

**IN THE SUPREME COURT STATE OF NEVADA**

GAVIN COX and MINH-HAHN COX,  
Husband and Wife,

Appellants,

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.

) Supreme Court No. 76422

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) District Court No. A-14-705164-C

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**JOINT APPENDIX - VOLUME 25**

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1 people safe because we work with them. Right? And we  
2 didn't -- they weren't slipping and falling out there.

3 And you know what? If somebody mentions that  
4 to you, "Oh, yeah, but they're employees. Right? They  
5 got those heavy boots. Right?" You say to them, Look,  
6 they're out there before they clean up at the end of  
7 the day. Right? They're like 2:00. I mean, that's  
8 when the cleanup -- our guys are out there taking stuff  
9 to the dumpster all the time before it's swept up.  
10 Right?

11 So why do you think that Team -- one of the  
12 benefits the company realizes from taking such good  
13 care of its good customers, like MGM, for housekeeping  
14 is that there's less dust that has to be swept up,  
15 there's less risk to employees, less downtime, injury,  
16 hurt. You know, it's good, reasonable, careful  
17 business. I'm telling you, these are the kind of  
18 contractors you want in this industry.

19 So if I could show you this one now, Jury  
20 Instruction 24. One of the issues that the law  
21 requires you to consider in your deliberations is this  
22 thing about proximate cause.

23 You okay? Is it cold? Anybody -- Bob --  
24 JUROR NO. 7: You can leave it. I'm okay  
25 now.

1 MR. STRASSBURG: Little cold? I mean, I'm  
2 just --

3 THE COURT: It's okay.

4 MS. FRESCH: It's okay.

5 MR. STRASSBURG: Shut up, Roger. Go back to  
6 work? Okay. Sorry.

7 Proximate cause. This is something that the  
8 law says you got to consider and you may have to  
9 deliberate as to whether -- and it comes up with, if  
10 you find one of the defendants was -- was negligent,  
11 that then you have to say is there -- was it a cause?  
12 A cause. A cause. Not the cause, a cause.  
13 Foreseeable in continuous sequence. Right? That's the  
14 dominoes. Anybody play dominoes or am I just dating  
15 myself? They were these little blocks. You remember?  
16 You line up? All right. You -- okay. Ask your mom.  
17 That's the domino effect. Domino 1 to domino  
18 2, 3, 4, 5. Right? If you take out dominoes 5, 6, 7,  
19 8, and 9, one, two, three, four, boom. All right? No  
20 proximate cause. No natural continuous sequence of  
21 events, physical events.

22 And -- and -- so two things -- and without  
23 which the accident would not have occurred.

24 Now, the way I see this is, you -- you got to  
25 say that whatever you choose is the cause, right, the

1 accident couldn't have happened without it. It was  
2 necessary. Okay? It had to be; it was necessary. All  
3 right.

4           So three things: Has to be a cause, has to  
5 be continuous sequence, and it has to be necessary.  
6 Couldn't have happened without it. Right?

7           And in considering this as to Team, because  
8 the law's going to tell you that -- that this has to be  
9 considered as to all the parties in the case, plaintiff  
10 too. Here, the dust from our work, okay -- I mean,  
11 construction work does generate some dust. That's why  
12 we have, you know, the guys doing the 15 hours of  
13 cleanup and the brooms and the shovels and the buggies  
14 and the Kleen Sweep on the floor. There's some dust.  
15 Right? But reasonable contractors, like Team, control  
16 it and dispose of it properly.

17           So here, remember the dominoes? One, two,  
18 three, four. Well, there -- the gap here is our  
19 cleanup, Team's cleanup. Right? That interrupts any  
20 natural continuous flow of physical events. We got up  
21 there and we broomed it off. Right?

22           Our precautionary measures. The sweeping,  
23 the buggies, the carpet mastic, the wet mat, all the  
24 stuff we did. Also, controlled so there was not bad  
25 dust on that accessway that could hurt somebody.

1 Surface not slippery.

2           You heard testimony, sworn testimony, that  
3 the accessway at the MGM is, as they say in the  
4 construction industry, broom finish. All right? It's  
5 different from broom clean, which is a degree of  
6 cleanliness. Broom finish is a degree of roughness.  
7 All right. It is traction.

8           So you heard him testify that -- that when  
9 the sidewalks -- or the cream, they say, floats to the  
10 top and it's a smooth surface. Well, if you're going  
11 to have people walk on it, you rough it up, and you  
12 rough it up with a broom. And so they call it broom  
13 finish. And that's what was out there. And the  
14 coefficient of friction of that finish that Dr. Yang  
15 measured was .7.

16           Now, coefficients of friction are unitless  
17 numbers. Do you remember that? You know, they don't  
18 come in seconds, miles, feet; right? Unitless numbers  
19 are numbers that only mean something compared with some  
20 other unitless number; right? And the comparison here  
21 is that this .7 is 40 percent rougher than OSHA  
22 requires it to be for workplaces. So factories,  
23 restaurants, hospitality, casinos where people are  
24 working under the jurisdiction of OSHA, the floors got  
25 to have traction of .5. That walkway was 40 percent

1 more traction, .7.

2           The skid marks, we talked about that. The  
3 sweeping deposited in the utility cover, we talked  
4 about that. Those are proofs. The trip and fall from  
5 the toe catch you -- you've heard several times that  
6 Morelli maintains that, you know, slip, trip, run too  
7 fast, light, whatever, it's a confluence. Okay. Yeah,  
8 it doesn't matter.

9           To Team it matters because the attack against  
10 Team is dust, that somehow we left our dust out there  
11 in a sufficient quantity that it was a trip -- a slip  
12 hazard and that's what hurt him. And that's not so.  
13 That's just not so.

14           We proved to you that it was a trip, and it  
15 was a trip running in a straight line. And why is that  
16 important, the straight-line stuff? It's 'cause of  
17 physics, see? When you're -- Mr. Cox testified that he  
18 was turning a corner, running, and his feet went out to  
19 the left. Right? Okay. That makes physical sense  
20 because of centrifugal force or centripetal force or  
21 whatever it is.

22           However, if he's running in a straight line,  
23 right, slip with feet going to the left, doesn't make  
24 any sense. It's not physically possible. The forces  
25 don't work that way.

1           Now, a trip makes sense, to catch. And  
2 that's what happened here. And, you know, I mean,  
3 you've heard a lot of attacks on Mr. Cox's credibility,  
4 and I can't say he didn't deserve some of it. But, you  
5 know, about this particular point, that he can't seem  
6 to tell a consistent story about what happened in a  
7 blink of an eye, yeah. Right? I don't know. That  
8 doesn't bother me, frankly.

9           I mean, I had an auto accident last October,  
10 and I still don't know what happened. Right? I mean  
11 it happened so quick. Right? And I can see how I --  
12 you think, like, how did that happen? You don't know.  
13 So I don't think that really is indicative one way or  
14 another, frankly.

15           If I was you, I would put my trust in  
16 physics, because you could say to yourself -- somebody  
17 says, you know, oh, the experts, they're bought and  
18 paid for. They'll say anything. You know, you pay a  
19 guy 100 grand, like, no telling what. Right?

20           Well, that ain't so, for one thing. But ask  
21 your -- say to that person, look, what's more probable?  
22 What's more likely? The guy in an extreme situation,  
23 right, misremembers stuff or that the laws of physics  
24 somehow stopped work? Right?

25           You know, I mean, I -- I think you got to



1 come out and say let's be guided by the scientific  
2 facts. And the scientific facts are that he went down  
3 running in a straight line. Right?

4 Oh, yeah. You've heard evidence of the prior  
5 trips and falls. And I may just rehearse this for you.  
6 But prior trip-and-fall, Amy Lawrence. Okay.  
7 Trip-and-fall. Remember her? She's the lady that --  
8 that -- right? The guy at the corner says, "Oh, watch  
9 out. Don't trip," boom, down she goes. Right? That  
10 was on June 17th, 2013.

11 I'll prove to you that Team did not start  
12 construction until August 12th, 2013. How am I going  
13 to do that? You probably know. Probably you're way  
14 ahead of me. The time cards. Right?

15 So -- and there were other two. None of  
16 these prior falls involved dust. Right? Now, I don't  
17 know why, but that's important evidence, that dust is  
18 not the reason.

19 Now, the precautionary measures. Again, as  
20 to proximate cause, you want to ask yourself, wait.  
21 You mean to tell me that a company that uses all these  
22 precautionary measures somehow -- somehow, right --  
23 enough dust got by them to trip up a big 6-foot 3-inch,  
24 something like that, 200-pound guy? Right? The  
25 world -- I mean, the world doesn't work that way.

1 That's just not -- that's not probable.

2           And I'll just remind you: The carpet mask,  
3 the wetted pieces of carpet, sticky mats, the Kleen  
4 Sweep inside, the vacuums, the Corex -- you know,  
5 that's the plastic boards they put down when they take  
6 real heavy stuff in -- the cautionary tape used inside  
7 actual construction to cordon it off, and the  
8 construction bags to pick up debris.

9           You know, I got slides on all that, but just  
10 in the interest of time, I think you can recall --  
11 those are broad enough topics -- that all of those  
12 protective measures were utilized, all of them were  
13 reasonable, all of them show that Team is careful,  
14 conscientious, and swept up on their project when they  
15 were supposed to. They met the standard of care  
16 customary in the business. And that's the reason they  
17 were reasonable. And if they were reasonable, they're  
18 not negligent.

19           I'm going to skip --

20           Oh, are you guys okay? Or do you want a  
21 break? Okay.

22           Now, you heard one of the things offered up  
23 was that he, like -- it's kind of a, well, confluence  
24 of slip and trip. Right? I mean, he slipped around  
25 the corner, right, before the ramp, then he fighting

1 for his balance, up the ramp, crest the top of the  
2 ramp, takes a few more steps, and trips. Right?

3           Okay. Maybe somebody says why isn't that  
4 reasonable? Right? You weren't there. What do you  
5 know? What if somebody may get in your face say, hey,  
6 well, let me show you.

7           And the reason is, is because that flies in  
8 the face of what Cox told everybody. Right? He says  
9 slip, feet out from under, down. Right? Virtually  
10 instantaneous between the time of the upset and the  
11 time of the impact. Right? That's his story.

12           And you might say to anybody who argues with  
13 you, you mean to tell me that you think that a guy who  
14 can remember a slip to the left, feet up in the air,  
15 somehow doesn't remember the 15 feet of stumble steps  
16 in between to get over to the top of the ramp before he  
17 trips? Is that the way people's memories work?

18           I mean, you know, I'm 65. I don't know.  
19 Mind's not so great, but you guys don't have that  
20 excuse. I think you got pretty good memories. And you  
21 know that a person under those circumstances sure would  
22 remember that. And, you know, maybe Cox is doing the  
23 best he can to tell you what -- what he thinks  
24 happened. But what he's telling us is totally  
25 inconsistent with the hop, skip, and a jump theory.

1           So -- and, for example, here's one of the  
2 pieces of evidence that Yang reviewed to make this  
3 point. Mr. Cox gave sworn testimony in his deposition:

4           "I came around the corner, my feet slipped  
5 out from under me, and I fell. I was in the  
6 middle of making a turn, aiming for the door,  
7 and that's when I fell."

8           Okay? I mean, that's this stuff (descriptive  
9 sound), right away. It's not we're doing the limbo  
10 dance for a couple of feet to go over to the ramp.

11           And, you know, here, the records -- the point  
12 of this is, is that when he talked to MGM at the scene  
13 and he talked to the EMTs in the ambulance, all he said  
14 was he slipped on concrete. No mention of dust. He  
15 doesn't mention dust until the emergency room where he  
16 says he slipped on some concrete dust, not construction  
17 dust. Right? That's a little Morelli magic. He  
18 doesn't say construction dust. That's from --  
19 construction dust from -- from the fertile imagination  
20 of Mr. Morelli. He said concrete dust.

21           And he said it -- you know, and I think this  
22 might be a mistake probably on my part. He said it in  
23 922. But if you look at the ER records, Plaintiffs'  
24 Exhibit 2, I think he said it to the doctor. Right?  
25 And the doctor doesn't see him until, like, 9:52.

1 Right? So this could be wrong. Right?

2 But at any rate, he comes in at about 9:15 on  
3 the ambulance records. Right? And Mrs. Cox is taking  
4 those pictures within minutes of arrival. Minutes.  
5 Right? So that's when -- I mean, they've already  
6 talked about it.

7 Because you can imagine a wife comes to her  
8 husband's side, has some questions. Right? Like,  
9 "What's all this on your clothes?" And they probably  
10 talked about it. That seems reasonable; right? But  
11 this was a derived interpretation of fragmented  
12 memories. That's what this is.

13 Let me show you also -- you have the court  
14 testimony. And, again, it's -- he says -- I'll just  
15 give you this part. And this is Morelli taking a --  
16 taking Mr. Cox through it.

17 And he says, "As I came around the corner, I  
18 was probably at my fastest -- you know, this is the  
19 corner before the door, so we're turning right here --  
20 "came around the corner, probably longest piece. As I  
21 turned, I saw the doorway. It was dark. I saw -- I  
22 thought I saw" -- wait -- "I thought -- I thought I saw  
23 the door, and it was like a golden light in the  
24 distance." And, you know, it does kind of look gold on  
25 the videos; right?

1           And he says, "And I knew that's where I was  
2 meant to head for." Okay.

3           "So were you still running hell for leather,  
4 hell for leather?"

5           "Absolutely."

6           So he's running hell for leather and he says,  
7 "And then I started running towards the door --  
8 turning, running towards the door. I'm taking the  
9 corner as fast as I can, and it felt like an elevator  
10 suddenly moving upwards. And I feel my feet just slip  
11 left from underneath me. And I almost feel like, for a  
12 second, all of me is in midair. That's what it felt  
13 like. There's the speed of turning, seeing the  
14 sharpness of the turn, and the weight of the body going  
15 around, and then I just feel my feet slip straight from  
16 under me."

17           All right. So, there, you can almost see him  
18 working it out in his head. The weight of his body  
19 goes around and slips. There's no hop. There's no  
20 slip, hop, hop, hop, hop, skip, trip. That's not what  
21 Mr. Cox remembered. That's not what he's testifying to  
22 there. That's not what the evidence shows.

23           And then he is asked -- okay. He says, "And  
24 then I just feel my feet slip." What -- and then what  
25 happened; right? Feet slipped. Then what happened?

1 Boom, "I hit the ground." Right? No hop, skip, and a  
2 jump. That sprung from the very clever lawyer,  
3 top-notch lawyer, from Mr. Deutsch; right? It just  
4 isn't so.

5 Now, if I could just remind you of some  
6 things again from Yang. Do you remember Dr. Yang?  
7 Football player, PhD, young kid at home, finds time to  
8 come out here and -- and tell you what his analysis  
9 showed. Remember that frame-by-frame analysis? Well,  
10 I mean, he analyzed over 80 seconds of video.

11 And you'll see -- I mean, if you check  
12 Exhibit 402, click on that properties thing, it's 30  
13 frames a second; right? So this is, like, 2600 frames  
14 this guy looked at. So it takes a while. It's  
15 time-consuming. It's meticulous work. But you're  
16 being asked to make an important decision, and you need  
17 the best evidence that we can find. And that's what we  
18 wanted you to have because the stakes are high for  
19 Team. You hold our immediate future in your hands for  
20 this case.

21 But MGM's here too. And they hold our future  
22 in their hands, our existence --

23 MR. DEUTSCH: Objection, Your Honor.

24 THE COURT: Sustained.

25 MR. STRASSBURG: Use your common sense and

1 ask yourself whether spending \$100,000 on an expert to  
2 really try to look behind the tree -- right? I mean,  
3 I'd have cut that tree down, frankly. But not to be.  
4 You know? And I finally get a case where there's a  
5 video; right? And there's a tree in it; right?

6           So frame by frame, we went out and scanned  
7 the pavement because we wanted to know was it slick.  
8 We measured it; right? We scanned it to see what it  
9 looks like -- is it rough; right? -- to find out -- to  
10 bring you some facts. That's not consciousness of  
11 guilt; that's consciousness of innocence and a sober  
12 understanding of what's at stake here. That's what  
13 that is.

14           So the analysis, the modeling, here's what it  
15 shows; right? As Mr. Popovich has pointed out for MGM,  
16 the ramp stops here -- starts here; right? It goes  
17 this whole distance and -- before he goes down.  
18 Logical travel path around the corner is here. He's  
19 running in a straight line; right? That's a trip.  
20 Dust doesn't have anything to do with it, not natural  
21 dust, not construction dust, not anybody's dust; right?

22           Now, I do remember that Mr. Morelli was  
23 somewhat critical of me for maybe suggesting that  
24 wind-blown dust could account for the soil on Mr. Cox's  
25 clothing. And, you know, as I was driving in today, I



1 looked up at the mountains. Maybe you did too. And  
2 remember how different the mountains looked today than  
3 they did after that rain two days ago?

4 Remember how clear -- I don't know if you get  
5 up in the morning like I do, but you get up, you look  
6 out, the mountains were crystal. You know, they're  
7 beautiful, the colors around the sky. Today they're  
8 the same old usual paced-out, you know, rocks that we  
9 all know; right? So why is that? That's the dust.  
10 That's why we have dust. Why do you think there's car  
11 washes in Vegas? Do you ever think about that? Why do  
12 we wash cars in this town; right?

13 You know, I'm from Ohio; right? And I know  
14 good and well why we wash them in Ohio. It's because  
15 they get covered in salt in the winter; right? And if  
16 you don't wash that stuff every week, your car turns to  
17 a pile of rust; right? But, here, why do we have car  
18 washes here? Huh? You think they're all on, like,  
19 being subsidized by the casinos? No. We get car  
20 washes here because we need them. Right? I mean, I  
21 got a black car this time; right? It was black when I  
22 picked it up from Avis. It ain't black now. It's kind  
23 of a nice shade of brownish-black; right?

24 And how come I sniff? You ever notice that?  
25 Sometimes I sniff. It's not emotion; right? Yeah,

1 maybe you do too. It's the dust, for crying out loud.

2           So I'm just saying that it may be far-fetched  
3 to someone from a fine town like New York City, on the  
4 coast, rain. It may be really far-fetched to someone  
5 from London with the rain. I don't know if the sun  
6 ever shines in London, where the natural elements,  
7 where Mother Nature keeps the accessways dust-free.  
8 But we have a different Mother Nature here and our  
9 Mother Nature, she does it Vegas style. And that's  
10 dust.

11           Now, we've also talked about the -- the  
12 second version of the slip-and-trip that was given by  
13 Mr. Cox under further questioning by Mr. Morelli. And,  
14 you know, again, I'm not -- I'm not critical of  
15 relentless, vigorous lawyering. I mean -- and I have  
16 enough to know top legal talent when I see it.

17           But, you know, the point here, it's not who's  
18 got the best lawyer? It's what the truth is; right?  
19 And, here, we have an example -- I'll show you -- of --  
20 you know -- I mean, we don't know what went on in  
21 Mr. Cox's mind, or Mr. Morelli's, for that matter. But  
22 the experts testified to you that the second version of  
23 the fall given at trial was different from the first.  
24 When viewed scientifically, it was different. Okay?

25           Now, I mean -- I assign -- again, I assign no

1 sinister intent. I'm just saying that it was  
2 different, because, here, Morelli says "I just want to  
3 clarify for the jury"; right? Now, I tell you, when a  
4 lawyer says "I just want to clarify" -- right? -- to  
5 his own witness, that's like code (descriptive sound).  
6 "Wake up. Wake up." Right? But maybe not in  
7 New York. I don't know. Again, I can't imagine that a  
8 lawyer of Mr. Morelli's skill would have to resort to  
9 that kind of stuff. But, nevertheless, that's what's  
10 on the record. And here it is.

11 "I just want to clarify. Did you turn it  
12 wide? Did you turn it narrow?"

13 Okay. And Cox says, "No, no, no, no, I  
14 turned it really sharply, as sharply as I could. And I  
15 had already taken some steps towards the door. And  
16 that's when I felt this motion pushing me up." Right?

17 "The speed of turning, motion, and then I  
18 felt the feet slip left under me together. It wasn't  
19 the pavement, it was an incline. At the time I did it,  
20 the speed of the corner, my feet just went whoosh."

21 Okay. So that's what he said. Now, the  
22 experts looked at that too. You know, the physicist  
23 that -- that managed to pass P chem in college, unlike  
24 some of us. And they saw this was different. And  
25 that's the -- Dr. Baker, for example --

1           MR. DEUTSCH: Objection, Your Honor. I don't  
2 think there were any physicists that testified.

3           MR. STRASSBURG: Huh?

4           THE COURT: Do you want to rephrase the  
5 reference?

6           MR. STRASSBURG: What did I say? What did I  
7 do wrong?

8           THE COURT: He says that there were no  
9 physicists who testified.

10          MR. STRASSBURG: Oh, I'm sorry. Someone who  
11 took physics. I mean, I think they take physics in  
12 college still.

13          So here's Baker. Dr. Baker took a look at  
14 that, and he said -- let me get the whole quote here.  
15 I asked him the difference and -- oh, sorry. Hold on.  
16 I'm not so good on this wobbly.

17          Okay. So I asked him, "What's the  
18 difference?" And, you know, we had our usual confab  
19 among the lawyers, and the Court said, "Okay. You can  
20 answer."

21          And he said, "Well, the difference here is  
22 that we're talking about now taking steps toward the  
23 door. That's new." And then he quotes him. And he  
24 says, "So this is not slipping outward -- the corner  
25 anymore." Right? "'And then I felt my feet slip left'

1 makes no kinematic sense to me." Right?

2 That's doctor talk for -- kinematics means  
3 motion. You know, it doesn't fit with the science of  
4 motion. Why not?

5 Okay. And he says "Well, he's going to the  
6 door."

7 And I said, "Well, because he's going  
8 straight?"

9 And he answered, "He's going straight. He's  
10 going straight and his feet slip left. It makes no  
11 sense." Right? And he says, "It makes no human motion  
12 sense to be going in a straight line and slip outward  
13 that way."

14 It makes no sense. It defies the laws of  
15 motion, of physics. Again, somebody asks you, "Well,  
16 yeah, Cox was there; right?" You might want to say to  
17 them, "Look, you know, what is more reasonable, that a  
18 guy in an extreme situation that he didn't expect  
19 misremembers stuff or that the laws of physics somehow  
20 don't apply to him?"

21 Because, remember, we got a surveillance  
22 video that shows where he ends up; right? And the only  
23 way to get there is in a straight line. And if you go  
24 in a straight line, you're not slipping out left;  
25 you're tripping forward.

1           Now, if I could show you one more -- you guys  
2 want a break or -- is it break time? I mean, I could  
3 break.

4           THE COURT: I think I saw some heads nodding.  
5 Right.

6           JUROR NO. 2: What?

7           JUROR NO. 12: A break.

8           MR. STRASSBURG: I think that's a yes, Judge.

9           THE COURT: I am going to admonish the jury.  
10 Let's take a -- what? -- a 15-minute break?

11          MR. STRASSBURG: Yeah, 15 minutes.

12          THE COURT: All right. We'll reconvene at 20  
13 to 4:00.

14                 During the recess, you're admonished not to  
15 talk or converse among yourselves or with anyone else,  
16 including, without limitation, the lawyers, parties,  
17 and witnesses on any subject connected with the trial  
18 or read, watch, or listen to any report of or  
19 commentary on the trial or any person connected with  
20 the trial by any medium of information, including,  
21 without limitation, newspapers, television, the  
22 internet, and radio, or to form or express any opinion  
23 on any subject connected with the trial until the case  
24 is finally submitted to you.

25                 Be outside the courtroom a little bit to the

1 south here at 20 to 4:00.

2 Counsel remain, please.

3 THE MARSHAL: All rise.

4 (The following proceedings were held  
5 outside the presence of the jury.)

6 THE COURT: All right. You may be seated.

7 All right. Mr. Strassburg, about how much  
8 more time do you think you got?

9 MR. STRASSBURG: Maybe another hour, hour and  
10 a half.

11 MS. FRESCH: What?

12 MR. DEUTSCH: What? Really?

13 MR. STRASSBURG: Judge, he got a month.

14 THE COURT: You know what? I didn't -- I'm  
15 not -- I was just reacting to what I heard --

16 MR. STRASSBURG: Yeah, I know.

17 THE COURT: -- from counsel.

18 MR. STRASSBURG: I know. And I don't blame  
19 them.

20 THE COURT: Here's what I plan to do. At the  
21 conclusion of Mr. Strassburg's argument, I'm going to  
22 get a sense from the jury as to how -- what they want  
23 to do.

24 MR. MORELLI: Whether they want me to sum up  
25 at 5:00 at night on a Friday before Memorial Day.

1 THE COURT: I'm going to let the jury -- my  
2 understanding is that there's one juror who's got to be  
3 out of here by 6:00, I think. But, here, let -- let's  
4 assume that we're not going to finish today. What that  
5 means is that we're going to come back on Tuesday at  
6 1:00. Okay?

7 MR. DEUTSCH: Yeah.

8 MR. MORELLI: That's okay.

9 THE COURT: And how much time do you think  
10 you're going to have, Mr. Morelli?

11 MR. MORELLI: Well, at this point, it will be  
12 around two hours.

13 THE COURT: Okay. All right. Now --

14 MR. STRASSBURG: Judge, may I say something?  
15 I think that's entirely fair. And I'm sorry I'm going  
16 so long, but I need to show them this proof.

17 THE COURT: No, that's fine.

18 MR. STRASSBURG: And I'm not trying to jam  
19 Morelli on the clock.

20 THE COURT: What I'm -- what I'm stating here  
21 is this: Depending on what time you conclude,  
22 Mr. Strassburg, we may start Mr. Morelli's summation.  
23 If -- depending on what the jury wants to do, if we're  
24 coming back on Tuesday, it's going to be at 1:00.  
25 You'll finish and it will go to the jury Tuesday



1 afternoon. I cannot go --  
2 MR. MORELLI: I understand.  
3 THE COURT: -- into Wednesday.  
4 MR. MORELLI: Judge, I understand.  
5 THE COURT: I've scheduled --  
6 MR. MORELLI: I have no problem with that. I  
7 understand. I'm not complaining. It's not your fault.  
8 THE COURT: Okay.  
9 MR. MORELLI: It just isn't your fault.  
10 THE COURT: But I will ask the jury what they  
11 want to do. I mean, it's their time as well.  
12 MR. MORELLI: Yeah, I mean, if they want to  
13 stay till 6:00, I'm glad to --  
14 THE COURT: Or if they want to stay past, if  
15 they can.  
16 MR. STRASSBURG: Judge --  
17 MR. RUSSELL: After all this time, it should  
18 be up to them.  
19 THE COURT: What's that?  
20 MR. RUSSELL: After all this time, it should  
21 be up to them. That would be our position.  
22 THE COURT: I'm going to get a sense from  
23 them as to what their thinking is. And they may want  
24 to leave early today -- I don't know -- given the  
25 weekend. I'll get a sense from them.

1 MR. STRASSBURG: I'll make you a bet. All  
2 right.  
3 THE MARSHAL: All rise.  
4 (Whereupon a short recess was taken.)  
5 THE MARSHAL: All rise. Come to order.  
6 THE COURT: Okay. We're back on the record  
7 outside the presence of the jury.  
8 MR. DEUTSCH: Yes, Your Honor. One thing --  
9 MS. FRESCH: Your Honor.  
10 MR. MORELLI: May we approach, Your Honor?  
11 THE COURT: Sure.  
12 (A discussion was held at the bench,  
13 not reported.)  
14 THE COURT: Bob, is the jury --  
15 THE MARSHAL: Jury is all set.  
16 THE COURT: Let's bring them in.  
17 THE MARSHAL: Bring them in?  
18 THE COURT: Yeah.  
19 THE MARSHAL: All rise.  
20 (The following proceedings were held in  
21 the presence of the jury.)  
22 THE COURT: All right. You may be seated.  
23 Do counsel stipulate that the jury is  
24 present?  
25 MR. MORELLI: The jury is present.

1 MR. POPOVICH: Yes, Your Honor.

2 MR. FREEMAN: Yes, Your Honor.

3 MR. RUSSELL: Yes.

4 THE COURT: All right. Very well. Before  
5 Mr. Strassburg resumes, I just want to get a sense from  
6 the jury as to what your thinking is about continuing  
7 to go on today. We're going to continue today, but, I  
8 mean, how -- how long.

9 The question is anybody have a problem -- if  
10 we were to go into the night, that would be a problem.  
11 Okay. So we got a problem with that; right?

12 All right. Does anybody have any problem  
13 going a bit after 5:00?

14 And -- yes, what is the problem?

15 JUROR NO. 6: I have a showing. I have to go  
16 to work.

17 THE COURT: Okay. At what time?

18 JUROR NO. 6: At 6:00.

19 THE COURT: So if we were to go until, say,  
20 around 5:30, would that be a problem, or is that  
21 pressing it too much?

22 JUROR NO. 6: I mean, I could speed.

23 MR. DEUTSCH: Off the record. Off the  
24 record.

25 JUROR NO. 6: Get out of jail free.

1 THE COURT: How about till around 5:15?

2 JUROR NO. 6: 5:15 wouldn't be a problem.

3 THE COURT: Anybody else have any problems?

4 Here's what we're going to do, then. We'll  
5 adjourn at about 5:15 -- okay? -- depending upon what  
6 the circumstances are. We're not going to be in  
7 session Saturday, Sunday, or Monday.

8 I understand there is a juror who has a  
9 problem Tuesday morning. All right. That's -- I  
10 received a note from a juror who has a problem on  
11 Tuesday morning. So what we'll be doing is resuming on  
12 Tuesday at 1:00. And I can't be in session Tuesday  
13 morning anyway because I have motions, you know,  
14 because Monday is a holiday. I always have motions on  
15 Mondays, but since it's a holiday, Tuesday is motions.  
16 Okay? So I'm going to be occupied all Tuesday morning  
17 anyway.

18 So we'll go until -- we'll go until 5:15  
19 today. All right? And then we'll reconvene on Tuesday  
20 at 1:00.

21 Does that work, Counsel?

22 MR. MORELLI: Yes, Your Honor.

23 MS. FRESCH: Yes.

24 MR. POPOVICH: We'll make it work.

25 MS. FRESCH: Thank you, Your Honor.

1 THE COURT: And counsel did stipulate that  
2 the jury is present; correct?

3 MR. MORELLI: Yes, we did and they are  
4 present.

5 THE COURT: That being so, Mr. Strassburg,  
6 you may resume.

7 MR. STRASSBURG: Thank you, Your Honor. And  
8 thank you for bearing with us, me.

9 I will attempt to speed this up. This is the  
10 law on preponderance of the evidence, that the  
11 evidence, when weighted with that opposed to it --  
12 evidence on both sides, more convincing force -- and  
13 which appears that the greater probability of truth  
14 resides therein.

15 The way I see this law is -- can think of it  
16 like this: There -- preponderance is there's evidence  
17 in favor of -- of something, say Team, and there's  
18 evidence opposed. And when the scales are perfectly  
19 balanced -- okay? -- then, when they tip one way or the  
20 other, then the preponderance -- your secret's safe  
21 with me. When they tip by a preponderance -- right? --  
22 then that -- the test has been met. All right?

23 In this case under these facts with this  
24 proof, the way I see it is this is the evidence that  
25 Team is reasonable, not negligent, didn't cause the

1 fall. And it is all here. And we've been -- I've been  
2 discussing it with you, and you've been kind enough to  
3 give me your attention for that.

4           So what -- I suggest that when it comes time  
5 to -- to deliberate about, you know, what about this  
6 preponderance-of-the-evidence thing? When it comes  
7 time to Team, you -- you call to mind, look, you know,  
8 Strassburg went through all of this evidence that --  
9 you know, no track-out, all that stuff; right? And so  
10 this -- let's look -- on Team's side, here's all that  
11 evidence.

12           On the other side, what -- what has the  
13 plaintiff offered on the other side? No experts.  
14 The -- the recollection of Mr. Cox under trying  
15 circumstances that kind of varies from time to time.

16           On Team's side, the business records, the  
17 photographs, the sworn testimony of construction  
18 professionals who have been in the business here for  
19 years in this valley and answered questions readily,  
20 truthfully, and told you the facts.

21           On the other side, you may want to say that  
22 there is not that kind of weight, and so the  
23 preponderance hasn't been satisfied. I submit that  
24 would be a good, helpful way. I've seen some juries  
25 that find that helpful in analyzing how that legal

1 mechanism works.

2           Let me talk about jumping to conclusions.

3 You see, I'll prove to you that what the plaintiff  
4 wants you to do is jump to conclusions, not to weigh  
5 and balance the evidence. And Instruction 21 says that  
6 negligence is never presumed. Okay? That's lawyer  
7 talk for "jump to conclusions." The fact that there's  
8 an accident, that's not enough to say that there's a  
9 legal wrong, negligence. You see, negligence is a  
10 legal wrong. It is unlawful conduct. That's what the  
11 plaintiffs' asking you to find Team did, engaged in  
12 unlawful conduct. But that has to be proven by  
13 evidence. You can't jump to the conclusion from the  
14 fact that there was an accident.

15           Similarly, you can't jump to that conclusion  
16 from the fact that there was dust on his clothes. The  
17 evidence is just overweighting that there was no  
18 observable evidence that -- at the accessway that night  
19 that you couldn't tell was there except by contact, by  
20 physical contact.

21           There were seven prior participants. I mean,  
22 you -- you remember the -- there were videos like this  
23 one. And this is a screenshot from it. All right.  
24 This is the part after 8:35. First three people  
25 through the door, they're running the same route. They

1 don't kick up any dust. They don't leave any  
2 footprints. They don't encounter any obstacles or  
3 debris in the way. And then there's four, five, six,  
4 and seven. And then there's Mr. Cox.

5           Now, I'm not going through all those, but I'd  
6 just cite you to Mr. Copperfield. You remember that  
7 ten minutes before, that Mr. Copperfield went through  
8 this same area. And, remember, we went through those  
9 slides. I mean, some of them are here; right? And I'd  
10 show them to you, but Elaine will kick everyone out of  
11 the courtroom. So I'm not going to do that. Just  
12 remember -- right? -- the -- the -- the stuff where  
13 Copperfield and his two assistants go through the same  
14 area ten minutes before on that other -- you know, the  
15 super-secret illusion that we don't talk about in  
16 public. That one. Okay?

17           So -- and Copperfield testifies that there  
18 wasn't construction dust. Let me show that. I'm  
19 sorry. Excuse me. And this is -- Mr. Morelli's going  
20 after Copperfield. And he says, "On November 12th, I'm  
21 asking you to assume there was construction dust on the  
22 incline," blah blah blah.

23           And he says -- Copperfield says, "There  
24 wasn't construction dust." He was there ten minutes  
25 before Mr. Cox was, and Copperfield says no



1 construction dust.

2           Now, Mr. -- the plaintiff is contending that  
3 you can't trust what Copperfield says because he  
4 couldn't remember these prior accidents; right? But  
5 sometimes -- and you'll see there's a jury instruction  
6 to this -- people give testimony that jurors decide to  
7 not give credence on one topic, but then, on another  
8 topic, same witness, and juries trust the testimony.

9           That's the case here, because Copperfield's  
10 testimony is corroborated by all these -- all these  
11 slides from the surveillance video. All right?  
12 Because the slides show you that the video shows you  
13 the same thing Copperfield swore to you. No  
14 construction dust. There's no footprints.

15           You know, even Mr. Cox agrees, and we only  
16 talked about those November 14th photos. Even he  
17 agrees that if you're not leaving footprints, it's not  
18 covered in dust. "It's just clean," as he put it.  
19 Same thing here. No footprints, no air kick-up. I  
20 don't know if you remember the -- the -- where --  
21 not -- Bob and I had a little bit of fun with the  
22 plastic stuff and dust; right?

23           Remember when I walked on it, as I walked  
24 through it, I kicked up dust. Okay? I mean, Bob about  
25 shot me, but -- right? And -- and that didn't happen

1 here. So that's got to tell you that it wasn't covered  
2 with dust.

3 And then Mr. Kenner said the same thing. And  
4 I can show you. I can show you right here. I mean,  
5 this is the picture that my partner, Call, took in the  
6 courtroom. See, this is first step, second step. You  
7 see all the dust it's carrying with me? Well, that  
8 dust got there through the air. Right?

9 And on those surveillance videos, you've got  
10 all those people helping Copperfield run there ten  
11 minutes before. Not a footprint on the pavement. No  
12 track-in into MGM. You got all the people with Mr. Cox  
13 during the act, the trick, 13 of them. 12 of them get  
14 through there, no tracks, no footprints, no track-out,  
15 no air -- no dust being kicked up in the air. That is  
16 proof to you that it wasn't covered in dust. It wasn't  
17 a slip hazard. It's just not so.

18 Now, what is the plaintiff asking you to jump  
19 to? And I looked at it this way. You see, plaintiff  
20 says circumstantial. Remember that little law lesson  
21 about circumstantial? Circumstantial. So there's dust  
22 on his clothes. Right? Even Dr. Yang agreed with  
23 that. Although they washed the clothes; right?

24 Yang said, "If I was going to calculate the  
25 coefficient of friction with dust, I need to know what

1 type and how much. And I need it from the pants and  
2 the shoes that the plaintiff wore that night." Right?  
3 But that -- that evidence was not preserved. So nobody  
4 could test it.

5 I mean, that's not fair, really. You know,  
6 you're going to take somebody to task about dust? And  
7 you take pictures that nobody can test and then you  
8 throw the dust away? That's not fair. And you're  
9 entitled under the law to infer that, had that evidence  
10 been retained, it would have been unfavorable to the  
11 plaintiff. And you should do that, just for fair play,  
12 because that's what's fair.

13 Now, construction dust. The plaintiff wants  
14 you to jump with no evidence. You know, jump from the  
15 mere presence of dust to it has to be construction  
16 dust. Can't be anything else. Can't be natural dust.  
17 All those car washes, boy, are they in trouble. Right?  
18 Has to be construction dust.

19 And then, it has to be Team's construction  
20 dust. Right? Another jump. Second jump. If it's  
21 construction dust, it has to be Team's. Are there  
22 other construction projects at MGM? Yes. I mean, you  
23 heard Voiss talk about they're wrecking out the lion  
24 habitat.

25 I don't know if you guys remember that. I

1 mean, my -- my grandkids used to love to stick their  
2 nose up to the window, and, you know, lions were like,  
3 I can't eat that. And remember what those lions --  
4 remember what they lived in? Rocks. Rocks big as my  
5 house; right? Well, to turn that into a sports bar,  
6 you got to take out all those rocks. You got to wreck  
7 them out. You got to haul them away. Right? And that  
8 was going on.

9           And then the grease trap. You heard King  
10 talk about the grease trap job. That was going on.  
11 Right?

12           So -- and not only that the -- the dust that  
13 blows in -- and you heard Navas, Funes-Navas say he'd  
14 seen dust blowing in in there in that location. That's  
15 not uncommon.

16           So -- and then, once you jump to -- I mean,  
17 it's like crossing a brook, you know, you jump from  
18 rock to rock. But the law says the evidence should be  
19 a bridge. You walk on it. You don't make these jumps  
20 into nothing.

21           And then from construction dust, you jump to  
22 it had to be a slip hazard. But there's no proof of  
23 that. There's no proof of that. And, in fact, the  
24 only guy that really knew, you know, Paul King, he's  
25 kind of an expert because he does construction. He

1 said that, you know, excessive amounts of dust, maybe  
2 it's a slip hazard, but not on broom-finish concrete.  
3 Why is that? It's because that's why they broom-finish  
4 it. So it's not a slip hazard.

5           And then you go from the possibility of a  
6 slip. Right? Which is what you jump to from it had to  
7 be Team's dust, which is what you jump to from it had  
8 to be construction dust, which is what you jump to from  
9 the only thing that has any foundation, in fact, that  
10 there's some dust on the guy's clothes, the dust he  
11 destroyed, threw away, while he was represented by a  
12 lawyer.

13           You know, like, I -- I like Mr. Morelli. I'm  
14 not critical of seeking the advice of counsel. I mean,  
15 you know, that's -- that's prudent. I'm critical of  
16 not preserving evidence when you're going to make a  
17 claim. That's not fair.

18           So and let me show you this. This is also  
19 from what Yang considered, that he came to this dust  
20 theory after the fact. And Yang looked at his  
21 deposition where he was asked, you know, do you know  
22 why?

23           And he says, well, apart from running as fast  
24 as I could, I didn't -- I realized, after the fact,  
25 what caused it but not at the time. And then he says,

1 well, because all my clothes were covered in dust;  
2 right?

3 He jumped to a conclusion about evidence.  
4 But juries don't get to do that. Right? Because  
5 that's not what that law requires of it.

6 The other thing is here. You see, Mr. Cox  
7 assumed that, because there was dust on the clothes,  
8 right, and he thought there was construction being  
9 carried out with cement drills, "I didn't see any other  
10 way it could have been caused by anything else."

11 But Dr. Yang did. He knew it was a trip  
12 after he went through all the videos frame by frame and  
13 saw that he went down while he was running in a  
14 straight line.

15 So Mr. Cox, he's doing the best he can, but  
16 it's an assumption. He kind of reverse-engineered this  
17 thing when he started trying to think about what  
18 happened. He made an assumption. And the plaintiff  
19 wants you to make the same one. Not once. Not twice.  
20 Three times. Jump, jump, jump.

21 Don't do that. That's not right. You're  
22 sworn to make your decision based on the evidence. And  
23 I think that's what you got to tell anybody who raises  
24 this thing. Look, we're sworn to decide this thing on  
25 evidence. And where there's no evidence -- and the

1 plaintiff could have brought some -- we get to take  
2 that into account.

3           And that is Jury Instruction No. 9, which is  
4 right here, that, when relevant evidence which could be  
5 part of the litigation is within the control of one  
6 party whose interest it would be to produce it and they  
7 fail to do so without satisfactory explanation, the  
8 jury may infer the evidence would have been  
9 unfavorable.

10           You've been offered no explanation about why  
11 Mr. Cox, while under the consultation with a  
12 professional lawyer, destroyed the evidence necessary  
13 for his claim. That's not right.

14           Now, again, another thing you might want to  
15 consider is the absence of track-out. I'm not going to  
16 bring it up because I want to get through this and give  
17 Mr. Morelli a chance to get started. But remember the  
18 photograph of the doors and the carpet coming in the  
19 theater area? It was taken on that night. Not at --  
20 it's pristine. Not a scrap of -- no footprints, no  
21 track-in, no nothing. In the airlock between the two  
22 security doors, investigating officer didn't even take  
23 any photographs. That's how pristine that place was.

24           So Mr. Cox agrees that, if you're not leaving  
25 footprints, it's clean. And he testified to that, as

1 he should.

2 Oh, there's also testimony, sworn testimony,  
3 that there was no back charge from MGM to Team. And, I  
4 mean, you heard some testimony about how back charges  
5 work, that if an owner has to do work that properly  
6 should have been done by a contractor, the owner can  
7 back-charge the contractor and take it out of the fee.  
8 MGM never did that.

9 Do you think for a minute that, if MGM had to  
10 go out there and clean stuff up that they thought we  
11 should have cleaned up, we wouldn't have heard about it  
12 in a back charge? I mean, that's -- that is Narnia,  
13 because that's not how it works at all -- or shouldn't.

14 Now, let me just take one more. You've heard  
15 of -- as I said, Mr. Morelli is critical of Team --  
16 well, me -- for engaging the services of Dr. Yang and  
17 paying his -- paying him for his time of over \$100,000.  
18 And he said that that was evidence of consciousness of  
19 guilt on the part of Team because why would somebody  
20 who was innocent go to that expense?

21 Well, let me tell you, the answer is it's  
22 just somebody who's innocent who knows what the stakes  
23 are of this case who would do that. Team is the kind  
24 of contractor that stands behind its work, that backs  
25 its work. It defends its work. It does that -- it



1 serves its customers.

2           And, you know, Beacher's was on the contract  
3 with MGM, was just as much as a customer. Because,  
4 remember, Team's market is 3 miles long and about a  
5 half a mile wide. It's the Strip. And MGM owns half  
6 of it. So, you know, it's pretty hard being in that  
7 business and incur the ill will of a top-notch client  
8 like MGM. And you've seen -- I've showed you -- the  
9 reasonableness of Team's precautionary measures. Team  
10 does not deserve to end up on MGM's, you know,  
11 do-not-call list.

12           MR. DEUTSCH: Objection, Your Honor.

13           THE COURT: Sustained.

14           MR. STRASSBURG: You can use your common  
15 sense as to what happens to a contractor in that kind  
16 of specialized narrow market --

17           MR. DEUTSCH: Objection, Your Honor.

18           MR. STRASSBURG: -- who disappoints a big  
19 customer like MGM.

20           THE COURT: Sustained.

21           MR. DEUTSCH: Your Honor, that's the fourth  
22 time. I'd ask for an admonishment, please.

23           THE COURT: I sustained the objection. No  
24 admonition is necessary.

25           MR. STRASSBURG: The evidence is I asked

1 Mr. King, I said, "What is the focus of Team's  
2 business? Is it the Strip? Is it Vegas as a city? Is  
3 it the state of Nevada? Or something else?"

4 And he said, "We do almost all of our work on  
5 the Strip."

6 That's sworn evidence before you.

7 And there is also sworn testimony, again from  
8 Mr. King. I asked him, "Is there anything about the  
9 type of construction that team typically does that  
10 especially attracted you to their service? Or is  
11 construction pretty much construction?"

12 And King said, "It's the high-end. I mean,  
13 when you deal with tenant improvements in hotels, it's  
14 the high-end aspect of it. There's a quality factor  
15 there. I've done work off the Strip, and it's hard to  
16 get quality. When you see baseboards that zig and zag,  
17 I mean, it's hard to get that quality that you have on  
18 the Strip in a lot of places."

19 That's Team's niche. Quality construction on  
20 the Strip for the big operators.

21 And who are they? How many? Again, there's  
22 sworn testimony from Mr. King. He swore to you, "I  
23 mean, there's four or five major operators on  
24 the Strip. And if you don't do well on their  
25 properties, you don't work on the Strip. And if we

1 don't work on the Strip, we don't work."

2 There's also Mr. King's sworn evidence here:

3 "QUESTION: Are you able to estimate what  
4 percentage of your work is on MGM projects?"

5 "ANSWER: On MGM projects, it's probably  
6 50 percent."

7 And he testified also, number of employees of  
8 Team at the time was 11. That's 11 breadwinners with  
9 their families who depend on them.

10 MR. DEUTSCH: Objection, Your Honor.

11 THE COURT: Sustained.

12 MR. STRASSBURG: Now, Mr. Morelli has argued  
13 to you -- he argued to you, "I ask myself this  
14 question. This little firm that might go out of  
15 business, God forbid. All right? Which is ridiculous.  
16 They spend over 100,000 just on Dr. Yang's company, not  
17 even for his testimony. It's over 100 grand they paid  
18 already. Now, if you're not at fault -- and that's up  
19 to you, not to me -- if they're not at fault and they  
20 really think so, do you hire somebody for over  
21 100,000?"

22 So you see what Morelli -- and, again, this  
23 is very clever lawyering, hats off to him. He's  
24 insinuating that the fact --

25 MR. MORELLI: That's not true.

1 MR. STRASSBURG: -- that Team accepted that  
2 cost to bring Dr. Yang's evidence to you, that it  
3 indicates something from which you can infer that Team  
4 must have been consciousness that Team was at fault.

5 I tell you, nothing could be further from the  
6 truth. What that means is a good, reasonable company  
7 that backs its work and clears its name, its good  
8 business reputation, knowing the stakes that are at  
9 issue here. Like I said, I'm trying this case in front  
10 of you, but I'm also trying this case in front of MGM.  
11 So the stakes are high for me.

12 Now, Morelli has suggested that you should  
13 hit them for 10 percent. I don't know where he got  
14 10 percent. But I tell you, 10 percent. Use your  
15 common sense. You know how business works in this  
16 town. Right? You're competitors. They're not --

17 MR. DEUTSCH: Objection, Your Honor. Same  
18 thing.

19 MR. STRASSBURG: This is common sense, Judge.  
20 I'm entitled to argue this.

21 THE COURT: Go ahead. Go ahead.

22 MR. STRASSBURG: Nobody's going to say,  
23 "Psst. Hey, did you hear Team got hit in that big  
24 Copperfield case? Oh, it was only 10 percent."

25 No. 10 percent's going to be lost.

1           It's going to be, "Hey, Team. MGM, did you  
2 hear about Team?" Right? We could do better. That's  
3 how this works. Don't think for a minute that  
4 10 percent oh, no, no, no, no. In this environment, in  
5 this market --

6           MR. DEUTSCH: Objection, Your Honor.

7           MR. STRASSBURG: -- it's got to be zero.  
8 Zero.

9           THE COURT: Overruled.

10          MR. STRASSBURG: That clears Team's business  
11 reputation. Send a message to the market --

12          MR. DEUTSCH: Objection, Your Honor.

13          MR. STRASSBURG: -- that these operators --

14          THE COURT: Sustained.

15          MR. STRASSBURG: As I said, Team, they have a  
16 reputation for quality. We have proved to you that  
17 they acted reasonable -- reasonably in this situation.  
18 Because they acted reasonably, they're not negligent.  
19 And because they're not negligent, your verdict must be  
20 for Team. Not for 10 percent. Not for 9 percent. For  
21 zero. Because that says the truth that they were not  
22 negligent and they don't deserve to be liable.

23                 And on that note, Mr. Morelli.

24          MR. DEUTSCH: Your Honor, can we have a quick  
25 record -- I mean, do you want to do it now or later?

1 THE COURT: Hold on. He hasn't --  
2 MR. STRASSBURG: I forget something?  
3 MR. DEUTSCH: Gary thinks he forgot  
4 something.  
5 MR. STRASSBURG: Oh, Judge, sorry. My  
6 partner, God bless him, he says I forgot something.  
7 Could I have the ELMO, please, Audra?  
8 THE COURT RECORDER: That's me. Just one  
9 moment.  
10 MR. STRASSBURG: Help. Can I have the ELMO,  
11 please?  
12 Oh, I see. That's how you -- wait a minute.  
13 Do I have it?  
14 Oh, real quick. You heard this before, but  
15 just so there's no mistakes, the Question 5 is the Team  
16 question. If you conclude, based on your  
17 deliberations, that the evidence proves Team is not  
18 negligent, then you should put an X where it says no.  
19 And then, if you answer no, you still have to  
20 go on -- wait a minute.  
21 Oh, if you answer no, then you skip to here,  
22 right, and you stop. You answer no further questions.  
23 Right? If you say yes to this, then you have to go on  
24 and talk about the proximate cause thing. Right? I  
25 mean, how many jumps are we going to have to get to

1 where the plaintiff wants to go? If you say no there,  
2 then you answer no further questions.

3 And this is how I submit to you the evidence  
4 and the law says to you the verdict form should be  
5 filled out because that's the right thing. This  
6 company was not negligent. We acted reasonably, we met  
7 the standard of care customarily in the industry. We  
8 honored our contract. And we deserve your vote  
9 (inaudible).

10 So thank you very much. I apologize. I  
11 promised I wouldn't, but it is a matter of moment to  
12 our company. And I did want to, after seven weeks,  
13 make sure you had a full opportunity to recall the  
14 proof that we brought to you. So thank you.

15 THE COURT REPORTER: I wasn't hearing you.

16 MR. STRASSBURG: Kristy, I plugged in to you.  
17 Do you mind?

18 THE COURT: All right. Thank you, Counsel.

19 All right. Mr. Morelli, you may proceed with  
20 the plaintiffs' rebuttal, rebuttal argument.

21 REBUTTAL CLOSING ARGUMENT

22 MR. MORELLI: Good afternoon.

23 IN UNISON: Good afternoon.

24 MR. MORELLI: I've got a few things to get to  
25 you now. I've been listening carefully to -- I've been

1 listening carefully to the lawyers.

2           There we go.

3           I've been listening carefully to the lawyers,  
4 Mr. Roberts and Mr. Popovich and Mr. Strassburg. And  
5 it's a little upsetting, actually. It's important for  
6 me to talk to you about how I look at things and how I  
7 feel and how I feel about representing the Cox family.  
8 You know I'm not from here. You know I'm from  
9 New York, and I told you that from the beginning. And  
10 I never tried to be somebody I'm not, not ever.

11           I'm a lawyer since 1977. That's longer than  
12 all of them. And when Mr. Roberts told you that he was  
13 leaving this afternoon and he excused himself and he  
14 told you he was taking his child to see Taylor Swift, I  
15 said to myself, well, you know, he told you the truth  
16 about what happened and you excused him for doing that.

17           But I never had an opportunity to do that  
18 because I was missing for two days, and you remember  
19 that, because my mother-in-law died. And so I didn't  
20 say anything about that, because I said, well, maybe  
21 that's not appropriate to do. We don't do that in  
22 New York. So I apologize to you for not telling you  
23 the truth about that, but it was only because I thought  
24 I couldn't. And now I see I can. And I am.

25           And so even though you've heard a number of



1 compliments being made about me by Mr. Strassburg and  
2 Mr. Roberts, especially, one of the best lawyers in the  
3 country, one of the best lawyers in New York, famous  
4 lawyer, well-known lawyer. That's the reason why the  
5 Cox family hired me, because of my reputation.

6 But my reputation is more than that of how  
7 good I am. I'm not pulling Morelli magic on you.  
8 That's what Mr. Strassburg called it, Morelli magic.  
9 He's over there. That's disparaging, you see. When  
10 Mr. Roberts calls me a showman, a really good showman,  
11 that's disparaging. That's not a compliment. You see?

12 And I don't know how these lawyers feel about  
13 their profession and them practicing in Las Vegas. I  
14 haven't spent lot of time in Las Vegas. I've been here  
15 maybe five or six times before this time. I've been  
16 here for conferences and because I lecture lawyers on  
17 how to try cases. So I'm often invited to be the  
18 keynote speaker to talk to 200 or 300 lawyers about how  
19 to do this. One of the things I always tell them is  
20 about ethics and about how important it is to me. And  
21 the truth is that they're questioning that.

22 You see this hair? I earned it. I earned it  
23 from being real. I win because I tell the jury the  
24 truth as much as I know. I wasn't the lawyer four and  
25 a half years ago in this case. I was hired two and a

1 half years ago on this case. And I'm doing the best I  
2 can to bring you the evidence. And it's very upsetting  
3 to me about how I have been treated by these other  
4 lawyers who compliment me but really disparage me.

5 At my age, at my level of achievement, I  
6 don't need this case. We're not looking for quick  
7 money. And it's interesting, because when I came from  
8 the airport originally and I saw all the billboards for  
9 lawyers, I said, wow, that's really so different from  
10 what I'm used to. And I've tried cases in Texas,  
11 Illinois, in New Jersey, in Philly. I mean I've tried  
12 cases in a lot of place. I've never had lawyers say  
13 these things about me in 40-plus years. And I ain't  
14 lying. I don't have to. I could quit.

15 MS. FRESCH: Objection, Your Honor. And I  
16 don't want to interrupt Mr. Morelli, if we could do it  
17 later.

18 THE COURT: All right.

19 MR. RUSSELL: Join.

20 MR. MORELLI: But the reason that I'm doing  
21 this is because of what they did to me. And I wanted  
22 to clear that up with you and make you understand that  
23 Mr. Cox and Mrs. Cox deserve the best representation.  
24 And if you think that I'm just a liar or a showman or a  
25 magical man, he knows top legal talent when he sees it.

1 That's what he told you today. Yeah. That's all the  
2 same thing.

3 Do you think they're trying to build me up so  
4 that I can convince you better? Or do you think  
5 they're trying to build me up so that maybe what  
6 they're proving looks better?

7 "Hey, I'm going against the best. What do  
8 you want from me?"

9 Just thought you should know how I really  
10 feel.

11 And you could say, "Morelli, you're a  
12 showman." But I'm not. I'm just real. This is real  
13 people's talk coming out of my mouth. This isn't legal  
14 talk. I'm from Brooklyn. Everything I have, I made  
15 myself.

16 MR. RUSSELL: Objection, Your Honor.

17 THE COURT: Sustained.

18 MR. MORELLI: Thank you.

19 Do you have the clicker there?

20 MR. DEUTSCH: Yeah. Just make sure. All  
21 right.

22 MR. MORELLI: Sorry. I have a number of  
23 things to talk to you about about the case. I'm going  
24 to start talking to you today, and I'll continue  
25 talking to you on Tuesday. I will be spending the

1 weekend in Las Vegas. I heard the weather's very good.  
2 The weather in New York is little shabby. So not going  
3 to feel so badly for me. My wife is in the courtroom.  
4 She's with me, so we can spend some time together.

5 This is a still shot of the videos that have  
6 been shown to you, and you have seen them. You've paid  
7 attention. And I -- I'm not a very big advocate of  
8 thanking jurors for doing their jury service. I'm a  
9 little unusual. I've actually been a juror in my life.  
10 When I was in law school I was in a jury -- on a  
11 criminal case, and we rendered a verdict. I can't tell  
12 you what.

13 And so I -- I know how -- how it is to be a  
14 juror. And -- and I know how important your function  
15 is, and I know how much time you've taken. And so I'll  
16 go against my normal behavior and say thank you because  
17 it has been a long time and you have been incredibly  
18 attentive, and my client and I appreciate that.

19 This is a still shot of one of the videos.  
20 And I thought it was important to show it to you.  
21 You've seen the video. There's nothing important about  
22 it that I need to share with you other than this is  
23 Mr. Cox in 2016. This is not him listening to Spotify.  
24 I hope I got that right. It's Mr. Cox --

25 MR. CALL: Objection, Your Honor. This goes

1 to the damages.

2 MR. MORELLI: -- wearing --

3 MR. CALL: This goes to the damages.

4 THE COURT: Overruled.

5 MR. MORELLI: Actually, when I objected to  
6 these videos being shown to you -- and I did, I  
7 admit -- I did it because I thought that these videos  
8 could be shown to you but not in this phase of the  
9 case. In the damages phase of the case, it would be  
10 appropriate if the defendants wanted to argue that  
11 Mr. Cox is not as injured as he is trying to tell you  
12 he is. And then it would be appropriate. And I'm a  
13 big boy. Well, I'm not that big, but in a matter of  
14 speaking. When you're working with a 6-foot-7 guy, you  
15 can't say stuff like that. But, anyway, this is --  
16 this is oxygen. Okay?

17 So I've also been taken to the woodshed on  
18 whether or not I should have brought Mr. Cox back to  
19 the witness stand. If you remember, a number of the  
20 attorneys mentioned that I should have brought him back  
21 to the witness stand to explain these videos.

22 Well, I thought about that. I really, really  
23 seriously thought about it. I did. I even brought the  
24 Stretcher over here about it, and we discussed it. I  
25 call him that because I don't like tall people, but

1 that's just me. And I said, well --

2 MR. POPOVICH: Objection. Arguing facts not  
3 in evidence.

4 MR. MORELLI: This is in evidence, this  
5 video.

6 MR. POPOVICH: Not the conversation between  
7 Mr. Morelli and Mr. Deutsch.

8 THE COURT: Sustained.

9 MR. MORELLI: My God.

10 Well, the -- the rules might be a little  
11 different for me, but the -- in order for Mr. Cox to  
12 explain exactly what goes on with him -- and he's never  
13 testified to you and said that he never walks without  
14 assistance because that's not true. But the  
15 disparagement went further because they took a video of  
16 me helping Mr. Cox from the witness stand.

17 MR. RUSSELL: Objection, Your Honor. It's  
18 the court record.

19 THE COURT: He's -- he's going to argue.

20 MR. MORELLI: They took the court record  
21 video and showed it to you. Now, I'm telling you, I  
22 didn't know there was court video or I would have had a  
23 really good time in this trial. But I didn't know.  
24 Really, I didn't. And so they showed me walking him  
25 back. And was that to mean that I'm part of this

1 conspiracy to fool you guys? I came from New York and  
2 spent two months living here away from my sons and my  
3 home to fool you. And if you believe that, there's  
4 nothing I can do about it. It's not true.

5           So it's interesting when things are done and  
6 then they're answered. And they say, "Well, whoa,  
7 whoa. I don't want the answer." Well, you asked for  
8 the answer, so I'm going to give you the answer. The  
9 only way for us to explain what's going on with him was  
10 to have medical testimony, doctors testify in terms of  
11 what his condition is then and now and, you know,  
12 how -- how long he was in the hospital and how he was  
13 treated, but that's not this part of the case.

14           So we can't do it. I can't do it. So if I  
15 put him on the witness stand -- and I thought about it,  
16 and I decided not to do it. And then they attack him  
17 and they attack him and they attack him. And I put him  
18 up for more attack. And then we can't bring any  
19 doctors -- and there's been a number of doctors in this  
20 case, but it's not the part of the case to do that.  
21 And I can't bring them to explain to you what this  
22 really is. And so it was a cheap shot. And my hands  
23 were tied. I made a decision. And I'm just being  
24 honest about that.

25           Now, just going to mention a couple of things

1 about what I just heard so I don't forget. But I guess  
2 I do have three and a half days to remember, but I'm --  
3 I'm going to say to you that when you talk about the  
4 fact of jumping to conclusions, and you know that  
5 Mr. Strassburg's spent a fairly long amount of time  
6 speaking to you today -- and that's his right. It's  
7 his right to do that. I certainly can't complain about  
8 it when I -- I feel like I've spent two weeks talking  
9 to you in one day. It might have been one of my  
10 longest -- if not my longest -- closing argument. And  
11 thank God I even have more time now.

12 But it isn't jumping to conclusions. As a  
13 matter of fact, the Court has spoken to you about the  
14 fact of substantial -- of circumstantial evidence,  
15 circumstantial evidence. And circumstantial evidence  
16 is just as valid as direct evidence. If, in fact --  
17 and I -- I think I spoke to you about this the other  
18 day. If, in fact, you're outside and it starts  
19 raining, and someone says to you, "Did it rain today  
20 when you got home?" You say, "Yeah, it rained for  
21 about an hour." That's the way it rains here, which we  
22 had that.

23 But, you know, "Did it rain today?" You say,  
24 "Yeah, I was caught in the rain." But if you weren't,  
25 and you saw somebody walking in, like I talked to you



1 about the other day, closing an umbrella and wiping  
2 themselves off from rain, you could say, "Looks like it  
3 rained today. You know, I think it rained." And  
4 that's circumstantial evidence.

5           Now you didn't see it. It isn't direct. But  
6 every evidence isn't direct. And, actually, we  
7 couldn't prove directly to you that Team Construction  
8 was liable in this case. We did it by circumstantial  
9 evidence. That's the truth. You know? I said to you  
10 in my presentation, and I said to you in my closing  
11 argument, I said, the dumpster was there; right? It's  
12 the lay-down area, which is where that ramp is. There  
13 was dust all over his clothing. By the way, dust all  
14 over your clothing, circumstantial evidence. Okay?  
15 There were -- there was a photo that, in my opinion,  
16 seemed to indicate that there was dust in the area.  
17 Okay?

18           And Mr. Cox was honest and -- honest with  
19 you -- you know? -- that regular people speak that  
20 Mr. Strassburg wants to reserve for his witness.

21           MR. DEUTSCH: Do you want the slide? Do you  
22 want me to put that slide up?

23           MR. MORELLI: No. I don't want the slides  
24 right now. I just want to talk, but thank you.

25           And Mr. Cox, you know, he also is entitled to

1 regular people speak, not only Mr. Strassburg's  
2 witness. So he wants you to give his witness a pass  
3 for speaking as a regular person. He doesn't need a  
4 pass with me. You know, I think everybody has the  
5 right to just speak the way they speak and hopefully we  
6 understand what they say; right?

7 Well, Mr. Cox, he said it the way he  
8 remembered it. He didn't make up anything. He said  
9 that it wasn't until he got to the hospital and he  
10 realized that he had all of this dust all over him that  
11 it must have been a factor.

12 Now, I don't know what's wrong with that.  
13 You know, I think that's -- that's regular people  
14 speak. I think that's honest. You know, I mean, he  
15 didn't know that night it was dark out. We're going to  
16 go over some of that stuff. And it was -- he was  
17 excited and -- and he was -- you know, for this  
18 illusion, and didn't realize it until he was in the  
19 hospital.

20 Now, he could have said "Hey, when I got up,  
21 I saw all this dust all over me and I knew that I had  
22 fallen on the dust." He could have said that. But he  
23 didn't because it wasn't true. It wasn't true. He  
24 realized it when he was in the hospital. And that's  
25 just circumstantial evidence. And that's the best we

1 could do.

2           And I said to you -- and I -- I think you  
3 remember -- and if you don't, I think that  
4 Mr. Strassburg reminded you -- that I suggested -- and  
5 I say it again to you -- I suggest you decide. I don't  
6 tell you what to do. And I don't tell you that if, in  
7 fact, you don't find for my client -- client -- that  
8 the community is going to suffer. Okay?

9           Listen, you're going to do what you're going  
10 to do on the merits of the case. And that's all I ask  
11 of you. And I think that's fair. You know? On the  
12 merits of the case. That's all I asked of you in  
13 opening statement. You know? I spoke to you in  
14 closing for almost four hours. I was pretty proud of  
15 my stamina.

16           But it's circumstantial evidence. And I said  
17 to you -- I didn't say to you that Team Construction  
18 was 50 percent responsible in this case. I said I  
19 thought they were 10 percent responsible. Why did I  
20 say that? Did I, like, pull it out of the air? I  
21 actually thought about it. I thought about it.

22           Now, you might say, "Yeah, that's because you  
23 like that guy, Strassburg." Well, I think's he's a  
24 pretty funny guy, actually. But, no, I didn't pull it  
25 out of the air. I actually thought that that was

1 appropriate because I think that the other defendants  
2 in this case, they're the major part of the  
3 responsibility for the happening of the accident.

4           They just do. That's what I think. I could  
5 only tell you that. I could tell you what I think and  
6 what I think the evidence showed you in this case. And  
7 then what I do is I take that evidence and I put it  
8 together the best I can. And I say this is what I  
9 think you should do about it, yeah.

10           And I always say -- you know, I tell, you  
11 know, lawyers who I teach all the time that when I lose  
12 my memory, I stop doing it. And I remember every one  
13 of your names. And I remember exactly what you are  
14 doing because, you know, when I'm not speaking to you,  
15 I'm like one of those energy guys. So when I'm not  
16 speaking to you, I'm, like (indicating). Tough for me  
17 to sit still.

18           But I spent some time the other day. And I  
19 was sitting there, and I was listening to one lawyer  
20 after another talk about these videos, one lawyer after  
21 another. Mr. Popovich said to you that Mr. Cox has  
22 been manipulating you from day one. I wrote that down.  
23 I didn't have to check the record on that. I wrote it  
24 down. Manipulating you from day one, that's what he  
25 said. Deceiving you, manipulating you.

1 I'm going to have an opportunity on -- on  
2 Tuesday to go over with you testimony in the case. And  
3 I'm going to show you what the evidence is. I try my  
4 best when I have a rebuttal argument -- and you should  
5 understand that in most jurisdictions in state courts,  
6 there's no rebuttal argument. You have one closing,  
7 and the plaintiff goes last. That's how we normally do  
8 it. In the federal court, you go first and last,  
9 like -- like here.

10 So that, yes, I have the first and last word.  
11 My wife will tell you whether or not I have that at  
12 home, not saying anything about that. Sometimes I wish  
13 I could. But the truth is that -- that you'll see that  
14 the testimony, which is part of the evidence in this  
15 case, lines up. It lines up.

16 Now, there's nothing in this world -- this is  
17 the real world that we're in. There's nothing perfect.  
18 We -- to say to -- to say to you that the plaintiffs  
19 want these defendants to be perfect is -- is just  
20 silly. It's silly. You know, it's silly and it's  
21 unfair at the same time because it doesn't make any  
22 sense.

23 We understand that it's a reasonable person  
24 standard. That law is the same all over the United  
25 States. Reasonable person, not a perfect person. But

1 that also goes for Mr. Cox. You know, he also has the  
2 same standard of reasonable, ordinary care, not  
3 perfect. You know? And -- and it isn't -- it is true  
4 that accidents happen very fast.

5           And, on the one hand, you can't say, "I was  
6 just in a car accident the other day" -- and, by the  
7 way, I can't say any conversation between me and  
8 Mr. Deutsch, but Mr. Strassburg could tell you that he  
9 was in a car accident the other day. Okay? I didn't  
10 have any problem with that. I didn't hear any  
11 objection to that.

12           And so Mr. Strassburg says, "And it happened  
13 so fast. You can't really remember exactly how it  
14 happens because it happens like that (descriptive  
15 sound)." Okay. I sat there and I said, all right. I  
16 agree with Mr. Strassburg on that point. I agree. It  
17 happens very fast. It's hard to remember a lot of  
18 details when you're not expecting -- you know, if  
19 you're expecting something to happen, you know, you go  
20 to the movies, you get your popcorn, hopefully, get  
21 some Twizzlers -- at least that's what I get -- and you  
22 sit down. And you know that you are expecting to pay  
23 attention and watch the movie.

24           But it's not like that when you have an  
25 accident. You're not expecting that. You're not

1 ready. You don't have your popcorn and your drink and  
2 you're sitting there and you're anticipating and you're  
3 going to try to remember so that, when you get home,  
4 you can say, "Hey, I saw this good movie. I want to  
5 tell you about it" or "I saw this bad movie and I want  
6 to tell you about it." It isn't like that.

7           So at the same time that he says that, that  
8 it happened so fast, he then goes on for a pretty long  
9 time analyzing every single thing that Mr. Cox said and  
10 how -- how does he not know that if he slipped to the  
11 left or he went to the right. He then breaks it down.  
12 It's like you can't have it both ways, Mr. S. You  
13 can't have it both ways.

14           I agree with you that accidents happen fast  
15 and people can't remember every single detail, left  
16 foot, right foot. They just can't. They could only  
17 tell you what they think. They could only tell you  
18 what they think. And I think that if a regular person  
19 is telling you what they think, not an expert, you take  
20 it for what it's worth. If you think it's not worth  
21 anything or worth less, it's up to you.

22           But I'm going to -- I want you to remember  
23 one thing -- and I'm going to show it to you on  
24 Tuesday. Let you anticipate something at least. Okay?

25           We -- we -- the plaintiffs in this case, do

1 not have to prove exactly how the accident happened.  
2 I'm going to repeat that to you. And I'm going to  
3 prove it to you with the law. Okay? We don't have to  
4 prove exactly how the accident happened. You've heard  
5 that from every lawyer, and they're wrong. They're  
6 wrong, dead wrong.

7           We have to prove -- and I'll show you the  
8 law -- that the defendants are negligent and that that  
9 negligence was a proximate cause of the accident.  
10 That's what we have to prove. That's it.

11           Now, I'm not saying that, because Mr. Cox was  
12 injured, that you should find for him and I should give  
13 you no proof of negligence and I should not have to  
14 prove that it was proximately caused by one or more of  
15 the defendants. I'm not that stupid. I know what the  
16 law is. I know. Okay?

17           So I want you to think about that, that we  
18 don't have to prove exactly how the accident happened.  
19 And you have been hearing this: Mr. Cox can't recover  
20 because he can't tell you exactly what happened.

21           First of all, he has told you exactly what  
22 happened, the best of his recollection, the best way  
23 that he knows how. He has.

24           JUROR NO. 8: I didn't do it.

25           MR. MORELLI: Feels like he got caught. I'm



1 not that powerful.

2 But it's important for you to realize this,  
3 that this is a very important thing. And there's --  
4 there's a lot to talk about with reference to this.

5 Now, I want to talk to you a minute about if  
6 something is reasonable -- okay? -- I -- I apologize to  
7 you for having to start today at 4:30 in the afternoon,  
8 but, you know, I ain't the boss, not yet.

9 So what I say is it's -- it's not whether or  
10 not something is unreasonable -- okay? -- because  
11 something could be reasonable in one set of  
12 circumstances and could be unreasonable in another set  
13 of circumstances. What are you talking about, Morelli?  
14 I don't know.

15 So, yes, running, in and of itself, it's not  
16 unreasonable. I used to run 40 miles a week. And  
17 sometimes people get their running shoes on, and it's  
18 dark out, and they go for a run. That's not  
19 unreasonable to do. And inclines aren't always  
20 unreasonable because you could get on a treadmill  
21 (descriptive sound) and hit incline. That's not  
22 unreasonable to do; right?

23 So, under certain circumstances, certain  
24 things are reasonable and certain things are  
25 unreasonable. And let's have an example of that.

1           Let's assume you take your Ferrari. Okay?  
2 You have a Ferrari? No.  
3           You take your Ferrari -- he has one -- you  
4 take your Ferrari and you go to the track -- because  
5 there's tracks here -- go to the track, and you do  
6 100 miles an hour, 120, whatever. That's not  
7 unreasonable, is it? That's not unreasonable. But if  
8 you take your Ferrari and you go out in the Strip and  
9 you do 100 miles an hour, that's unreasonable.  
10           That's unreasonable, because it's whether the  
11 behavior is reasonable under the circumstances. And  
12 all of these lawyers are conflating things. You know,  
13 they like to pick apart things. And, you know, if you  
14 say -- if you say garbage fast, it really sounds right.  
15 You know, sometimes they say "Really?" You know? But,  
16 hey, running is not unreasonable. The dark is not  
17 unreasonable. Running in the dark is not unreasonable.  
18 It's all of these things together. It's the  
19 circumstances. You see?  
20           When you go to a show and you want to watch a  
21 magician or a singer or a dancer or go to the ballet or  
22 whatever, you don't expect to be put in a position  
23 where you could get injured. You don't. You just  
24 don't. And, look, I understand that I'm fighting all  
25 these lawyers. They're all against me.

1           MR. RUSSELL:  Objection, Your Honor.  
2  Grosjean violation.

3           THE COURT:  Beg pardon?

4           MR. RUSSELL:  Objection.  Grosjean violation.  
5  Personal statement.

6           THE COURT:  Sustained.

7           MR. MORELLI:  I'm being very violative today.

8           None of these lawyers have said one thing  
9  about the other defendants and whether or not they  
10 thought that they were responsible instead of them,  
11 none of them.  That's somewhat unusual.

12           But I tell you that I'm going to show you  
13 with the testimony in this case and put it together  
14 with the law.  I'm also going to show you things that  
15 have been said in closing arguments about me, about  
16 this case, about the testimony.  And I'm going to put  
17 it together with the law.  And I'm going to show you  
18 that I'm not saying to you, "Hey, do me a favor."  I'm  
19 not saying to you, "Hey, have sympathy for Mr. Cox or  
20 for me and, therefore, give me your verdict in this  
21 case."

22           No.  I want to earn that verdict.  You see?  
23 And when I say I want to earn it, I think I have.  
24 Okay?  But what I'm saying to you is, in my final  
25 closing argument, which this is part of, and on

1 Tuesday -- and I promise not to go into the night on  
2 Tuesday. All right? I'm -- I'm hoping to convince you  
3 that the plaintiff is entitled to your verdict if I  
4 haven't convinced you already. If I have, I want to  
5 reconvince you because of all of the things that I've  
6 listened to.

7           Now, you could say, "Hey, Morelli, you've  
8 been talking all together over four hours to us," and  
9 that's true. But the combined summations have been  
10 more than eight or nine hours. And most of that has  
11 been attacking our case, my client, and me. So,  
12 hopefully, you know, you'll bear with me when I do that  
13 and when we go forward talking about the specific  
14 evidence in the case.

15           But I want you to think about a few things  
16 before we do that. And one is circumstantial evidence.  
17 The other is, under the circumstances -- under the  
18 circumstances -- certain things could be reasonable.  
19 And I submit to you that many of the things that went  
20 on that I believe led to Mr. Cox being injured were  
21 unreasonable under the circumstances. Okay?

22           Now, listen, when Mr. Cox says, you know, "I  
23 was running for my life" or something like that, that's  
24 a figure of speech. That's like regular people speak.  
25 Okay? And he's entitled to share with you what it felt

1 like to him. You know? It felt like to him. That's  
2 what it felt like. He knew that a rhinoceros wasn't  
3 chasing him. I mean, I hope it wasn't. You know, he  
4 knows that. But it seemed like that kind of urgency to  
5 him. He used the word "pandemonium." That's what it  
6 seemed like to him at the time.

7           And I'm going to show you that there were a  
8 couple of other people who actually spoke about whether  
9 or not it's chaotic, whether it was chaotic, whether  
10 it's confusing, confusing. It's not only Mr. Cox who  
11 thought that. Huh-uh. There's a couple of other  
12 people who said the same thing in testimony. And I'm  
13 going to show you that testimony.

14           You know, I just think that it's a little  
15 late in the day to start showing you testimony.  
16 "Morelli, please, I've seen enough slides for the day."  
17 Okay? So I -- hopefully, the judge will let me stop  
18 now. And I'll say to you guys have a great weekend.  
19 Don't do anything unreasonable. I'll see you on  
20 Tuesday.

21           THE COURT: All right. Thank you.

22           At this time, ladies and gentlemen, we're  
23 going to adjourn. As I indicated earlier, we'll  
24 reconvene on Tuesday at 1:00.

25           In the meantime, you're admonished not to

1 talk or converse among yourselves or with anyone else,  
2 including, without limitation, the lawyers, parties,  
3 and witnesses on any subject connected with the trial  
4 or read, watch, or listen to any report of or  
5 commentary on the trial or any person connected with  
6 the trial by any medium of information, including,  
7 without limitation, newspapers, television, the  
8 internet, and radio, or to form or express any opinion  
9 on any subject connected with the trial until the case  
10 is finally submitted to you.

11           Once again, you're directed to return to the  
12 outside of the courtroom, a bit to the south of it,  
13 Tuesday, May 29th, 2018, no later than 12:50, p.m., 10  
14 to 1:00 so we can resume here at 1:00.

15           Thank you, ladies and gentlemen. Have a  
16 great Memorial Day weekend. We'll see you on Tuesday.

17           Anything to come before the Court outside the  
18 presence?

19           MR. DEUTSCH: No, Your Honor.

20           MR. POPOVICH: No, Your Honor.

21                     (The following proceedings were held  
22                     outside the presence of the jury.)

23           THE COURT: All right. Did I hear somebody  
24 say --

25           MS. FRESCH: Well, I think we can just deal

1 with anything on Tuesday.

2 THE COURT: Okay.

3 MS. FRESCH: I mean, it's -- it is a holiday  
4 weekend.

5 THE COURT: Okay. Everybody have a great  
6 Memorial Day weekend. See you Tuesday at 1:00.

7 MS. FRESCH: You too, Your Honor. Thank you.

8 THE COURT: Thank you.

9 (Thereupon, the proceedings  
10 concluded at 5:14 p.m.)  
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16 ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF  
17 PROCEEDINGS.  
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21   
22 KRISTY L. CLARK, CCR #708  
23  
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1 CASE NO. A705164

2 DEPT. NO. 13

3 DOCKET U

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DISTRICT COURT

6

CLARK COUNTY, NEVADA

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8

GAVIN COX and MINH-HAHN COX,  
husband and wife,

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Plaintiffs,

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vs.

11

MGM GRAND HOTEL, LLC; DAVID  
COPPERFIELD aka DAVIS S.  
KOTKIN; BACKSTAGE EMPLOYMENT  
AND REFERRAL, INC.; DAVID  
COPPERFIELD'S DISAPPEARING,  
INC.; TEAM CONSTRUCTION  
MANAGEMENT, INC.; DOES 1  
through 20; DOE EMPLOYEES 1  
through 20; and ROE  
CORPORATIONS 1 through 20,

16

17

Defendants.

18

MGM GRAND HOTEL, LLC.,

19

Third-Party Plaintiff,

20

vs.

21

BEACHER'S LV, LLC, and DOES 1  
through 20, inclusive,

22

Third-Party Defendants.

23

24

25

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708,  
CA CSR #13529

REPORTER'S TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE

MARK R. DENTON

DEPARTMENT XIII

TUESDAY, MAY 29, 2018



1 APPEARANCES:

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I N D E X

CLOSING ARGUMENT	PAGE
By Mr. Morelli	25

E X H I B I T S

Number:	Marked:	Admitted:	Joint:
1		113	
2		113	

1 LAS VEGAS, NEVADA, TUESDAY, MAY 29, 2018;

2 1:04 P.M.

3  
4 P R O C E E D I N G S

5 \* \* \* \* \*

6  
7 THE MARSHAL: All rise. Eighth Judicial  
8 District Court, Department 13, is in session, the  
9 Honorable Mark Denton presiding.

10 THE COURT: Good afternoon. Please be  
11 seated. We're reconvening outside the presence of the  
12 jury in the case of Cox v. MGM Grand Hotel, LLC.

13 Please state appearances of counsel, identify  
14 parties and party representatives who are now present.

15 MR. MORELLI: Benedict P. Morelli for the  
16 plaintiffs, Gavin and Minh Cox, who are in the  
17 courtroom.

18 MR. DEUTSCH: Good morning, Your Honor. Adam  
19 Deutsch, also for the plaintiffs.

20 MR. FALLICK: Good afternoon, Your Honor.  
21 Perry Fallick for plaintiffs.

22 MS. HARRIS: Heather Harris for the  
23 plaintiffs.

24 MR. POPOVICH: Good afternoon. Jerry  
25 Popovich for the defendant MGM Grand Hotel, with

1 Mr. Habersack for the hotel. We also have counsel  
2 Mr. Infuso, Mr. Martin.

3 MS. FRESCH: Good afternoon, Your Honor.  
4 Elaine Fresch for David Copperfield and David  
5 Copperfield Disappearing, Inc. And with me is my  
6 associate Eric Freeman as well as my client David  
7 Copperfield.

8 MR. ROBERTS: Good afternoon, Your Honor.  
9 Lee Roberts and Howard Russell for Backstage Employment  
10 and Referral. Here again with us today is president,  
11 Chris Kenner.

12 MR. STRASSBURG: May it please the Court,  
13 Roger Strassburg, assisted by my partner Gary Call, for  
14 defendant, Team Construction.

15 THE COURT: All right. As I indicated, we're  
16 outside the presence of the jury. I'd first like to  
17 make a record regarding the juror whom we discussed  
18 earlier today during the telephonic conference. I was  
19 in the courtroom here in the midst of hearing the  
20 motions. It was in the midst of hearing a rather  
21 lengthy number of motions in a case and interrupted  
22 counsel in that so I could make the record regarding  
23 Juror No. 10. That's Luzangelica Gomez that we  
24 discussed.

25 After the -- and everything was recorded. As

1 I say, it was in open court here. It was recorded and  
2 minutes were kept by the clerk.

3 After that conference, my JEA contacted the  
4 juror who determined that she did not feel that she  
5 could come in. All right? So she's excused from  
6 further service. And I admonished her. I called her  
7 and admonished her that she's not to discuss the case,  
8 et cetera -- all right? -- until the verdict has been  
9 rendered, until the case is completed.

10 So, in any event, that's that. So that means  
11 that the first alternate in order is No. 8. That  
12 person will step into the shoes of Luzangelica Gomez, I  
13 mean. Okay?

14 I understand there's something else about  
15 which a record needs to be made?

16 MS. FRESCH: Yes, Your Honor. I filed a  
17 brief this morning as well as -- I have extra copies if  
18 needed. This is a follow-up on my objection to  
19 Mr. Morelli's rebuttal argument that he began late  
20 Friday afternoon. And I just wanted to preserve the  
21 record. And -- both essentially by the brief that I  
22 filed to cite the case law as well as to, right now,  
23 just point out a few highlights, because I would  
24 request that the Court admonish the jury as well -- or  
25 admonish counsel and provide instruction to the jury to

1 ignore the majority of what Mr. Morelli said on Friday.

2           First, I would like to point out that  
3 Mr. Morelli violated the rules that Your Honor had set  
4 forth that counsel is always to remain on this side of  
5 the -- of this lower wall. And he purposefully went  
6 and sat on the other side and almost really had a  
7 fireside chat, I felt, with the jury, speaking very low  
8 so the rest of us couldn't hear. If it was -- luckily  
9 for the reporter, she couldn't hear, so he had to raise  
10 his voice. It still was hard to hear because when I  
11 read the record again, I missed certain things that he  
12 said because he was speaking so low, which was  
13 purposefully done.

14           And then to -- to compound his -- his  
15 entire -- talking about his mother-in-law -- and I'm  
16 not -- you know, just because one counsel -- he thinks  
17 Mr. Roberts crossed the line, that does not excuse  
18 misconduct by another counsel. Because, otherwise,  
19 there would be chaos in the courtroom.

20           He did that. He talked about his legal  
21 career. He talked about how he's so great. He went on  
22 and on, personal -- personalizing this entire event.  
23 He -- which, pursuant to PRC 3.4, he violated those  
24 rules. He violated all the principles set forth by  
25 Grosjean and Lioce. I mean, he talked about how -- how

1 good I am.

2           And then you did not see this, Your Honor,  
3 but I do want to set forth in the record, because I was  
4 sitting next to Mr. Russell at the time, and when  
5 Mr. Russell objected on the basis of Grosjean,  
6 Mr. Morelli looked over with the most threatening look.  
7 And, frankly, I felt it was directed at all of us, at  
8 least for the attorneys who could see it. That is  
9 inappropriate.

10           We're allowed to object. We're allowed to  
11 state the record. It does not require Mr. Morelli to  
12 give us the devil eye. And that's essentially what he  
13 was doing.

14           I -- I cited in my brief all the different  
15 things. And I could set forth that he's one of the  
16 best lawyers, famous lawyer, well-known lawyer, "that's  
17 why the Cox family hired me, because of my reputation.  
18 My reputation is more than that of how good I am. I've  
19 been here for conferences," blah blah blah. "I win  
20 because I tell the jury the truth. At my age, at my  
21 level of achievement, I don't need this case. We're  
22 not looking for quick money. And it's interesting,  
23 because when I came from the airport originally and I  
24 saw all the billboards for lawyers, I said, 'Wow,  
25 that's really so different from what I'm used to. And



1 I've tried cases in other states." I'm paraphrasing  
2 slightly. "I've never had these -- had lawyers say  
3 these things about me in 40-plus years. I ain't lying.  
4 I don't have to. I could quit. They're all against  
5 me."

6 I mean, first of all, he's disparaging all of  
7 us when he makes a comment about lawyers on the  
8 billboards. Now, I'm not on a billboard, but I could  
9 go to other states and I see billboards. So to say  
10 that somehow the defense group as a whole is, like,  
11 some lower level of attorneys than in New York is  
12 inappropriate. And, frankly, him even talking about  
13 being in from New York is inappropriate.

14 And that's been okay. We've all -- no one  
15 objected to that. It's kind of obvious anyway. But I  
16 move for a mistrial on the basis of this because I  
17 think the bell has been rung with this jury, and I  
18 think this has permeated the jury, and they're not  
19 going to look at this case objectively when they get in  
20 the room for deliberations. And, at the very least,  
21 there should be an admonition.

22 MR. DEUTSCH: Your Honor, nothing that he  
23 said was inappropriate. I could go down the list --

24 THE COURT: I'm sorry. But it was. It was  
25 the way that it was said and his location when he said

1 it.

2 MR. DEUTSCH: If I can go down the list, Your  
3 Honor, and respond.

4 THE COURT: Okay.

5 MR. DEUTSCH: From the beginning of the case,  
6 Your Honor said nobody should go around that corner.  
7 That rule went out the window six weeks ago when  
8 Mr. Strassburg was having the jury hold the boards for  
9 him as he stood in there or when he went in there to  
10 use his roller. So that rule went out the window a  
11 long time ago, and it's been done by the defendants in  
12 this case. So that's with respect to the setting.

13 The response of one of the best lawyers in  
14 New York, the only reason any of that came out was  
15 because multiple defendants -- Mr. Strassburg;  
16 Mr. Roberts, I believe -- in their closing statements  
17 made specific comments commenting about how Mr. Morelli  
18 is this famous lawyer and Mr. Morelli is a great  
19 lawyer. And Mr. Morelli is this and Mr. Morelli is  
20 that. They did that in their closing arguments to  
21 comment to him.

22 And what his response was at the time was  
23 they didn't do that as a compliment to me. That wasn't  
24 meant as a compliment. There was a reason why they all  
25 did that in their summations. So the only reason that

1 came up was because they brought it up in their closing  
2 arguments.

3           The next one is the fact that he was a lawyer  
4 since 1977. I don't see how there's any harm in that.  
5 It goes along -- for them to suggest that the  
6 plaintiffs or Mr. Morelli disparaged the defendants, we  
7 sat here, Your Honor, for two days with every single  
8 lawyer on the defense side doing a closing, commenting  
9 how this entire case was fabricated by the plaintiffs'  
10 lawyers, how the plaintiffs' lawyers were deceiving --  
11 what are the other words that they used? -- deceiving,  
12 misdirecting, lying, basically, to the jury.

13           The basis of their closing that it was  
14 magic --

15           MR. MORELLI: "Morelli, the magic showman."

16           MR. DEUTSCH: -- that it was an illusion,  
17 that the whole case was a showman, Morelli magic, their  
18 entire closing, we sat here and they disparaged us over  
19 and over and over, and we didn't object. We sat here  
20 and we listened to it.

21           MR. MORELLI: We took it.

22           MR. DEUTSCH: And we took it. And he has  
23 been allowed -- if they're going to get up here and say  
24 that this case was a manufactured lie by the plaintiffs  
25 and their counsel to try to put one over on you and to

1 try to pull the wool over your eyes and try to do  
2 this --

3 MR. MORELLI: "Green box, money grab."

4 MR. DEUTSCH: -- and do that and do that,  
5 we're entitled to respond that we're not putting one  
6 over to you; it's the evidence that decides. And  
7 that's all Mr. Morelli did, was that they could get up  
8 here and call me a liar over -- they could call my  
9 clients liars, but that's not what's happening here.

10 And everything he said was a direct response  
11 to what they said in their closing arguments. The  
12 comment about his mother-in-law, when we brought that  
13 up initially, Your Honor, we specifically, at the  
14 request of the defendants, did not mention why  
15 Mr. Morelli was going to be absent for two days. We  
16 said we agree it's not appropriate.

17 Mr. Roberts got up there and told the jury it  
18 doesn't matter if it's about a Taylor Swift concert or  
19 a death in the family. The reason he said it is  
20 because it makes him look like a good guy and good dad.  
21 And I commend him for going to a Taylor Swift concert.  
22 We all think it's because he actually likes Taylor  
23 Swift and he's using his five-year-old daughter as an  
24 excuse. But that's beside the point. But there was no  
25 reason for him to say that to the jury. All he had to

1 say was "The judge excused me for the afternoon. I  
2 have a personal matter."

3           So if he's going to be able to do it, as  
4 we've said from the beginning, what's good for the  
5 goose is good for the gander. Every single thing on  
6 this list was a response directly to the defense  
7 position. When he said "they're all against me"  
8 and Mr. Russell made an objection and Mr. Morelli  
9 looked at him, Your Honor sustained the objection.

10           So everything here was a direct response to  
11 the defendants' closing. I objected to  
12 Mr. Strassburg's closing on the same issue five times,  
13 five times. When he said "My client's not going to get  
14 business anymore. My client's not going to get  
15 business anymore." And Your Honor sustained it and  
16 sustained it, and he kept doing it and kept doing it  
17 and kept doing it. And I asked for an admonition at  
18 that point. And Your Honor said it's not necessary.

19           So there is absolutely nothing here that was  
20 done but for the defendants raising these issues in  
21 their closing. They can't say Mr. Morelli is the  
22 greatest lawyer in the world as a way to negatively  
23 attack our side and then us not be able to respond to  
24 it, or them to be able to call us liars and say that  
25 all we're doing is misdirecting them and us not be able

1 to respond to it. That's exactly what they did. Or  
2 say this is the pot at the end the rainbow or the big  
3 bag of money and that's all the plaintiffs are here  
4 for.

5 MR. MORELLI: The green box.

6 MR. DEUTSCH: And even though Your Honor gave  
7 them an admonishment about that, we're entitled to say  
8 that we're here because the evidence and the case  
9 supports it. And that's all he said. He said over and  
10 over again despite that whole speech, "We don't want  
11 sympathy." Mr. Strassburg -- Mr. "we're never going to  
12 work again" -- is the only one here who's been asking  
13 for sympathy during this whole trial. We have  
14 specifically said over and over again the evidence  
15 decides the case. The evidence decides the case and  
16 the law. And that's it. So there is nothing that he  
17 said here that was inappropriate. It was all a  
18 response to the defendants' argument, every single  
19 thing he said.

20 MR. POPOVICH: Plaintiffs just invoked what's  
21 good for the goose is good for the gander. When Your  
22 Honor thought I went too far, Your Honor sustained an  
23 objection and gave the jury an admonishment. What's  
24 good for the goose is good for the gander.

25 MR. DEUTSCH: Your Honor, in response to

1 that, there was a specific case that said the exact  
2 quote that he did. Their motion is based upon the  
3 golden rule. Nothing that Mr. Morelli said anywhere  
4 had anything to do with the golden rule, which is  
5 saying to the jury "put yourselves in the position of  
6 Mr. Cox and then decide the case."

7           Their whole brief is based on a violation of  
8 the golden rule. None of these comments have anything  
9 to do with the golden rule. There's no case that  
10 suggests that what he said was inappropriate. Your  
11 Honor wasn't going to give an admonishment to  
12 Mr. Popovich until it specifically said in Lioce that  
13 what he said was one of the specific things you can't  
14 say, and then Your Honor gave it.

15           But there's nothing here that's  
16 inappropriate. Everything is a direct response. And I  
17 could point to the Court, if you want, to everything  
18 that they said that this was in response to.

19           MR. CALL: Your Honor, Team would also ask  
20 that plaintiffs be given an admonishment because, let's  
21 face it, a lot of things that Mr. Morelli, you know,  
22 said were personal, talking about his mother, his  
23 mother-in-law, and almost his voice cracking as though  
24 he was going to cry. This is a -- directly out of the  
25 DeJesus case. I mean, he was doing everything that was

1 inappropriate.

2           We never really did anything inappropriate in  
3 this action. There was an objection made. And, you  
4 know, Your Honor didn't -- didn't sustain that  
5 objection. In fact, Mr. Strassburg corrected some of  
6 the things he was doing as he was discussing the  
7 matters with our client.

8           And Mr. Deutsch is asking, well, it's --  
9 since we did something, they should be allowed to do  
10 something. That's misconduct in of itself. I think  
11 that's in DeJesus or Lioce. And so we would ask that  
12 plaintiffs be given an admonishment for their actions.

13           Thank you, Your Honor.

14           MR. DEUTSCH: Your Honor, if the Court is in  
15 any way thinking that an admonishment is appropriate, I  
16 think the only admonishment, since all of the behavior  
17 was done by them and by the plaintiffs, would be to  
18 reread the instruction that says that everything that  
19 the -- and you could do this at the end of the  
20 summations, before they take it into the jury room to  
21 deliberate, and say, "What the attorneys said in this  
22 case is not evidence. You must decide the case solely  
23 based on the facts and the law." And that's all that's  
24 necessary.

25           MR. ROBERTS: Your Honor, if I could just



1 point out one thing. In the Lioce case, the supreme  
2 court said that "more importantly, a court of law is no  
3 place to resort to the argument of 'he said it first'  
4 or 'he did it too.' Opposing counsel's violations of  
5 professional standards should never be the basis for  
6 engaging in professional misconduct."

7           So the idea that we did it so they get to do  
8 it simply isn't Nevada law. I don't believe I violated  
9 any of the professional standards in my closing. But  
10 assuming arguendo I did, it was unobjected to. It was  
11 unobjected to. They can't now ask for an instruction  
12 based on something they did not object to at the time  
13 it was said.

14           Thank you, Your Honor.

15           MR. DEUTSCH: None of this was objected to  
16 either, Your Honor, until the end. And we don't think  
17 that what they did was inappropriate. They did what  
18 they did; we did what we did. We don't think any of it  
19 was inappropriate.

20           MR. ROBERTS: It was objected to under  
21 Grosjean by Mr. Russell.

22           MR. DEUTSCH: And it was sustained under  
23 Grosjean by Mr. Russell.

24           THE COURT: Okay. The motion for -- did you  
25 want to be heard again?

1 MS. FRESCH: You know what? I -- probably  
2 everyone has said everything. I just want to say that  
3 I would like the record to reflect that I think of  
4 everyone's closing -- and I agree with Mr. Roberts. If  
5 they don't object, they -- that's their problem. They  
6 could have objected more to Mr. Strassburg or whomever.

7 But, if you noticed, I believe, of all the  
8 parties here who are bringing this motion right now, I  
9 believe I -- my closing was probably the one that was  
10 the most appropriate. And I did not attack anyone  
11 personally. I did not personalize this case at all.

12 So I just want to have that on the record in  
13 terms of where I am. But, regardless, I don't care,  
14 what's good for the goose is good for the gander is a  
15 ridiculous statement to come out from plaintiffs' side  
16 because that does not excuse, under the professional  
17 rules of conduct, 3.4. I mean, it's so clear.

18 Thank you.

19 THE COURT: How does the death of  
20 Mr. Morelli's mother-in-law compare with the statement  
21 about going to see Tyler Swift? I want to make sure  
22 I -- not being here because of the concert.

23 MR. ROBERTS: Well, it seems to me that going  
24 to see Taylor Swift is somewhat irrelevant --

25 THE COURT: I'm sorry. Taylor Swift. Don't

1 tell anybody that I said Tyler.

2 MR. ROBERTS: -- is irrelevant --

3 MR. MORELLI: Don't tell anybody I said  
4 "Tyler Swift."

5 MR. ROBERTS: It would not seem to engender  
6 sympathy to tell someone I was stuck going to a Taylor  
7 Swift concert. On the other hand, saying that someone  
8 died in my immediate family, I believe, is calculated  
9 to engender sympathy. And it's something that was  
10 agreed to specifically by Mr. Morelli that he wouldn't  
11 bring up.

12 MS. FRESCH: And, Your Honor, more  
13 importantly, the way Mr. Morelli brought that up was to  
14 basically say, "Well, I didn't realize that -- you  
15 know, I'm just the poor New York lawyer here. I didn't  
16 realize it was okay to talk about all this stuff." So  
17 he inflamed the jury because he was saying like, well,  
18 you know -- you know, the same thing when he goes,  
19 "Well, I didn't know there was a court record that  
20 showed videos, and they tried to use that against my  
21 client."

22 Well, again, that's something -- it's the way  
23 he presented it. It's not -- and we've already dealt  
24 with his mother-in-law's passing because Your Honor  
25 addressed and said he was away for an emergency leave.

1 So that had been addressed. So for him to bring it up  
2 the way he did, I do think there is a distinction  
3 between what Mr. Roberts says and what Mr. Morelli  
4 said.

5 THE COURT: Okay. Here's what I'm going to  
6 do: When the jury comes in, I'll read a portion of  
7 Instruction No. 2 that says, "Statements, arguments,  
8 and opinions of counsel are not evidence in the case,"  
9 number one.

10 Number two, I will read a brief admonishment  
11 which will be as follows: "Members of the jury, during  
12 the beginning of Mr. Morelli's rebuttal argument, he  
13 made a number of comments, among which were 'I win  
14 because I tell the jury the truth as much as I know'  
15 and 'They're all against me.'" All right?

16 "Those comments were objected to and the  
17 Court has sustained the objection, and I admonish you  
18 to disregard those comments and to dismiss them from  
19 your mind. You may not use those comments in coming to  
20 your decision in this case and must decide this case  
21 solely based on the evidence and the law."

22 I think an admonishment on those two points  
23 is appropriate, and I'm not going to refer to any as  
24 I -- I'm not going to refer to -- what you provided to  
25 me, Ms. Fresch, references a violation of Nevada

1 Professional Rules of Conduct. I'm not going to say  
2 that.

3 MS. FRESCH: Okay.

4 THE COURT: I didn't say that with respect to  
5 the other admonishment that I gave. So --

6 MS. FRESCH: Right.

7 THE COURT: Anyway, I think that's fair. I  
8 think that other comments made by Mr. Morelli regarding  
9 his position as a lawyer and that, I think that I don't  
10 need to admonish them on that. Okay? So that's what  
11 we'll do.

12 MS. FRESCH: Thank you, Your Honor.

13 THE COURT: All right. So we ready for the  
14 jury now?

15 MR. MORELLI: Ready, Your Honor.

16 THE COURT: And how much time do you think  
17 you're going to be, Mr. Morelli?

18 MR. MORELLI: I told Mr. Deutsch to kick me  
19 if I go longer than an hour and a half.

20 MR. DEUTSCH: And, luckily, my legs are long  
21 enough. From here, I could do that.

22 MS. FRESCH: I have stilettos. You want me  
23 to do it?

24 MR. MORELLI: That's not kicking; that's  
25 sticking. You know, that's a little ...

1 I don't believe longer than that, Your Honor.

2 THE COURT: Okay. I want to give you a  
3 heads-up too. What I do at the conclusion of argument,  
4 just before the jury goes to deliberate, I identify the  
5 alternates.

6 MR. MORELLI: Okay.

7 THE COURT: And I have them remain here while  
8 the rest of the jury goes in.

9 MR. MORELLI: You had told us that.

10 THE COURT: And then we'll have to determine  
11 what to do with the alternates with respect to whether  
12 they stay here or are allowed to depart. But they're  
13 still alternates. Okay?

14 MR. MORELLI: Right.

15 THE COURT: They're still alternates.

16 MR. MORELLI: I think we have to keep them.

17 THE COURT: Well, I mean, if they depart, we  
18 can bring them back.

19 MR. MORELLI: Oh, okay.

20 THE COURT: I mean, the question is whether  
21 they can leave the courthouse.

22 MR. MORELLI: Oh, I got you. Okay.

23 MS. FRESCH: And, Your Honor, are you going  
24 to mention that Ms. Gomez was excused?

25 THE COURT: Yes. Unless there's any

1 objection to that.

2 MR. RUSSELL: No.

3 THE COURT: They probably already know it,  
4 but I'll say it.

5 Okay. All right. Let's have the jury come  
6 in.

7 THE MARSHAL: All rise.

8 (The following proceedings were held in  
9 the presence of the jury.)

10 THE COURT: Good afternoon, ladies and  
11 gentlemen.

12 IN UNISON: Good afternoon.

13 THE COURT: You may be seated.

14 Do counsel stipulate that the jury is  
15 present?

16 MR. MORELLI: Yes, Your Honor.

17 MS. FRESCH: Yes, Your Honor.

18 MR. ROBERTS: Yes, Your Honor.

19 THE COURT: All right. Ladies and gentlemen,  
20 you will note that Juror No. 10 is not present. She's  
21 been excused due to illness. She had something come up  
22 during the weekend and became ill and wanted to return  
23 but was not able to. So she is not present at this  
24 time.

25 Now, before we resume the rebuttal argument

1 being made by plaintiffs, there are a couple of things  
2 I just want to -- I need to say. One minute.

3 I want to reiterate that statements,  
4 arguments, and opinions of counsel are not evidence in  
5 the case. During the beginning of Mr. Morelli's  
6 rebuttal argument, he made a number of comments, among  
7 which were "I win because I tell the jury the truth as  
8 much as I know" and "They're all against me." All  
9 right?

10 Those comments were objected to and the Court  
11 has sustained the objection, and I admonish you to  
12 disregard those comments and to dismiss them from your  
13 mind. You may not use those comments in coming to your  
14 decision in this case and must decide the case solely  
15 based on the evidence and the law. All right.

16 Mr. Morelli, you may resume.

17 MR. MORELLI: Thank you, Your Honor.

18 THE COURT: And counsel do stipulate that the  
19 jury is present?

20 MS. FRESCH: Yes.

21 MR. ROBERTS: Yes, Your Honor.

22

23 REBUTTAL CLOSING ARGUMENT

24 MR. MORELLI: Good afternoon, everyone.

25 IN UNISON: Good afternoon.



1           MR. MORELLI: Little shaky. It's important  
2 for me to spend some more time talking to you. I  
3 promise not to yell or get too animated. I got an  
4 admonishment from my home. Okay?

5           So we're going to deal with the evidence and  
6 the law. We're going to talk to you about why Mr. Cox  
7 and Mrs. Cox are entitled to your verdict. I'm going  
8 to show it to you in slides that we didn't look at on  
9 Friday.

10           And I believe that I will answer any  
11 questions that may be remaining at this point of why  
12 the plaintiffs are entitled to your verdict. That's  
13 the important question for me to answer.

14           And I believe that there's been a lot of talk  
15 about why and how everything has happened, but I -- I  
16 still think that there are certain things that have to  
17 be directly answered at that point.

18           When I was, you know, sitting on -- on Friday  
19 listening to all of the closing arguments, I was making  
20 copious notes about certain things that were said. And  
21 I have now incorporated certain things, not everything,  
22 that the attorneys have said about the case and about  
23 the evidence and about what we need to prove. And I  
24 think I'll be answering those things.

25           Please understand -- and I think you will

1 appreciate this -- I'm not going to try to answer  
2 everything. Okay? That is a fool's errand, and it  
3 wouldn't be appropriate at this time. I think you've  
4 listened to so much already that you know a lot about  
5 the case, if not more than anyone. And so I'm going to  
6 try to address certain points.

7           So the first thing that I'd like to talk to  
8 you about -- and I think it's in some sort of logical  
9 order, the way I'm addressing these points, but I don't  
10 think it's necessary for it to be in some very specific  
11 order because you've heard all the evidence. And a lot  
12 of times evidence doesn't come in in a very neat way,  
13 you know, very organized, neat way.

14           And -- and actually, when the judge told you  
15 what the law was, he said it doesn't -- you don't even  
16 have to necessarily figure out how you heard the  
17 evidence, which side gave you the evidence. Evidence  
18 is evidence. So if the evidence is positive for the  
19 plaintiffs' case and it came from the defendant or  
20 positive for the defendants' case and it came from the  
21 plaintiffs, doesn't really matter. Okay?

22           So let's see if you could see that, because I  
23 can't. Okay. And this first slide, I talk about what  
24 we have to prove.

25           Now, in Mr. Roberts's closing -- and we put

1 the pages in anyway to show you that it's directly from  
2 the -- his closing argument. He had to prove why he  
3 fell and that it was our fault to be entitled to your  
4 verdict. When you don't prove your case, you are not  
5 entitled to your verdict -- to your verdict.

6 Well, I believe -- I agree with sentence  
7 No. 2. When you don't prove your case, you are not  
8 entitled to your verdict. But it's not right, and it  
9 is very wrong, that he had to prove why he fell and  
10 that it was our fault to be entitled to your verdict.

11 We don't have to prove why he fell. As a  
12 matter of fact, this is Instruction No. 22. And that  
13 says, "Plaintiffs claims are based on negligence. I  
14 will now instruct you on the law relating to this  
15 claim. For their claim of negligence, plaintiffs have  
16 the burden to prove" -- and we know that we have the  
17 burden -- "1, that one or more of the defendants were  
18 negligent and that such negligence was a proximate  
19 cause of Gavin Cox's accident."

20 Okay? So that's what we have to prove.  
21 That's the law. We don't have to prove why he fell.  
22 We don't have to prove that it was a slip. We don't  
23 have to prove it was a trip. We don't care -- we don't  
24 have to prove that it was a stumble. Okay? This is  
25 what we have to prove. This is the law.

1           Now, I know that a lot of things have been  
2 said, you know, during the -- this trial, and, you  
3 know, I've had an opportunity for many hours to speak  
4 to you and tell you what I thought we were going to  
5 prove, what we did prove, and so on. But now I'm only  
6 talking to you specifically about what was told to you  
7 and what the law is. Okay? So we don't have to prove  
8 that. We do have to prove the defendants were  
9 negligent and that negligence was a proximate cause of  
10 Gavin's accident.

11           Okay. Now, we're going -- we're going to go  
12 over not only this negligence charge, but we'll go over  
13 also proximate cause.

14           Okay. So now let's deal with  
15 negligence/avoid injury. This is Instruction No. 23,  
16 which is right after, hopefully, No. 22. All right?  
17 And -- at least it should be.

18           Negligence/avoid injury under the  
19 circumstances.

20           Now, I put this here to really key me so that  
21 I know where I'm going to speak to you. Okay?

22           So it says here, "When I use the word  
23 'negligence' in these instructions, I mean the failure  
24 to do something which a reasonably careful person would  
25 do or the doing of something which a reasonably careful

1 person would not do to avoid injury to themselves or  
2 others under circumstances similar to those shown by  
3 the evidence."

4           So I submit to you that it is true that the  
5 defendants -- and at the end, I will speak about each  
6 defendant individually and specifically and tell you  
7 why I believe that not only were they negligent, but  
8 they were a cause of what happened to Mr. Cox, the  
9 cause of his accident, which is just what the jury  
10 verdict sheet says, by the way, cause of his accident.  
11 Okay?

12           So the "to avoid injury to themselves or  
13 others," very, very important because it isn't enough  
14 for the defendants -- and we'll talk about each one of  
15 them individually later -- to just be reasonable --  
16 reasonably careful; they have to be reasonably careful  
17 to avoid injury to themselves or others.

18           So if, in fact, you have people going out  
19 during this illusion and they're doing all of the  
20 things that you know they're doing -- not going to  
21 rehash it every minute -- but they have to do it with  
22 an understanding that they have to make sure that they  
23 avoid injury to the participants. They have to avoid  
24 injury. Okay?

25           So, now, ordinary or reasonable care is that

1 care which persons of ordinary prudence would use in  
2 order to avoid injury, again, to themselves or others  
3 under circumstances similar to those shown by the  
4 evidence.

5           So if, in fact, you have people who go to a  
6 show and expect to be entertained at a show and now  
7 they find themselves in a circumstance that they're  
8 participating in this illusion -- they're not told  
9 anything; we know that, okay -- the people who do know,  
10 the people who are in charge of the show --  
11 Copperfield, his company, Backstage, MGM, they know  
12 what is going to be happening with the participants;  
13 the participants don't know.

14           So they now have a responsibility -- they  
15 have a responsibility of ordinary prudence in order to  
16 avoid injury to these people. They have to be thinking  
17 about, could they get injured and what do we have to do  
18 to make sure that we lessen the -- the danger to these  
19 people of being injured?

20           It's not enough that they just don't think  
21 about it; they must do it in order to avoid injury. So  
22 they can't raise the level of danger to the  
23 participants; they have to lower the level. Because  
24 they know that they're going on a route that they don't  
25 know about. They know that they're going to be running

1 in the dark. They don't know -- the participants don't  
2 know. And they also know that there's an incline  
3 there. They know that. Okay? So this is what has to  
4 be done.

5           Now, the law does not say how a reasonably  
6 careful person would act under those circumstances.  
7 That's for you to decide. Okay? You decide that.  
8 Under the circumstances, every single thing that I'm  
9 talking about today has to do with under the  
10 circumstances.

11           If somebody is asked to run under certain  
12 circumstances, that could be okay. Under other  
13 circumstances, it may not be okay. It may be  
14 unreasonable. And -- and just thinking about it, I  
15 know I -- I gave an example on -- on Friday, 'cause I  
16 know a few of you drive Ferraris. So I spoke to you  
17 about driving the Ferrari very fast. So let's take a  
18 different example.

19           If, in fact, one of you and -- and many men  
20 and women these days like to work out in the gym, and  
21 boxing is one of the things that people like to do. So  
22 let's assume that you were in the gym and you were  
23 shadowboxing, you know, you were punching in the gym.  
24 There's nothing unreasonable about that. Nothing.

25           But if you were doing that, let's say, in a

1 crowd of people in a very tight spot and you started,  
2 like, going like this and you punched somebody in the  
3 face, that's negligence, you see? Under those  
4 circumstances, that's not reasonable behavior. That's  
5 not ordinary care. You see?

6           So it's really -- I want you to think about  
7 it as we go along, that every single thing I'm talking  
8 about is really "under the circumstances." It isn't,  
9 you know, when -- when you take each one of the things  
10 individually, is there anything wrong with the dark? I  
11 heard, you know, the attorneys say of course not. I  
12 mean, that's silly. Is there anything wrong with  
13 running? Of course not. That's silly.

14           But in certain circumstances, yes, there's  
15 something wrong with that. As a matter of fact, you  
16 know, there are a lot of things that -- that are  
17 unreasonable in certain circumstances and reasonable in  
18 others.

19           So let's go on. Okay. So this is what  
20 Mr. Kenner told me. And I thought -- you know, I --  
21 I -- I thought about this, and I said, you know, should  
22 I mention this to you or not? And I think it makes a  
23 point. And I'll tell you why it makes a point.

24           You remember that Mr. Kenner and I, I think,  
25 sort of had a little bit of fun together, and I asked



1 him to -- to run at one point, you know. And he ran.  
2 And, actually, he was pretty acrobatic, I thought. He  
3 wound up on the table, and I said how did he do that?  
4 It's like, you know, if I would have done that, I'd be  
5 in a coma. But it was -- it was pretty amazing.

6 And -- and -- but that was -- I mean, that  
7 was -- I thought that was pretty incredible. But  
8 forgetting about that for a moment, it's what he said  
9 was even more incredible. Because he said and he  
10 said -- I said to him, "That's pretty good. Thank God  
11 you didn't fall and get injured." First thing I think  
12 about, you know.

13 So he says:  
14 "ANSWER: That would have been awesome  
15 because you told me to do it."

16 Right? So he's saying -- I mean, I think  
17 there's only one way to interpret it, not going to ask  
18 him -- that, hey, you told me to do it. So if I would  
19 have gotten injured, it would have been your fault,  
20 Morelli. Right?

21 And -- and what a perfect example about this  
22 case, you know, because they tell the participants to  
23 do these things. They don't warn them in advance, and  
24 they don't want to be responsible for it. So that's  
25 why I stuck that in there.

1           Okay. So let's talk about proximate cause.  
2 And the reason that -- that I -- that I think proximate  
3 cause is important to talk about right here is because  
4 we just spoke about negligence and the fact that, when  
5 somebody is exercising -- good word -- ordinary care,  
6 they have to exercise that care not to put somebody in  
7 an unreasonably -- an unreasonable position where they  
8 could get injured. They have to avoid injury.

9           So we have to look at now this proximate  
10 cause because that's the second part. You know, you  
11 have the negligence and then you have the proximate  
12 cause. Okay?

13           And proximate cause said -- you know, it  
14 sounds like, you know, a little bit fancy, and -- and,  
15 actually, the reason that -- that it's important for  
16 there to be a charge about proximate cause is to  
17 explain, you know, what it means and -- and -- because,  
18 all of us have to know what it means, you know, not  
19 only -- not only the jurors.

20           And so it says, "A proximate cause of an  
21 accident" -- of an accident -- "is a cause which in  
22 foreseeable and continuous sequence produces the  
23 accident and, without which, the accident would not  
24 have occurred."

25           Okay. Now, what's also important to know is

1 it need not be the only cause. It need not be the only  
2 cause nor the last or nearest cause. It could be just  
3 one of the causes. It is sufficient if it concurs with  
4 some other cause acting at the same time which, in  
5 combination with it, causes the accident.

6 And that's, you know, basically, I think,  
7 what I've been speaking to you about, you know, during  
8 this -- during this case, that it's not the running  
9 alone; it's not the dark alone; it's not the ramp or  
10 incline alone. It's all of these things together.  
11 Each one of them is a cause.

12 And, if you think about what a cause is, we  
13 have a question that we ask ourselves, but for. But  
14 for the running, would it have happened?

15 Now, you have to understand, under the  
16 circumstances of all of it together, all of it  
17 together.

18 But for the incline, would it have happened?  
19 We're going to talk about the incline specifically.  
20 I -- I spent some time talking about it. I think it's  
21 important to do that.

22 But please understand that this proximate  
23 cause, there -- there are a number of causes in this  
24 case, and they're all, if they were taken out, would  
25 probably change what happened. Okay?

1           So let's go on and -- common sense, something  
2 that I think we've spoken about a number of times. I  
3 believe that I talked to you about that.

4           Cox didn't know dust was slippery. Roberts  
5 says there was an instruction for this. We agree.  
6 Okay. We agree.

7           So what -- what does Mr. Roberts say? He  
8 says, "I asked him on May 1st, 2018, page 100, line 15,  
9 'How do you know the dust was slippery?' And he  
10 said" -- meaning Mr. Cox -- "I didn't know the dust was  
11 slippery, just assumed."

12           And he -- and Mr. Roberts says you got an  
13 instruction, and one of the instructions from the Court  
14 deals with this issue. Okay? And here's the  
15 instruction.

16           Because, in fact, Mr. Cox said the truth.  
17 Okay? Told the truth. This is what I think after I  
18 realized that I had dust all over my clothing. Okay?  
19 So here's the instruction:

20           "Although you are to consider only the  
21 evidence in the case in reaching a verdict, you must  
22 bring to the consideration of the evidence your  
23 everyday common sense and judgment as reasonable men  
24 and women. Thus you are not limited solely to what you  
25 see and hear as the witnesses testify; you may draw

1 reasonable inferences from the evidence which you feel  
2 are justified in the light of common experience,  
3 keeping in mind that such inferences should not be  
4 based on speculation or guess. A verdict may never be  
5 influenced by sympathy, prejudice, public opinion," and  
6 we spoke about that. "Should be the product of sincere  
7 judgment and sound discretion."

8 But let's talk about this common experience  
9 and common sense and bringing forth inferences that you  
10 draw. I -- I think I gave probably more than once an  
11 example of it being raining out and it was  
12 circumstantial evidence.

13 Well, here, Mr. Cox is running and he falls,  
14 has an accident, and it's -- it's dark out. And we  
15 know that he gets up, because we can tell, and he  
16 finishes the illusion. He finishes and doesn't, I  
17 guess, pay attention because of everything that  
18 happened to him. And at a certain point, when he's in  
19 the hospital, he sees that he has all this construction  
20 dust on him.

21 So he drew an inference. Right? That's what  
22 he did. I mean, that's just straight talk. He drew an  
23 inference. He said, well, I know what I was feeling,  
24 like an elevator was coming up and I'm running and I'm  
25 running fast and I made a -- I made a right turn and

1 I'm going. And now, later on that day or night, he  
2 sees all of this construction dust on him and says to  
3 himself, hey, this probably has something to do with it  
4 because it's all over me.

5 That's a reasonable inference that a normal  
6 ordinary person would draw under the circumstances. It  
7 just is. And so it's -- it's not outlandish. And --  
8 and when Mr. Strassburg says to you that he's jumping  
9 to conclusions, he's not jumping anywhere. He's using  
10 what the law tells you to use, which is your common  
11 sense, everyday common sense and judgment as reasonable  
12 men and women would say, hey, this had something to do  
13 with it.

14 So that's with reference to Instruction No. 5  
15 and you using your common sense to draw reasonable  
16 inferences. Okay?

17 So, now, this -- this is something that I  
18 want to spend a couple of moments on talking about.  
19 This is what Mr. Popovich told you in his closing.

20 "A poor investigation did not cause this  
21 accident."

22 I think that we know that, if you were  
23 listening carefully -- and I think we all were -- to  
24 all of the attorneys when they gave their closing  
25 arguments, that Mr. Popovich was saying to you, "Hey,

1 could things have been done better? For sure." That's  
2 like a quote of what he said in his closing. "Could  
3 things have been done better? For sure."

4 Which is an acknowledgment that this  
5 investigation and what went on here with reference to  
6 Mr. Janson doing an investigation was certainly less  
7 than stellar. Okay? So he says it didn't cause the  
8 accident. In other words, I'm going to acknowledge  
9 that this investigation was -- was pretty bad, but it  
10 didn't cause the accident. Let's -- let's deal with  
11 that. I want to really talk about it.

12 I agree. I agree. Didn't cause the  
13 accident. There's a lot of things in this case that  
14 didn't cause the accident that we're talking about  
15 because they still could be relevant. They could be  
16 relevant. So, yes, it didn't cause the accident.

17 But let's assume for a moment that  
18 Mr. Janson -- who I called to the witness stand and I  
19 examined him. He did take the panoramic photos that  
20 his security handbook tells him that he has to take.  
21 And, if you remember, I asked him, "Did you take  
22 panoramic photos?" And he said no.

23 And there were a lot of things that I asked  
24 him. I said, "Did you interview any witnesses?" And  
25 he said no.

1 I said, "Did you speak to Mr. Kenner?" And  
2 he said no.

3 I said, "Did you speak to Mr. Copperfield?"  
4 And he said no.

5 Now, it would have changed a lot of things if  
6 this was actually done. Okay? Because a poor  
7 investigation actually amounted to almost a  
8 noninvestigation, because if you don't take the proper  
9 photos and you don't interview the witnesses and you  
10 don't get all of the facts that you need to be able to  
11 make a determination in a case for all of you, that's  
12 not a poor investigation; that's almost a  
13 noninvestigation.

14 So, yes, it didn't directly cause the  
15 accident. But let's think about if, in fact -- and we  
16 know that there was an MGM employee standing over here  
17 when Mr. Cox made his turn, the last -- the last right  
18 turn, because had made a right turn coming out of the  
19 building and then made a right turn to go up the  
20 incline.

21 And that particular person would have -- had  
22 that person been interviewed -- and there's never been  
23 an explanation of why that person wasn't interviewed,  
24 and there's never been an explanation really from  
25 Mr. Janson of why all these other people weren't



1 interviewed. You know, it was sort of glossed over.

2           And -- and this would have -- would have  
3 changed the case because, if you think about having  
4 witnesses who were actually at the scene of the  
5 accident, who were now interviewed, and they tell you  
6 what they know, then the defendants couldn't have  
7 gotten together and retained two experts to tell us  
8 what they think went on that night when, in fact, they  
9 weren't there.

10           But we had people who were there. And so,  
11 yes, you're right. But that was a very big thing that  
12 there was no investigation here and that you didn't get  
13 the direct evidence. Okay? Otherwise, the defendants  
14 could not have brought an expert to create what -- what  
15 happened. Not re-create, but to create what happened.

16           So, now, let's -- let's look at weaker versus  
17 stronger evidence, because that fits right here at this  
18 point.

19           Instruction No. 8 and 9. "You may consider  
20 the ability of each party to provide evidence."

21           Okay? And right now I'm -- I'm just asking  
22 you to think about the ability of each party to provide  
23 evidence. Let's think about MGM. Okay?

24           "If a party provided weaker evidence when it  
25 could have provided stronger evidence, you may distrust

1 the weaker evidence."

2 Well, I submit to you that the weaker  
3 evidence is bringing in an expert who, in -- and  
4 Dr. Baker was an expert, was retained by three of the  
5 defendants, one of the defendants being MGM. Okay?  
6 And Dr. Baker was asked to review everything and give  
7 this analysis and come up with determinations.

8 And the determinations that he came up with  
9 originally in 2016 -- and I brought this to your  
10 attention, I believe, once before -- was nothing to do  
11 with tripping.

12 Now, it doesn't matter to me one way or the  
13 other whether he says he tripped or he slipped. Okay?  
14 And I've only told you that probably 88 times. All  
15 right? Because it's about the accident happening.  
16 See? Why did the accident happen? Not why did he  
17 trip. That's not the question. Not why did he slip.  
18 We don't have to prove that. Why did the accident  
19 happen?

20 So Dr. Baker, in 2016 when he was retained,  
21 gave a report. Nothing in his report -- lengthy  
22 report -- nothing in his report about the fact that he  
23 had tripped.

24 Now, two weeks or so before we started this  
25 trial, he rendered a new report in 2018, and all of a

1 sudden he now decided that Mr. Cox tripped instead of  
2 slipped. Okay? I leave it to you to figure out what  
3 to do with that. All right?

4 And if you remember correctly, during my  
5 first closing argument, I didn't disparage the experts,  
6 you know, really. I mean, I was pretty calm with them,  
7 because I don't really think it has a lot of relevance  
8 except that, if you're going to believe that somebody  
9 is telling you straight truth, okay, you can't take --  
10 you can't retain an expert and the expert gives, let's  
11 say, four different opinions, and you, as a party in  
12 the case who retained the expert, now say, "Well, I  
13 don't like this opinion of Dr. Baker. I'll take these  
14 three. They fit better."

15 They can't do that. You know, if you are  
16 saying, like Ms. Fresch said and that I remember, you  
17 know, very vividly, she said that these experts were  
18 neutrals.

19 Well, they're not neutrals. I mean, that's  
20 not accurate, you know. They're not neutrals. I mean,  
21 they were paid a total of over \$150,000 to testify.  
22 Now, I'm not saying that the amount of money alone  
23 makes somebody not tell the truth, but you are not a  
24 neutral if you're working for me.

25 MR. CALL: Objection, Your Honor. Under the

1 DeJesus case.

2 THE COURT: Say it again.

3 MR. CALL: Objection under DeJesus.

4 THE COURT: I will overrule it.

5 Go ahead.

6 MR. MORELLI: You're not a neutral if you're  
7 being retained by a party. You're working for that  
8 party and you're asked to do a certain thing, and you  
9 know what you're asked to do. I mean, it only makes  
10 common sense. Common sense dictates what you're going  
11 to do in this case. Okay?

12 So that is -- let's finish looking at this.  
13 Okay? Instruction No. 9. Now, we talked about if you  
14 could -- if you provided weaker evidence instead of  
15 stronger evidence, okay? "Where relevant evidence  
16 would be properly be a part of the litigation is within  
17 the control of one party whose interest it would  
18 naturally be to produce it and they fail to do so  
19 without a satisfactory explanation" -- and I repeat  
20 that -- "and they fail to do so without a satisfactory  
21 explanation, the jury may draw an inference" -- there  
22 goes that inference again -- "that such evidence would  
23 have been unfavorable to that party."

24 That's the inference, the conclusion that you  
25 draw. Well, if they didn't bring that -- that witness,

1 then it probably wasn't a good witness for them.  
2 That's what they're saying. That's what this charge is  
3 saying.

4 An inference means a logical and reasonable  
5 conclusion of a fact not presented by direct evidence  
6 but which, by the process of logic and reason, the jury  
7 may conclude exists from the established facts.

8 Now, why is that something that I want to  
9 speak to you about? Well, it is something I want to  
10 speak to you about because this person -- and we  
11 don't -- you know, I couldn't even get the name of this  
12 person out of Funes-Navas or out of Mr. Janson. All  
13 right? The person who is standing there, who's feet  
14 away from where Mr. Cox fell, may know everything about  
15 what happened, may know everything, because he wasn't  
16 looking through a tree. You know? He wasn't trying to  
17 look at video. He was there. Okay?

18 And there was no explanation of why we didn't  
19 even know the name of this person. The person works  
20 for MGM. There are two people who came in, one that I  
21 called and -- and one that Mr. Popovich called. You  
22 know, instead of calling this person who is standing  
23 there who's an MGM employee, Mr. Popovich, when he gets  
24 a chance to bring a witness, he brings Funes-Navas who  
25 knows hardly anything about that night or what

1 happened.

2           So there was no reasonable explanation, no  
3 satisfactory explanation of why they didn't bring that  
4 person or why both of their witnesses -- Funes-Navas  
5 and Janson -- don't -- they didn't even know the name  
6 of this person, let alone interview the person and  
7 bring him before you. So you can now draw an inference  
8 and say must have been bad for them or they certainly  
9 would have been able to figure out who it was and bring  
10 him in.

11           Instead, I heard the lawyers say in closing  
12 that, you know, Morelli -- not even me, because it  
13 wasn't me at the time -- but that the -- the Cox family  
14 had retained attorneys early on. They have mentioned  
15 that a number of times as if that's, you know, a bad  
16 thing.

17           And that they -- the attorney, whoever it  
18 was, should have hired investigators to find out who  
19 this person is who's standing there who might be a  
20 witness instead of -- it being an MGM employee, bring  
21 them here. Tell us the name of the person at least so  
22 that we could find out what he has to say about it.

23           So I didn't think that was -- that was fair  
24 comment to say that the plaintiff should have hired  
25 investigators. That's not the way it works.

1           So I want you to be aware of Instruction  
2 No. 8 and No. 9. And when -- when you -- when you look  
3 at these charges and you take them sort of all  
4 together, they're all saying basically similar things;  
5 true? They're saying similar things. They're saying  
6 to you as jurors, "Hey, use your common sense." Okay?  
7 They're saying to you you can take something that is a  
8 piece of evidence and you can take it further and draw  
9 reasonable inferences. And that's -- that's what this  
10 law is telling you and that's what the judge told you  
11 when he read this to you.

12           So, now, this adverse inference which comes  
13 from the previous slide -- now, when Mr. Popovich spoke  
14 to you in his closing, he said figuring out who the MGM  
15 stagehand was at the corner, the person I'm speaking  
16 about, didn't happen. It's agreed. Okay. Things  
17 could have been done better, just like I just mentioned  
18 to you that he said. Sure.

19           Was that intentional obstruction? I don't  
20 think you'll find that. You know, at this particular  
21 point, if you notice, I'm not yelling and screaming or  
22 arguing whether or not it was obstruction. Hey, that's  
23 for you to decide. What I'm saying to you is let's  
24 deal with this case in a very calm, very deliberate  
25 way.

1           Let's look at what the lawyers have told you.  
2 If this makes sense to you, okay. And let's look at  
3 what really happened here because whether or not this  
4 person at the corner -- okay? -- figuring out who it  
5 was didn't happen. It's agreed. Things could have  
6 been done better. Well, that's not a defense; that's  
7 an excuse and an apology. You know?

8           But you don't need excuses and apologies; you  
9 need evidence. And each one of the defendants'  
10 attorneys in this case have asked for your verdict.  
11 And please -- and I want you to think about this now  
12 because I'm going to be talking about it again in a  
13 little while.

14           Each one of the defendants, when they asked  
15 for your verdict, they are asking you to nonsuit --  
16 I'll be a nice person -- nonsuit the plaintiff.  
17 Because if each one of them say they're 0 percent  
18 responsible, then they're blaming it all on Mr. Cox  
19 even though they have not proven any negligence on  
20 Mr. Cox's behalf. And that's their burden, by the way,  
21 to prove that. Okay?

22           So what did I write down here? "The charge  
23 doesn't require intentional obstruction." So I don't  
24 have to prove that to you. And the -- the charge  
25 doesn't say you have to find that. The missing guard



1 was in their control. No doubt about that. The  
2 stagehand. I -- we -- I said "guard," but I think he  
3 might have been a stagehand who was on the point.

4           They would naturally produce him or her. I  
5 mean, that's all part of the charge that I read to you  
6 before, that, in a normal course, would they naturally  
7 produce this person. The above isn't an explanation;  
8 it's -- it's an admission and apology. You can draw an  
9 inference that had they brought the guard, the guard  
10 would have supported Gavin's claim and testified  
11 against MGM's position. That is the law. Okay?

12           So after looking at all of this over the  
13 weekend and having an opportunity to read the record  
14 and to look carefully at -- at what was said, I said,  
15 "I want to speak to the jurors on Tuesday afternoon  
16 only about what the lawyers have told you and what the  
17 law is so that you understand that our case is about  
18 this unreasonable behavior under the circumstances."  
19 Okay?

20           So let's go to the next slide. This is a  
21 long one.

22           Okay. Now, I'm going to paraphrase some of  
23 this because it's pretty long and you don't need to  
24 listen to me for another day. So -- and I don't need  
25 to listen to me for another day.

1           So let's just talk about direct versus  
2 circumstantial evidence. Now, I think I was very clear  
3 when I spoke to you. And, if not, I'll try to be a  
4 little clearer.

5           The fact -- and let's just take the dust as  
6 an example. The dust is all over Mr. Cox's clothing.  
7 The dumpster was put along the route. And when the  
8 dumpster was put along the route, that was decided by  
9 MGM and Team that that's the position where it would  
10 go. And you remember that testimony. That's what they  
11 said.

12           So we had the dust on his clothing. We had  
13 the dumpster; right? We know that they were doing  
14 concrete work that day -- that day -- because right in  
15 the records that Mr. Strassburg showed you, four hours  
16 of concrete work was done that day.

17           And so you're entitled to -- when you -- you  
18 fall and that happens, not -- not all cases are based  
19 on direct evidence. As a matter of fact, many criminal  
20 cases are based only on circumstantial evidence.  
21 People go (descriptive sound) just on circumstantial  
22 evidence.

23           So let's see what it says. Okay?

24           "The evidence which you are to consider in  
25 this case consists of testimony, witnesses, the

1 exhibits, any facts admitted or agreed to by counsel.  
2 There are two types of evidence: direct and  
3 circumstantial. Direct evidence is direct proof of a  
4 fact, such as testimony by a witness about what the  
5 witness personally saw or heard or did."

6 And we've had direct evidence in this case,  
7 not on every point. Okay? And, on this particular  
8 point, I submit to you it's circumstantial evidence.  
9 Right?

10 Now, "Circumstantial evidence is the proof of  
11 one or more facts from which you could consider another  
12 fact." So you -- this isn't speculation; it's  
13 circumstantial evidence. See?

14 "The law makes no distinction between the  
15 weight to be given either direct or circumstantial  
16 evidence." There's no distinction. So that  
17 circumstantial evidence and direct evidence could be  
18 used by you just as strongly one another; right?  
19 There's no distinction. Okay? Therefore, all of the  
20 evidence in the case, including the circumstantial  
21 evidence, should be considered by you in arriving at  
22 your verdict.

23 And, you know, I know that all of you, when  
24 you retire to the jury room -- that's what they call  
25 it -- to -- to deliberate, you're not going to do any

1 retiring at that point, by the way. Hopefully, you'll  
2 do some deliberating, which is a little bit more work  
3 than retiring.

4 But you're going to have the law with you.  
5 That's what the Court said to you. So I don't need to  
6 read every single word. I just highlighted this  
7 portion because I thought it was important for us to  
8 understand that circumstantial evidence is as important  
9 oftentimes as direct evidence and can be considered by  
10 you just as strongly.

11 So now let's talk about credibility. And I  
12 am not -- I am not here today -- this is the new  
13 Morelli. Okay? I am not here today to disparage  
14 anybody. I'm really not. I'm here to talk to you  
15 about the plaintiffs' case. And I'm here to talk to  
16 you about the defendants and what they've said and why  
17 I believe that we have a strong case and why we're  
18 entitled to your verdict.

19 So here's what Mr. Popovich said in his  
20 closing. You know, and a lot of times when you --  
21 you're listening to a closing for an hour, hour and a  
22 half, two hours, even more, a lot of things are said.  
23 And you can catch some of them. Sometimes you don't  
24 catch everything. We're all human. So I don't catch  
25 it all even. I might be writing down something and

1 something else is said and I miss it. You know? But I  
2 bring it to you so that you could see what was said and  
3 what I said.

4           When someone references another attorney's  
5 opening statement, you know, that was, like, a really  
6 long time ago, like, six, seven weeks ago, I think.  
7 Seems longer. Anyway -- so Mr. Popovich says, "But, if  
8 you'll recall, Mr. Morelli in opening statement didn't  
9 talk about the ramp being the source of Mr. Cox's  
10 problem. That's because that had never come out, I  
11 believe, until Mr. Cox was on the stand."

12           Okay. So I looked back and said, "Really? I  
13 thought I remember doing that." So I went to the  
14 opening statement -- my opening statement, and I didn't  
15 give it all to you because it was too long. "He's  
16 yelling 'Turn right. Turn right.' So, now, when he's  
17 yelling 'turn right,' you're coming along, you're  
18 running and you're running and you're running." This  
19 is in my opening. "And as soon as you turn right, this  
20 next right, there's an additional obstacle that no one  
21 warned anyone of, an additional obstacle. And what was  
22 that obstacle? Well, they weren't turning onto a flat  
23 surface; they were turning from a flat surface to an  
24 incline, an unsuspected incline. Now, nobody warned  
25 anyone -- any of the participants -- and, obviously,

1 we're interested that Mr. Cox wasn't warned of this  
2 incline."

3           This is what Mr. Popovich said, that it only  
4 came out when -- when -- you know, it was an  
5 afterthought, another, you know, way to inject to you  
6 that we're trying to, like, figure out what the case is  
7 as we're doing it. That's just -- it's just not true.  
8 You know? It's wrong, dead wrong. And so I wanted to  
9 show you that the opening statement was consistent with  
10 my closing argument and the -- the testimony in the  
11 case.

12           Now, notice of prior accidents, I put there.  
13 And I am referencing now Mr. Popovich's closing and  
14 Mr. Roberts's closing. And it's not that one is more  
15 than the other. I think we just ran out of yellow. So  
16 that's -- that's why one's in yellow and one's not.  
17 Okay?

18           So let's see what Mr. Popovich said. "And  
19 she did not fill out an accident report." This is in  
20 reference to Ms. Lawrence. Okay? Ms. Lawrence. "And,  
21 to some extent, what Mr. Morelli said yesterday is if  
22 an accident report doesn't get made, the MGM Grand  
23 process does not pick this up. And so how can that be  
24 notice to MGM Grand as a company, as a big business  
25 enterprise, that there was some notice of a problem

1 with this runaround?"

2 Now, he was referencing Ms. Lawrence. And if  
3 you remember, I think the testimony in the case was  
4 that Ms. Lawrence did not fill out an accident report.  
5 It's true. It's accurate. Okay?

6 So now we go to what Mr. Roberts says, and  
7 he's talking as to Backstage; right? "Which leaves us  
8 with Ms. Lawrence. And we told you about her. You  
9 know? No one knew who she was or what her name was  
10 because she had chosen not to file an incident report  
11 that night."

12 Okay? That's true. She didn't. All right.  
13 "She wasn't disclosed on anyone's witness list -- not  
14 theirs, not ours -- because no one knew who she was if  
15 you say you're fine and you leave and you don't fill  
16 out an incident report and your name is not anywhere."

17 Okay. So let's take those two things.  
18 Mr. Popovich is representing a big business. What do  
19 you want from him? You know? Ms. Lawrence didn't want  
20 to fill out an incident report, so therefore, hey, what  
21 do you want from me? And Mr. Roberts, who represents  
22 Backstage, hey, we didn't know anything about her, so  
23 we weren't on notice. So this notice of prior  
24 accidents isn't really notice to MGM or Backstage.  
25 That's what the lawyers say. Okay?

1           So let's see if that's true. Now, this is a  
2 little small, so I'm going to read it to you. This is  
3 from the MGM's security handbook. Now, if you  
4 remember, I had that on the screen, I believe, when  
5 Mr. Janson was on the witness stand. And I asked him  
6 about, you know, certain things that he would -- he has  
7 to do.

8           And, oddly enough and interestingly enough,  
9 the fact that Ms. Lawrence did not want to fill out an  
10 incident report doesn't change the responsibility of  
11 MGM. Okay?

12           So what does it say? Right from the  
13 handbook, "guest accidents." Not injuries; guest  
14 accidents. You know, there's an accident and there's  
15 an injury. They're not the same. So this is guest  
16 accidents.

17           "A guest accident report will be completed  
18 whenever a guest-involved accident is reported to  
19 security." Now, we know that Ms. Lawrence said that it  
20 was reported and that three different people spoke to  
21 her that night, MGM people spoke to her. Okay? Now --

22           MR. POPOVICH: Objection. That misstates  
23 testimony, Your Honor.

24           MR. MORELLI: -- "first aid" --

25           THE COURT: That's for the jury to determine.



1           MR. MORELLI:  -- "first aid and paramedics  
2 will be offered to the complainant and noted in the  
3 report narrative."

4           Now, this is the important part -- and just  
5 to show you that, when you listen to closing arguments,  
6 there's sort of phrases that you -- sort of almost like  
7 a throwaway phrase, that you say, well, you know, I  
8 guess that's true because he said it.  But it isn't,  
9 because right from the handbook of MGM, "If the  
10 complainant declines filing a report, a report will be  
11 completed by the officer stating 'guest refused  
12 report.'  Noted in the report narrative, the officer  
13 will complete the report, detailing the information  
14 obtained."  Okay?

15           So it's not true that they don't have a  
16 responsibility.  They violated their own rules in all  
17 of these cases -- okay? -- where there was an accident.  
18 You can't just say that because the patron, the guest,  
19 didn't want to fill out an accident report that you  
20 don't do it.  Because if they did it, then they  
21 wouldn't be able to come in here and say, "Hey, we  
22 didn't know anything about it."  And Mr. Popovich  
23 wouldn't be saying what he said here, because he  
24 couldn't -- you see? -- if there was an accident report  
25 and we would have had it.  Okay?  So that's what their

1 rules are.

2 Now, Mr. Popovich asked a question and -- in  
3 his closing, what warning could we have given him?  
4 What would have prevented this accident? I like  
5 answering questions like that. You know? I think  
6 that's a good -- I like those two questions because I'm  
7 going to answer them. All right?

8 The -- it's -- Mr. Popovich is saying, "What  
9 do you want from us? We didn't need to warn. And if  
10 we warned, what would have happened?" Okay.

11 Now, let's have a little background with  
12 reference to MGM because MGM -- Mr. Popovich said a  
13 whole lot of things in his closing that I made notes  
14 on. And he's basically saying, "Hey, you know, we're  
15 not involved. You know, we didn't do anything. And if  
16 it isn't the ramp, we had nothing to do with it."

17 Well, that's not really true because you have  
18 a contract with the Copperfield people and you're  
19 making money from Mr. Copperfield doing his illusions  
20 at your hotel. Actually, you even named the theater  
21 after him now. Okay? That was evidence in the case.

22 So it's not true that you're not responsible  
23 other than the ramp, you know, which is what he said in  
24 his closing. You are because you have signed on to  
25 this illusion being done at your hotel. You have

1 signed on to the route that the illusion runs. You  
2 know it. You know that it's being run there. You know  
3 that it's dark out when it's being run. And you know  
4 that there's an incline there. And you know that  
5 they're running.

6           So to -- to just, you know, make all of these  
7 offhanded comments to dismiss this case and your  
8 responsibility is just not accurate. It's just not  
9 accurate. So I can say to you here's what should have  
10 happened -- here's what should have happened. And I'm  
11 going to reference a couple of things here to put it  
12 all together for you so that you understand that I'm  
13 really, really trying to focus on specifics now. Okay?  
14 No, you know, cute phrases, just specifics. Okay?

15           And that is that Mr. Roberts, in his closing,  
16 said, "Well, you know, the illusion doesn't have to be  
17 done in a minute." You remember? "It could be done in  
18 longer than that." And I think, if I remember  
19 correctly, he was standing over here. And he was  
20 doing, you know, all of these different things, you  
21 know, these race walking and trotting and -- and then  
22 had all of these numbers of how long it takes. You  
23 know? Which I thought was pretty interesting, not  
24 relevant to the case, but interesting.

25           And he said it could take a minute 40.

1 That's what he came up with. Right? A minute 40. I  
2 remember specifically. Okay. So let's take  
3 Mr. Roberts' minute 40 and say that Mr. Kenner  
4 testified that he thought that the illusion should take  
5 a minute to a minute 15, a minute 20. Okay? That's  
6 what Mr. Kenner says. He's the executive producer.  
7 All right. That's what he said. All right.

8 Let's take the minute 40, or even a minute  
9 20, and say if you want the answer to this, I'm going  
10 to give it to you. When these participants come out of  
11 the prop and they walk down the stairs, you have  
12 somebody right there. And you say to these 13 people,  
13 11, 10, 9 -- 'cause it's always a different number --  
14 that's what we heard -- however many it is. Okay.

15 "This is what we're going to be doing. Okay? You are  
16 going to have to hurry. Okay? You are going to be  
17 running through a few hallways, but there's going to be  
18 people positioned each place. They'll tell you which  
19 way to go. There's two lefts and a right, and then  
20 you'll be outside. After you make the right outside,  
21 there will be somebody positioned there. And you  
22 should slow down there because there's an incline when  
23 you make a right. So be careful because it's dark  
24 out."

25 That's it. 10, 15 seconds, it would take,

1 still within the minute 40, a minute 30, or whatever  
2 you believe. Okay? That's what should have been done.  
3 That's what I think, Mr. Popovich. That's my answer.  
4 That should have been the warning.

5 Now, if, in fact, you say, "Well, you know,  
6 maybe you don't even have to, you know, give a  
7 warning." Well, yes, you do, because, if you don't,  
8 then you're not exercising, under the law, that  
9 ordinary care to avoid people getting injured -- right  
10 from the law -- because that's your responsibility. It  
11 is your illusion, so you have to avoid injury. You  
12 have to make sure that you do everything to avoid  
13 injury.

14 And please understand -- look, let's put it  
15 in the real world because I've heard some of the  
16 lawyers say that I'm looking for the world to be  
17 perfect. That would be a really good thing if I could  
18 do that. But, no, this isn't perfect. This is just  
19 reasonable under the circumstances, reasonable under  
20 the circumstances, ordinary care. That's all we're  
21 talking about.

22 And if, in fact, you designed the route,  
23 Mr. Copperfield, Mr. Kenner, you designed the route and  
24 MGM signed off on the route, they knew the route. The  
25 route -- they need people to open the security doors

1 right at a high -- very high-security area. They have  
2 to open the door to let them out and they have to open  
3 the doors to let them in. And when they open doors to  
4 let them in, they're going by the cage where all their  
5 moolah is; right? So you know that all of them know  
6 what the route is.

7           So if, in fact, you designed this route and  
8 you knew that the route was going to go outside at  
9 night and you knew that you -- the participants are  
10 going to encounter an incline, design a different  
11 route. I mean, this wasn't -- the route didn't come  
12 down from heaven; you designed it. Okay? And if you  
13 say, "Well, it was the best route," really? Okay.  
14 Let's assume for a moment it was the best. And you  
15 have to warn. See? You can warn. And I just told you  
16 how long that would take, not a long time. You can  
17 change the route, or you can get rid of the incline.  
18 Get rid of it, redo it; right? That's it.

19           So there's a whole lot of things that you  
20 could do, but, yes, what would have been -- prevented  
21 this accident? What I just told you. That would have  
22 prevented the accident. Or it would have taken it  
23 to -- in accordance with the law, it would have  
24 diminished the chances of someone getting injured. And  
25 that's all anyone could ever ask is that you take the

1 precautions to make sure that people have a much less  
2 risk of being injured.

3           It's your responsibility because the  
4 participants don't know. I mean, they show up. If you  
5 think about it, you're showing up at a show. You know,  
6 when you go to a show, you want to be entertained. And  
7 you've already -- it's 8:30 at night -- 8:00 at night  
8 or whatever it is, it's -- you've already had a whole  
9 day. Maybe you got up at 8:00 or maybe you got up at  
10 6:00 or 9:00. So you've already been up and out and  
11 about for 10 or 12 hours. You've been doing things.  
12 Maybe you're a little pooped. Maybe you're this; maybe  
13 you're that.

14           Well, certainly, it is the responsibility of  
15 the people who are putting on the show, putting on the  
16 performance, if they're asking people to participate  
17 for their financial gain, not the participants -- they  
18 get a picture. Okay? So if you're doing that -- and  
19 there's nothing wrong with that, and I'm not saying  
20 that there is. What I'm saying is if you're going to  
21 do that, then warn them. You know? Give them the  
22 information that's necessary in order for them to be  
23 careful. You can't be careful when you don't know what  
24 you're doing.

25           Now, another thing comes to my mind. And

1 that is that, hey -- I think, you know, not only did a  
2 number of the lawyers say it, but Ms. Fresch said it,  
3 that Mr. Cox is an adult. That's true. He is. And he  
4 could have stopped. Okay?

5 But I think that if, in fact, you're giving a  
6 warning like I propose, you say to them, "Listen,  
7 you're going to be doing this, this, and that. If you  
8 want to stop, you can stop at any time along the route.  
9 Tell somebody, and we'll take you out."

10 That didn't take me very long. Okay. So  
11 yeah, yeah, you can. And I don't want to be flip about  
12 it. I really don't. And I want to be very, very  
13 straightforward in talking about only the evidence and  
14 the law. Okay? This is not reasonable behavior. I'm  
15 sorry. It just is not. The -- the defendants have not  
16 exhibited reasonable behavior under the circumstances  
17 of this illusion.

18 Now, one can say, "Hey, they got away with it  
19 a lot of times." Maybe they did. We don't know. We  
20 only know of three people with reference to the MGM  
21 Grand. And we know of one person who was injured at  
22 another location during the same illusion. So we know  
23 of four people being injured during this illusion,  
24 three during the same exact route at the MGM.

25 Are there more? I don't know. I'm not



1 clairvoyant. I don't know. I know that you've heard  
2 from the people we found out about. That's all I could  
3 do. All right?

4           So let's see what we have going on now that  
5 we know that the accident, in my opinion, could have  
6 been prevented.

7           Now, this is -- I want -- I want to make a  
8 certain point about this, not that the debriefing, I  
9 call it, you know, at the end of the show is -- is so  
10 relevant to our case. But it's just like investigation  
11 is relevant because it shows certain things and it  
12 tells you certain things that may be important for you  
13 to draw inferences later on when you are chatting.  
14 Okay? No yelling. Chatting. Okay?

15           Now, Popovich argued that, while it was in  
16 the script, Carvalho went off script and didn't say it,  
17 didn't say "running for your lives with crazy looks on  
18 your faces."

19           Now, you saw the script. And that was the  
20 script -- a Copperfield script of what they're supposed  
21 to say to the participants after the illusion is  
22 completed and they're in that room, whatever room they  
23 call that. Okay? And we say that's convenient.  
24 Right?

25           However, Mr. Popovich's favorite witness, who

1 he said rings of truth, Ms. Weall, said this about the  
2 scripts. Okay? This is what she said. This is her  
3 testimony. Now, this is the most honest witness in the  
4 whole case. That's what he says. No comment.

5 "QUESTION: So you would consider  
6 Mr. Copperfield someone that likes things done  
7 a certain way?

8 "ANSWER: I think he's particular.

9 "QUESTION: Okay. And that would go for  
10 the things in the show too. And that's one of  
11 the reasons why you were given the script of  
12 what to say; is that fair?

13 "ANSWER: Yes.

14 "QUESTION: And, therefore, the protocol  
15 of the show is to follow along with the script  
16 that you were given; right?

17 "ANSWER: Yes.

18 "QUESTION: You're not supposed to, like,  
19 just go off on your own and create your own  
20 kind of stuff; is that fair?

21 "ANSWER: That's fair."

22 Okay. So we know that this is what he says.

23 Now, I'm not at all trying to convince you  
24 that this is not somewhat being funny. I think that he  
25 is. Mr. Copperfield and Mr. Carvalho are being

1 somewhat funny when they're reading the script.

2 But, as we all know, as reasonable human  
3 beings in the real world, not in the world of movies  
4 that Mr. Roberts likes to bring us to a lot, without  
5 any popcorn, I will say, okay, but this is something  
6 that is important because let's assume for a moment  
7 that it wasn't true that the participants didn't feel  
8 that they were running and didn't expect to run like  
9 that, that the only reason why they might have crazy  
10 looks on their faces is because they were doing the  
11 unexpected. They didn't -- they couldn't assume that  
12 they were going to do that.

13 So that's why it's funny. It wouldn't be  
14 funny if it didn't ring true. Okay?

15 So when you are at a comedy club and someone  
16 makes a joke, if it doesn't ring true to you, you say,  
17 "I don't get it." Right? "I don't get it." And --  
18 and sometimes you don't get it because it's not a good  
19 joke. But other times, you say, yeah, that happened to  
20 me, or I get that, or, you know, same thing, I think  
21 about, you know.

22 So if, in fact, the participants had no  
23 context, it wouldn't be funny. It wouldn't ring true.

24 So the Thirteen room speeches. Okay. And  
25 this is going along because this is at the beginning of

1 this speech. It says, "Hey, everybody, how fun was  
2 that? You had no idea you were going to get  
3 entertained -- getting entertainment and exercise  
4 tonight. Right?"

5 Now, is there kidding around there? Of  
6 course. But if it doesn't ring true -- hey, look, I  
7 didn't expect that -- it wouldn't make any sense to  
8 anybody. Okay?

9 "If you're feeling like you missed out on  
10 getting to see the grand finale because you were part  
11 of it, we have a video of what you just -- of what you  
12 just did from the audience's point of view. It's not  
13 you. It's not tonight. It's not a video of you all  
14 running for your lives with crazy looks on your faces,  
15 but it is exactly what the audience just saw. So  
16 gather around the big screen here and check out. And  
17 sorry we didn't have popcorn or Gatorade for you."

18 So that is just reinforcing that nobody knew  
19 what to expect. That's why that makes any sense to  
20 anybody. Okay?

21 So now let's talk about credibility, the  
22 credibility charge. This charge talks about the  
23 fact -- and you're going to have it so you can read  
24 it -- talks about the fact that you may disregard the  
25 entire testimony of a witness or any portion of the

1 testimony which is not proved by other evidence. So  
2 if, in fact, you think that there's a witness who  
3 didn't tell you the truth, you could take certain parts  
4 of that evidence and disregard it; you can take all of  
5 the evidence and disregard it. It's up to you.

6 And I'm not telling you which evidence to  
7 disregard. I have my job to do; you have your job to  
8 do. Okay? I make suggestions to you; you make  
9 decisions. I don't make those. You do. All right?

10 So this tells you about credibility. And,  
11 again, you're using your common sense. You're using  
12 your ability and all of your experience in the world.  
13 And, you know, not everybody wants to admit to how old  
14 they are so -- but you guys are grownups. Okay? And  
15 you've been in the world and you've had some  
16 experiences. And that's what you are going to bring to  
17 this to decide who is telling you the truth, whether it  
18 rang true.

19 And remember that I also told you early on --  
20 don't read it yet. I also told you early on that it  
21 isn't only what someone says -- we dealt with that, I  
22 think, in jury selection -- but it's how they say it,  
23 how they look when they say it, does it ring true to  
24 you? And, actually, it's part of the charge telling  
25 you that. Okay?

1           So let's look at what Lee Roberts said.

2           "I am not asking you and I don't think anyone  
3 at that table" -- that table, not my table -- "is  
4 asking you -- they can jump up and object if I'm  
5 wrong -- but we're" -- in other words, them  
6 collectively -- "we're not asking you to punish him for  
7 this" -- punish Mr. Cox. "We're not asking you to find  
8 that, even though he's proven that we were negligent,  
9 the negligence caused his injuries -- because he does  
10 have injuries -- we're not asking you to punish him and  
11 not give him anything if it's proven by some other  
12 evidence than his uncorroborated testimony."

13           Now, just to be fair to Mr. Roberts, he  
14 misspoke. Okay? He didn't mean to say that we had  
15 proven that they were all negligent and the negligence  
16 caused his injuries. He says that. It's not what he  
17 means. Okay? It's not what he means. So but this is  
18 what he means.

19           He says, "We're not asking you to punish him  
20 and not give him anything."

21           Well, I'm not so sure that's true, you know.  
22 I think they collectively and individually are telling  
23 you to nonsuit, is what I call it, Mr. Cox. They are  
24 telling you. Because if, in fact, each one of them --  
25 and I'm going to go over the jury verdict sheet with

1 you. If each one of them is saying to you you should  
2 put -- you should say no to negligence with reference  
3 to my client -- that's what they're saying -- no to  
4 proximate cause. If you say yes to negligence, got  
5 another chance to let them out. Right? If, in fact,  
6 they're saying that to you and each one of them is  
7 saying that, all of them over there at that table, at  
8 that table. That's his words, not mine. Okay? Every  
9 one over there is asking you to do that.

10 And let's -- let's think about -- because  
11 when you say things fast, sometimes you -- you don't  
12 really get the meaning. I miss meanings a lot of times  
13 when people tell me these things fast. And what he's  
14 saying to you is that each one of them want you to find  
15 that they're not responsible.

16 Well, if they're not responsible and they  
17 haven't proven that Mr. Cox bears any responsibility  
18 because they have the burden to do that, then what  
19 they're telling you is to -- I use the term throw him  
20 out of court; they didn't like that -- so nonsuit him,  
21 not give him your verdict is -- is more  
22 straightforward. Okay?

23 Now, but we're not asking you to punish him  
24 and not give him anything.

25 Well, if you are telling the jury -- now,

1 understand that it's a little bit different when you're  
2 trying a case totally at the same time. And, you know,  
3 we've dealt with that with reference to not being able  
4 to talk about Mr. Cox's injuries, the extent of them,  
5 and all of that. And yet he's saying not give him  
6 anything.

7           Well, you're not giving him anything right  
8 now. He's not asking you for anything. We're asking  
9 for your consideration. We're asking you to look at  
10 the evidence in the case and take it. And it's like  
11 baking a cake. You know, if you leave out certain  
12 ingredients, the cake either crumbles, it falls, it  
13 doesn't taste so good -- I like cake -- and it doesn't  
14 taste so good. That's what it is.

15           So the ingredients here are the evidence and  
16 the law and reasonable inferences that you can draw  
17 from the evidence, circumstantial, direct. That's your  
18 job. Okay?

19           So he now says that -- now, I don't know --  
20 "not give him anything," that's for Phase 2. I mean,  
21 in -- in Phase 2 -- let's be clear. If, in fact,  
22 Mr. Cox is entitled to your verdict -- I'm sorry, which  
23 I believe he is, but that's up to you -- based on the  
24 evidence and the law, you give him the verdict.

25           No matter how you break up the



1 responsibility -- which I mentioned to you, I believe  
2 earlier, and I will talk about it again today. No  
3 matter how you break up the responsibility or what  
4 percentages you give to each one of these defendants  
5 being liable to Mr. Cox, no matter what you do with  
6 that, in Phase 2, when -- when we have an opportunity,  
7 if we're successful in Phase 1, to talk about the  
8 damages in the case, that's the time when you decide  
9 anything or something, no matter how big or small.  
10 There's no limit either way.

11               So your verdict in Phase 1 doesn't affect  
12 Phase 2 because Phase 2 is, again, based on the merits  
13 of the case. You see? So you're just dealing with now  
14 negligence and proximate cause. And if you believe  
15 that Mr. Cox is entitled to a large amount of money or  
16 a small amount of money, you're not thinking about that  
17 now. That has nothing to do with this case. All  
18 you're thinking about is what is the responsibility of  
19 the parties. Later on, you decide how much to give him  
20 if anything. That's up to you. It's not up to me.  
21 Okay?

22               So this is Phase 1. And this is a strange  
23 set of terms to use in Phase 1. Okay? So now he says,  
24 "We're not asking you to punish" -- "we" meaning the --  
25 the table. "We're not asking you to punish him and not

1 give him anything if it's proven by some other evidence  
2 than his uncorroborated testimony."

3           Okay? I don't believe his testimony is  
4 uncorroborated. I think all of his testimony is  
5 actually corroborated. All right? So let's look.

6           And, you know, you've heard -- and you know  
7 that Mr. Popovich and others of the lawyers talked  
8 about how Mr. Cox is deceiving you and he's  
9 manipulating you. And I don't -- I -- I understand  
10 that, if you want to win a case, you sometimes go a  
11 little further than you should.

12           But I don't know what he's deceiving you  
13 about because this actually is -- is what happened. He  
14 was in the trick, the illusion. Any dispute about  
15 that? No. No dispute.

16           He wasn't told anything. Any dispute about  
17 that? No dispute.

18           He did the runaround. Any dispute about  
19 that? No dispute.

20           He ran. No dispute. He went up the incline.  
21 No dispute. There was dust. It was all over his  
22 clothing. No dispute. As a matter of fact, the  
23 lawyers told you -- a number of the lawyers said  
24 there's dust and -- you know, on the ramp there. Okay?

25           It was at least as dark as a parking lot at

1 night. No dispute. That's what Amy Lawrence said, and  
2 a number of the people in the case have now used that  
3 as an indication. Was it pitch black that you couldn't  
4 see anything? No. Okay. But it was at least as dark  
5 as a parking lot at night. No dispute.

6 He fell. No dispute. He was injured. No  
7 dispute. As a matter of fact, the lawyers in their  
8 closings say "We don't dispute that he was injured."  
9 Mr. Roberts says, "We don't want to punish him and not  
10 give him anything."

11 Well, it's hard to say that and then say  
12 nonsuit him or don't give him your verdict. Right?

13 And this is also very important for you to  
14 think about, that Mr. Cox gave a statement to MGM  
15 Officer Janson right after the accident. There's no  
16 dispute about that. He was on the witness stand. I  
17 asked him about it. And this is what it says.

18 "Gavin Cox stated to RO" -- reporting  
19 officer -- "that he was selected as part of the magic  
20 act for the David Copperfield show. Gavin Cox was  
21 exiting the stage, going outside and entering through  
22 the emergency exit doors near the Hollywood service bar  
23 at approximately 2035 hours when he slipped and fell.  
24 Gavin Cox stated he was in a hurry due to being told to  
25 hurry by the production staff."

1           Now, it's really, really important for us to  
2 understand that they are talking about Mr. Cox  
3 deceiving you, manipulating you, when every one of  
4 these things is undisputed in this case. There's even  
5 an accident report, and -- and this is written down by  
6 Mr. Janson. This is -- this is what Gavin Cox told him  
7 at the scene.

8           Now, when you're at the scene of an accident  
9 and you just fell and were injured, okay, and you get  
10 up and you're then going on, this is when he's  
11 deceiving the jury, five years ago almost? This is  
12 when you're telling exactly what happened. So every  
13 single thing is consistent, and it's the reason that  
14 we're entitled to your verdict, 100 percent of your  
15 verdict. The amount of money, hey, that's not for now.

16           Okay. So Mr. Roberts says, "That doesn't  
17 meet his burden of proof. There's no one else who can  
18 say it was too dark, it was so dark it was dangerous,  
19 other than Mr. Cox. That's the only testimony they  
20 rely on."

21           Well, wrong again. Dead wrong. Okay?  
22 Here's Mr. Carvalho.

23           "QUESTION: Do you know why it is they're  
24 saying or do you have any idea why they would  
25 be saying 'Watch your step' at the incline?"

1           Because it's dark," Mr. Carvalho says. "It's  
2 usually dark, you know." That's what Carvalho says,  
3 not I. Doesn't work for me. Okay.

4           Amy Lawrence:

5           "QUESTION: All right. What? What do you  
6 think happened in terms of why you fell this  
7 evening?"

8           That was to Amy Lawrence.

9           "ANSWER: I don't know. I mean, it's  
10 dark."

11           Okay. So it's not true that only Mr. Cox  
12 says that it was dark when he's running the illusion.  
13 It's not true.

14           So now we did a little sheet for you that --  
15 to show that everything that Mr. Cox said is  
16 corroborated.

17           And, look, I believe that every one of you  
18 have been showing up here for all of these weeks  
19 because you are fair and open-minded. Otherwise, you  
20 know, what would be the point; right? So I know that  
21 you're going to give the kind of consideration to the  
22 case that's necessary.

23           But this is really it. This is it. He  
24 participated in the illusion. Everyone agrees with  
25 that. Corroborated by. Wasn't told anything. Kenner,

1 Carvalho, Copperfield, Yang, Lawrence, everybody agrees  
2 with that. Well, a lot of people.

3 Running during the illusion. Yes, Kenner,  
4 Carvalho, Yang, Lawrence, Weall.

5 Dark. Yes, Carvalho, Anderson, Lawrence.

6 Chaotic. Yes, Carvalho, Lawrence, Anderson.

7 This is all the testimony in the case. This  
8 isn't what Morelli made up.

9 Incline. Yes, Carvalho, Baker, Yang, Kenner.  
10 And if you remember, I had a slide where Mr. Kenner  
11 said, you know, you should warn about it.

12 No warning. Yes, Carvalho, Kenner,  
13 Habersack. Everyone knows there was no warning given.  
14 They're now saying they didn't have to.

15 Dust. Yes, Yang, Baker, clothing, pictures.

16 He fell. Yes, everyone agrees with that,  
17 including the video. That's the one thing you can see.

18 He got injured. Yes, everyone agrees with  
19 that.

20 You know, I don't know what else the  
21 plaintiffs could bring you in this case in order to be  
22 entitled to your verdict. That's the whole case right  
23 there. And Mr. -- Mr. Roberts says, if what he says is  
24 corroborated, then it's a different story and we should  
25 get your verdict. There it is.

1           So let's talk about negligence per se  
2 violation of the building code.

3           Now, I'm going to talk about this, and I'm  
4 going to let you read the law when you have an  
5 opportunity to do that. But I mentioned to you earlier  
6 that, when you retain an expert in a case, you can't  
7 cherry-pick what you like and what you don't. Right?

8           Now, we, meaning -- okay. We, meaning this  
9 table, okay, we didn't know anything about this, you  
10 know, violation of the building code. Mr. Baker said  
11 it. He said it violates the building code.

12           And now that he has said that it violates 1  
13 in 12, and 1 in 12 is what is supposed to be, you know,  
14 looked at in this case, that that's the reason that  
15 there's a violation, now Mr. Popovich is arguing --  
16 they're all arguing -- against their own expert.

17           They want you to believe that their expert is  
18 right about where Mr. Cox landed, not where he fell.  
19 Two different things. We'll talk about it. They want  
20 you to believe every single thing that he says -- not  
21 believe, but they wanted to be accurate about  
22 everything else but not about this.

23           So they're now saying that Mr. Baker is  
24 wrong, 1 in 12 doesn't apply. And we'll talk about  
25 that in a few minutes. However, they say now that 1 in

1 8 applies, and however Dr. Yang says that this ramp  
2 violated 1 in 8 also.

3 Your Honor, could we take a ten-minute break.

4 THE COURT: Yes, we can. Is ten minutes  
5 okay?

6 MR. MORELLI: Yeah.

7 THE COURT: Ten minutes? Okay.

8 During the recess, you're admonished not to  
9 talk or converse among yourselves or with anyone else,  
10 including, without limitation, the lawyers, parties,  
11 and witnesses, on any subject connected with the trial  
12 or read, watch, or listen to any report of or  
13 commentary on the trial or any person connected with  
14 the trial by any medium of information, including,  
15 without limitation, newspapers, television, the  
16 internet, and radio, or to form or express any opinion  
17 on any subject connected with the trial until the case  
18 is finally submitted to you.

19 Be outside the courtroom a bit to the south  
20 in 20 after 3:00. Okay?

21 (Whereupon a short recess was taken.)

22 (The following proceedings were held  
23 outside the presence of the jury.)

24 THE COURT: Department is again in session.  
25 We're back on the record. You may be seated.



1           Mr. Roberts.

2           MR. ROBERTS: Yes, Your Honor. Thank you.

3           At this time, I would renew Backstage's  
4 request for proposed Backstage Instruction No. 1, which  
5 was marked at the settlement conference on May 22nd,  
6 2018. It reads, "A dangerous or unsafe condition will  
7 not be presumed from the accident alone, and the mere  
8 fact that the pedestrian slipped and fell upon the  
9 sidewalk is insufficient to warrant a recovery. In  
10 order to recover, the plaintiff has the burden of  
11 proving why he fell and that the negligence of the  
12 defendant was the cause of the fall."

13           It's my understanding that the Court denied  
14 this because it was duplicative of the Gunlock  
15 instruction, which the Court gave.

16           The problem is the Gunlock instruction  
17 doesn't have the second sentence, which instructs the  
18 jury that the plaintiff has the burden of proving why  
19 he fell and that negligence of the defendant was a  
20 cause of the fall.

21           That has now become prejudicial error because  
22 Mr. Morelli just argued to the jury that the  
23 instructions do not require the plaintiff to prove why  
24 he fell. And that's directly contrary to the Eggers v.  
25 Harrah's Club case and also to Rickard v. City of Reno.

1           So he has just made an instruction directly  
2 contrary to Nevada law based upon the jury instructions  
3 the Court gave. We were entitled to this instruction  
4 if it's an accurate statement of law, and the failure  
5 to give it is now prejudicial based on arguments of  
6 plaintiffs' counsel.

7           MR. POPOVICH: MGM joins.

8           MS. FRESCH: Copperfield joins.

9           MR. POPOVICH: So would Team.

10          MR. MORELLI: Shocker.

11          MR. DEUTSCH: We would oppose, Your Honor.

12          MR. POPOVICH: Shocker.

13          MR. DEUTSCH: Your Honor, what they're trying  
14 to suggest --

15          THE COURT: Instruction No. 19 says, the  
16 second paragraph, "Plaintiffs are seeking damages based  
17 upon a claim of negligence. The plaintiffs have the  
18 burden of proving by a preponderance of the evidence  
19 all the facts necessary to establish that a defendant  
20 was negligent and that the negligence was a proximate  
21 cause of plaintiffs' accident."

22          MR. DEUTSCH: That's exactly right, Your  
23 Honor.

24          MR. ROBERTS: Right. And Mr. Morelli pointed  
25 at that instruction and said, because of this

1 instruction, he doesn't have to show why.

2           And it gets worse than that, Your Honor. He  
3 put up a slide which has everything that is undisputed.  
4 He talks about various elements -- the runaround, he  
5 ran, the incline, the dust, the darkness -- and then he  
6 says, "He fell; he was injured. That's my case.  
7 Doesn't matter why he fell. It doesn't matter if it's  
8 a slip or a trip."

9           THE COURT: All right.

10           MR. ROBERTS: In Rickard summary judgment was  
11 appropriate because the -- even though the plaintiff  
12 fell on the sidewalk, he claimed to have slipped, but  
13 there was no evidence of why he fell and, in fact, the  
14 way he slipped was contrary to the law of physics.

15           It's exactly the same thing we have in this  
16 case. He's argued it doesn't matter whether he slipped  
17 or tripped; all that matters is that he fell. That's  
18 contrary to Nevada law, and without this instruction --

19           THE COURT: I've told the jury that arguments  
20 are not evidence. I've instructed the jury. Your  
21 motion is noted, and it's denied.

22           MR. ROBERTS: Thank you, Your Honor.

23           MR. DEUTSCH: Your Honor, just that one thing  
24 that wasn't done, and it's been sitting around for a  
25 couple of days, the deposition of Dennis Funes-Navas

1 was never officially published. So we just wanted  
2 to -- we thought we had done it a while ago. We were  
3 informed it was never officially done. So we wanted --

4 THE COURT: For the record, so ordered. It  
5 will be published.

6 MR. CALL: Your Honor, Team moves to have  
7 admitted plaintiffs' redacted Exhibits 1 and 2, which  
8 were asked to be moved into evidence during  
9 Mr. Strassburg's cross-examination. And they were not  
10 moved in -- admitted into evidence. Plaintiffs were  
11 going to look to see if they had any objections, and  
12 they did not make any at the time.

13 THE COURT: Plaintiffs' 1 and 2.

14 MR. DEUTSCH: Well, I just -- I don't have a  
15 recollection of this, Judge. I would just like to go  
16 back to the transcript to see what -- it's just two  
17 pages. I don't think it's a problem, but I'd like to  
18 go back and see --

19 MR. CALL: It's page 35.

20 MR. DEUTSCH: Of the transcript?

21 MR. STRASSBURG: 34, May 11.

22 MS. FRESCH: What exhibit?

23 MR. CALL: It's just -- it's redacted.

24 There's --

25 THE COURT: Plaintiffs' Exhibits 1 and 2

1 proposed?

2 MR. CALL: Yes.

3 THE CLERK: Are these ones that were  
4 redacted? Did you give me the redacted ones?

5 MR. CALL: No, I don't think we --

6 MR. DEUTSCH: May 11th, page what?

7 MR. CALL: Unless somebody did that I'm  
8 unaware of.

9 THE CLERK: So I can't send this back until I  
10 get the redacted ones.

11 MR. DEUTSCH: Hold on. What was given was  
12 not redacted at the time.

13 MR. STRASSBURG: Yes. I e-mailed it to you.

14 MR. DEUTSCH: So the only issue is the one  
15 sentence, which I think should be redacted, about the  
16 injury.

17 MR. STRASSBURG: I took that out.

18 MR. DEUTSCH: So let me see it. I don't  
19 think we have any problem. All right.

20 THE CLERK: But do I have a hard copy of  
21 that?

22 MR. CALL: We'll get it.

23 (Discussion was held off the record.)

24 MR. POPOVICH: I think I'm okay, probably  
25 should be. But I would still like to look at them.

1 MR. MORELLI: We can do it after.  
2 MS. FRESCH: Yes.  
3 THE COURT: Keep in mind that once this goes  
4 to the jury --  
5 MR. MORELLI: No, I understand.  
6 THE COURT: -- the exhibits --  
7 MR. MORELLI: It could go to the jury ten  
8 minutes later.  
9 THE COURT: All right.  
10 MR. MORELLI: Actually -- actually, in some  
11 jurisdictions, they don't get the evidence unless they  
12 ask for it.  
13 MR. RUSSELL: Here, they get it all.  
14 MR. DEUTSCH: Let's go.  
15 MR. MORELLI: That's not funny; it's true, a  
16 lot of places.  
17 MR. DEUTSCH: Let's just go. Let's continue.  
18 MR. MORELLI: This is not the only place in  
19 the universe, by the way.  
20 THE COURT: Yeah, we've heard that.  
21 MR. MORELLI: All right. I'm going to stand  
22 here so we can rock and roll.  
23 THE COURT: Ready? Ready for the jury, then?  
24 So, in other words --  
25 MS. FRESCH: Yes.

1 THE COURT: -- what you want to do is you  
2 want to take a look at it before it's actually --

3 MR. DEUTSCH: Yes.

4 MR. POPOVICH: The final proposed.

5 MR. DEUTSCH: The final printed ones, printed  
6 ones, not on his computer, printed. They'll take 30  
7 seconds, and we have no problem.

8 THE COURT: All right. Very well. Let's  
9 have the jury come back in.

10 (The following proceedings were held in  
11 the presence of the jury.)

12 THE COURT: You may be seated.

13 Do counsel stipulate that the jury is now  
14 present?

15 MR. MORELLI: Yes, Your Honor. So  
16 stipulated.

17 MR. POPOVICH: Yes, Your Honor.

18 MR. ROBERTS: Yes, Your Honor.

19 THE COURT: You may proceed.

20 MR. MORELLI: Okay.

21 Okay. So I mentioned already to you that MGM  
22 is now arguing against their own expert. And you have  
23 to recognize that if MGM violated the building code,  
24 you must find that MGM was negligent.

25 Now, after Dr. Baker said 1 in 12 applies to

1 this ramp, and it was violated, MGM is now arguing that  
2 their expert is wrong and that 1 in 8 applies; however,  
3 Dr. Yang says that the ramp violates 1 in 8. So just  
4 to -- remember that if, in fact, they violated the  
5 building code, it's negligence per se.

6           It's not going to work unless it's on. There  
7 you go. Okay. So just going through this, "If you  
8 find that a party violated the building code just read  
9 to you, it is your duty to find such violation to be  
10 negligence by MGM Grand Hotel, and you -- you should  
11 then consider the issue of whether the negligence was a  
12 proximate cause of the accident."

13           Now, this is what Mr. Popovich says: "I'm  
14 doing my best to let you know that, for Mr. Cox, I  
15 would agree that the 1 in 8 applies. The ramp complied  
16 therefor." Okay? But that's not what Dr. Yang says.  
17 Dr. Yang says 1 in 8 in 7.13. And then he says at one  
18 point it's 16 degrees and it's 11 -- 10 or 11 degrees  
19 at another point, the ramp.

20           So Dr. Yang is saying even if -- even if you  
21 find that 1 in 8 applies to this and that MGM's own  
22 expert, Dr. Baker, is wrong, it still violates 1 in 8.  
23 That's what Dr. Yang says.

24           So now let's talk about the location of the  
25 accident. I state to you Mr. Cox landed where he



1 landed. You could see it on the video. But where he  
2 landed doesn't tell you much. They want you to say  
3 that the ramp had nothing to do with it. Now, why do  
4 they want to say that the ramp had nothing to do with  
5 it? It's obvious. Because it's out of code, violated  
6 the building code, which is negligence. Because it's  
7 unexpected, not obvious. And they didn't warn. I  
8 mean, that's all straightforward. It's unexpected and  
9 not obvious and they didn't warn.

10 Now, Mr. Popovich in his closing talked about  
11 the ramp. He said, "Yesterday, we talked about the  
12 fact that plaintiffs can't prove that MGM was  
13 responsible for just any risk; has to be unreasonable  
14 risk. We then -- I then talked about the fact that  
15 they're -- there were no permanent conditions in the  
16 area where the accident occurred which in any way  
17 caused an unreasonable risk to be present for Mr. Cox  
18 negotiating that area to head back into the casino."

19 Well, I submit to you that, actually, there  
20 were. There was the ramp, and the ramp is a permanent  
21 condition, and it did create an unreasonable risk to  
22 the participants running there.

23 And just so that we can -- we can speak about  
24 this -- this area where this accident occurred for  
25 Mr. Cox, if you remember, Mr. Roberts talked about the

1 fact -- and he used the term at least five or six  
2 times, "substantially similar" -- that the fact that  
3 Mr. Cox fell where he fell, that Amy Lawrence fell  
4 there, that Tara Anderson fell there was brought to you  
5 for notice. Okay? But Mr. Roberts says those  
6 accidents weren't substantially similar.

7           And I submit to you substantially similar  
8 doesn't have to mean that they're all wearing the same  
9 clothing. Okay? It was -- this accident -- Mr. Cox,  
10 Amy Lawrence, Tara Anderson -- all happened in the same  
11 area, all happened when they were negotiating that  
12 ramp. That's what the evidence is in this case. Can't  
13 be any more substantially similar than that.

14           Okay. So -- so what about the ramp? Now,  
15 this is what Mr. Roberts says: "He's on concrete" --  
16 and it's important for us to listen to the words --  
17 "What about the ramp? Well, the ramp may not have been  
18 obvious." Mr. Roberts says that. The ramp may not  
19 have been obvious. I agree with him. Except that  
20 I'm -- I would say a little more strongly. The ramp  
21 wasn't obvious. Okay?

22           "You've seen the pictures. I don't know that  
23 I would notice it if I was walking it." He wouldn't  
24 notice it. "It doesn't look like anything that's  
25 unusual if you walk around Vegas for a while. There

1 are ramps on sidewalks up and down. People navigate  
2 them all the time." But he's rounding the corner, and  
3 there it is. So he's thinking, you know, there might  
4 be ramps on sidewalks up and down that people navigate  
5 in the light and they're walking, or even with  
6 streetlight, but he's rounding the corner, and there it  
7 is.

8 I think, when it comes to the ramp, the  
9 question is it probably wasn't obvious to him until he  
10 was on it. So that's not a defense. That's  
11 Mr. Roberts who says the fact of this ramp being  
12 obvious is not a defense, because he's rounding the  
13 corner and there it is.

14 So what does Dr. Baker say about it?

15 "QUESTION: Well, then answer is that if  
16 it's steeper than that -- and we're talking  
17 about now the grade -- it could be dangerous  
18 and people could trip or fall or it could cause  
19 a disruption in someone's gait as they're  
20 running."

21 Dr. Baker: "That is the idea."

22 That's the idea, and it's the reason that you  
23 have to have the incline be within the -- the limits  
24 that are set by the building code. And it's also the  
25 reason why you're creating an unreasonable risk of harm

1 to these people when you don't warn them. It would  
2 only take you 10 or 15 seconds.

3 Now, he was only two strides from the ramp  
4 when he landed. Now, it's important for us to -- to  
5 deal with this because there's been a lot of talk about  
6 where Mr. Cox was. And it's not where he landed; it's  
7 where he fell. Then -- he's running along and he loses  
8 his balance, he falls forward. Everyone agrees with  
9 that. And he lands -- he's 6-foot-4, and he lands.  
10 What does Dr. Yang say? "Probably two strides away  
11 from the top of the ramp." Two strides.

12 He says, "How -- how many feet is it? And  
13 from the top of the ramp to where his feet ended up,  
14 you said, is only 9 or 10 feet. About 10 feet. Is  
15 that right?"

16 "Yes. Between 9 and 10 feet."

17 That's not what Ms. Fresch was trying to tell  
18 you. It's not what Mr. Roberts was trying to tell  
19 you -- 19 feet, 15 feet -- 9 or 10 feet, two strides  
20 from the ramp. Loses his balance, goes forward, and he  
21 falls. This isn't complicated; it's common sense.

22 And -- and -- and the defendants have told  
23 you that the reason that we shouldn't prevail in this  
24 case is not because we don't have all the evidence.  
25 Because you'll read the charge. When you look at the

1 law, it says that if the evidence is corroborated, you  
2 must use it if it's corroborated. And all the evidence  
3 in our case is corroborated. So you can't just throw  
4 it out and forget about it. Right? So this is what  
5 really happened.

6 Now, I know that the -- the -- my opinion  
7 that the -- the expert came in and he's telling you I  
8 didn't -- I didn't dispute any of it. I didn't  
9 cross-examine him or neither did Mr. Deutsch with  
10 reference to that. That's what he says. That's  
11 normal. He's going forward, and that's where he was.  
12 I know that they want the ramp out of the case because  
13 the ramp is an important issue in this case because  
14 it's unreasonably dangerous, especially when you don't  
15 know about it. So you have to warn about it. That's  
16 what a reasonably prudent person would do. All right?

17 So Mr. Popovich told you, "We did not have to  
18 take reasonable precautions because there was nothing  
19 there to be seen or concerned with." Well, that  
20 doesn't make any sense. You have to take reasonable  
21 precautions because it's your premises, it's your ramp.  
22 You didn't warn about it. You didn't change it. It's  
23 out of code. You're charged with the responsibility of  
24 knowing that. Come on. I mean, it even -- it doesn't  
25 even sound right. We don't have to take reasonable

1 precautions? Yes, you do.

2           The -- I wanted to just bring this to your  
3 attention, not because it has anything to do with the  
4 case specifically, it just has to do with whether or  
5 not I'm -- I'm telling you something and trying to  
6 confuse you or deceive you.

7           Mr -- Mr. Roberts, he made a very, very big  
8 point. And he took the deposition and he threw it on  
9 the table next to me, which I didn't appreciate, but  
10 forgetting about that for a moment because I thought it  
11 was not respectful to do that. But I think that, first  
12 of all, he was wrong because, yes, Mr. Kenner -- when  
13 we were talking about brisk walk, "How would you  
14 describe in most instances the pace that participants  
15 would move?"

16           "I would say brisk walk."

17           That was Weall. Carvalho said it, brisk  
18 walk. Copperfield said brisk walk. And I -- when I  
19 was questioning Mr. Kenner, I never said that he said  
20 it in his deposition because I realized that I had  
21 misspoken in my opening statement. And I said to  
22 him -- okay? -- when I was questioning, "If I was to  
23 say to you" -- this is my question -- "that nowhere in  
24 your transcript during your deposition you used the  
25 term 'brisk walk,' would you disagree with me?"

1           He says no.

2           Because I realized that he hadn't said it in  
3 his transcript. He just said here that he might have,  
4 on certain occasions, used the term "brisk walk." No  
5 one's trying -- that's certainly not a point big enough  
6 for anyone to try to confuse anybody about, but I was  
7 being straight about it to begin with.

8           So let's now talk about -- I didn't -- you'll  
9 notice that I have not really said a lot about  
10 Ms. Fresch attacking me or saying things that -- that I  
11 disagreed with. But there are a number of things that  
12 she said that I disagree with. And one of the things  
13 that was confusing to me was that, at one point toward  
14 the end of her closing, she said, "Okay. Why was he  
15 sued in this?" meaning Mr. Copperfield. "He wasn't  
16 sued because he was John Smith; he was sued because he  
17 was David Copperfield, a very famous celebrity."

18           Really? That doesn't make a lot of sense  
19 because, as I said to you in one of my 38 closing  
20 arguments, I said to you it made it more difficult. So  
21 we're not suing you, Mr. Copperfield, because you're  
22 famous. We're suing you because you were negligent.  
23 That's the reason. So it doesn't make sense that  
24 anybody would be suing anybody because they're famous;  
25 it only makes your life more difficult.

1           So Ms. Fresch says, "He does not have any  
2 personal participation in that portion of the  
3 illusion," meaning the runaround. "He's on stage.  
4 He's with the audience." So, in other words, how could  
5 he be personally responsible if, in fact, he's up on  
6 the stage?

7           Well, personal liability by a person -- by  
8 personal participation in the wrongful activity. You  
9 designed this illusion. You designed the route. You  
10 know what's happening. I'm not going to belabor  
11 whether or not I agree with the things that he said to  
12 you that he doesn't remember. You know what my opinion  
13 is about that. Okay? But of course he's personally  
14 liable. Every -- his fingerprints are on everything.  
15 This is his illusion. This is -- he brought it there.  
16 So it doesn't make any sense that he's not responsible  
17 personally.

18           Okay. So let's see. Let's talk about the  
19 preponderance of the evidence. So "the preponderance  
20 of the evidence" -- sounds like, you know, a big deal.  
21 It's not such a big deal -- "that a defendant was  
22 negligent and that the negligence was a proximate cause  
23 of the plaintiff's accident. The term 'preponderance  
24 of the evidence' means such evidence as, when weighed  
25 with that opposed to it, has more convincing force and



1 from which it appears that the greater probability of  
2 truth lies therein."

3 And, actually, it has to be only the  
4 slightest bit more. Not that I don't think that we're,  
5 like, much, much more. And I actually have a slide to  
6 show you what it needs to be, which is just slightly  
7 more in order for us to prevail. And this is a slide  
8 that Mr. Strassburg showed you. Interesting that he  
9 has bricks here, but -- but this is a slide that he  
10 showed you. Okay? And he can't get out of  
11 construction no matter what he does. You know what I  
12 mean? He should have put dust over here.

13 But this is -- this is not what we need to do  
14 to prove a case to you. This is the preponderance of  
15 the evidence that is appropriate, you know, in this  
16 case. Now, with that understanding, I'm --

17 Mr. Deutsch, I'm going to ask you to put up  
18 the jury verdict sheet.

19 MR. DEUTSCH: Can I just have the ELMO,  
20 please?

21 THE COURT RECORDER: Just a moment.

22 MR. DEUTSCH: Sure.

23 MR. MORELLI: And, as he's doing that, I -- I  
24 want to go over this with you, but I also want to state  
25 to you that this isn't, you know, about movies that we

1 might like. You know, Mr. Roberts likes a lot of  
2 movies, you know, "Raiders of the Lost Ark" when he  
3 spoke to you and told you that you didn't have to  
4 deliberate in this case. He referenced "12 Angry Men."  
5 He's spending too much time at the movies.

6 But this isn't a movie. This isn't a joke.  
7 This has real consequences. It isn't like it is in the  
8 movies. You know, this is the real world. And I know  
9 you know that because you've been showing up for a very  
10 long time in this case. And I've told you how much we  
11 appreciate that.

12 So I -- I say to you that Question 1 is "Did  
13 you find by a preponderance of the evidence that  
14 defendant MGM Grand Hotel was negligent?" Well, in  
15 fact, you know, we just spoke about the fact that, with  
16 reference to the ramp, you know, I -- I think that,  
17 based on what Mr. Popovich has said in his closing, he  
18 understands that the ramp is a big problem for him.  
19 And I think the ramp is a very, very intricate part and  
20 very crucial part of why this accident happened and why  
21 the other two accidents happened of the other two women  
22 who came and testified.

23 And preponderance of the evidence. Okay?  
24 And all of the evidence in this case was corroborated,  
25 all of the evidence by Mr. Cox. Every single thing

1 that he said as we went through the checklist is  
2 everything that's true in this case.

3 Now, was it a proximate cause of the  
4 accident? Well, the MGM Grand not only owns the  
5 property where the ramp is, but, like I said earlier,  
6 they have total participation in this illusion.  
7 They've signed on to it. Even with reference to the  
8 dust, they were the ones who said you could put the  
9 dumpster there. So their participation in this case is  
10 much more than just the ramp because they are working  
11 the route along with the other stagehands, their  
12 employees.

13 Now, it doesn't have to be the only cause; it  
14 has to be one of the causes. And I submit to you that  
15 not only were they negligent but that negligence was a  
16 proximate cause of what happened to Mr. Cox.

17 Question 2, "Do you find by a preponderance  
18 of the evidence that the defendant David Copperfield,  
19 also known as David Kotkin, was negligent?" The answer  
20 is yes. And I told you all of the reasons with  
21 reference to this. All of this comes down -- every one  
22 of these questions, when you're answering these  
23 questions of whether they're negligent, it's under the  
24 circumstances, what they allowed to go on under the  
25 circumstances and the fact that they did not make an

1 effort to reduce the risk of injury. Read the law.

2 That's what it says.

3 This is all about the evidence and the law.

4 It's not about -- you know -- and -- and the judge told  
5 you again today that, you know, what the lawyers say,  
6 in my opinion, is important, but it's not evidence in  
7 the case. It's not evidence; right? The evidence and  
8 the law, that's all I'm asking. That's all I'm asking  
9 is for you to look at it.

10 And I believe that you will find that,  
11 certainly, Mr. Copperfield, whose illusion it is,  
12 who -- who set up the route, who never changed it, and  
13 I believe had notice -- had notice -- had notice that  
14 this particular illusion was causing people to fall and  
15 get injured no matter what he said -- because I don't  
16 think it's credible. Okay? I think he was on notice.  
17 Never changed anything. Never changed anything.

18 So not only was he negligent in not warning  
19 anybody and not telling them, "Hey, listen, you're  
20 going to go through this and that. You can stop  
21 anytime you want. Don't worry about it. We're all  
22 good," things like this wouldn't be happening. And,  
23 certainly, the -- the negligence was a proximate cause  
24 of the accident, because if they didn't set up this  
25 way, it couldn't happen.

1           You're in the dark. You're running. You  
2 don't know where you're going. You're going up an  
3 incline. It really is preposterous to think that you  
4 would set this up and no one would get injured. You're  
5 not making -- you're not making or taking ordinary care  
6 when you're doing something like that.

7           Next, "Do you find by a preponderance of the  
8 evidence that David Copperfield Disappearing, Inc., was  
9 negligent?" I'm answering this yes and yes because he  
10 controls this illusion. So he personally is involved  
11 in doing everything. But, certainly, his company is  
12 involved with MGM. They've decided that this is the  
13 way they're going to do things. This is the route.

14           And I said from the beginning, when -- when I  
15 talked to you at first -- we just lost it -- that -- so  
16 I say to you that -- yes and yes to Question 3.

17           Let's go to Question 4.

18           Question 4, "Do you find by a preponderance  
19 of the evidence that defendant Backstage Employment and  
20 Referral was negligent?"

21           Well, we know that Mr. Kenner, who's the  
22 president of Backstage, was involved in designing the  
23 route. You know he's the executive producer. You know  
24 that Backstage employees are working only to do this  
25 illusion for Mr. Copperfield. So how could they not be

1 negligent in this case? Every single thing they did,  
2 they didn't warn, they're just -- they're liable in  
3 this case. There's no question about it.

4 What's the next, Mr. Deutsch?

5 "Do you find by a preponderance of the  
6 evidence that Backstage Employment and Referral, Inc's  
7 negligence was a proximate cause of the accident? I  
8 think that obviously, yes, that it was a proximate  
9 cause, because, without their negligence, the accident  
10 wouldn't happen.

11 Next.

12 Now, I spoke to you about Team Construction.  
13 And I'm going to speak to you again about it. I'm  
14 telling you, and I've told you before, that they  
15 certainly -- as we saw, their broom clean didn't work  
16 out so good. Now, Mr. Strassburg tells you that he  
17 only has to deal with the custom and practice. He only  
18 has to be broom clean.

19 Well, that's true that that's relevant for  
20 you to think about and use to decide, but it's not the  
21 law. Okay? So even if you found that they followed  
22 the custom and practice, that's not the law. It still  
23 has to live up to what the law says, which is whether  
24 or not that care was ordinary care and whether it was  
25 good enough. So you have to read the law on that,

1 because the law is not he followed the custom and  
2 practice and therefore he's off the hook. He said it a  
3 lot of times. It's not true. It's not -- it's not  
4 accurate. Okay?

5 And I think that they were negligent. Okay?  
6 And I think that their negligence certainly was a  
7 proximate cause. The dust was a cause. Now, you know  
8 and I know that the other accidents of Amy Lawrence and  
9 Tara Anderson -- and Tara Anderson happened and dust  
10 wasn't involved as far as we know. Okay?

11 So I'm telling you that this illusion was  
12 dangerous to begin with. The dust, was it an added  
13 factor? Did it cause -- was it one of the multiple  
14 causes of this accident? I submit to you yes. But, if  
15 you remember correctly, let's go to -- and I think it  
16 was a proximate cause.

17 Could we go to the last --

18 Now -- okay. So yes and yes.

19 So now let's go to Question 6. And  
20 Question 6 says, "Do you find by a preponderance of the  
21 evidence that Gavin Cox was negligent?"

22 There's no evidence in this case that -- that  
23 Gavin Cox was negligent. I -- I listened to the  
24 closing arguments, that he missed a step, that he  
25 didn't bring his foot up enough. And it doesn't make

1 any sense because, first of all, there's no evidence of  
2 that. And, second of all, when you put somebody in a  
3 position like you put him, running in the dark, running  
4 up an incline, and -- and you don't tell anybody where  
5 they're going, they don't know where they're going, you  
6 have to be responsible for this.

7           So Mr. Cox is not responsible. So the answer  
8 to that is no. And then you don't have to answer no to  
9 the second part because it certainly wasn't a proximate  
10 cause of what happened.

11           Okay. So now I'm going to repeat to you what  
12 I told you to begin with. And I think you remember  
13 what I said, but I will repeat it. I believed then and  
14 I believe now the same thing.

15           I believe that MGM Grand is 20 percent  
16 responsible. I think that David Copperfield is  
17 25 percent responsible. I think that his company is  
18 25 percent responsible. I think Backstage is  
19 20 percent responsible. And I think Team Construction  
20 is 10 percent responsible.

21           And that adds up to 100 percent. And the  
22 reason why that 100 percent is very important at this  
23 point is because I'm 100 percent finished. Okay? And  
24 so yay.

25           So I thank you for your attention. Now go do



1 what you know is the right thing. That's all you have  
2 to do is what you believe, based on the evidence and  
3 the law, is the right verdict.

4 Thank you.

5 THE COURT: Thank you, Counsel. That  
6 concludes his summation.

7 Just stand by a moment.

8 All right. The clerk will now swear the  
9 officers to take charge of the jurors and the alternate  
10 jurors.

11 THE CLERK: You do solemnly swear that you  
12 will keep this jury together in some private and  
13 convenient place, where you will not permit any person  
14 to speak to them nor speak to them yourself unless it  
15 be by order of the Court, except to ask them whether  
16 they have agreed upon a verdict, and that you will  
17 return them into court when they have so agreed, so  
18 help you God?

19 THE MARSHAL: I do.

20 THE LAW CLERK: Yes.

21 THE COURT: All right. At this time, I'll  
22 ask Germaine Prescott, Derick MacFawn, and David Allen  
23 to remain seated. The rest of you, please stand and  
24 accompany Bob to the deliberation room.

25 (The following proceedings were held

1 outside the presence of the jury.)

2 THE COURT: Okay. At this time,  
3 Ms. Prescott, Mr. MacFawn, and Mr. Allen, you will  
4 accompany Lorraine to my chambers on the other side of  
5 the wall there. And I'll be there in a few minutes to  
6 further inform you as to what will be happening. Okay?  
7 Thank you.

8 (Whereupon alternate jurors exited the  
9 courtroom.)

10 THE COURT: All right. Now, at this time, I  
11 will be leaving the bench to go into chambers. I'll  
12 meet with the alternates, and I'll ascertain from them  
13 whether they want to stay here pending deliberation or  
14 depart.

15 Does anybody have any objection to allowing  
16 the alternates to depart the courthouse so long as  
17 they're informed that they have to come back here on a  
18 moment's notice?

19 MR. ROBERTS: No objection, Your Honor.

20 MR. MORELLI: And not to discuss anything,  
21 sure.

22 THE COURT: Oh, yes.

23 MR. MORELLI: Absolutely.

24 MR. CALL: We were going to move in some  
25 evidence.

1 THE COURT: Yeah, but I mean, does anybody  
2 have a problem?

3 MS. FRESCH: No, Your Honor.

4 THE COURT: They may want to stay. And I'll  
5 tell you, my policy is to allow the jurors to  
6 deliberate as long as they want.

7 MR. MORELLI: Sure.

8 THE COURT: They can go into the night if  
9 that's what they want to do. A lot of times what  
10 happens is they'll meet and confer for a bit and select  
11 a foreperson or whatever and then want to come back  
12 tomorrow. I don't know what they're going to want to  
13 do here.

14 I also think that we'll -- we'll want the  
15 alternates to come back when the verdict is rendered.  
16 Correct?

17 MR. MORELLI: Yep.

18 THE COURT: Because these alternates are  
19 going to be involved in any Phase 2, at least as it  
20 stands right now. If it goes to a Phase 2, these  
21 alternates will also be involved in the jury at that  
22 time and hear further -- correct? I mean, is there any  
23 question about that?

24 MR. MORELLI: Well, we've never discussed  
25 that.

1 THE COURT: I mean, that's my -- you know,  
2 they were selected for the jury in this case, and they  
3 are alternates, and I think they remain alternates  
4 until --

5 MR. MORELLI: I think they should stay, for  
6 sure.

7 THE COURT: Okay. So, I mean, that's just --  
8 I'm giving you a heads-up in terms of my view of what  
9 happens here.

10 MR. MORELLI: Sure.

11 THE COURT: Because I've seen it done  
12 different ways as well.

13 MR. MORELLI: Sure.

14 THE COURT: Okay? So, in any event, as I  
15 indicated, I allow the jury to deliberate as long as  
16 they want. If counsel wants to leave or whatever, just  
17 make sure that we can bring you back here on a moment's  
18 notice. It occasionally happens -- in fact, it  
19 frequently happens -- that deliberating jurors have  
20 questions --

21 MR. MORELLI: Right.

22 THE COURT: -- and they'll --

23 MR. MORELLI: Exactly.

24 THE COURT: I want to make sure everybody is  
25 aware of what questions there are and what response

1 they think the questions should have. All right.

2 So you'll meet with the clerk here in a  
3 minute and make sure --

4 THE CLERK: We're going to admit  
5 Plaintiffs' 1 and 2?

6 THE COURT: I want to make sure we have  
7 everyone's phone numbers. Okay.

8 THE CLERK: Oh, that's just to write your  
9 phone numbers down.

10 THE COURT RECORDER: I already got their  
11 numbers.

12 THE CLERK: Okay.

13 THE COURT: So now we'll talk about the  
14 exhibits, right, 1 and 2.

15 MR. STRASSBURG: I just need some tape, if I  
16 could just make copies. I had to take off some more  
17 stuff.

18 THE CLERK: I'll go to the back and grab some  
19 tape.

20 MR. STRASSBURG: Okay. That would be great.

21 THE CLERK: You need Wite-Out or Scotch tape?

22 MR. STRASSBURG: I need a piece of tape.  
23 When they copy it, it blots it out.

24 MR. DEUTSCH: So we'll wait to see the final  
25 one.

1 MS. FRESCH: So it's not finalized yet?

2 Okay.

3 THE COURT: Counsel will want to make sure  
4 they are on the same page of what's going to be  
5 admitted.

6 MR. STRASSBURG: No pun intended.

7 THE CLERK: So these are the old ones that  
8 I'm taking out. We're going to replace them with the  
9 new ones. No, these were in the -- they were in the  
10 others, yeah. They're all brand-new.

11 (Discussion was held off the record.)

12 THE COURT: Are we ready for those exhibits?

13 MR. DEUTSCH: No. I think Alice is still  
14 making copies --

15 THE COURT: Okay.

16 THE COURT RECORDER: -- of the exhibits, so  
17 she'll be right back.

18 (Whereupon a short recess was taken.)

19 THE COURT: All right. We're back on the  
20 record, outside the presence of the jury.

21 MR. POPOVICH: Oh, Mr. Morelli, back on the  
22 record.

23 THE COURT: Want to make a record regarding  
24 the exhibits; right?

25 MR. MORELLI: Yes. Where is Mr. Deutsch, the

1 exhibit king?

2 MS. FRESCH: He was talking outside.

3 MR. FALLICK: I will get him, but he and  
4 Howard approved.

5 MS. FRESCH: See? Look what happens.

6 MR. POPOVICH: Wasn't my turn to watch him.  
7 I rotated off, 4:00.

8 MR. MORELLI: Something about exhibits.

9 MR. POPOVICH: We just need to make a record.  
10 I think I can state it, if nobody else is interested.

11 THE COURT: That's fine.

12 MR. POPOVICH: Exhibit 1 and Exhibit 2, all  
13 counsel have met and conferred. They have been fully  
14 redacted to the point where I believe all counsel are  
15 in agreement they can be submitted to the jury for  
16 consideration. And I believe Team Construction had  
17 moved them into evidence. I have no objection at this  
18 point.

19 MR. DEUTSCH: I looked back at the  
20 transcript. They did offer them subject to what we  
21 just did, and it looks like we just never got back to  
22 them. So we have redacted them so they can be added to  
23 the binders and brought back.

24 THE COURT: Very well. So ordered. They're  
25 admitted as redacted, okay, for the jury. Thank you.

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(Whereupon, Plaintiffs' Exhibit 1 was  
admitted into evidence.).

(Whereupon, Plaintiffs' Exhibit 2 was  
admitted into evidence.)

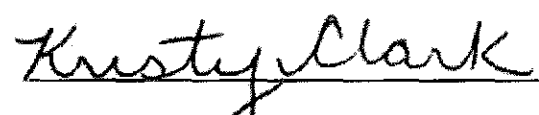
MR. MORELLI: Thank you, Judge.

THE COURT: I'll be in chambers.

(Thereupon, the proceedings  
concluded at 4:29 p.m.)

-oOo-

ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF  
PROCEEDINGS.



KRISTY L. CLARK, CCR #708



ORIGINAL

FILED IN OPEN COURT  
STEVEN D. GRIERSON  
CLERK OF THE COURT

MAY 29 2018

DISTRICT COURT  
CLARK COUNTY, NEVADA BY ALICE JACOBSON, DEPUTY

7:07pm

GAVIN COX and MINH-HAHN COX,  
Plaintiffs,

Case No.: A-14-705164-C  
Dept. No.: XIII

v.

MGM GRAND HOTEL, LLC; DAVID  
COPPERFIELD aka DAVID S. KOTKIN;  
BACKSTAGE EMPLOYMENT AND  
REFERRAL, INC.; DAVID COPPERFIELD'S  
DISAPPEARING, INC.; TEAM  
CONSTRUCTION MANAGEMENT, INC.,

VERDICT (Phase 1)

Defendants.

We, the jury in the above-entitled action, find the following special verdict on the following questions submitted to us:

Question 1:

a. Do you find by a preponderance of the evidence that defendant MGM Grand Hotel, LLC was negligent?

Yes ☒ No ☐

*If you answered "Yes" to subpart a., answer subpart b. If you answered "No" to subpart a., skip subpart b., and go to Question 2.*

b. Do you find by a preponderance of the evidence that MGM Grand Hotel's negligence was a proximate cause of the accident?

Yes ☐ No ☒

*Go to Question 2.*

///

A-14-705164-C  
VER  
Verdict  
4760266



1 **Question 2:**

2 a. Do you find by a preponderance of the evidence that defendant David Copperfield aka  
3 David S. Kotkin was negligent?

4 Yes ☒ No ☐

5 *If you answered "Yes" to subpart a., answer subpart b. If you answered "No" to subpart a., skip*  
6 *subpart b., and go to Question 3.*

7 b. Do you find by a preponderance of the evidence that David Copperfield aka David S.  
8 Kotkin's negligence was a proximate cause of the accident?

9 Yes ☐ No ☒

10 *Go to Question 3.*

11  
12 **Question 3:**

13 a. Do you find by a preponderance of the evidence that defendant David Copperfield's  
14 Disappearing, Inc. was negligent?

15 Yes ☒ No ☐

16 *If you answered "Yes" to subpart a., answer subpart b. If you answered "No" to subpart a., skip*  
17 *subpart b., and go to Question 4.*

18 b. Do you find by a preponderance of the evidence that David Copperfield's Disappearing,  
19 Inc.'s negligence was a proximate cause of the accident?

20 Yes ☐ No ☒

21 *Go to Question 4.*

22  
23 **Question 4:**

24 a. Do you find by a preponderance of the evidence that defendant Backstage Employment &  
25 Referral, Inc. was negligent?

26 Yes ☐ No ☒

27 *If you answered "Yes" to subpart a., answer subpart b. If you answered "No" to subpart a., skip*  
28 *subpart b., and go to Question 5.*

b. Do you find by a preponderance of the evidence that Backstage Employment & Referral, Inc.'s negligence was a proximate cause of the accident?

Yes \_\_\_\_\_ No \_\_\_\_\_

*Go to Question 5.*

**Question 5:**

a. Do you find by a preponderance of the evidence that defendant Team Construction Management, Inc. was negligent?

Yes \_\_\_\_\_ No ☒ \_\_\_\_\_

*If you answered "Yes" to subpart a., answer subpart b. If you answered "No" to subpart a., skip subpart b., and read the explanation below 5b.*

b. Do you find by a preponderance of the evidence that Team Construction Management, Inc.'s negligence was a proximate cause of the accident?

Yes \_\_\_\_\_ No \_\_\_\_\_

*If you answered "Yes" to one or more of 1b., 2b., 3b., 4b., or 5b. above, go to Question 6. If you did not answer "Yes" to any of 1b., 2b., 3b., 4b., or 5b. above, stop here, answer no further questions, and have your foreperson sign and date this Verdict.*

**Question 6:**

a. Do you find by a preponderance of the evidence that plaintiff Gavin Cox was negligent?

Yes ☒ \_\_\_\_\_ No \_\_\_\_\_

*If you answered "Yes" to subpart a., answer subpart b. If you answered "No" to subpart a., skip subpart b., and go to Question 7.*

b. Do you find by a preponderance of the evidence that Gavin Cox's negligence was a proximate cause of the accident?

Yes ☒ \_\_\_\_\_ No \_\_\_\_\_

*Go to Question 7.*

1 **Question 7:**

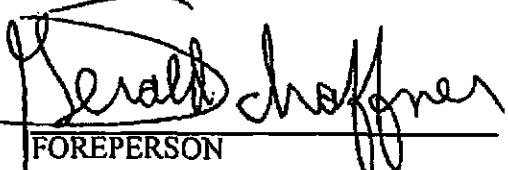
2 *For any party where you answered "Yes" to subpart b. above, enter the percentage of*  
3 *liability next to the party below. For any party for which you did not answer "Yes" to subpart b.*  
4 *above, enter a "0" next to the party.*

5 Using one hundred percent (100%) as the total combined negligence which acted as a  
6 proximate cause of Mr. Cox's accident, allocate the percentages of the total combined negligence  
7 that you find to be attributable to each party that does not already have a "0" entered on his or its  
8 line:

9	MGM GRAND HOTEL, LLC	<u>0</u> %
10	DAVID COPPERFIELD aka DAVID S. KOTKIN	<u>0</u> %
11	DAVID COPPERFIELD'S DISAPPEARING, INC.	<u>0</u> %
12	BACKSTAGE EMPLOYMENT AND REFERRAL, INC.	<u>0</u> %
13	TEAM CONSTRUCTION MANAGEMENT, INC.	<u>0</u> %
14	GAVIN COX	<u>100</u> %
15	<b><u>TOTAL</u></b>	<b><u>100%</u></b>

16  
17 **THIS IS OUR VERDICT.**

18  
19 Dated this 29<sup>th</sup> day of May, 2018.

20  
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22 FOREPERSON  
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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

GAVIN COX; AND MIHN-HAHN COX,  
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR  
THE COUNTY OF CLARK; AND THE  
HONORABLE MARK R. DENTON, DISTRICT  
JUDGE,

Respondents,

and

MGM GRAND HOTEL, LLC; DAVID  
COPPERFIELD'S DISAPPEARING, INC.;  
DAVID COPPERFIELD; BACKSTAGE  
EMPLOYMENT AND REFERRAL, INC.; AND  
TEAM CONSTRUCTION MANAGEMENT,  
INC.,  
Real Parties in Interest.

**Supreme Court No. 75762**

District Court Case No. A705164

**NOTICE IN LIEU OF REMITTITUR**

TO THE ABOVE-NAMED PARTIES:

The decision and Order of the court in this matter having been entered on May 7th, 2018, and the petition for rehearing having been denied, notice is hereby given that the Order and decision entered herein has, pursuant to the rules of this court, become effective.

DATE: June 04, 2018

Elizabeth A. Brown, Clerk of Court

By: Amanda Ingersoll  
Chief Deputy Clerk

cc: Hon. Mark R. Denton, District Judge  
Harris & Harris  
Morelli Law Firm PLLC  
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC  
Selman Breitman, LLP/Las Vegas  
Resnick & Louis, P.C.  
Steven D. Grierson, Eighth District Court Clerk

*Steven D. Grierson*

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

GAVIN COX and MINH-HAHN COX,  
Husband and Wife,

Plaintiffs,

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.;  
DOES 1 through 20; DOE EMPLOYEES 1  
through 20; and ROE CORPORATIONS 1  
through 20;

Defendants.

Case No. A-14-705164-C  
Dept. No. XIII

**PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW, OR,  
ALTERNATIVELY, FOR A NEW TRIAL**

JA005925

Plaintiffs **GAVIN COX** and **MINH-HAHN COX**, by and through their counsel of record, the law offices of **HARRIS & HARRIS**, and **THE MORELLI LAW FIRM**, , hereby moves this Court for Judgment As A Matter of Law, Or, Alternatively, For A New Trial.

This Motion is made and based upon all pleadings and papers on file herein, the memorandum of points and authorities submitted herewith, together with such further evidence and argument as the court may entertain at the hearing on the matter.

DATED this 5<sup>th</sup> day of July, 2018.

**HARRIS & HARRIS**

By: \_\_\_\_\_

**BRIAN K. HARRIS, ESQ.**

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*Attorneys for Plaintiffs*

**NOTICE OF MOTION**

TO: Defendants **DAVID COPPERFIELD'S DISAPPEARING, INC. / DAVID COPPERFIELD, aka DAVID A. KOTKIN and MGM GRAND HOTEL, LLC**; and

TO: Elaine Fresch, Esq. / Eric O. Freeman, Esq., **SELMAN BREITMAN, LLP**, 3993 Howard Hughes Parkway, Suite 200, Las Vegas, Nevada 89169 their attorneys; and

TO: Defendants **BACKSTAGE EMPLOYMENT & REFERRAL, INC.**; and

TO: Lee Roberts, Esq. / Howard J. Russell, Esq., **WEINBERG WHEELER HUDGINS GUNN & DIAL, LLC**, 6385 S. Rainbow Boulevard, Suite 400, Las Vegas, Nevada 89118; their attorneys; and

TO: Defendants **TEAM CONSTRUCTION MANAGEMENT, INC.** and Third-Party Defendant **BEACHER'S LV, LLC**; and

TO: Roger Strassberg, Esq. / Gary W. Call, Esq., **RESNICK & LOUIS, P.C.**, 5940 S. Rainbow Boulevard, Las Vegas, Nevada 89118, their attorneys:

**YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the undersigned will bring the above and foregoing **PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, FOR A NEW TRIAL** on for hearing on the \_\_\_\_\_ day of <sup>August 6</sup> \_\_\_\_\_, 2018, at the hour of <sup>9:00</sup> \_\_\_\_\_ a.m., or as soon as counsel may be heard.

DATED this 5 day of July, 2018.

**HARRIS & HARRIS**

By: \_\_\_\_\_

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*Attorneys for Plaintiffs*



**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. LEGAL STANDARD**

Nevada Rule of Civil Procedure 50(b) provides: “[i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59.” Nev. R. Civ. P. 50(b).

Nevada Rule of Civil Procedure 59(a) provides the opportunity for a new trial to be ordered when orders of the Court affect a party’s ability to receive a fair trial. See Nev. R. Civ. P. 59. The 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.

The Court has broad discretion in ordering a new trial and exercising such discretion will not be disturbed on appeal absent “palpable abuse.” See Southern Pac. Transp. Co. v. Fitzgerald,

94 Nev. 241 (1978). In addition, Nevada Rule of Civil Procedure 61 provides that an error in either the admission or the exclusion of evidence and 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. Nev. R. Civ. P. 61. To demonstrate that an error is not harmless, a party "must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached." Wyeth v. Rowatt, 126 Nev. 446, 465 (2010).

**II. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW AS TO COMPARATIVE NEGLIGENCE, OR, ALTERNATIVELY, PLAINTIFFS ARE ENTITLED TO A NEW TRIAL BECAUSE THE DISTRICT COURT ERRED IN SUBMITTING THE ISSUE OF COMPARATIVE NEGLIGENCE TO THE JURY.**

Plaintiffs are entitled to judgment as a matter of law pursuant to Rule 50(b), or, alternatively, a new trial because the District Court erred: (1) in denying the Plaintiffs' Rule 50(a) motion as to Defendants' comparative negligence affirmative defense<sup>1</sup>; (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 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);

<sup>1</sup> At the close of Defendants' case, Plaintiffs made a motion, pursuant to NRCP 50(a), to dismiss Defendants' affirmative defense of comparative negligence. (See Trial Tr., May 11, 2018, 143:17-146:25, attached hereto as Exhibit 1).

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 Gonzalez v. Jamaica Hosp., 25 A.D.3d 652, 652 (2d Dep’t 2006); Jaworski v. Great Scott Supermarkets, Inc., 403 Mich. 689, 697, 272 N.W.2d 518, 520 (1978) (“It is axiomatic that it is error to submit to the jury an instruction on an issue not sustained by the evidence”); Rose, 934 A.2d at 747. 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).

“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 held that the trial court "erred in instructing the jury on comparative negligence because there was insufficient evidence to warrant the instruction." Id. at 593. Ms. Townsend slipped and fell on a sidewalk at the defendant's apartment complex while walking her dog. Id. "In an effort to prove the allegations of comparative fault at trial, the defendant relied on the following: (1) the plaintiff's testimony that a light dusting of snow covered and obscured the sidewalk on the morning of her accident; (2) the cross-examination of the plaintiff, which revealed that she weighed approximately 110 pounds and that her dog weighed roughly seventy-five pounds on the day of the accident; (3) testimony from the defendant's on-site employee that the plaintiff's dog, on other occasions, had tugged and pulled at the leash during walks with the plaintiff; and (4) a statement from the plaintiff's expert witness that slip-and-fall accidents on sidewalks can result from factors attributable to the pedestrian, rather than the sidewalk." The 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) (concluding that the trial court "properly declined to charge the jury on comparative negligence [in a slip and fall case] since there was no valid line of reasoning based on the trial evidence that would support a finding of comparative negligence"); *Labarrera v. Boyd Gaming Corp.*, 132 So. 3d 1018, 1023 (La. 2014) (concluding that the defendant failed to carry its burden — in a case involving "a patron who slipped and fell in the lobby of a racetrack, casino, and hotel" — of establishing contributory negligence); *Marshall v. A & P Food Co. of Tallulah*, 587 So. 2d 103, 110 (La. Ct. App. 1991) (concluding that the trial court did not err in finding no comparative negligence in the plaintiff's slip and fall case against a supermarket because, *inter alia*, the plaintiff "testified that he neither saw the substance on the floor until he had already fallen, nor had any warning that the floor might be wet," and because "[n]othing in the record indicate[d] that [the plaintiff] was inattentive or otherwise careless in his conduct"); *Bergeron*, 540 So. 2d at 408-409 (concluding that the jury manifestly erred in finding the plaintiff negligent in a slip and fall case where the 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], the 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 the 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 the comparative negligence instruction in a case in which the plaintiff testified that she did not see grapes on the floor before slipping on them because it was reasonable under the circumstances for her 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) (concluding that there was an issue of fact as to comparative negligence because the plaintiff testified that she observed the slippery condition on the defendant's steps before her fall and proceeded anyway); Walker v. Bruno's, Inc., 228 Ga. App. 589, 590 (1997) (concluding that the trial court did not err in giving the comparative negligence charge because the evidence established that the plaintiff "admittedly stood for nearly fifteen

minutes within three or four steps of where she eventually slipped but failed to see watermelon juice on the floor near her feet and failed to observe a piece of rind which was readily visible to the assistant manager who arrived in the area almost immediately"); Anderson v. L & R Smith, Inc., 265 Ga. App. 469, 470 (2004) (concluding that it was not error for the trial court to give a comparative negligence charge in a slip and fall case against a restaurant because there was evidence that the plaintiff "was diabetic and that she would become dizzy, weak, and faint when she did not eat for a long period of time," that "she had not eaten for more than seven hours at the time of the afternoon accident," that she told a restaurant employee that she was in a hurry before the accident and that she 'shouldn't have worn them shoes that day' after the accident, that she had already successfully negotiated the dangerous condition just prior to her fall, and that she had noticed that the walkway was wet and slippery before her fall).

Unlike the circumstances in Taylor, Walker, and Anderson, there is no evidence here that Gavin Cox was comparatively negligent. Indeed, at trial, the Defendants proffered absolutely no evidence that Mr. Cox acted unreasonably or that he contributed in any way to his injuries. Accordingly, at the close of the Defendants' case, the Plaintiffs moved, pursuant to Rule 50(a)(1), for judgment as a matter of law to dismiss the Defendants' affirmative defense of comparative negligence and asked that the jury not be read the comparative negligence charge. (Ex. 1, 143:16-25; 144:1-25; 145:1-25; 146:1-25; 149:25; 150:1-16). The Court cursorily denied the Plaintiffs' motion, saying only: "Lots of things

for the jury to consider, and comparative negligence is one of them. So the motion is denied." (**Exhibit 1**, 2018, 150:17-20). Then, 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:

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.

(Trial Tr., May 23, 2018, 25:12-25; 26:1-5, attached hereto as **Exhibit 2**; see also Jury Instruction No. 22). The District Court's rulings as to comparative negligence were error because the Defendants proffered no evidence whatsoever that Mr. Cox was in any way negligent or that he in any way contributed to his fall. Indeed, the evidence presented at trial established that Mr. Cox was merely following the Defendants' directions on the night of his fall and that he had never been on the "runaround" route before. There was no evidence that Mr. Cox went rouge or engaged in some negligent act or conduct in defiance of the Defendants' instructions. 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 he was looking toward the door 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 dimly lit, unfamiliar location and was following the Defendants' 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 Defendants provided no evidence to the contrary. 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.

\*\*\*

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.

(Trial Tr., April 27, 2018, 158:9-25; 159:1-18, attached hereto as **Exhibit 3**). Furthermore, the Defendants did not proffer any eyewitnesses testimony to establish any unreasonableness on Mr. Cox's part at the time of his fall. (Trial Tr., May 8, 2010, 185:23-25; 186:1-9, attached hereto as **Exhibit 4**; Trial Tr., May 10, 2018, 154:24-25; 155:1, attached hereto as **Exhibit 5**). The only testimony as to the manner of Mr. Cox's fall was

from Mr. Cox himself. Moreover, the Defendants' entire defense throughout the trial was that Mr. Cox just 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 Defendants' 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 Plaintiffs' motion to dismiss the comparative negligence defense, to charge the jury as to comparative negligence, and to allow comparative negligence on the verdict sheet.

The District Court's errors as to the comparative negligence defense were severely prejudicial and affected Plaintiffs' ability to receive a fair trial. As such, Plaintiffs 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 Defendants to meet their burden on the issue of comparative negligence<sup>2</sup> and the issue should have never been submitted to the jury. 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. See Hernandez-Sanchez v. Gibrick, No. 10A643968, 2013 WL 6912967, at \*3 (Nev. Dist. Ct. 2013). In the present case, there is no credible evidence that Mr. Cox contributed

<sup>2</sup> 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 Cox was negligent, and that the negligence was a proximate cause of his own accident").

in any way to his fall. By improperly submitting the issue of comparative negligence to the jury even though it was "not a viable defense," the District Court created the opportunity for the jurors to reach an inconsistent verdict, which 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., 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: "In short, allowing the issue of [plaintiff's] comparative negligence in failing to take his blood pressure medication 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 (citing Johansen v. Makita U.S.A., Inc., 128 N.J. 86 (1992)). So too in the case at bar. If the District Court had properly dismissed the comparative negligence claim pursuant to Rule 50(a), the issue of whether Mr. Cox was a proximate cause of his injuries would not have been before the jury and the jury would have necessarily found that the Defendants'

negligence was the proximate cause of Mr. Cox's accident. 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. 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 Plaintiffs, a new trial is necessary. See id.; see also 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 and was plainly inconsistent and contrary to the District Court's instructions and applicable law. A new trial is warranted on those grounds as well. See NRCP 59.

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

Plaintiffs are entitled to judgment as a matter of law, or, in the alternative, a new trial because if the jury had properly followed the Court's instructions and/or the applicable law, it would have been impossible for the jury to reach the verdict it returned: that MGM GRAND HOTEL, LLC (hereinafter "MGM Grand"), David Copperfield, and DAVID COPPERFIELD'S DISAPPEARING, INC. (hereinafter "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 is "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).

As the trial testimony — including the opening statements and closing arguments — bear out, the only issue as to the negligence of Defendants MGM Grand, David Copperfield, and DCDI was whether or not those Defendants negligently designed and implemented the 13 Illusion. By finding that those Defendants had engaged in negligent conduct, it is clear that the jury properly concluded that in fact the 13 Illusion had been negligently designed and implemented. Under all the circumstances, including the fact that there was no evidence of any intervening force between the Defendants' negligence and Mr. Cox's fall, the jury could not have found an absence of proximate cause if it had correctly applied the applicable law and the District Court's instructions.

The Nevada Supreme Court has long adhered to the rule 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); DeFonce Const. Co. v. City of Miami, 256 F.2d 425 (5th Cir. 1958)). "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 (citing Stetson v. Stindt, 279 F. 209, 210 (3d Cir. 1922)).

This case readily evokes the exception because of the jury's obvious disregard of the proximate cause instruction with its resulting injustice. See Price, 85 Nev. at 607. 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 that defendant was negligent but that the negligence was not the proximate cause of the plaintiff's injuries if the jury had correctly applied the law and therefore, a new trial was required); see also Price, 85 Nev. at 608 (where manifestly unjust verdict resulted from jury's disregard of court's instructions on proximate cause and negligence, administratrix of estate of motel guest who died from carbon monoxide poisoning was entitled to new trial). "Proximate cause is any cause which in natural and continuous sequence, unbroken by any

efficient intervening cause, produces the injury complained of and without which the result would not have occurred." Taylor, 96 Nev. at 741 (citations omitted).

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). 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."

Kroeger Properties & Development v. Silver State Title Company, 102 Nev. 112 (1986) (citation omitted). This is such a case.

Here, the jury found that Defendants MGM Grand, David Copperfield, and DCDI were all negligent, but inexplicably found that said Defendants' negligence was not a proximate cause of Mr. Cox's accident. Throughout the trial, Plaintiffs presented a plethora of evidence that the above-mentioned Defendants negligently designed and implemented the 13 Illusion. Specifically, David Copperfield and DCDI initially designed the 13 Illusion "runaround" route, which was also approved by MGM Grand. (Trial Tr., April 17, 2018, 53:13-24, 96:7-24, attached hereto as **Exhibit 6**; Trial Tr., April 18, 2018, 96:4-16, 97:13-15, 98:14-99:7, 110:11-111:2, attached hereto as **Exhibit 7**.) This approved "runaround" route had unknowing audience participants, including Mr. Cox, (**Ex. 6**, 78:9-13, 101:2-4), running (**Ex. 6**, 194:15-18; **Ex. 7**, 126:23-127:7, 145:13-17), an unknown route outside of

the MGM Grand in the dark at night (Ex. 6, 147:5-18), and up a hidden incline that violated the applicable Building Code at the time of Mr. Cox's fall. (Ex. 7, 44:5-9, 71:2-5; Ex. 4, 249:9-250:22.) 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. (Ex. 6, 156:6-14; Ex. 7, 45:7-11, 178:24-179:9; Ex. 3, 127:12-128:8.) A finding of negligence on any of the alleged grounds would require a finding of causation.

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. In Taylor v. Silva, 96 Nev. 738, 740 (1980), the plaintiff was driving following an earthmover owned and operated by the defendants. As the vehicles approached the intersection, the traffic signal turned red. Believing that the earthmover would continue straight, the plaintiff drove her car to the right of the earthmover and prepared to turn right. As she was about to turn, the earthmover turned right, hitting the front left fender of plaintiff's car. Plaintiff was thrown across the inside of her car and suffered neck injuries. The plaintiff filed an action for damages against the defendants for damages resulting from the collision. Id. Following a jury trial, the jury returned a special verdict finding that the defendants were negligent, but that their negligence was not the proximate cause of the plaintiff's injuries. After trial, the plaintiff's motion for a new trial or judgment notwithstanding verdict was denied. On



appeal, the Nevada Supreme Court held that there was no intervening force between the defendants' negligence and the collision. *Id.* Moreover, the type of harm was foreseeable. Contributing fault, if any, on the plaintiff's part could reduce her recovery under the doctrine of comparative negligence, but does not negate a finding that the defendants' negligence was a proximate cause of the plaintiff's injuries. The jury was adequately instructed on the concept of proximate cause. If the jury had correctly applied the law, it could not have found an absence of proximate cause. Thus, the plaintiff was entitled to a new trial. *Id.* So too in the case at bar.

Here, like in *Taylor*, there was no intervening force between the Defendants' negligence and Mr. Cox's fall. In fact, it was undisputed that Mr. Cox was simply following the directions the Defendants gave him and there were no facts in evidence that he did anything wrong while participating to contribute to his accident. (Ex. 3, 158:19-159:18.) Furthermore, the type of harm — a participant falling during the "runaround" — was admittedly foreseeable (Ex. 06, 197:18-198:2), and this was evidenced by the Defendants being on notice of previous participants who have fallen during the "runaround" portion of the 13 Illusion at MGM Grand. (Ex. 6, 201:20-24; *see* Trial Tr. of Amy Lawrence, April 30, 2018, 18:14-48:24, attached hereto as **Exhibit 8**; Ex. 1, 36:9-54:3.)

The analysis in the case of *Hardison v. Bushnell*, 18 Cal. App. 4th 22, 25 (1993) is also instructive, as the appellate court made holdings with respect to evidentiary support for

causation findings. In Hardison, a pickup truck struck a semi-tractor driven by the defendant making a left turn across the road in front of the truck. Id. at 25. The jury found that the defendant had acted negligently, but that his negligence was not a proximate cause of the injuries of the plaintiff who was a passenger in the pickup truck. Id. The trial court denied the plaintiff's motions for JNOV and/or a new trial. Id. The appellate court reversed, holding that, on the facts of the case, the defendant's actions clearly were a substantial factor in causing the injuries suffered by the plaintiff passenger. Id. at 26. The appellate court then considered whether the defendant's conduct was also the proximate cause of the accident. The court first noted that "[t]he question here becomes whether the jury could reasonably have found that there was an independent intervening act, one that respondent could not reasonably have foreseen, that absolved him of being a legal cause of appellant's injuries. Otherwise, respondent's negligence was a proximate cause as a matter of law." Id. The court then considered the various possible intervening acts that were suggested: (1) the dusty weather conditions, (2) the plaintiff's alcohol consumption prior to the accident, (3) plaintiff's failure to wear a seat belt, and (4) the pickup driver's excessive rate of speed. Id. at 28. After considering the effect of each act, the appellate court held that none of them could "assume the role of the sole proximate cause to the entire exclusion" of defendant's negligence. Id. at 29. On the basis of the foregoing, the appellate court concluded that the defendant's negligence was a proximate cause of the accident and of plaintiffs injuries,

noting that the 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." Id.

Here, as in Hardison, the jurors inconsistently found that three (3) of the Defendants were negligent, but that those same Defendants were not the proximate cause of Mr. Cox's accident. To the extent that the Defendants may offer speculative scenarios in which the jury could have found that MGM Grand, David Copperfield, and DCDI were negligent in some manner, yet that this negligence was unrelated to the ultimate accident, Defendants 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 Defendants may offer are supported by evidence to establish that the subject accident would not have occurred without the negligence of MGM Grand, David 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 the Defendants harmonize the negligence and proximate cause verdicts.

As discussed above, the Defendants 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 the Defendants' conduct.<sup>3</sup> The affirmative defense of comparative negligence should have been dismissed

<sup>3</sup> 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 Cox was negligent, and that the negligence was a proximate cause of his own accident").

on that basis alone and dismissal would have properly prevented 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 Defendants' negligence was a proximate cause of Mr. Cox's fall and the jury was so instructed.<sup>4</sup> See Mahan v. Hafen, 16 Nev. 220, 224-25 (1960). The jury's failure to understand the concept of proximate cause in reaching its verdict is an example of the plain error and manifest injustice exception. The jury also refused to properly apply the District Court's instructions and/or the law to the evidence which overwhelmingly showed that MGM Grand, David Copperfield, and DCDI negligently designed and implemented the 13 Illusion which was a proximate cause of Mr. Cox's accident. All of the evidence establishes that Mr. Cox's accident was foreseeable and that but for the Defendants' negligently designing and implementing a dangerous trick, the accident would have not occurred. "Had the jury followed the instruction on proximate cause<sup>5</sup> and applied that instruction in conjunction with the instruction on negligence<sup>6</sup> to the

<sup>4</sup> 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).

<sup>5</sup> 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").

<sup>6</sup> 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 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

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

These facts, coupled with the jury's obvious disregard of the instructions on negligence and proximate cause, after hearing all of the compelling and un-rebutted testimony regarding the negligent design and implementation of the 13 Illusion, warrants a reversal of the verdict in this matter and entry of judgment notwithstanding the verdict in favor of the Plaintiffs, or at a minimum, a new trial. The jury's improper actions clearly resulted in a manifest injustice to the Plaintiffs and an inconsistent verdict.

**IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN  
BIFURCATING THE TRIAL AND IN MAKING EVIDENTIARY  
ERRORS WHICH EXACERBATED THE PREJUDICIAL EFFECT OF  
BIFURCATION.**

The District Court also abused its discretion in bifurcating the trial of this matter: (1) because bifurcation severely and unduly prejudiced the Plaintiffs; (2) because the issues of liability and damages are intertwined; and (3) because the Defendants did not demonstrate that bifurcation was "clearly necessary to lessen costs and expedite the litigation." Rule 42(b) of the Nevada Rules of Civil Procedure provides:

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

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").

NRCP 42(b) (emphasis added). "To justify a separate trial on the issue of liability, the issue of liability must be separate and distinct from the issue of damages." Verner v. Nevada Power Co., 101 Nev. 551, 554 (1985) (emphasis added); see also State ex rel. Perry v. Sawyer, 262 Or. 610, 614 (1972) ("[B]ifurcation of the issues of liability and damages, even in those jurisdictions where it is allowed by statute or rule, should be allowed only in exceptional cases where the movant has shown that it is clearly necessary to expedite the litigation, lessen costs, and, more importantly, that liability be separate and apart from the issues of damages") (emphasis added); Tracey v. Am. Family Mut. Ins. Co., Case No. 2:09-CV-01257 GMN, 2010 WL 3613875, at \*7 (D. Nev. Sept. 8, 2010) (denying an application to bifurcate the trial of a bad faith claim and a contractual claim where the two claims were inextricably intertwined). Accordingly, "[w]here the nature of the injuries has an important bearing on the issue of liability, a separate trial should not be ordered." Verner, 101 Nev. at 554 (citing Williams v. Adams, 46 A.D.2d 952 (1974)) (emphasis added). "Further, the movant must demonstrate that a bifurcated trial is clearly necessary to lessen costs and expedite the litigation." Id.

Notably, in analyzing a request for bifurcation, a district court "should be mindful [ ] that the paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants." ATC/Vancom of Nevada Ltd. P'ship v. MacDonald, 125 Nev. 1016 (2009) (internal quotation omitted) (emphasis added) (holding that the district court abused its discretion in bifurcating issues). "Bifurcation is an abuse of discretion if it

results in unfair prejudice to a party.” Windsor Indus., Inc. v. Pro Team, Inc., 87 F. Supp. 2d 1129, 1130 (D. Colo. 2000) (emphasis added); see also Minor v. Second Judicial Dist. Court of State, ex rel. Cty. of Washoe, 127 Nev. 1160 (2011) (holding that the district court “manifestly abused its discretion in bifurcating the trial”); Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1244 (Utah 1998) (“Regardless of convenience . . . an order to bifurcate trial is an abuse of discretion if it is unfair or prejudicial to a party or if the issues are not clearly separable”) (internal quotations omitted).

In Verner, the plaintiff — a telephone lineman — sued Nevada Power Co. for injuries he sustained when he sustained an electric shock and fell from the power company’s pole. Id. at 552-54. The trial court bifurcated the issues of liability and damages as an “economy of time” and Verner appealed. Id. at 553. On appeal, Verner asserted “that medical testimony regarding his burn patterns was necessary to show how his accident occurred” and “that medical testimony concerning his temporary loss of memory following the accident and later recovery of it was necessary to preserve his credibility.” Id. at 554 (emphasis added). In reversing the district court’s bifurcation order and remanding the case for a non-bifurcated trial, the Nevada Supreme Court explained:

Due to the bifurcation of trials, the trial court allowed only limited medical testimony. These limitations resulted in a cursory, almost cryptic, presentation of Verner’s injuries. In its final argument, Nevada Power used this restricted review of Verner’s injuries to challenge the limited medical testimony. Nevada Power argued that Verner did not recover from his amnesia, but had, instead, fabricated his testimony regarding how the accident took place.

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The trial court bifurcated the trial as an "economy of time," although it was asserted that the damage portion would only have taken approximately two additional days of trial time. More significantly, the issues of liability and damages were inextricably interrelated. The bifurcation of trial prejudiced Verner's ability to present his case on the issue of liability. The district court abused its discretion in ordering separate trials.

Id. (emphasis added). Here, as in Verner, it was an abuse of discretion for the District Court to bifurcate the liability and damages issues because the Defendants did not demonstrate that bifurcation was "clearly necessary to lessen costs and expedite the litigation" and because liability and damages were intertwined and their segregation severely prejudiced the Plaintiffs, particularly in light of the District Court's several evidentiary errors, addressed below.

**A. Bifurcation was an Abuse of Discretion Because the Issues of Liability and Damages are Inextricably Interrelated and Because the Defendants Did Not Demonstrate that Bifurcation was "Clearly Necessary to Lessen Costs and Expedite the Litigation."**

Bifurcation of the within matter was an abuse of discretion because the liability and damages issues in this action are inextricably interrelated. Plaintiffs argued that one of the severe injuries Mr. Cox suffered as a result of his fall is a traumatic brain injury. The Defendants argued that Mr. Cox did not directly hit his head as a result of his fall during the illusion and thus "vehemently disputed" that the manner and mechanism of Mr. Cox's fall on the illusion path could cause him to suffer a traumatic brain injury. To prove this injury, Plaintiffs intended to present, among other evidence, opinion testimony from medical



experts to demonstrate that Mr. Cox's fall did result in a traumatic brain injury. Such opinion testimony would rely upon, *inter alia*, evidence of the execution of the subject illusion and evidence of the manner of Mr. Cox's fall on the illusion path. Accordingly, testimony and other evidence pertaining to the execution of the subject illusion, the events surrounding Mr. Cox's fall, and the manner in which Mr. Cox slipped, fell, and landed were all integral to both the liability and damages issues at trial.

Importantly, as in Verner, because Mr. Cox suffered a brain injury as a result of his fall, the nature of his injuries could be used against him to question his credibility if those injuries are not properly explained and detailed, and that is precisely what the Defendants did during the liability trial. Because the trial was bifurcated, Plaintiffs were not allowed to present medical expert testimony to explain the nature and extent of Mr. Cox's injuries. Nor were Plaintiffs able to explain Mr. Cox's injury-related behavior which the defense counsel improperly characterized as suspicious to the jury on multiple occasions. In Verner, the jury at least had the benefit of "limited medical testimony." Here, however, the Plaintiffs were not permitted to submit *any* medical testimony or other damages evidence to establish that Mr. Cox suffered a brain injury and explain his actions. Scandinavian World Cruises (Bahamas) Ltd. v. Barone, 573 So. 2d 1036 (Fla. Dist. Ct. App. 1991) is instructive. In Barone, a "slip-and-fall negligence action," the court concluded that the trial court erred in bifurcating the issues of liability and damages and granted a new trial because the bifurcation "prejudiced the plaintiff on the issue of liability because evidence that the

plaintiff suffered an organic brain injury as a result of the accident sued upon was necessarily excluded at the liability trial, which evidence was necessary to explain certain confusing and inconsistent testimony of the plaintiff, including a glaring inconsistency as to where the plaintiff had slipped and fallen on the defendant's cruise ship." 573 So. 2d at 1037. Here, as in Barone and Verner, the bifurcation of liability and damages was an abuse of discretion because the issues of liability and damages are interrelated and because Mr. Cox's injuries could be (and were) used to impugn his credibility in the liability phase of the trial.

The District Court also abused its discretion in bifurcating the issues of liability and damages because the Defendants did not demonstrate that bifurcation was "clearly necessary to lessen costs and expedite the litigation." As Plaintiffs argued in opposition to the Defendants' pre-trial motion for bifurcation, a bifurcated trial would require them to present the evidence of the mechanism of Mr. Cox's fall and all of the events surrounding his fall (e.g., the Defendants' chaotically rushing him around the back of the theater in the dark) and his landing during the liability trial and *then* present the exact same evidence a second time during the damages trial. Such re-hashing of evidence would be a waste of the resources of both this Court and the parties. Indeed, as liability and damages are unquestionably interrelated here, it was not efficient or reasonable to bifurcate those issues for trial. Moreover, it would have been far more efficient and cost-saving to just try damages and liability together than to impanel two different juries and conduct two different

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3 trials when the damages evidence would not have significantly extended the length of the  
4 trial. The Defendants did not proffer specific evidence to establish that separate trials would  
5 be more efficient or cost-saving.  
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7 Accordingly, the Defendants did not demonstrate that bifurcation was "clearly  
8 necessary to lessen costs and expedite the litigation" and it was an abuse of discretion to  
9 grant their request for bifurcation. See Verner, 101 Nev. at 554.  
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11 **B. Bifurcation was Also an Abuse of Discretion Because it Severely**  
12 **Prejudiced the Plaintiffs and Affected their Ability to Receive a**  
13 **Fair Trial.**

14 In opposition to Backstage Employment's pre-trial motion for bifurcation, Plaintiffs  
15 argued that bifurcation was inappropriate because it would cause them severe prejudice.  
16 Plaintiffs turned out to be right. In fact, the level of prejudice that bifurcation caused the  
17 Plaintiffs is astounding, particularly: (1) because the District Court improperly permitted the  
18 Defendants to use bifurcation as both a sword and a shield to the great detriment of the  
19 Plaintiffs by permitting the Defendants to present damages evidence (such as surveillance  
20 videos of Mr. Cox) during the liability trial; (2) because, as in Verner, the District Court  
21 permitted the defense counsel to make improper statements to the jury about Mr. Cox's  
22 credibility and damages (including comments about how Mr. Cox was purportedly  
23 deceiving and misleading the jury about the nature and extent of his injuries and was only  
24 looking for money); and (3) because the District Court erroneously denied Plaintiffs'  
25 requests to attempt to diminish the prejudice by refusing to permit Plaintiffs to present  
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2 medical expert testimony and refusing to give proper admonishments as required by Lioce  
3 v. Cohen, 124 Nev. 1 (2008). In light of these extremely prejudicial errors which affected  
4 Plaintiffs' ability to receive a fair trial, a new trial is necessary.

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6 **i. The District Court erred in permitting Defendants to introduce**  
7 **surveillance videos of Mr. Cox during the liability portion of the**  
8 **trial and that error unduly prejudiced the Plaintiffs.**

9 Over the strenuous objections of Plaintiffs' counsel, the Court permitted the  
10 Defendants to introduce surveillance footage of Mr. Cox during their liability case. (Trial  
11 Tr. May 9, 2018, 274:10-25; 275:1-25; 276:1-25; 277:1-25; 278:1-25; 279:1-25; 280:1-25;  
12 281:1-18; 284:1-25; 285:1-20, attached hereto as **Exhibit 9; Ex. 1**, 29:19-25; 30:1-25; 31:1-  
13 2). Counsel for Defendant Backstage Employment, Lee Roberts, argued that the  
14 surveillance videos were admissible to "impeach[ ] [Mr. Cox's] conduct" in the courtroom.  
15 (Ex. 9, 276:14-25; 277:1-9; 279:19-25; 280:1-2; Ex. 5, 249:9-19). Specifically, Mr. Roberts  
16 allegedly proffered the surveillance videos to "rebut" the "fact that, on the way to the  
17 witness stand, [Mr. Cox] held onto the marshal's arm" and that "on the way back from the  
18 witness stand, he held onto [Plaintiff's counsel] Mr. Morelli." (Ex. 9, 276:23-25; 277:1-2).  
19 Jerry Popovich, counsel for Defendant MGM Grand, likewise argued that the videos were  
20 admissible because "the law anticipates the ability to impeach credibility through  
21 mannerisms." (Ex. 1, 58:17-25; 59:1-25; 60:1-25; 61:1-6). In response, Plaintiffs' counsel  
22 argued that the surveillance videos were inadmissible: (1) because the information depicted  
23 in the videos goes to damages, not liability; (2) because you cannot impeach a witness'  
24 conduct in the courtroom; you can only impeach *sworn testimony*; (3) because the admission  
25 of the videos violated NRS 50.085(3) which provides that "[s]pecific instances of the  
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2 conduct of a witness, for the purpose of attacking or supporting the witness's credibility,  
3 other than conviction of crime, may not be proved by extrinsic evidence"; (4) because Mr.  
4 Cox's walk to and from the witness stand did not constitute "statements" pursuant to NRS  
5 51.045; (5) because even if the surveillance videos *could* be used to impeach Mr. Cox's  
6 conduct, they did not do so because Mr. Cox had walked around unassisted in front of the  
7 jury during trial; (6) because the surveillance videos were unduly prejudicial; and (7)  
8 because at no time did Mr. Cox ever testify that he *always* needs assistance while walking.  
9 (Ex. 9, 275:14-25; 276:1-11; 277:19-25; 278:1-22; 279:15-25; 280:3-25; 281:1-20; 284:1-  
10 25; 285:1-20; Ex. 5, 249:22-25; 250:1-25; Ex. 1, 61:9-25; 62:1-25; 63:1-20). Plaintiffs'  
11 counsel also argued that if the Court permitted the Defendants to introduce the surveillance  
12 videos, the Plaintiffs should be given the opportunity to present rebuttal evidence, including  
13 the opportunity to call a medical expert, to explain the nature and extent of Mr. Cox's brain  
14 damage to the jury. (Ex. 5, 250:18-25; 251:1-25; 252:1-3; Ex. 1, 62:25; 63:1-9).

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17 In deeming the surveillance videos admissible, the District Court merely said: "I  
18 consider that whatever has happened in open court is fair game. And, accordingly, I'll  
19 permit the video." (Ex. 1, 63:21-24). Immediately after this ruling, Plaintiffs' counsel  
20 requested permission to call a medical expert to rebut the surveillance videos and the Court  
21 denied the request. (Ex. 1, 63:25; 64:1-8). Specifically, the Court said: "I'm not talking  
22 about doctors coming in or that kind of thing. We're not going to get into that. We've got  
23 to conclude this – the evidence in this case. All right?" (Ex. 1, 64:5-8). Thereafter, the  
24 Defendants were permitted to admit into evidence and show the jury six (6) surveillance  
25 video clips of Mr. Cox that were taken outside of the courtroom at various times both before  
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2 and during the time of trial. (Ex. 1, 64:21-25; 65:1-25; 66:1-14). The Defendants  
3 contrasted these surveillance clips with courtroom video footage of Mr. Cox approaching  
4 and leaving the stand while he was not under oath. (Ex. 1, 64:21-25; 65:1-25; 66:1-14).

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6 The District Court's admission of the surveillance videos was erroneous and unduly  
7 prejudicial for the reasons argued at trial. First, it was error to admit the surveillance videos  
8 during the liability case because such videos bear only on Mr. Cox's *damages*. The videos  
9 have absolutely nothing to do with the Defendants' liability. If a personal injury action is  
10 bifurcated, damages evidence should be excluded from the liability portion of the trial to  
11 prevent prejudice. See Kozup v. Georgetown Univ., Case No. CIV. A. 86-0033, 1989 WL  
12 39002, at \*1 (D.D.C. Apr. 12, 1989).

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14 In bifurcating the trial over Plaintiffs' objections, permitting the Defendants to  
15 present damages evidence during the liability case (also over the Plaintiffs' objections), and  
16 then denying the Plaintiffs' request to effectively rebut said evidence, the District Court  
17 unfairly permitted the Defendants to use bifurcation as both a shield and a sword. By  
18 admitting the surveillance videos during the liability phase of the case, the Defendants were  
19 able to support their false narrative that Mr. Cox was faking or exaggerating his injuries and  
20 that the Plaintiffs only brought the lawsuit for a pay day (counsel for MGM Grand, Mr.  
21 Popovich, expressly touted this false narrative in his patently improper statements about Mr.  
22 Cox during his closing argument, discussed below). The surveillance videos went to  
23 damages only, and it was a severely prejudicial abuse of discretion to admit them into  
24 evidence during the liability case.  
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Moreover, the admission of the surveillance videos violated basic, well-established evidentiary principles and NRS 50.085(3). The Defendants argued that the videos were admissible to impeach Mr. Cox's unsworn conduct in the courtroom. 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 is under oath*. The District Court's holding to the contrary contradicts basic legal principles and sets a dangerous precedent.

Furthermore, the Defendants' arguments did not support their claim that the surveillance videos could be admitted to "impeach[ ] [Mr. Cox's] conduct." Mr. Roberts argued that Mr. Cox's movements to and from the witness stand constitute impeachable "statements" pursuant to NRS 51.045. (Ex. 9, 285:15-20). However, 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.<sup>7</sup>

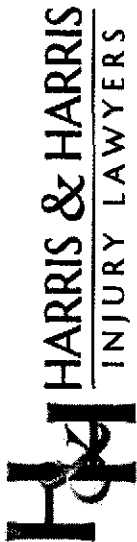
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<sup>7</sup> NRS § 51.045 provides:

"Statement" defined

"Statement" means:

1. An oral or written assertion; or



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2 NRS 51.045 is not applicable here to determine whether Mr. Cox's movements to and from  
3 the witness stand constitute impeachable testimony under the impeachment rules of Chapter  
4 50. Indeed, NRS 51.045 would only apply if the dispute here was about whether the  
5 proffered surveillance videos were hearsay statements. However, the dispute is whether Mr.  
6 Cox's unsworn conduct is impeachable. Accordingly, the hearsay rules are not at issue here  
7 and the Defendants' reliance on the definition of a hearsay "statement" in NRS 51.045 is  
8 wholly misplaced. Moreover, even if NRS 51.045 *were* applicable to this dispute (and it is  
9 not) it still cannot be used to conclude that Mr. Cox's movements to and from the witness  
10 stand constitute impeachable testimony. Indeed, NRS 51.045 provides that a hearsay  
11 statement includes "[n]onverbal conduct of a person, if it is intended as an assertion." NRS  
12 51.045 (emphasis added). Walks to and from the witness stand do not constitute nonverbal  
13 assertions within the meaning of the rule. See Black's Law Dictionary (10th ed. 2014)  
14 (defining "assertive conduct" as "[n]onverbal behavior that is intended to be a statement,  
15 such as pointing one's finger to identify a suspect in a police lineup") (emphasis added); see  
16 also Rugamas v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 129 Nev. 424, 432 n. 2 (2013)  
17 (concluding that the minor witness' pointing *during her testimony* to indicate where the  
18 criminal defendant had inappropriately touched her constituted nonverbal conduct that "was  
19 intended as an assertion that [the defendant] touched her private area") (citing Michael H.  
20 Graham, Federal Practice & Procedure § 7002, at 24–25 (interim ed. 2011) ("Nodding,  
21 pointing, and the sign language of the hearing impaired are as plainly assertions as are  
22 spoken words")). Mr. Cox simply walking with assistance to and from the witness stand do  
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2. Nonverbal conduct of a person if it is intended as an assertion.



not constitute nonverbal behavior that is intended to be a statement such as nodding or pointing.

Accordingly, the Defendants' argument that NRS 51.045 justified admission of the surveillance videos is unfounded and erroneous because NRS 51.045 does not even apply here and because even if it did, walking around in a courtroom while not under oath simply cannot be deemed assertive conduct within the meaning of the rule.

The applicable evidentiary rule, which the District Court disregarded, is NRS 50.085(3). That section provides:

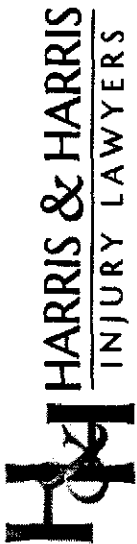
50.085. Evidence of character and conduct of witness

\*\*\*

3. 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). The Court concluded that this rule did not apply to the Defendants' proffer of the surveillance videos to "impeach[ ] [Mr. Cox's] conduct" in the courtroom. (Ex. I, 284:1-25; 285:1-14). However, this rule does apply: (1) because the Defendants proffered the videos to attack Mr. Cox's credibility<sup>8</sup>; and (2) because the surveillance videos are extrinsic evidence of specific instances of Mr. Cox's conduct, i.e.,

<sup>8</sup> That the Defendants proffered the videos to attack Mr. Cox's credibility is clearly demonstrated by the statements they made about the videos during their closing arguments, set forth below.



1  
2 Defendants were permitted only to ask Mr. Cox about his conduct outside of the courtroom  
3 and had to accept his answer. They were not permitted to introduce any extrinsic evidence  
4 of his conduct to attack his credibility. In admitting the videos for the purpose of attacking  
5 Mr. Cox's credibility, the District Court violated NRS 50.085(3) and severely prejudiced the  
6 Plaintiffs.  
7

8 The District Court further erred in denying the Plaintiffs' request to call a medical  
9 expert to rebut the surveillance videos and that error also unduly prejudiced the Plaintiffs.  
10 As explained above, in showing the jury the surveillance videos of Mr. Cox, the Defendants  
11 were able to lend credence to their narrative that Mr. Cox was faking or exaggerating his  
12 injuries. To rebut this, the Plaintiffs should have been permitted to present medical expert  
13 testimony to explain Mr. Cox's injuries and his conduct in the videos. In refusing to permit  
14 limited medical expert testimony, the erroneously admitted surveillance videos went  
15 un rebutted and the jury was left to believe that Mr. Cox was faking or exaggerating his  
16 injuries. This error was compounded by the fact that the jury also saw the accident video  
17 depicting Mr. Cox getting up quickly after his fall that, without the availability of  
18 corresponding medical testimony due to the bifurcated trial, could mislead the jurors as to  
19 the nature and extent of Mr. Cox's injuries. Without limited medical expert testimony to  
20 establish that Mr. Cox's fall and his behavior thereafter *were in fact consistent with his*  
21 *alleged brain damage*, the lay jury were inclined to believe defense counsel's contentions  
22 that Mr. Cox was faking his injuries and not credible.  
23  
24  
25  
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27

28 8 That the Defendants proffered the videos to attack Mr. Cox's credibility is clearly demonstrated by the  
statements they made about the videos during their closing arguments, set forth below.

1  
2 Finally, the prejudicial effect of the surveillance videos was further compounded by  
3 the fact that defense counsel spoke at length in their closing arguments about the videos,  
4 how they affected Mr. Cox's credibility, and Plaintiffs' purported failure to rebut them. Mr.  
5 Popovich, counsel for MGM Grand, said:

6  
7 The Friday before the long break, you all saw videotape of Mr. Cox. You  
8 saw him in this court -- again, with these cameras -- being helped up to the  
9 witness stand. You saw him being helped back down from the witness stand  
10 Based on my experience with jurors, I'm sure you have observed him for  
11 many weeks in this courtroom. When, during testimony, he needed to go  
12 outside for any reason, he was assisted by his son. When he stood for you to  
13 go in and out, he would often stand using some hard physical assistance,  
14 steadied by a hand, something like that. Now, Mr. Cox, it is true, never gave  
15 verbal testimony that "I can walk without assistance." And he never gave  
16 verbal testimony that he couldn't stand without some physical assistance like  
17 leaning on anything. So the subsequent video you were shown of Mr. Cox  
18 walking in 2016 for exercise, 2017 for exercise, after or before court days  
19 here, during this trial when you could

20 observe him here, and then you see him when you're -- when you, this jury,  
21 is not around, well, that is evidence that impacts Mr. Cox's credibility. You  
22 can compare what you saw on the surveillance videotape to what you  
23 observed in this courtroom, and you can decide whether that looks consistent  
24 or whether it looks very inconsistent. Now, the part that plays into this jury  
25 instruction is the failure to produce stronger evidence. After those videos  
26 were played, plaintiffs were in their rebuttal case. And they had the  
27 opportunity to put Mr. Cox up here and tell us why he hasn't been deceiving  
28 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?

(Trial Tr., May 24, 2018, 27:25; 28:1-25; 29:1-11, attached hereto as **Exhibit 10**) (emphasis  
added). Elaine Fresch, counsel for David Copperfield and DCDI, 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

1 courtroom. Left is April 24th and right is May 1st of this trial . . . . So Mr.  
2 Popovich has already explained the purpose of these videos and what we saw  
3 and the reason for them. It goes to the credibility. And it's your job. There's  
4 a jury instruction about this, about your job as the jury when you're  
5 deliberating to assess the credibility of witnesses. And I want you to recall  
6 those videos when you're doing that of Mr. Cox.

7 (Ex. 10, 113:18-25; 114:1-20) (emphasis added). Likewise, Mr. Roberts, counsel for  
8 Backstage, told the jury:

9 And if we're going to bring the family into it, then I got to revisit where I  
10 started. You know, the videos that we sort of started out here with you, we go  
11 to Mr. Cox's credibility, strolling down the street without any help. And --  
12 you know, and, most of those, his family is with him. It's either just his wife  
13 or it's among all his sons that are with him. And they're not helping him.  
14 They're not even looking at him, not like they did in this courtroom for  
15 weeks and weeks. And it wasn't one day of magical recovery in the  
16 courtroom. You know, the videos we showed you were a year and a half ago  
17 and a few months later and then more in court. And to the extent he's asked  
18 you to do something for the Cox family, the Cox family was part of the  
19 deception that I talked about yesterday. And I don't know how Mr. Morelli is  
20 going to explain this when he didn't put on any explanation that you can  
21 consider in the form of evidence after we showed you this, but the fact is  
22 those videos don't and can't lie.

23 (Trial Tr., May 25, 2018, 59:22-25; 60:117, attached hereto as **Exhibit 11**) (emphasis  
24 added). Accordingly, not only were the surveillance videos erroneously admitted for the  
25 purpose of attacking Mr. Cox's credibility, but the jury was *expressly and repeatedly*  
26 improperly told that they could consider the videos in assessing Mr. Cox's credibility. The  
27 cumulative prejudicial effect of the admission of the videos — particularly when combined  
28 with defense counsel's other improper comments — is strikingly apparent, and a new trial is  
warranted.

1  
2 **ii. The defense counsel's improper statements during their closing**  
3 **arguments and the District Court's denial of Plaintiffs' request**  
4 **for a proper admonishment of the same necessitate a new trial.**

5 The defense counsel made numerous patently improper statements throughout their  
6 closing arguments which also affected Plaintiffs' ability to receive a fair trial, necessitating  
7 a new trial. It is well established that attorney misconduct during closing arguments can be  
8 grounds for a new trial. See Lioce v. Cohen, 124 Nev. 1 (2008). Statements that amount to  
9 jury nullification, statements of personal opinion, and golden rule arguments examples of  
10 such misconduct. Id. at 20. Comments about a plaintiff lying about her injuries and only  
11 bringing suit for a "big pay day" are also patently improper. Id. at 20-22; see also Centeno-  
12 Alvares v. Coe, Case No. A510230, 2008 WL 8177830 (Nev. Dist. Ct. 2008). As for  
13 statements of personal opinion, the Lioce Court explained:

14  
15 Under Nevada Rule of Professional Conduct (RPC) 3.4(e), an attorney shall  
16 not state to the jury "a personal opinion as to the justness of a cause, the  
17 credibility of a witness, [or] the culpability of a civil litigant." As an  
18 example, we have held in criminal cases that prejudicial misconduct occurred  
19 when an attorney provided the jury with his personal opinion on an expert  
20 witness's credibility and a defendant's character. Although criminal cases  
21 involve constitutional issues, requiring heavy scrutinization of improper  
22 comments, an attorney's statements of personal opinion as to the justness of a  
23 cause, the credibility of a witness, or the culpability of a litigant is  
24 nonetheless improper in civil cases and may amount to prejudicial  
25 misconduct necessitating a new trial.

26 Id. at 21-22. Notably, the Lioce Court also advised that in cases "in which an objection has  
27 been made to attorney misconduct, the district court should not only sustain the objection  
28 but admonish the jury and counsel." Id. at 17 (emphasis added). After Lioce, the Supreme  
Court of Nevada specified the admonishment requirement:

1  
2 When an attorney commits misconduct, and an opposing party objects, the  
3 district court should sustain the objection and admonish the jury and counsel,  
4 respectively, by advising the jury about the impropriety of counsel's conduct  
5 and reprimanding or cautioning counsel against such misconduct. See [ ]  
6 Black's Law Dictionary 55 (9th ed. 2009) (defining "admonition" as "[a]ny  
7 authoritative advice or caution from the court to the jury regarding their duty  
8 as jurors or the admissibility of evidence for consideration," or "[a]  
9 reprimand or cautionary statement addressed to counsel by a judge").

10 Gunderson v. D.R. Horton, Inc., 319 P.3d 606, 611-12 (2014) (internal citation omitted).

11 As discussed above, Mr. Popovich, counsel for MGM Grand, improperly expressed  
12 personal opinions as to Mr. Cox's credibility and blatantly accused Mr. Cox of faking his  
13 injuries and looking for "a payoff." Specifically, Mr. Popovich said:

14 The Friday before the long break, you all saw videotape of Mr. Cox. You  
15 saw him in this court -- again, with these cameras -- being helped up to the  
16 witness stand. You saw him being helped back down from the witness stand  
17 Based on my experience with jurors, I'm sure you have observed him for  
18 many weeks in this courtroom. When, during testimony, he needed to go  
19 outside for any reason, he was assisted by his son. When he stood for you to  
20 go in and out, he would often stand using some hard physical assistance,  
21 steadied by a hand, something like that. Now, Mr. Cox, it is true, never gave  
22 verbal testimony that "I can walk without assistance." And he never gave  
23 verbal testimony that he couldn't stand without some physical assistance like  
24 leaning on anything. So the subsequent video you were shown of Mr. Cox  
25 walking in 2016 for exercise, 2017 for exercise, after or before court days  
26 here, during this trial when you could observe him here, and then you see  
27 him when you're -- when you, this jury, is not around, well, that is evidence  
28 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 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

1 does he have any left? I don't think so. He's been manipulating this  
2 jury from day one with every move he made. You shouldn't believe a  
3 word that comes out of his mouth because the only reason to do that is  
4 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.

(Ex. 10, 27:25; 28:1-25; 29:1-25; 30:1-3) (emphasis added). Plaintiffs' counsel objected to  
this language after Mr. Popovich's closing argument and argued that it constituted  
"incredibly prejudicial" misconduct in violation of Nevada Rule of Professional Misconduct  
3.4(e) and pursuant to the Lioce and Centeno-Alvares decisions. (Ex. 10, 49:13-25; 50:1-  
25; 51:1; 51:17-20; 52:1-25; 53:1-19; 116:21-25; 117:1-25; 118:1-25; 119:1-25; 120:1-25;  
121:1-25; 122:1-25). Plaintiffs' counsel requested that the Court admonish the jury and the  
defense counsel pursuant to Lioce. (Ex. 10, 50:22-25; 51:1; 52:1-25; 53:1-19; 118:4-20;  
119:1-25; 120:1-25; 121:1-25; 122:1-25; 125:15-25; 126:1-25; 127:1-25; 128:1-16).  
Specifically, Plaintiff's counsel requested the following admonishment, based on the  
language from the Gunderson decision:

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

(Ex. 10, 122:1-25). The Court denied the request to admonish the jury pursuant to Lioce,  
saying: "I'm not inclined to use the term 'misconduct' or 'impropriety' or anything like  
that." (Ex. 10, 121:11-22; 129:24-25; 130:1-25; 131:1-22; 132:4-25). The Court also said:

1 So I'm not going to get into misconduct or violations of rules of professional  
2 responsibility or anything like that. I'm going to just allude to the fact that  
3 there was an objection, that I've sustained it, and telling them to disregard the  
comment. Okay?

4 (Ex. 10, 132:15-20). Ultimately, the Court gave the following instruction:

5 All right. Before we get underway with Mr. Roberts' summation, just a  
6 couple of things I'm going to do here. First of all, I'm going to read an  
7 admonishment to you which will be made.

JUROR NO. 2: Can't hear you. I'm sorry.

8 THE COURT: I'm going to read an admonishment here, and then that will be  
9 made part of the record. Okay. Members of the jury, during Mr. Popovich's  
10 closing arguments, he stated that Gavin Cox is here because of the "green  
11 box at the end," and he "just wants a payoff." Those comments were  
12 objected to and the Court has sustained the objection, and I admonish you to  
13 disregard those comments and to dismiss them from your mind. You may not  
14 use those comments in coming to your decision in this case and must decide  
15 this case solely based on the evidence and the law.

16 (Ex. 10, 138:17-25; 139:1-10).

17 Mr. Popovich also improperly expressed his personal opinions about the credibility  
18 of defense witness Pomai Weill during his closing argument. He said:

19 Okay. Let's go to some clips of Pomai Weill. You can assess witnesses how  
20 you like. I think she was the best witness in the case. Love this woman,  
21 just because she didn't seem to really care if she spoke coherently. She  
22 answered questions.

\*\*\*

23 [Her voice] just goes into flat. "Take my hand. Hold the stairs." That rings  
24 of truth; right? It does to me anyway.

25 (Ex. 10, 32:5-9; 33:11-13) (emphasis added). Ms. Fresch likewise improperly expressed her  
26 personal opinions about the credibility of Ms. Weill's testimony. She said:

27 Pomai Weill, that you saw earlier today, I completely agree with Mr.  
28 Popovich's assessment of her. She was a great – she was so natural doing  
that.

(Ex. 10, 65:22-24). Ms. Fresch also improperly expressed her personal opinions about the  
credibility of Mrs. Cox:



1 But I get that [going to the bathroom] was more important, you know, than  
2 stopping and looking at her husband and thinking maybe I should go to him  
3 first. I didn't buy that testimony. It didn't ring true to me . . . And I'm  
4 not mud-slinging . . . Here's the Cox family. Here they're all sitting.  
5 They're all together. Mrs. Cox did testify. The part of what this phase is  
6 about is assessing credibility of the witnesses and credibility of the  
7 parties. That's why I spent a little time with that. I don't know if that  
8 was too extreme for everyone, but that was my thought. That was the  
9 ticket.

10 (Ex. 10, 75:22-25; 76:3-10). These patently improper comments constitute misconduct as  
11 defined by Lioce and the District Court erred in denying Plaintiffs' request to give a proper  
12 admonishment as to Mr. Popovich's comments that Mr. Cox was "deceiving" and  
13 "manipulating" the jury "from day one," that the jury "shouldn't believe a word that comes  
14 out of [Mr. Cox's] mouth because the only reason to do that is the green box at the end,"  
15 that "[Mr. Cox] just wants a payoff." (Ex. 10, 27:25; 28:1-25; 29:1-25; 30:1-3). Mr.  
16 Popovich's misconduct unquestionably prejudiced the jury against the Plaintiffs because he  
17 blatantly told the jurors that Mr. Cox is a liar who is only after the Defendants' money. The  
18 personal opinions that Mr. Popovich and Ms. Fresch expressed were also unduly prejudicial  
19 to the Plaintiffs because they improperly bolstered defense witness Pomai Weill and  
20 attacked the credibility of the Plaintiffs, adding to the defense counsel's narrative that the  
21 Plaintiffs are liars. Moreover, the severely prejudicial effect of the defense counsel's  
22 misconduct was compounded by: (1) the District Court's erroneous admission of the  
23 surveillance videos which the Defendants improperly and repeatedly used to attack the  
24 credibility of Mr. Cox and his family; and (2) the District Court's erroneous denial of  
25 Plaintiffs' request to call a medical expert to rebut the videos. Because the trial was  
26 improperly bifurcated and because of the defense counsel's improper conduct and the  
27  
28

District Court's erroneous rulings, by the end of the trial the jurors believed that Mr. Cox was a liar and a faker, and the Plaintiffs were improperly and prejudicially left without remedy. This misconduct and abuse of discretion certainly affected the Plaintiffs' ability to receive a fair trial. Considering these numerous substantial errors, a new trial is necessary.

**V. 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 PLAINTIFFS 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); see also NRCP 61 (new trial may be granted or verdict set aside where "action appears to the court inconsistent with substantial justice").

On May 4, 2018, after the Plaintiffs had rested their case-in-chief, counsel for Defendant Backstage Employment, in the presence of the jury and without any prior notice to Plaintiffs' counsel, made an oral motion for a jury view of all relevant portions of the MGM Grand property pursuant to NRS 16.100. (See Trial Tr., May 4, 2018, 8:2-6, attached hereto as **Exhibit 12.**) The fact that such a request was made in the presence of the jury was patently improper and ran completely counter to how counsel had conducted themselves throughout course of the trial. This underhanded tactic by defense counsel was done with the express purpose of placing Plaintiffs in the untenable position of opposing the request for a jury view at the risk of intimating to the jury that Plaintiffs had something to hide. Moreover, as the Court noted, Plaintiffs were not given any notice or opportunity to brief Defendants' oral motion.

1  
2 Nevertheless, argument regarding the proposed jury view was held outside the  
3 presence of the jury during which Plaintiffs stated their strenuous objections to the jury view  
4 due to, among other reasons, the fact that the entire outdoor portion of the "runaround" route  
5 had been significantly structurally altered and, as such, the accident conditions could not be  
6 accurately recreated. (See e.g., Ex. 12, 91:2-92:3, 97:4-21, 98:16-99:9.) Plaintiffs further  
7 argued that substantial changes to the lighting, curbing, slope of the ramp and alterations to  
8 the surface of the concrete and curbing in the area where Mr. Cox's fall occurred would  
9 make the Jury View prejudicial to Plaintiffs and of limited probative value to the jury.  
10 Plaintiffs argued that having a jury view under such circumstances would only confuse the  
11 jury and substantially prejudice the Plaintiffs because the jury would not be able to wipe the  
12 significant changes from their minds. (Ex. 12, 99:17-102:24.) Over Plaintiffs' objections,  
13 the Court granted the Defendants' request for a jury view. (Ex. 12, 119:18-22, 125:4-5.)

14  
15 In response, on May 7, 2018, Plaintiffs filed an Emergency Petition for Writ of  
16 Mandamus Under NRAP 27(E) in the Supreme Court of Nevada. (Docket 75762, Doc.  
17 2018-17238). Plaintiffs requested the issuance of a Writ of Mandamus pursuant to NRAP  
18 21 and NRS 34.160 relating to the District Court's May 4, 2018, Oral Order granting the  
19 Jury View, arguing that the District Court abused its discretion by permitting the Jury View  
20 in light of the substantially different condition of the subject area. Plaintiffs further argued  
21 that permitting the Jury View would irreparably taint the jury and substantially prejudice the  
22 Plaintiffs.

23  
24 On May 7, 2018, the Court of Appeals issued an Order Denying Petition for Writ of  
25 Mandamus exclusively on the procedural ground that the "court's intervention by way of  
26  
27  
28

1  
2 extraordinary relief [was not] warranted" because Plaintiffs had "an adequate and speedy  
3 legal remedy in the form of an appeal from any adverse final judgment, precluding writ  
4 relief." However, the Court of Appeals issued a substantive dissent (Silver, J.). (Ex. 16).  
5 Justice Silver supported Plaintiffs' arguments stating "[m]any years have passed, the area is  
6 substantially different from when petitioner fell, and viewing the area in the daylight are all  
7 factors that contribute, in my view, to the irreparable harm petitioners may face with regard  
8 to this unfair procedure after resting their case." (Ex. 16). Justice Silver further stated that  
9 she would "prohibit[] the jurors from viewing the scene at this late juncture of trial as being  
10 untimely and unfair." (Ex. 16).  
11

12  
13 The following day, May 8, 2018, the District Court indicated that it was  
14 reconsidering its prior decision to grant the Jury View and, in fact, ultimately reversed its  
15 decision and denied the Defendants' request for a Jury View. During argument on the issue,  
16 Plaintiffs' counsel played a video in Court that was taken by Plaintiffs' counsel just the  
17 night before. (See Ex. 4, 7:9-9:9.) The video showed the outside portion of the  
18 "runaround" route at the MGM Grand and that Defendants had hired a crew of power  
19 washers to clean up the outdoor route in preparation for the Jury View. The video further  
20 showed MGM Grand employees with mops, brooms, and floor buffers further altering the  
21 accident location, all in an attempt to falsely convince the jury that the route was clean and  
22 safe on the night of Mr. Cox's accident five years earlier. The video also showed that  
23 defense counsel were actually present at the MGM Grand while the cleaning and power  
24 washing was taking place and, therefore, knew the accident scene was being altered for the  
25 jury. Id. Despite providing video proof of Defendants' unethical conduct, the Court  
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27  
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1  
2 stopped Plaintiffs from playing the video any further and, essentially, refused to  
3 acknowledge the existence of the video. (Ex. 4, 9:10-18).

4 Outside the presence of the jury, the Court, in acknowledgment of, and agreement  
5 with, Justice Silver's dissent in the Court of Appeals, specifically stated that the reasoning  
6 for its reconsideration included: (1) Defendants' request for the Jury View coming only after  
7 Plaintiffs had rested their case; (2) the substantial changes that had been made to the  
8 premises; and (3) that the substantial changes would likely ring a bell that could not be  
9 unrung in the minds of the jury. (Ex. 4, 9:19-10:16.) The Court even went on to quote  
10 directly from Justice Silver's dissent and noted that the points Justice Silver made in her  
11 dissent "have significance." (Ex. 4, 10:18-11:4, 13:15-16, 27:23-25). Ultimately the Court,  
12 on reconsideration, denied Defendants' oral motion for a Jury View. (Ex. 4, 25:14-21, 32:7-  
13 14.)

14 Yet, when the District Court subsequently informed the jury that it was cancelling  
15 the Jury View, it did not give the jury any of the above-mentioned reasons for changing its  
16 mind. Instead, the Court simply stated that it "has determined that this is not conducive –  
17 this case is not conducive to" a Jury View. (Ex. 4, 48:20-25.) By not providing the jury  
18 with the actual reasons for cancelling the Jury View, the Court severely prejudiced the  
19 Plaintiffs, acted inconsistently with substantial justice, and prevented the Plaintiffs from  
20 having a fair trial. By not explaining to the jury the actual reasons for changing its mind —  
21 as it did on the record outside the presence of the jury — the District Court prejudiced the  
22 Plaintiffs by implying to the jury that the Jury View was cancelled at Plaintiffs' request. As  
23 it was Defendants who initially requested the Jury View, this was the only logical  
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1  
2 conclusion the jury could draw based on the Court's limited explanation of its reasoning.  
3 The District Court's error was compounded when, during closing arguments, counsel for  
4 Defendant Team Construction implied that it was Plaintiffs' fault the Jury View was  
5 cancelled. Specifically, counsel for Team Construction stated: "I wish we could have had a  
6 jury view, but that didn't happen." (See Ex. 11, 112:12-19.) This was a bell that could not  
7 be unrung.  
8

9 This irregularity in the proceedings prevented the Plaintiffs from having a fair trial  
10 and was inconsistent with substantial justice. See NRCP 59(a)(1); see also NRCP 61.  
11 Accordingly, the Court's decision not to provide a sufficient explanation, including its  
12 actual reasoning, for cancelling the Jury View warrants a new trial.  
13

14 **VI. PLAINTIFFS' WERE SUBSTANTIALLY JUSTIFIED IN FAILING TO**  
15 **TIMELY DISCLOSE THE THREE (3) NEWLY DISCOVERED FACT**  
16 **WITNESSES AND, THEREFORE, THEIR TESTIMONY SHOULD**  
17 **HAVE BEEN ALLOWED IN ITS ENTIRETY AGAINST ALL**  
18 **DEFENDANTS.**

19 A trial should be a search for the truth. During the approximately five years after  
20 Mr. Cox's accident, the Defendants failed to disclose any prior accidents or injuries which  
21 occurred during the 13 Illusion in violation of their ongoing discovery obligations under the  
22 Nevada Rules of Civil Procedure. As a direct result of the media coverage during trial,  
23 Plaintiffs' counsel was contacted by Patricia Esack, Amy Lawrence, and Tara Anderson.  
24 All three women were injured while participating in the "runaround" portion of the 13  
25 Illusion – exactly like Gavin Cox. In fact, both Amy Lawrence and Tara Anderson were  
26 injured in the exact outdoor portion of the "runaround" at the MGM Grand where Mr. Cox's  
27 accident occurred.  
28

1  
2 Immediately after being contacted by each of the potential witnesses, Plaintiffs'  
3 counsel notified defense counsel and the Court of Plaintiffs' intention to call all three  
4 women as witnesses during their case-in-chief and provided their identities and relevant  
5 contact information. Although the Court ultimately permitted Plaintiffs to call each of the  
6 witnesses during the trial (Tara Anderson only as a rebuttal witness), the Court improperly  
7 restricted the substance of their testimony and instructed the jury to consider their testimony  
8 as to only certain Defendants. Such a ruling was severely prejudicial to the Plaintiffs and  
9 was contrary to the Nevada Rules of Civil Procedure. All three (3) witnesses' testimony  
10 should have been allowed in its entirety and the jury should have been permitted to consider  
11 the testimony against all Defendants.  
12

13  
14 NRCP 37(c) provides: "A party that without substantial justification fails to disclose  
15 information required by Rule 16.1, 16.2, or 26(e)(1) ... is not, unless such failure is  
16 harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or  
17 information not so disclosed." NRCP 37(c) (emphasis added); see also Pizarro-Ortega v.  
18 Cervantes-Lopez, 396 P.3d 783, 787-88 (2017). If a failure timely disclose occurs, it is the  
19 burden of the proponent of the evidence to establish that such failure to disclose was either  
20 substantially justified or harmless. Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d  
21 1101, 1107 (9th Cir. 2001). It is universally recognized in Nevada Courts that justice is best  
22 served by a trial on the merits. The Court "must be mindful of the underlying rights of a  
23 party to due process and a trial by jury, as well as the judicial policy favoring the disposition  
24 of cases on their merits." Havas v. Bank of Nev., 96 Nev. 567, 570, 613 P.2d 706, 708  
25 (1980).  
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2 Plaintiffs were both "substantially justified" for the failure to disclose these three (3)  
3 witnesses and such failure was harmless. See McConnell v. Wal-Mart Stores, Inc., 995  
4 F.Supp.2d 1164, 1175 (2014) (customer who sustained injuries after slipping and falling in  
5 store met his burden of showing that failure to formally disclose store manager as witness in  
6 his negligence action was substantially justified or harmless; store should have anticipated  
7 witness would be called to testify). Plaintiffs should have been allowed to call all three (3)  
8 of these newly discovered witnesses during their case-in-chief and without any limiting  
9 instructions from the Court as to against which Defendants the jury could consider the  
10 witnesses' testimony. Plaintiffs concede that these witnesses were not timely disclosed in  
11 accordance with Rule 16.1, 16.2, or 26(e)(1). However, pursuant to NRCP 37(c), if a party  
12 is substantially justified in failing to timely disclose a witness, or if such failure is harmless,  
13 that party should be permitted to call a late disclosed witness at trial.  
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16 Here, Plaintiffs proved that they were substantially justified in failing to timely  
17 disclose the three (3) witnesses and, therefore, the witnesses' testimony should have been  
18 allowed in its entirety and against all Defendants. Instead, as to Patricia Esack and Amy  
19 Lawrence, the Court ruled that trial depositions would have to be taken and only then would  
20 the Court decide if they were permitted to testify in front of the jury. (See Trial Tr., April  
21 25, 2018, 18:1-3, 19:25-20:1, 27:3-6, attached hereto as **Exhibit 13**.) The Court then  
22 restricted Ms. Esack's testimony to the "fact of injury" during the course of the illusion.  
23 (Ex. 3, 70:19-22.) As to Ms. Lawrence, after much argument and objection from Plaintiffs'  
24 counsel, the Court ruled she could testify not only to "fact of injury," but also as to the  
25 manner in which the accident occurred. (Ex. 3, 92:2-7, 94:22-95:8, 101:10-25.) However,  
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