS 50.085(3); and (5) because the admission of the sub rosa videos was unduly prejudicial to the Appellants. The District Court's error in admitting the sub rosa surveillance videos during the liability portion of trial caused such severe prejudice to Appellants that it cannot be considered harmless and requires a new trial.

First, it was error to admit the surveillance videos during the liability phase of trial because such videos bear only on Mr. Cox's *damages*. The videos have absolutely nothing to do with Respondents' *liability*. The Nevada Court of Appeals recently noted that if an action is bifurcated, damages evidence, specifically sub rosa videos, should be excluded from the liability portion of the trial to prevent prejudice. See Burrows v. Riley, Case No. 71350, 2018 WL 565431, at *4 n.4 (Nev. App. Jan. 19, 2018) ("*Because this was a bifurcated trial and only liability was at issue here, the subrosa video was not presented*"). In bifurcating the trial over Appellants' objection and then permitting Respondents to present damages evidence during the liability case (also over objection), the District Court unfairly permitted Respondents to use bifurcation as both a sword and a shield. By admitting the sub rosa videos during the liability phase of the case, Respondents were allowed to support their false narrative that Mr. Cox was faking or exaggerating his injuries and that Appellants only brought the lawsuit for a pay day (counsel for MGM Grand expressly touted this false

narrative in his patently improper statements about Mr. Cox during his closing argument, discussed below). As the sub rosa surveillance videos went to damages only, it was a severely prejudicial abuse of discretion to admit them into evidence during the liability case when damages were not even at issue.

Second, the admission of the sub rosa surveillance videos violated basic, well-established evidentiary principles and NRS 50.085(3). Respondents never once questioned Mr. Cox about his ability to walk unassisted and he therefore never gave any sworn testimony on that subject. Instead, Respondents were improperly permitted to admit the sub rosa surveillance videos to purportedly impeach Mr. Cox's *conduct* in the courtroom *while not even on the witness stand.* However, impeachment by definition is a contradiction of a witness' *sworn testimony.* See Black's Law Dictionary (10th ed. 2014) (defining impeachment as "[t]he discrediting of a witness's *testimony* by confronting the witness with his or her specific untruthful acts, prior convictions, prior inconsistent statements, or the like") (emphasis added). Testimony is defined as "[e]vidence that a competent witness *under oath or affirmation* gives at trial or in an affidavit or deposition." Black's Law Dictionary (10th ed. 2014) (emphasis added). Accordingly, by both definition and simple logic, one cannot "impeach" a witness' physical conduct, and certainly cannot impeach conduct such as that at issue here which *does not occur on the witness stand while the witness under oath.* Notably, Respondents

never cited a single case that permits "impeachment" of a witness' unsworn conduct in the courtroom, and they certainly never cited any case which permits the use of extrinsic, collateral evidence for such purported "impeachment." Nor did the District Court cite any such case law in its September 17, 2018 Decision denying Appellants' motion for a new trial. With regard to the admission of the sub rosa videos, the District Court only cited United States v. West, 670 F.2d 675, 682 (7th Cir. 1982) which does not address the question of whether a party may use extrinsic evidence to impeach a witness' unsworn conduct in a courtroom. As Mr. Cox did not provide any sworn testimony as to whether or not he could walk unassisted, there was nothing to impeach on that issue. While it is of course true that the jury may evaluate a witness' demeanor, body language, and conduct *while he is on the witness stand*, *only sworn testimony* may be impeached. The District Court's holding to the contrary contradicts basic evidentiary principles, the Nevada rules, and sets an extremely dangerous precedent.[3]

Respondents argued that Mr. Cox's movements to and from the witness stand constituted impeachable "statements" pursuant to NRS 51.045.[4] *JA*

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3 Followed to its logical conclusion, this ruling would allow all non-verbal conduct of any witness present anywhere in the courtroom (or maybe even the court house) to be impeached using extrinsic evidence. This cannot be what the law and rules intended or allow.

4 Tellingly, when counsel for Backstage made this argument, he read the definition of "statement" into the record, but conveniently chose not to read the

004719. This argument is erroneous and unavailing for several reasons. First, Chapter 51 sets forth the evidentiary rules as to hearsay. NRS 51.045 defines the term "statement" in the context of the hearsay rules and is used to determine whether a particular proffered statement constitutes hearsay. NRS 51.045 is not applicable here to determine whether Mr. Cox's movements to and from the witness stand constitute impeachable testimony under the impeachment rules of Chapter 50. Indeed, NRS 51.045 would only apply if the dispute here was about whether the proffered surveillance videos were hearsay statements. Instead, the dispute is whether Mr. Cox's unsworn conduct is impeachable. Accordingly, the hearsay rules are not at issue here and Respondents' reliance on the definition of a hearsay "statement" in NRS 51.045 is wholly misplaced.

Even if NRS 51.045 *were* applicable to this issue (and it is not) it still cannot be used to conclude that Mr. Cox's movements to and from the witness stand constitute impeachable testimony. Indeed, NRS 51.045 provides that a hearsay statement includes "[n]onverbal conduct of a person, if it is intended as an assertion." NRS 51.045 (emphasis added). Walks to and from the witness stand do not constitute nonverbal assertions within the meaning of the rule. See Black's Law Dictionary (10th ed. 2014) (defining "assertive conduct" as

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final part of the definition, "if it is intended as an assertion," which was the most relevant portion to the issue at hand. *See NRS 51.045; JA 004719.*

"[n]onverbal behavior that is intended to be a statement, such as pointing one's finger to identify a suspect in a police lineup") (emphasis added); see also Rugamas v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 129 Nev. 424, 432 n.2 (2013) (concluding that minor witness' pointing *during her testimony* to indicate where the criminal defendant had inappropriately touched her constituted nonverbal conduct that "was intended as an assertion that [the defendant] touched her private area") (citing Michael H. Graham, Federal Practice & Procedure § 7002, at 24–25 (interim ed. 2011) ("*Nodding, pointing, and the sign language of the hearing impaired are as plainly assertions as are spoken words*")). Mr. Cox walking with assistance to and from the witness stand plainly does not constitute nonverbal behavior that is intended to be a statement such as nodding or pointing. Accordingly, any argument that NRS 51.045 justified admission of the surveillance videos is unfounded and erroneous because NRS 51.045 does not even apply, and even if it did, walking around in a courtroom while not under oath simply cannot be deemed assertive conduct within the meaning of that rule.

The admission of the sub rosa surveillance videos also patently violated NRS 50.085(3). That section provides:

> **Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence**. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to an opinion of his or her character for

> truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

NRS 50.085(3) (emphasis added). Accordingly, a party may not impeach a witness' credibility with extrinsic evidence relating to a collateral matter. McKee v. State, 112 Nev. 642, 646 (1996); see also Collman v. State, 116 Nev. 687, 703 (2000) (noting that "NRS 50.085(3) permits impeaching a witness on cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness and no extrinsic evidence is used" and that "[i]mpeachment on a collateral matter is not allowed") (emphasis added); see also Vaughan v. Harrah's Las Vegas, Inc., 124 Nev. 1515 (2008) (employee's prior employment records were inadmissible extrinsic evidence on a collateral matter). Collateral facts are those which are "not directly connected to the issue in dispute." See Black's Law Dictionary (10th ed. 2014) (also noting that "[e]vidence of collateral facts is generally inadmissible").

Where, as here, a court violates NRS 50.085(3) in admitting extrinsic evidence to impeach a witness' testimony on a collateral matter, reversal is necessary. See Rembert v. State, 104 Nev. 680 (1988). In Rembert, the State improperly presented testimony as to the reason for the termination of the defendant's employment which was completely unrelated to his criminal charges. The Supreme Court concluded:

> [The State] sought to impeach [the defendant's] credibility with extrinsic evidence on a matter entirely collateral to the issues being decided at trial. In permitting the prosecution to proceed in this manner, the district court erred. As the jury's verdict in this case was dependent on its assessment of the witnesses' credibility, we cannot say that the district court's error was harmless beyond a reasonable doubt. Accordingly, we reverse the district court's judgment of conviction and remand this case for a new trial.

Id. at 683–84 (emphasis added).

Here, the District Court erroneously concluded that NRS 50.085(3) did not apply to Respondents' proffer of the sub rosa surveillance videos to "impeach[ ] [Mr. Cox's] conduct" in the courtroom. *JA 004718-4719.* However, the rule does apply: (1) because Respondents expressly proffered the videos to attack Mr. Cox's credibility relating to a collateral matter[5]; and (2) because the surveillance videos are extrinsic evidence of specific instances of Mr. Cox's conduct, *i.e.*, his movements outside of the courtroom. There can be no doubt that the videos are extrinsic evidence relating to a collateral matter. The Respondents proffered the videos to impeach Mr. Cox's credibility regarding the extent of his injuries. However, the extent of his injuries was not at issue during the liability phase of the trial. As the surveillance videos of Mr. Cox after his fall have absolutely nothing to do with liability, they unquestionably address a collateral matter. As extrinsic, collateral evidence, the videos cannot be used to attack Mr. Cox's

credibility. Rather, pursuant to NRS 50.085(3), the Respondents were permitted only to cross-examine Mr. Cox about his conduct outside of the courtroom (which they failed to do) and they would have had to accept his answers. The Respondents were not permitted to introduce any extrinsic evidence of Mr. Cox's conduct to attack his credibility. In admitting the videos for the purpose of attacking Mr. Cox's credibility, the District Court clearly violated NRS 50.085(3) and severely prejudiced the Appellants.

The District Court further erred in denying Appellants' request to call a medical expert to rebut the sub rosa surveillance videos and that error also unduly prejudiced Appellants. *JA 005065-5068.* As explained above, in showing the jury the surveillance videos of Mr. Cox, the Respondents were able to lend credence to their false narrative that Mr. Cox is a faker and a liar. To rebut this, the Appellants should have been permitted to present medical expert testimony to explain Mr. Cox's injuries and how those injuries affected his conduct in the videos. In refusing to permit limited medical expert testimony on that issue, the erroneously admitted sub rosa surveillance videos went unrebutted and the jury was left to wrongly believe that Mr. Cox was faking or exaggerating his injuries. Without limited medical expert testimony to establish that Mr. Cox's fall and his

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5 That Respondents proffered the videos to attack Mr. Cox's credibility is clearly demonstrated by the statements they made about the videos during their closing arguments.

behavior thereafter *were in fact consistent with his traumatic brain injury*, the lay jury were inclined to believe Respondents' contentions that Mr. Cox was faking his injuries. In denying the Appellants' motion for a new trial, the District Court stated that "Plaintiffs could have sought to rebut the [video] evidence by putting Plaintiff Gavin Cox back on the stand to address any inconsistency between his courtroom walking ability [and his manner of walking outside the courtroom]." *JA 006556-6557.* However, recalling Mr. Cox would have only opened him up to unnecessary further cross-examination where Respondents could again tout their false narrative. As the videos should have never been admitted in the first place, it is entirely unfair for the District Court to blame and punish Appellants for a purported failure to rebut them. Medical testimony was warranted and necessary to rebut the improperly admitted videos, and the denial of Appellants' request severely prejudiced the Appellants and denied them a fair trial.

The severely prejudicial effect of the surveillance videos was further compounded by the fact that Respondents were permitted to speak at length in their closing arguments about the videos, how they affected Mr. Cox's credibility, and the Appellants' purported failure to rebut them. As set forth above, Mr. Popovich on behalf of MGM Grand made repeated references to the videos and improper statements about how Mr. Cox "just wants a payoff" and how the jurors "shouldn't believe a word that comes out of [Mr. Cox's] mouth because the only

reason to do that is the green box at the end." As was common throughout the trial, other counsel piled on and even showed the surveillance videos during their closing arguments. These Respondents were working in concert throughout the entire trial, never blamed each other, and even were allowed to share experts. They spoke with one voice and that continued during closing arguments. Elaine Fresch, counsel for Copperfield and DCDI, played the videos and said:

> So last but not least I want to show the videos . . . Okay. That's 2016. Here's Mr. and Mrs. Cox in 2016 again walking with their dog. Okay. Now we're in 2017, another walk with the dog, I think. Yep. Okay. Now we're April 24th of the trial. Okay. Thank you, Ms. Bonney. All right. And then the photo on the right, as you know, that's from the observations in the courtroom. Left is April 24th and right is May 1st of this trial . . . . So Mr. Popovich has already explained the purpose of these videos and what we saw and the reason for them. It goes to the credibility. And it's your job. There's a jury instruction about this, about your job as the jury when you're deliberating to assess the credibility of witnesses. And I want you to recall those videos when you're doing that of Mr. Cox.

JA 005552-5553 (emphasis added). Likewise, Mr. Roberts, counsel for Backstage, told the jury:

> And if we're going to bring the family into it, then I got to revisit where I started. You know, the videos that we sort of started out here with you, we go to Mr. Cox's credibility, strolling down the street without any help. And -- you know, and, most of those, his family is with him. It's either just his wife or it's among all his sons that are with him. And they're not helping him. They're not even looking at him, not like they did in this courtroom for weeks and weeks. And it wasn't one day of magical recovery in the courtroom. You know, the videos we showed you were a year and a half ago and a few months later and then more in court. And to the extent he's asked you to do something for the Cox family, the Cox family was part of the

> **deception** that I talked about yesterday. And I don't know how Mr. Morelli is going to explain this when he didn't put on any explanation that you can consider in the form of evidence after we showed you this, but the fact is those videos don't and can't lie.

JA 005672-5673 (emphasis added). The District Court failed to give any admonishment for these patently improper statements that were not appropriate for closing argument and severely prejudicial to Appellants. Accordingly, not only were the surveillance videos erroneously admitted for the purpose of attacking Mr. Cox's credibility and played again during closing arguments, but the jury was *expressly and repeatedly* improperly told they could consider the videos in assessing Mr. Cox's credibility. Respondents back-to-back coordinated summations on this improper piece of evidence was so prejudicial that it changed the course of this trial.

The District Court erred in failing to give the necessary admonishments for Respondents patently improper statements in their closing arguments. It is well established that attorney misconduct during closing arguments can be grounds for a new trial. See Lioce v. Cohen, 124 Nev. 1 (2008). Statements that amount to jury nullification, statements of personal opinion, and golden rule arguments are examples of such misconduct. Id. at 20. Comments about a plaintiff lying about her injuries and only bringing suit for a "big pay day" are patently improper. Id. at 20–22; see also Centeno-Alvares v. Coe, Case No. A510230, 2008 WL 8177830 (Nev. Dist. Ct. 2008). Indeed, "[u]nder Nevada Rule of Professional

Conduct 3.4(e), an attorney shall not state to the jury a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a civil litigant." Lioce, 124 Nev. at 21 (internal quotation omitted). In cases "in which an objection has been made to attorney misconduct, the district court should not only sustain the objection but [also] admonish the jury and counsel." Id. at 17 (emphasis added). After Lioce, the Supreme Court of Nevada specified the admonishment requirement:

> When an attorney commits misconduct, and an opposing party objects, the district court should sustain the objection and admonish the jury and counsel, respectively, by advising the jury about the impropriety of counsel's conduct and reprimanding or cautioning counsel against such misconduct.

Gunderson v. D.R. Horton, Inc., 319 P.3d 606, 611–12 (2014) (citation omitted). When an attorney's misconduct "is so extreme that an objection and the admonishment could not remove the misconduct's effect," a new trial is warranted. Lioce, 124 Nev. at 21. Appellants believe that is true in this case. On appeal, this Court reviews whether an attorney's comments were misconduct de novo and it reviews a District Court's order granting or denying a motion for a new trial based on any misconduct for an abuse of discretion. Lioce, 124 Nev. at 20. Notably, the Lioce decision also imposed new requirements on district courts deciding motions for a new trial based on attorney misconduct. Id. It explained:

> Additionally, we now require that, when deciding a motion for a new trial, the district court must make specific findings, both on the

> record during oral proceedings and in its order, with regard to its application of the standards described above to the facts of the cases before it. In doing so, the court enables our review of its exercise of discretion in denying or granting a motion for a new trial.

Id. at 20–21 (emphasis added). Where a District Court fails to properly analyze and make specific findings about a party's claims of attorney misconduct in a motion for a new trial, the case must be remanded for that purpose. See Michaels v. Pentair Water Pool & Spa, 131 Nev. Adv. Op. 81, 357 P.3d 387, 394 (Nev. App. 2015) ("When the losing party in a civil trial alleges in a post-trial motion that it is entitled to a new trial because the prevailing party committed attorney misconduct during the trial, the Nevada Supreme Court has held that the district court must make detailed findings regarding the role that the alleged misconduct played at trial and the effect it likely had on the jury's verdict"); Jimenez v. Blue Martini Las Vegas, LLC, Case No. 72539, 2018 WL 3912241, at *1–2 (Nev. App. July 27, 2018).

As discussed above, Mr. Popovich improperly expressed personal opinions as to Mr. Cox's credibility and blatantly accused Mr. Cox of lying, faking his injuries, and looking for "a payoff." Attorneys for Copperfield and Backstage then followed suit with no admonishment from the District Court. These patently improper comments are precisely the type addressed in the Lioce decision. The District Court erred in denying Appellants' request to give a proper admonishment as to Mr. Popovich's comments that Mr. Cox was "deceiving" and

"manipulating" the jury "from day one," that the jury "shouldn't believe a word that comes out of [Mr. Cox's] mouth because the only reason to do that is the green box at the end," and that "[Mr. Cox] just wants a payoff." *JA 005466-5469.* Mr. Popovich's extreme misconduct unquestionably prejudiced the jury against the Appellants because he blatantly stated Mr. Cox is a liar who is only after money. This prejudice was compounded when Copperfield and Backstage were allowed to make similar improper comments. For this sole reason, the District Court should have granted Appellants motion for a new trial without the need for an appeal. The District Court's instruction to the jury — wherein it merely stated Mr. Popovich's comments were objected to and should be disregarded and failed to advise the jury about the "impropriety of counsel's conduct" and failed to "reprimand or caution counsel against such misconduct" — was wholly insufficient to eliminate the severely prejudicial effect of the extreme misconduct. Telling the jurors that Mr. Popovich's comments "were objected to" is not comparable to instructing that Mr. Popovich engaged in improper misconduct worthy of reprimand. In failing to instruct the jurors that Mr. Popovich's comments constituted misconduct, the District Court effectively put Appellants' objections to those comments in the same category as any other basic objection. However, Lioce specifically requires such extreme, improper comments be handled differently. As the District Court's insufficient admonishment for Mr.

Popovich's extreme misconduct did not remove the severely prejudicial effects of said misconduct, a new trial is necessary.

Nor did the District Court make the requisite specific findings on the record during the oral argument of, or in its September 17, 2018 Decision on, the Appellants' motion for a new trial. *JA 006497-6561.* The District Court was required to "make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards described [in Lioce] to the facts of [this case]." Lioce, 124 Nev. at 20–21. However, during the oral argument of Appellants' motion for a new trial, the Court did not make any specific findings as to Mr. Popovich's misconduct or discuss the Lioce standards. *JA 6497-6552.* Likewise, in its September 17, 2018 Decision, the District Court made no specific findings about Appellants' claims of misconduct and it did not discuss Lioce at all. It merely stated:

> The Court is not persuaded by Plaintiffs' misconduct contentions. The Court properly admonished the Jury and made the Jury aware that it was the subject of an objection that the Court had sustained.

JA 006553-6559. As the District Court failed to properly analyze and make specific findings about the claims of attorney misconduct that Appellant made in their motion for a new trial, this case must at least be remanded for that purpose. See Michaels, 357 P.3d at 394; Jimenez, 2018 WL 3912241, at *1–2.

Moreover, the severely prejudicial effect of counsel's misconduct was compounded by the District Court's erroneous admission of the sub rosa surveillance videos — which Respondents improperly and repeatedly used to attack the credibility of Mr. Cox — and the District Court's erroneous denial of Appellants' request to call a medical expert to rebut the surveillance videos. As Respondents had spent the entire trial working in concert to paint Mr. Cox as a liar and a faker, the only thing that could have helped correct this prejudicial error was a separate medical witness to prove he was truly injured. Because of Respondents' counsel's improper conduct and the District Court's erroneous rulings, by the end of the trial the jurors believed that Mr. Cox was a liar and a faker, and Appellants were improperly and prejudicially left without remedy. This misconduct and abuse of discretion denied Appellants a fair trial. Indeed, Team Construction expressly acknowledged in its Brief below that: "The jury, as indicative of its decision, found Mr. Cox to be less than credible and thus rendered a decision in favor of Defendants." *JA 006331*. This statement perfectly summarizes the severely prejudicial manner in which this trial unfolded. The District Court permitted the Respondents to use bifurcation as both a sword and a shield by improperly admitting damages evidence (surveillance videos), by improperly denying Appellants' request to present limited medical testimony to rebut said evidence, and by permitting and not adequately admonishing

Respondents counsel's blatantly improper comments about said evidence and Mr. Cox's credibility. As Respondents were improperly and repeatedly permitted to frame the entire trial in terms of an assessment of Mr. Cox's credibility regarding his injuries, it cannot be said that the District Court's errors were harmless and a new trial is necessary.

II. THE DISTRICT COURT ERRED IN SUBMITTING THE ISSUE OF COMPARATIVE NEGLIGENCE TO THE JURY.

The District Court also erred: (1) in denying Appellants' Rule 50(a) motion as to Respondents' comparative negligence affirmative defense; (2) in charging the jury on comparative negligence; and (3) in including comparative negligence on the verdict sheet. It is well settled that defendants, including those in the present case, have the burden to plead and prove a comparative negligence defense by a preponderance of the evidence. See Bergeron v. K-Mart Corp., 540 So. 2d 406, 408 (La. Ct. App. 1989); Townsend v. Legere, 141 N.H. 593, 594 (1997); Rose v. Annabi, 934 A.2d 743, 746 (2007) ("It is well established that the burden of establishing comparative negligence rests on the defendant"). Comparative negligence "should not be charged if there is no or insufficient evidence to support it." See Nevada Revised Statutes § 41.141 (emphasis added); Hernandez-Sanchez v. Gibrick, Case No. 10A643968, 2013 WL 6912967, at *3 (Nev. Dist. Ct. 2013); Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 517 (1980) (internal quotation omitted); see also Jaworski v. Great Scott Supermarkets, Inc.,

403 Mich. 689, 697 (1978) ("It is axiomatic that it is error to submit to the jury an instruction on an issue not sustained by the evidence"). In Hernandez-Sanchez, the District Court concluded that the doctrine of comparative negligence did not apply because:

> To implicate NRS 41.141, a plaintiff's contributory negligence must be a bona fide issue, and to be a bona fide issue, a plaintiff's contributory negligence must be a viable defense. If there is no evidence to suggest that a Plaintiff is negligent, an affirmative defense alleging contributory or comparative negligence is not a viable defense, and consequently, it is not a bona fide issue, and NRS 41.141 is not applicable. In the present case, there is no credible evidence that the Plaintiff contributed in any way to the subject accident. The evidence was that the Plaintiff, Ms. Hernandez-Sanchez, was stopped at a traffic light, when she was struck from behind by the vehicle being driven by Mr. Petersen. As there is no bona fide issue regarding comparative fault of the Plaintiff, NRS 41.141 does not apply to the circumstances of this case.

2013 WL 6912967, at *3 (emphasis added) (internal quotations omitted); see also See ETT, Inc. v. Delegado, 126 Nev. 709 (2010) (noting that "[t]o implicate NRS 41.141 [ ] a plaintiff's contributory negligence must be a bona fide issue" and concluding that the evidence presented at trial did not establish that the plaintiff was negligent); Buck by Buck v. Greyhound Lines, Inc., 105 Nev. 756, 764 (1989). Accordingly, defendants must establish that comparative negligence is a bona fide issue before the NRS 41.141(2) jury instruction may be given.

"Comparative negligence is conduct which falls below the standard of care to which one should perform for one's protection [and] [i]t is determined by

reasonableness of behavior under the circumstances." Bergeron, 540 So. 2d at 408 (emphasis added). Speculation and conjecture are insufficient to justify a comparative negligence charge. See Townsend, 141 N.H. at 594–95. Rather, a defendant must proffer tangible, admissible evidence of negligence on the part of the plaintiff to justify use of the charge. See id. In Townsend, a slip and fall case, the New Hampshire Supreme Court noted that "tangible evidence of the plaintiff's comparative fault must be introduced before the question can be submitted to the jury," and concluded that it was error to charge the jury on comparative negligence because the defendant proffered only speculation and generalizations, not tangible evidence. Id. at 594–96 ("If the plaintiff was negligent, the defendant was bound to prove it. In the absence of evidence, the mere possibility, which exists in every case, that the plaintiff may have been guilty of negligence, cannot be made the basis of a ruling against her").

As in Townsend, courts often find that defendants fail to carry their burden as to the comparative negligence defense in slip and fall cases. See, e.g., Nieves v. Riverbay Corp., 95 A.D.3d 458, 459 (2012); Labarrera v. Boyd Gaming Corp., 132 So. 3d 1018, 1023 (La. 2014); Marshall v. A & P Food Co. of Tallulah, 587 So. 2d 103, 110 (La. Ct. App. 1991); Bergeron, 540 So. 2d at 408–409 (concluding jury manifestly erred in finding plaintiff negligent in a slip and fall case where plaintiff was reasonably looking around rather than at the floor at the

time of his fall and did not see the spill on which he slipped); King v. Kroger Co., 787 So. 2d 677, 681 (Miss. Ct. App. 2001) ("In giving [the comparative negligence instruction], trial court erred, since there was not a single instance of negligence on the part of [the plaintiff] which could have supported a comparative negligence finding by the jury other than fact that [the plaintiff] should have apparently recognized the mopped floor"); Clark v. Kmart Corp., 249 Mich. App. 141, 151–52 (2002) (concluding trial court did not err in omitting comparative negligence instruction because it was reasonable under the circumstances for plaintiff to be looking around her (and not at the floor) at the time of her fall). Indeed, a comparative negligence charge is only warranted in a slip and fall case where the defendant presents tangible evidence that the plaintiff knew of or should have known of a particular hazard and failed to take reasonable steps to avoid said hazard. See, e.g., Taylor v. Tolbert Enterprises, Inc., 439 So. 2d 991, 992 (Fla. Dist. Ct. App. 1983); Walker v. Bruno's, Inc., 228 Ga. App. 589, 590 (1997); Anderson v. L & R Smith, Inc., 265 Ga. App. 469, 470 (2004).

Unlike the circumstances in Taylor, Walker, and Anderson, there is no evidence here that Gavin Cox was comparatively negligent. Accordingly, the District Court's denial of Appellants' Rule 50(a) motion to dismiss the Respondents' comparative negligence defense was error because, at trial, the Respondents proffered absolutely no evidence whatsoever that Mr. Cox was in

any way negligent or that he in any way contributed to his fall. To the contrary, the evidence presented at trial established that Mr. Cox was merely following the Respondents' directions on the night of his fall and that he had never been on the "runaround" route before that night. This was a condition set in motion by the Respondents. There was no evidence that Mr. Cox went rogue or engaged in some negligent act or conduct in defiance of the instructions he was given. Nor was there any evidence that anything about Mr. Cox's physical condition on the night of his fall contributed to his injuries. Although Mr. Cox testified that he was looking toward the door leading back into the building at the time of his fall and not at the ground, such conduct was not unreasonable considering the circumstances. Mr. Cox was being rushed around in a dark, unfamiliar location and was following directions; it was entirely reasonable for him to be looking ahead to see where he was going rather than looking down at his feet and the Respondents provided no evidence to the contrary. Mr. Cox simply wanted to make sure he was not the reason this illusion failed, and for this, the District Court's errors punish him. In fact, defense witness Mark Habersack, MGM Grand's head of Risk Management, specifically testified that Mr. Cox was not negligent in any way. He testified:

Q: Am I correct that MGM Grand has no facts that Mr. Cox did anything wrong in performing the illusion?
A: I'm not aware of any.
Q: Okay, so that's a correct statement? That's what I'm saying.

A: That would be a correct statement. I'm not aware of any.
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Q: [Referring to deposition testimony]: I'm going to ask you to read this also, Mr. Habersack. Question on line 3: "QUESTION: And nothing in the [investigation] report indicates that Mr. Cox did anything wrong to contribute to his injuries; correct? ANSWER: There's nothing that's indicated in the report that he was acting carelessly or with malice." I guess that means maliciously; right?
A: Yes, sir.
Q: Yeah. And you said that under oath, did you not?
A: I did make that statement under oath.

JA 002672-2673. Furthermore, the Respondents did not proffer any eyewitnesses testimony to establish any unreasonableness on Mr. Cox's part at the time of his fall. *JA 004255-4256; JA 004876-4877.* The only testimony as to the manner of Mr. Cox's fall was from Mr. Cox himself. Moreover, the Respondents' entire defense throughout the trial was that Mr. Cox simply tripped and that this accident was no one's fault, *i.e.*, that accidents just happen. That position is certainly not compatible with a finding of comparative negligence. In light of the Respondents' complete failure to proffer *any* tangible evidence that Mr. Cox acted unreasonably or contributed to his injuries, it was an abuse of discretion for the District Court to deny the motion to dismiss the comparative negligence defense, to charge the jury as to comparative negligence, and to allow comparative negligence on the verdict sheet. This improper charge put the jury in a position to render their inappropriate, inconsistent verdict. Yet, despite all the District Court's errors, the jury still found the main Respondents negligent

because the evidence was so overwhelming. Even a jury that had been so prejudiced, and wanted to throw Mr. Cox out of court prior to the damages phase, could not ignore the evidence of Respondents' negligence. The only reason the jury was able to find Respondents negligent, but not a proximate cause, was because the District Court improperly allowed the jury to put all the blame on Mr. Cox despite Respondents not presenting a scintilla of such evidence.

The District Court's errors as to the comparative negligence defense were severely prejudicial and affected Appellants' ability to receive a fair trial. As such, Appellants are entitled to a judgment notwithstanding the verdict, or, alternatively, a new trial. As there was absolutely no evidence that Mr. Cox acted unreasonably or contributed to his fall, it was impossible for the Respondents to meet their burden on the issue of comparative negligence[6] and the issue should have never been submitted to the jury. By improperly submitting the issue of comparative negligence to the jury even though it was "not a viable defense," the District Court improperly permitted the jurors to focus on Mr. Cox's conduct and created the opportunity for the jurors to reach an inconsistent verdict, which, as will be shown below, is exactly what occurred. See Harb v. City of Bakersfield, 233 Cal. App. 4th 606 (2015); see also Tobia v. Cooper Hosp. Univ. Med. Ctr.,

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6 See Jury Instruction No. 19 ("A defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish: That Gavin

136 N.J. 335 (1994). In Harb, as here, the trial court erred in instructing the jury on comparative negligence because there was insufficient evidence to support that defense. 233 Cal. App. 4th at 609–610. The Harb court concluded that the error was prejudicial enough to warrant a new trial, explaining that "allowing the issue of [plaintiff's] comparative negligence . . . may have affected the findings that the defendants were not at fault by improperly focusing the jury's attention on the [plaintiff's] conduct." Id. at 637. Likewise, in Tobia, the Supreme Court of New Jersey concluded that the trial court's incorrect jury charge on contributory negligence required a retrial because, *inter alia*, "the erroneous charge may have affected [the jury's] verdicts by improperly focusing the jury's attention on plaintiff's conduct, thus distracting the jury from the key question of whether defendants had been negligent." Tobia, 136 N.J. at 343. So too in the case at bar. If the District Court had properly dismissed the comparative negligence defense pursuant to Rule 50(a), the issue of whether Mr. Cox was a proximate cause of his injuries would have never been before the jury. As in Harb and Tobia, the District Court's error in submitting the issue of comparative negligence to the jury "affected the findings that the defendants were not at fault by improperly focusing the jury's attention on the [plaintiff's] conduct." Id. That the comparative negligence charge improperly focused the jury's attention on Mr.

Cox was negligent, and that the negligence was a proximate cause of his own

Cox's conduct in this case is demonstrated by the fact that the jury *went out of its way* to find Mr. Cox comparatively negligent on the verdict form, even though they were not even supposed to reach that issue based on the clear instructions on the Special Verdict. Indeed, the instructions before question six on the Special Verdict instructed the jury not to proceed to the questions concerning Mr. Cox's negligence if it concluded that the Defendants were either not negligent or not a proximate cause of Mr. Cox's injuries, and, despite so finding, the jury ignored the instructions and answered the questions about comparative negligence anyway. *JA 005920-5923.* Accordingly, it is clear that the jury was improperly focused on Mr. Cox's conduct in rendering its verdict. As the issue of comparative negligence should have never been submitted to the jury, and because the District Court's error in submitting it necessarily affected the jury's verdict to the severe prejudice of the Appellants, a new trial is necessary. See NRCP 59. Moreover, as there was absolutely no evidence to support a conclusion that Mr. Cox acted unreasonably, the jury's verdict as to comparative negligence was without any factual basis, plainly inconsistent, and contrary to the instructions and applicable law. A new trial is warranted on those grounds as well. See NRCP 59.

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accident").

III. THE JURY'S MANIFEST DISREGARD OF THE DISTRICT COURT'S INSTRUCTIONS AND APPLICABLE LAW RESULTED IN AN INCONSISTENT VERDICT THAT WARRANTS A NEW TRIAL.

As the trial testimony, opening statements, and closing arguments all bear out, the only issue as to the negligence of MGM Grand, Copperfield, and DCDI was whether those parties negligently designed and implemented the 13 Illusion. By specifically finding that MGM Grand, Copperfield, and DCDI were all negligent, it is clear that the jury properly concluded the 13 Illusion had in fact been negligently designed and implemented. Under all the circumstances, including that there was absolutely no evidence of any intervening force between the negligence of MGM Grand, Copperfield, DCDI, and Mr. Cox's fall, if the jurors had correctly applied the law and Court's instructions, they could not have found an absence of proximate cause and it would have been impossible for them to reach the verdict they returned: that MGM GRAND, Copperfield, and DCDI *were all negligent*, but that their negligence was not *a* proximate cause of Mr. Cox's accident.

Because there "was indeed a manifest disregard by the jury of the instructions of the court [ ] as a matter of law on that contention alone," the district court was "obligated to grant a new trial." Price v. Sinnott, 85 Nev. 600, 608 (1969), aff'd sub nom. Price v. First Nat'l Bank of Nevada, 90 Nev. 5 (1974). The Supreme Court has held that where there is a conflict in the evidence, the

verdict or decision will not be disturbed on appeal. See Frances v. Plaza Pacific Equities, 109 Nev. 91, 94 (1993) (citation omitted). However, the Supreme Court has recognized an exception where "there is plain error in the record or . . . a showing of manifest injustice." See Frances, 109 Nev. at 94 (citing Price, 85 Nev. at 607). "The refusal of the trial court to set aside a verdict entered contrary to its instructions is an error of law and not within the mere discretion of the trial court." Price, 85 Nev. at 606.

This case readily evokes that exception because of the jury's disregard of the proximate cause instruction with its resulting injustice. See Price, 85 Nev. at 607 (*where jury, had they followed court's instruction on proximate cause and applied such instruction, in conjunction with instruction on negligence, to evidence in case, could not possibly have reached verdict they reached, trial court as matter of law was obligated to grant new trial*); see also Shere v. Davis, 95 Nev. 491 (1979) (new trial properly granted when jury found for plaintiff and failed to award damages despite undisputed evidence plaintiff suffered injuries); Groomes v. Fox, 96 Nev. 457, 458 (1980) (evidence supported trial court's finding that had jury paid due regard to instructions of court, it was not possible to return defense verdict).

Jury instructions "are not given to be ignored. They must be meaningful, and they must be followed by the jury to arrive at a fair and impartial verdict. It

is the duty of the jury to be governed by the instructions and when given they become the law of the case, whether right or wrong. If the jury does not follow them the verdict must be set aside as contrary to law." Price, 85 Nev. at 606. Under Nevada law, a new trial may be granted if there was "(m)anifest disregard by the jury of the instructions of the court." NRCP 59(a)(5). "Therefore, if the jurors could not have reached the verdict that they reached if they had properly applied the court's instruction on proximate cause, then the district court was obligated to grant a new trial." Taylor v. Silva, 96 Nev. 738, 740 (1980) (citations omitted) (*jury could not have found defendant was negligent but negligence was not proximate cause of plaintiff's injuries if jury had correctly applied the law and therefore, new trial was required*).

Here, there is no conflict in the evidence. The obvious disregard by the jury of the District Court's instructions resulting in a verdict which is shocking to the conscience of reasonable men is nothing short of manifest injustice. See Avery v. Gilliam, 97 Nev. 181, 183 (1981); see also Kroeger Properties & Development v. Silver State Title Company, 102 Nev. 112 (1986) (in order to find manifest injustice a case must be presented where "the verdict or decision strikes the mind, at first blush, as manifestly and palpably contrary to the evidence"). The jury clearly disregarded the District Court's instruction on proximate cause by finding that Mr. Cox was the sole proximate cause of his own

accident and disregarding that the negligence of MGM Grand, Copperfield, and DCDI was, at an absolute minimum, a concurring cause of the accident because those parties were responsible for placing Mr. Cox in the position to get injured when they randomly selected him from the audience to participate in the illusion. This error was only compounded by the District Court's decision to include comparative negligence on the verdict sheet.

The jury was instructed that "[a] proximate cause of an accident is a cause which, *in foreseeable and continuous sequence, produces the accident, and without which the accident, would not have occurred*. It *need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the accident*." Jury Instruction No. 24 (emphasis added). Even if the Respondents' negligence in placing Mr. Cox in an inherently dangerous situation was arguably not the only cause of the accident, at a minimum, it was clearly *a concurring* cause of the accident, which, in foreseeable and continuous sequence, produced the accident and without which the accident would not have occurred. *See* Jury Instruction No. 24. "In determining the propriety of the granting of a new trial under NRCP 59(a)(5), the question is whether we are able to declare that, had the jurors properly applied the instructions of the court, it would have been impossible for

them to reach the verdict which they reached." Weaver Brothers, Ltd. v. Misskelley, 98 Nev. 232, 234 (1982). This is such a case.

As further support, Nevada law is clear that a negligent defendant is responsible for all foreseeable consequences proximately caused by his or her negligent act. See Taylor v. Silva, 96 Nev. 738, 740 (1980). Moreover, not every intervening cause, or even every negligent intervening cause, acts as a superseding cause absolving the prior negligence. Konig v. Nevada-California-Oregon Ry., 36 Nev. 181 (1913); see also Hardison v. Bushnell, 18 Cal. App. 4th 22, 25 (1993) (after considering effect of each possible intervening act, appellate court held none could "assume the role of the sole proximate cause to the entire exclusion" of defendant's negligence; appellate court concluded defendant's negligence was a proximate cause of the accident and plaintiffs injuries, noting question of "[w]hether there are concurring causes that may end up sharing in the determination of liability is a matter to be determined by retrial on remand"). In the case at bar, as in Taylor, there was no intervening force between the negligence of MGM Grand, Copperfield, and DCDI, and Mr. Cox's fall. In fact, it is undisputed that Mr. Cox was simply following Respondents' directions and there was no evidence he did anything wrong to contribute to his accident. *JA 002672-2673.*

Furthermore, the type of harm — a participant falling during the "runaround" — was foreseeable, *JA 001089-1090*, as was evidenced by the Respondents admittedly being on notice of previous participants who had fallen during the "runaround" portion of the 13 Illusion at MGM Grand. *JA 001093; JA 002922-2952; JA 005040-5058.* Because MGM Grand, Copperfield, and DCDI were on notice that participants, such as Mr. Cox, could fall and be injured during the "runaround," they each had a duty to take affirmative action to prevent such injuries from occurring in the future. They failed to do so. See Thomas v. Bokelman, 86 Nev. 10, 13 (1970). The District Court set up the jury for its inconsistent verdict by improperly charging comparative negligence when no such evidence existed. Without this erroneous charge, the jury would not have been improperly focused on Mr. Cox's alleged negligence and would not have been able to blame Mr. Cox one-hundred percent.

Here, as in Hardison, the jurors inconsistently found that MGM Grand, Copperfield, and DCDI were all negligent, but that those same parties were not a proximate cause of Mr. Cox's accident. To the extent that Respondents may offer speculative scenarios in which the jury could have found that MGM Grand, Copperfield, and DCDI were negligent in some manner, yet that this negligence was unrelated to the ultimate accident, Respondents move beyond the realm of the record and evidence. See Asam v. Ortiz, No. PC051705, 2014 WL 585350, at

*6 (Cal. Super. Ct. 2014). None of the potential scenarios that the Respondents may offer are supported by evidence to establish that the subject accident would not have occurred without the negligence of MGM Grand, Copperfield, and DCDI, or that there was an independent intervening act that would cut the causal chain. See Asam, 2014 WL 585350, at *6. By no interpretation of the evidence can Respondents harmonize the negligence and proximate cause verdicts.

Respondents produced absolutely no evidence at trial, much less the necessary preponderance of the evidence, that Mr. Cox was in any way comparatively negligent or that his fall was caused by anything other than Respondents' conduct. The affirmative defense of comparative negligence should have been dismissed on that basis alone and dismissal would have eliminated the opportunity for the jury to reach an inconsistent verdict. However, even assuming there was some such evidence, it does not negate a finding that the Respondents' negligence was a proximate cause of Mr. Cox's fall and the jury was so instructed.[7] See Mahan v. Hafen, 16 Nev. 220, 224–25 (1960).

Moreover, the jury was only put in a position to reach this inconsistent verdict because of the District Court's multiple errors described herein which compounded the prejudice. Allowing in surveillance videos during the liability

7 See Jury Instruction No. 22 ("[I]f Gavin Cox was negligent, Plaintiffs may still recover a reduced sum so long as his comparative negligence was not greater than the negligence of the combined negligence of all the Defendants).

phase of trial, including comparative negligence on the verdict form without any actual evidence to support it, failing to admonish Respondents for their multiple improper comments during closing arguments, and not stating the true reasons for cancelling the jury view, were all errors by the District Court which allowed Respondents to support their shared false narrative that Mr. Cox and his attorneys were trying to deceive the jury. Respondents seized on these errors to push their false narrative that Mr. Cox was a faker, that he did not truly need assistance to walk to and from the witness stand, and that Appellants asked for the jury view to be cancelled because they had something to hide. Nothing could have been further from the truth, but the District Court's errors fueled this narrative.

All of the record evidence establishes that Mr. Cox's accident was foreseeable and that but for MGM Grand, Copperfield, and DCDI negligently designing and implementing a dangerous trick, the accident would have not occurred. "Had the jury followed the instruction on proximate cause[8] and applied that instruction in conjunction with the instruction on negligence[9] to the evidence

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8 See Jury Instruction No. 24 ("A proximate cause of an accident is a cause which, in foreseeable and continuous sequence, produces the accident, and without which the accident, would not have occurred. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the accident").
9 See Jury Instruction No. 23 ("When I use the word 'negligence' in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, to avoid injury to themselves or others, under circumstances similar to those

it would have been impossible for them to reach the verdict which they reached in this case." Price, 85 Nev. at 606.

IV. THE DISTRICT COURT'S FAILURE TO INFORM THE JURY OF THE TRUE REASONS FOR ITS DECISION TO CANCEL THE JURY VIEW WAS INCONSISTENT WITH SUBSTANTIAL JUSTICE AND PREVENTED APPELLANTS FROM HAVING A FAIR TRIAL.

Under Nevada law, a new trial may be granted due to "irregularity in the proceedings of the court," or "any order of the court . . . by which either party was prevented from having a fair trial." NRCP 59(a)(1). In addition, NRCP 61 provides that an error in any ruling or order by the Court may be grounds for granting a new trial or for setting aside a verdict if refusal to take such action appears inconsistent with substantial justice. By not providing the jury with the actual reasons for cancelling the jury view, the Court severely prejudiced the Appellants, acted inconsistently with substantial justice, and prevented the Appellants from having a fair trial.

The Respondents improperly requested a jury view in the presence of the jury and, over Appellants' objections, the District Court thereafter informed the

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shown by the evidence. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide. You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence").

jurors that there would in fact be a jury view on a set date and time. Then, after the Court of Appeal's ruling, the District Court simply told the jury that the site visit was cancelled, saying only that it decided that "this case is not conducive to" a jury view. By not explaining to the jury the actual reasons for changing its mind — as it did on the record outside the presence of the jury — the District Court prejudiced the Appellants by implying to the jury that the jury view was cancelled at Appellants' request because the Appellants had something to hide. As it was Respondents who initially requested the jury view in the presence of the jury, this was the only logical conclusion the jury could draw based on the Court's limited explanation of its reasoning.

However, the request for a jury view was entirely improper (particularly in light of the defense counsel's active participation in altering the subject premises as Appellants captured on video) and should have never been relayed to the jury in the first place. As the jury was improperly informed of the jury view (to the severe prejudice of the Appellants), the District Court erred in failing to give the jurors an explanation for the reasons it cancelled the jury view. In its September 17, 2018 Decision denying Appellants' motion for a new trial, the District Court incorrectly stated: "[n]othing was discussed in the jury's presence about who had sought a view, who had objected to a view, or whose position was adopted by the Court in cancelling it." *JA 006557-6558.* On the contrary, counsel for Backstage

Employment made an oral motion for a jury view in the presence of the jury and without any prior notice to the Appellants. *JA 003853-3854.* Then, during closing arguments, counsel for Defendant Team Construction implied that it was Appellants' fault that the jury view was cancelled. Specifically, counsel for Team Construction stated: "I wish we could have had a jury view, but that didn't happen." *JA 005725.* Accordingly, the assertion that the jury did not unfairly assign fault to Appellants in the cancellation of the jury view is unfounded.

Moreover, although the Respondents were improperly allowed to show the jury sub rosa surveillance videos during the liability portion of trial, Appellants were prevented from even playing a full video for the District Court, much less for the jury, which showed that Respondents and their counsel had literally hired power washers and cleaners to further alter the admittedly already structurally altered "runaround" route prior to the jury view. The video showed Respondents' counsel was present while the power washing was taking place and were actively involved in altering the scene. Despite providing video proof of this unethical conduct, the District Court stopped Appellants from playing the video and it was never submitted to the jury. *JA 004077-4080.* In a case where Respondents made credibility a central issue, Appellants should have been allowed to play this video for the jury and submit it into evidence, especially in light of the District Court's decision to allow in the sub rosa videos.

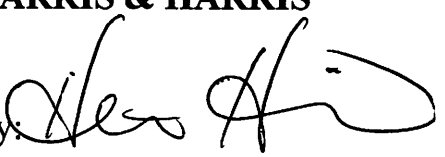
While it is true that a District Court is not typically required to explain the reasoning for its decisions to the jury, in this specific instance, the District Court's failure to explain the actual reasoning for its decision to cancel the jury view after the Respondents requested one in the jury's presence was inconsistent with substantial justice and prevented Appellants from having a fair trial, especially in a trial where the credibility of the Appellants was improperly, repeatedly attacked. Accordingly, a new trial is necessary.

CONCLUSION

For all the reasons set forth herein, this Appeal should be granted, the jury verdict reversed, and this case should be remanded and sent back for a new trial.

Respectfully submitted this 11th day of June, 2019.

HARRIS & HARRIS

By: 

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Time New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it: contains fewer than 14,000 words (13,892).
3. I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

4. I understand I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the NRAP.

DATED this 11th day of June, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11 day of June, 2019, I served a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF,** addressed to the following counsel of record at the following address(es):

____ **VIA U.S. MAIL**: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

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