Case No. 76422

IN THE SUPREME COURT 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.	**On Appeal from Eighth Judicial District Court Case A-14-705164-C**

RESPONDENT BACKSTAGE EMPLOYMENT AND REFERRAL, INC.'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Respondent Backstage Employment and Referral Inc. is privately owned, and there are no parent corporations or publicly held companies that own 10% or more of this party's stock.
2. D. Lee Roberts, Jr. and Howard J. Russell of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC have represented Respondent Backstage Employment and Referral, Inc. in this litigation.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 12th day of August, 2019

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

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ROUTING STATEMENT

Backstage does not concede that there was any "unfairness" in the proceedings as noted on page viii of Appellants' Opening Brief, however it agrees that the question of how impeachment evidence can be used is one of statewide significance. The District Court properly determined that a party's conduct and mannerisms meant as assertions should be subject to impeachment evidence. 22 JA 005067. Backstage agrees with Appellants that the ability of parties to use impeachment evidence has statewide importance to guide litigants and courts on the import and relevance of assertions made in open court, but does not concede that there was any unfairness in the trial below.

STATEMENT OF THE CASE

This is an appeal from a judgment on a jury verdict, the denial of judgment as a matter of law post-verdict, and the denial of a motion for new trial. 28 JA 006553-006559. The case arises out personal injuries alleged by Appellants Gavin Cox and Minh-Hahn Cox. Mr. Cox claims he sustained injuries while participating in an illusion known as "13" (the "Illusion"), which he volunteered to participate in during the David Copperfield show in Las Vegas on November 12, 2013. 1 JA 00001-00011. While participating in the Illusion, Mr. Cox claims he slipped and fell, and sustained injuries. *Id.* Appellants filed suit against Respondents MGM Grand Hotel, LLC ("MGM"), David Copperfield ("Copperfield"), Backstage Employment and Referral, Inc. ("Backstage"), David Copperfield's Disappearing, Inc. ("DCDI"), and Team Construction Management, Inc. ("Team"). *Id.* The matter proceeded to trial on April 3, 2018 before the Honorable Mark Denton, District Judge, in and for the Eighth Judicial District Court. After 28 days of trial on the question of liability, the jury returned a verdict in favor of all Respondents. 25 JA 005920 – 005923. Appellants moved post-trial for judgment as a matter of law, or in the alternative, a new trial. 25 JA 005925-27 JA 006295. The District Court denied Appellants' Motion, and the instant appeal followed. 28 JA 006553-006559. With respect to Respondent Backstage, Appellants claim the District Court abused its discretion and erred by (1) admitting sub-rosa surveillance video,

(2) submitting the issue of comparative negligence to the jury, and (3) failing to inform the jury of its reasoning for cancelling a jury view.

STATEMENT OF FACTS

The record clearly supports that the District Court did not err in denying judgment as a matter of law in favor of Appellants on the question of comparative fault, and that the District Court did not abuse its discretion in admitting certain impeachment evidence or in denying a new trial. Therefore, this Court should affirm the Judgment on the jury's verdict, and the District Court's denial of Appellant's Motion for Judgment as a Matter of Law and Motion for New Trial.

BACKGROUND

This case stems from Appellant Gavin Cox's ("Cox") fall at the MGM Grand Hotel ("MGM") while participating in the "13" Illusion ("Illusion") during the David Copperfield Show on November 12, 2013. 1 JA 00001-00011. Appellants allege that during the Illusion, participants were ushered through a dimly lit backstage area, exited the theater at the MGM and, while traveling on an exterior concrete path to re-enter the building, Mr. Cox fell and sustained a right shoulder injury and a traumatic brain injury. *Id.*

The Illusion involves a group of audience participants who, after catching inflatable balls and being called to the stage, are asked whether they are able to run. Once seated in a large prop, curtains drop and the participants are then

ushered into a back hallway, through a backstage area, outside the MGM Hotel, and then back in through a side door. This is referred to as the "runaround" portion of the Illusion. After the participants re-enter the building, they then appear at the back of the audience.

Mr. Cox alleged that he fell and was injured during the "runaround" portion of the Illusion. Appellants filed suit on August 6, 2014, against Respondents MGM, Copperfield, DCDI, Backstage, and Team.

THE TRIAL

The District Court bifurcated the trial in two phases: liability and damages. The case proceeded to trial on April 3, 2018. The liability phase of the trial lasted 28 days. Because the trial was bifurcated, the liability portion focused on whether Respondents breached any duty of care owed to Appellants, and whether any alleged breach was the proximate cause of Mr. Cox's incident.

During trial, Backstage presented testimony of its current President Chris Kenner, and two former employees, Pomai Weall and Ryan Carvalho. Mr. Kenner testified to the procedures and the protocols of the Illusion, and how the pace is set. 5 JA 001028-001031, 6 JA 001244-001248. He testified to how it was designed to keep participants safe, and the people involved in that design process. 5 JA 00988. He further testified to the lighting in the area where Mr. Cox fell. 6 JA 001198.

Mr. Carvalho, who was part of the Illusion on the evening of Mr. Cox's accident, testified on how he communicated and interacted with participants, the speed at which the Illusion moved, and that it was orderly and calm. 9 JA 002054-002057, 002066, 002068-002072. He testified that participants are ushered along with flashlight signals. 9 JA 002081-002082. He further described the lighting at various locations in the "runaround", 9 JA 002056, 002062, and when participants were handed flashlights. *Id.* 002064-002065. Finally, he testified that participants moving slowly or not completing the Illusion did not ruin the effect. 9 JA 002069-002070.

Ms. Weall, also involved in the Illusion on the night of Mr. Cox's participation, explained how audience members were vetted for participation in the Illusion, including signs that she looked for to determine if a volunteer may not be well suited for participating. 11 JA 002412-002418. She testified at length as to how she led participants out of the prop, the lighting and glow tape on the prop, how she and others guided participants, and how she was the last person behind the line of participants. 11 JA 002418-002429. She presented the jury with first-hand eyewitness knowledge of how the Illusion proceeded, and the speed at which participants moved through the Illusion. 11 JA 002429-002430. Ms. Weall also addressed Appellants' claimed "chaos" theme and explained how Backstage could stretch the time for the Illusion if necessary, and make adaptations along the route. 11 JA 002431-002434. Finally Ms.

Weall described the atmosphere of the Illusion; certainly not chaotic, but excited. 11 JA 002489-002490.

In their combined "Statement of Case and Statement of Relevant Facts", Appellants very adeptly omitted an important aspect of Mr. Cox's participation in the Illusion. They fail to mention that, like all participants who are part of the Illusion, he was asked questions to assure he was an appropriate participant. 13 JA 003036-003037. This was consistent with what was described as a vetting process by Backstage employees, and consistent with what another former participant experienced. 10 JA 002281-002282; 10 JA 002380-002382; 5 JA 000968-000970.

Appellants also fail to note, despite their adamant contention that there was no evidence to support a finding of comparative fault, that Mr. Cox's testimony on his place in line was wholly inaccurate. Appellants' Opening Brief at 1. Indeed, the Backstage employee who was last in line—Pomai Weall—testified that she never saw Mr. Cox fall. 11 JA 2392-2395, 2436. In fact, the video surveillance conclusively showed that Mr. Cox was **not** the last person in line, which Mr. Cox admitted at trial:

> Q. Is it fair to say that you now know you were not the last one in line from looking at the video?
>
> A. It would appear that way.
>
> Q. Okay. And is it possible you misrecollected and that you were never the last one in line?

A. It's possible.

13 JA 003075-003076. The import of these inconsistencies and omissions will be discussed herein.

Perhaps the most glaring omission in Appellants' Statement of the Case is any argument that the jury erred in finding Backstage was **not negligent**. Nowhere in Appellants' entire brief do they argue that the jury's verdict on this issue was not supported by evidence. Not once do Appellants argue that a reasonable jury could not have reached the conclusion it did, i.e. that Backstage was not negligent in how it carried out the Illusion. That should be very telling to the Court—Appellants offer no reason to disturb the jury's verdict that Backstage was not negligent, and that alone should end the Court's inquiry as to Backstage.

Comparative Fault

Respondents each asserted comparative fault as an affirmative defense. During trial, the jury heard testimony from several witnesses—including Mr. Cox, who testified over the course of two days and described the incident in detail. 13 JA 003008 – 14 JA 003211. Mr. Cox testified how he grew up loving magic, and how he idolized David Copperfield as a child, so when he came to Las Vegas for his 53rd birthday in November 2013, he was excited to learn Mr. Copperfield was performing while he was in town. 13 JA 003033-003034. He made arrangements to get the best tickets he could. *Id.* He described how he was chosen for the Illusion, and how he was asked if

he could run after he was chosen. 13 JA 003035-003036. He described how the Illusion worked, and throughout his testimony, he repeatedly stated that he ran as fast as he could. He testified that as he ran through what he described as a "rabbit warren," the light changed from dark to light and light to dark. 13 JA 003036-003051. He described running from the inside to outside and then back inside again. 13 JA 003038-003051. As he neared the end of the outside portion, he rounded a corner, running as fast as he could, and slipped and fell. He testified that after he fell, there was a scuff mark on the shoes he was wearing that was not there before he fell. 14 JA 003137-003138. He testified that he was not paying attention to the ground while he was running and was not looking at the ground when he fell. 13 JA 003094.

Mr. Cox testified that he fell because of the changes of light to dark, because he was running as fast as he could, and because of dust on the ground. 13 JA 003059. Mr. Cox admitted that he recognized it was dark, and was unfamiliar where he was going, but failed to look at the ground in front of him anyway. 14 JA 003112-003113.

In addition to Mr. Cox's testimony, the jury heard testimony of a human factors expert, John Baker, who testified about the scuff marks on Mr. Cox's shoes. Dr. Baker testified that the evidence was consistent with a trip rather than a slip. 18 JA 004023-004214. After each side rested, and prior to deliberating, the jury was given an instruction regarding comparative negligence. Ultimately, with respect to Respondent

Backstage, the jury never had to reach the issue of comparative negligence, as the jury did not find that Backstage was negligent in the first instance.

The Admission of Sub-Rosa Surveillance

During Mr. Cox's testimony, counsel for Backstage noted that Mr. Cox, in the presence of the jury, used the courtroom marshal's assistance to walk to the witness stand. Counsel asked Mr. Cox whether he had used assistance elsewhere in the courthouse, and whether he used assistance when he was outside the presence of the jury, to which Mr. Cox said yes. 13 JA 003063. Because of the affirmative representations of Mr. Cox in the courtroom by his conduct and testimony, Backstage was allowed, after the District Court heard argument on the issue, to impeach Mr. Cox by admitting sub-rosa surveillance of Mr. Cox ambulating without assistance. 20 JA 004708-004719, 21 JA 005033-005035, 005061-005067, 005068-005070. Appellants objected on the grounds that the sub-rosa surveillance went to the issue of damages, which was not to be considered during the liability phase. *Id.* Appellants further argued the sub-rosa surveillance was not appropriate impeachment evidence. Backstage argued the sub-rosa was not to contest damages, but rather to challenge Mr. Cox's credibility, since he had affirmed that he needed assistance ambulating, but outside of the courtroom apparently had no issue walking without assistance. *Id.* Ultimately, the District Court ruled the sub-rosa could be admitted for the purpose of impeachment

and for no other purpose. *Id.* Appellants then would be permitted to recall Mr. Cox in rebuttal to rehabilitate him; however, they declined to do so. 21 JA 005067-005068.

Jury View

During trial, Respondents requested the jury be permitted to view the incident scene. The District Court originally granted the request for the view over Appellant's objection. Appellants then submitted an extraordinary Writ of Mandamus/Prohibition to the Court of Appeals. The Court of Appeals declined to consider the Writ; however, in so doing, Justice Silver issued a substantive dissent, which swayed the District Court. 18 JA 004077-004012, 004118. The District Court then reconsidered its prior order and cancelled the jury view, which was exactly the outcome Appellants had hoped. *Id.* The District Court informed the jury that the view would not be taking place, and made no other comments regarding the same. 18 JA 004118. Appellants argued in support of their new trial motion, for the first time, that the jury should have been informed of why the District Court cancelled the view. Appellants also argued that counsel made improper comments that implied to the jury that Appellants were at fault for cancelling the jury view.

Appellants also contend that they should have been permitted to show sub-rosa surveillance of MGM employees allegedly washing the incident scene prior to when the jury view was to have taken place. The District Court declined to allow Appellants to show the video, as it was irrelevant, as the view was no longer taking place. 18 JA

004077-004081. Appellants attempted to argue the video should be admitted to impeach the credibility of Respondents, but as Respondents had made no affirmative representations regarding the condition of the subject incident scene, the video could not be admitted as such. *Id.*[1]

Verdict

After 28 days of trial over the course of eight weeks, on May 29, 2018, the jury returned a verdict in favor of all Respondents and found Appellant Gavin Cox was one-hundred percent at fault for the incident. 25 JA 005920-005923. The jury found Backstage was ***not negligent***. *Id.* Because the jury returned a verdict in favor of Respondents, the trial did not need to proceed to a damages phase.

At the close of Respondents' case, Appellants moved for judgment as a matter of law with respect to Respondents' comparative negligence defense. 22 JA 5147-5154. The District Court denied the motion. *Id.* On October 17, 2018, the District Court denied Appellants' renewed Motion for Judgment as a Matter of Law, or Alternatively, for New Trial. 28 JA 006562-006566. The instant appeal followed.

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[1] Although the video was wholly irrelevant once the jury view was cancelled, Appellants' interpretation of this video is just that—counsel's ***interpretation***. Counsel for Backstage was not involved with any request to clean any areas of the MGM prior to the jury view. Further, the area where the incident occurred was an outside area exposed to the elements, and Backstage never asserted that the dirt / dust / debris that Mr. Cox claimed he encountered could be replicated, so whether the area was washed the day before, the week before, or the year before the trial is of no import. Appellants' counsel is using this video as a Hail Mary attempt to overcome a fairly rendered jury verdict.

SUMMARY OF THE ARGUMENT

Appellants argue the District Court made several errors that warrant a new trial. Appellants' arguments all fail, as the record is clear the District Court did not abuse its discretion or commit any error, and to the extent the District Court did commit any error, such error was harmless given the jury's verdict. *See* Nev. R. Civ. P. 61; *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81, 94 (2016) ("To be reversible, an error must be prejudicial and not harmless.").

First, the District Court acted within its discretion to admit sub-rosa surveillance video to impeach Mr. Cox's credibility. The sub-rosa was not admitted for any other purpose. No legal authority supports Appellants' contention that sub-rosa surveillance may only be admitted during the damages phase of a bifurcated trial. NRS 51.045 clearly allows for conduct to constitute an impeachable statement, and the sub-rosa videos were properly admitted in order to impeach Mr. Cox's statements in the form of his conduct. Undoubtedly, Mr. Cox's demeanor and conduct on the stand were relevant to the jury's determination of his credibility. The Confrontation Clause supported admission of the sub-rosa surveillance video, as did the fact that Mr. Cox put his own conduct at issue when he testified in front of the jury, which creates an exception to the admission of extrinsic evidence under NRS 50.085. Moreover, counsel committed no misconduct during closing arguments by referencing the sub-rosa video or

commenting on Mr. Cox's credibility, as the District Court had properly admitted the sub-rosa, and counsel offered no personal opinion of a witness's credibility.

Likewise, the District Court committed no error in submitting the issue of comparative negligence to the jury, as there was a bona fide comparative negligence defense, and judgment as a matter of law on this defense was not warranted. The record supports that there was sufficient evidence of comparative negligence to submit the issue to the jury. Appellants clearly misunderstand the law in Nevada with respect to the comparative negligence defense and its applicability. Regardless, even if this Court were to determine the instruction was given in error, it was entirely harmless as to Backstage. The jury did not find that Backstage was negligent; therefore, the jury never had to reach the issue of Mr. Cox's comparative negligence. Appellants make no arguments that the jury disregarded jury instructions with regard to its finding that Backstage was not negligent; therefore, the Court should not consider any such arguments with regards to Backstage.

Appellants further allege the District Court erred by failing to explain to the jury why the planned jury view was cancelled. This position is entirely nonsensical and fails to create any legitimate basis for a new trial. First, Appellants vehemently opposed a jury view and submitted an extraordinary Writ to prevent the jury view from taking place. Upon denial of consideration of the Writ, the District Court

cancelled the jury view at its discretion, and had no obligation to inform the jury of the reasoning behind cancelling the view. Appellants feel aggrieved by getting exactly what they asked for, yet somehow believe an outcome in their favor provides them a basis for a new trial. This is patently incorrect.

Finally, Appellants claim that improper statements by counsel during closing arguments constituted misconduct and warranted admonishments pursuant to *Lioce*. Appellants did not, however, object to or seek any admonishment for any alleged misconduct by Backstage's counsel when he argued the import of the sub-rosa evidence. Therefore, any such alleged misconduct cannot be basis for a new trial against Backstage absent plain error by the jury, which there was none. Appellants have failed to establish any basis for a new trial; therefore, the Judgment on the jury's verdict should stand.

ARGUMENT

1. The District Court Did Not Err By Allowing The Admission of Sub-Rosa Surveillance Video.

The District Court properly allowed the sub-rosa videos of Mr. Cox, as these videos were admitted solely on the issue of Mr. Cox's credibility, bias and interest as a testifying witness, and not on the issue of damages. Backstage maintains that any error in admitting the videos, which there plainly was none, would have been harmless in any instance. The jury—after it heard the testimony of Backstage's witnesses and David Copperfield on how the Illusion was performed, and after it

heard the testimony of a purportedly disinterested third party (Amy Lawrence) about the lighting, layout, and speed of the Illusion—**still** found Backstage was not negligent. The evidence Appellants relied on to establish the protocols of the Illusion was before the jury independent of what Mr. Cox may have testified to, and as such any error in the admission of the sub-rosa videos (again, there was none), was harmless vis-à-vis the claims against Backstage.

In any event, the sub-rosa surveillance was properly admitted in the liability phase, as it was admitted for the sole purpose of attacking Mr. Cox's credibility, bias, and interest as a testifying witness. For the proposition that sub-rosa surveillance may not be admitted in the liability phase of a trial, Appellants cite to *Burrows v. Riley*, No. 71350, 2018 WL 565431 (Nev. App. Jan. 19, 2018), an unpublished decision by the Court of Appeals, which may not be cited for any purposes. Nev. R. App. P. 33(c)(3). To the extent the Court would even consider *Burrows*, it important to point out Appellants have mischaracterized what *Burrows* stands for. Appellants contend *Burrows* stands for the proposition that sub-rosa surveillance may not be admitted during a liability phase, but this is a blatant misrepresentation. Rather the Court of Appeals did not even consider the propriety of admitting surveillance video, because no such video was ever admitted. *Id.* at *4. The Court of Appeals noted that it never reached the issue of sub-rosa surveillance because it was never admitted during the liability phase of trial. *Id.*

The Court of Appeals made no findings and there is no indication of whether it would have permitted such evidence to be admitted during the liability phase for the purposes of attacking credibility. *Id.*

The videos were properly admitted in this case, among other reasons to rebut an assertion Mr. Cox made through his physical conduct in the courthouse and in the jury's presence. NRS 51.045 defines a statement as "[n]onverbal conduct of a person, if it is intended as an assertion." Appellants argue Mr. Cox walking to and from the witness stand is not a statement as it was non-assertive conduct. This is plainly too narrow a reading of NRS 51.045; Mr. Cox's decision to walk to and from the witness stand, holding onto someone for stability, was a carefully choreographed assertion as to his physical condition. The surveillance videos were properly admitted in order to impeach Mr. Cox's statement in the form of his conduct.

Moreover, the conduct and demeanor of a witness is absolutely relevant to the jury's determination of the witness's credibility. "[T]he ability to observe a witness's body language and to hear the inflection and emphasis given in spoken testimony may aid a factfinder in evaluating both the credibility of the witness and the proper interpretation of ambiguous testimony." *Forrester Environmental Services, Inc. v. Wheelabrator Technologies, Inc.* 2012 WL 1161125 (D.N.H., April 6, 2012). It has been noted that the need for the jury to weigh credibility of a

witness based upon his physical demeanor in the courtroom is protected by the Confrontation Clause:

> [T]he right guaranteed by the Confrontation Clause includes not only a personal examination, but also (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth'; and (3) **permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility**.
>
> The combined effect of these elements of confrontation—physical presence, oath, cross-examination, **and observation of demeanor by the trier of fact**—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings.

Maryland v. Craig, 497 U.S. 836, 845-846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (internal citations and punctuation omitted) (emphasis added). *See also Taylor v. Wall*, 821 A.2d 685, 690-691 (R.I. 2003) (to protect the right of confrontation, jury should be able to take "physical mannerisms into account" to assess credibility). While couched in the context of the Confrontation Clause, the Supreme Court's reasoning in *Craig* is no less applicable here, and indeed the jury was instructed to consider things like a witness's demeanor when testifying to weigh credibility. *See* Jury Instruction No. 12 (The credibility or "believability" of a witness should be determined by his or her manner upon the stand . . .). "[A] trier

of fact may judge credibility based on the physical mannerisms of a witness during testimony." *Salgado v. Industrial Com'n of Arizona*, 2008 WL 2192858 (Ariz. Ct. App., May 22, 2008).[2] Mr. Cox placed his demeanor and mannerisms into issue, and Backstage was entitled to introduce evidence challenging the veracity of that demeanor.

Appellants also claim the videos were inadmissible "extrinsic evidence", but the prohibition against the use of "extrinsic evidence" is not applicable here. This Court has recognized an exception to the general rule of NRS 50.085 when a party affirmatively put his credibility at issue through his direct testimony:

> We cannot pervert the shield provided by NRS 50.085(3) into a license for a defendant to purposefully, even inadvertently, introduce evidence giving the jury a impression through an absolute denial of misconduct then frustrate the State's attempt to contradict this evidence through proof of specific acts. As a result, we adopt a limited exception to the collateral-fact rule and hold that our statutory rules of evidence do not prohibit a party from introducing extrinsic evidence specifically rebutting the adversary's proffered evidence of good character.

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[2] Appellants will no doubt return to the argument that only Mr. Cox's testimony on the stand was relevant for the jury's consideration. Plainly Nevada law and Jury Instruction 12 cannot be read so narrowly. Under Appellants' interpretation, Mr. Cox could have performed cartwheels to music while on the way to the stand and yet the jury could not consider that aspect of his demeanor because he was not "under oath" yet. Mr. Cox's mannerisms throughout his time in front of the jury were fair game for the jury to consider, and evidence which showed those mannerisms to be manufactured or exaggerated was plainly relevant and admissible.

Jezdik v. State, 121 Nev. 129, 139, 110 P.3d 1058, 1065 (2005). Although decided in the criminal context, the rule announced in *Jezdik* applies with equal weight here. Repeatedly in front of the jury, Mr. Cox made an affirmative assertion about his condition by accepting assistance while walking. ***He*** put that aspect of his case into issue; Backstage had every right to contradict that assertion through the surveillance videos.

NRS 50.085 is modeled after Federal Rule of Evidence 608. But just as NRS 50.085 was construed by the *Jezdik* Court, the principles behind Rule 608(b) are not implicated when a party makes an affirmative statement in court, and the evidence offered is to contradict that very fact. Where a plaintiff, in his case in chief, creates a material issue, a defendant is properly allowed an opportunity to challenge such an assertion with extrinsic evidence. *Cf. Conaway v. Smith*, 1989 WL 36054, at *2 (D. Kan., March 17, 1989). *See also U.S. v. Garcia*, 900 F.2d 571, 575 (2nd Cir. 1990) (608(b) bars impeaching *general* credibility through extrinsic evidence, and does not prohibit extrinsic evidence to contradict a false statement made by a party); *U.S. v. Rodriguez*, 539 F. Supp. 2d 592, 595 (D. Conn. 2008) ("Impeachment by contradiction, as opposed to evidence of a witness's character for truthfulness or untruthfulness, is a permissible exception to the general proscription of Rule of 608(b)"); Committee Notes to 2003 Amendment to FRE 608 ("The Rule has been amended to clarify that the absolute prohibition on

extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness . . . the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as **contradiction**, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403) (emphasis added). Where a specific issue or conduct is introduced and made a material issue by one party in direct testimony, proving the falsity of such assertion is a fair target for the opposing party. *See U.S. v. Barrett*, 766 F.2d 609, 619 (1st Cir. 1985).

Mr. Cox made a plain and deliberate assertion through his physical conduct that he required assistance walking. The videos depicting Mr. Cox walking freely without assistance outside of the courtroom contradict this assertion and fairly challenged whether Mr. Cox was a credible witness. 21 JA 005068-005070. The jurors were correctly instructed by the District Court to give appropriate weight to any witnesses' testimony which they deemed as not credible; the sub-rosa videos directly informed that analysis.

Further, the District Court properly denied Appellants' request to call a medical expert to rebut the surveillance videos. 21 JA 005067-005068. Mr. Cox can certainly testify as to his own physical condition. At no point was a medical expert present when Mr. Cox was in the courtroom walking with assistance, so any medical expert would have no basis to opine on Mr. Cox's conduct or need for

assistance in the courtroom. As discussed above, the videos were not played to question Mr. Cox's ***actual*** physical condition, but were played solely to contradict his affirmative assertion that he required assistance while walking. No such medical professional could rebut this narrow information presented to the jury, and an expert would offer no more than what Mr. Cox would be able to discuss himself, namely why he allegedly needed assistance in one environment (the courtroom) as opposed to other environments (a public sidewalk and the entry way to his apartment). Medical testimony simply would have been irrelevant on the liability issues.

The irony is that Appellants had the opportunity to present rebuttal evidence following presentation of the videos. 21 JA 005067-005068. The Court gave Appellants' counsel an opportunity to recall Mr. Cox to the stand for rehabilitation purposes. *Id.* Appellants elected not to do so. Apparently Appellants would have the Court believe that an unidentified medical expert who never once saw Mr. Cox during trial was vital to rebutting the impact of the surveillance videos, but Mr. Cox's own testimony would have been worthless. Appellants cannot now claim prejudice based on a tactical decision of theirs at trial, and argue they were denied the ability to provide rebuttal evidence when it was their choice not to do so.

Finally, Appellants focus on whether Mr. Cox walking to the stand was a "statement" or whether the videos were barred by NRS 50.085 as "extrinsic

evidence". But Appellants miss a key point here: A witness's bias and motives are always relevant. The jury is instructed to consider the motives and interests of witnesses to assess whether their testimony is believable. NRS 50.085 does not prohibit the use of evidence to show bias or the witness's motives: "[E]xtrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption or prejudice, is never collateral to the controversy and not subject to the limitations contained in NRS 50.085(3)." *Lobato v. State*, 120 Nev. 512, 519, 96 P.3d 765, 770 (2004). Mr. Cox, likely assuming he would later testify as to his physical limitations, had motive and interest to convey to the jury (even in the liability phase) that he needed assistance walking; the surveillance videos revealed, and were relevant and admissible to show, how his motive affected his mannerisms in the jury's presence. The District Court did not err in allowing them to be shown to the jury.

Appellants additionally argue the District Court erred in not admonishing the jury regarding the allegedly improper statements by Respondents' counsel to the jurors that they may consider the video in weighing Mr. Cox's credibility. Appellants, however, ignore that the District Court did not give any such admonishments because the videos were admitted to attack credibility, as such, counsel was permitted to make such arguments to the jury. 21 JA 005061-005067. Moreover, Appellants made **no objection** to any alleged misconduct by

Backstage's counsel, and sought no admonishment, for statements made in closing arguments about the impeachment videos. *See* 24 JA 005629-005676, 25 JA 005812-005830. Therefore, any such arguments are now waived. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Even if this Court were to find there was a timely and adequate objection raised to Backstage's counsel's comments, his closing argument certainly did not violate any professional standards or the *Lioce* framework. The District Court had admitted the sub-rosa videos for the purpose of impeaching Mr. Cox's credibility given his in-court assertion; counsel for Backstage argued in closing for the jury to consider that very same analysis, by applying the admitted evidence to the jury instructions.

2. Respondent Backstage's Counsel Did Not Engage In Any Misconduct During Closing Arguments.

Appellants misconstrue the limitations on proper closing argument. They appear only to object to Backstage's closing argument under the rubric of "personal opinions on a witness's credibility." But that is **not** what was offered. A review of Mr. Roberts' closing argument reveals that he properly, fairly, and within the bounds of professional ethics, asked the jury to review the ***evidence*** and judge for itself whether it found Mr. Cox to be untruthful. Specifically, he argued:

> But it is not so entertaining when you are in a court of law searching for the truth. And, trust me, when Mr. Cox walked into this courtroom for weeks, holding on to his family for support, making faces,

> struggling, **he was attempting to communicate a message**. And statements can be nonverbal conduct in the courtroom if they are intended as an assertion of fact.
>
> And I think you can **reasonably infer** that what he did in the show he put on for weeks was intended as an assertion of fact. He was attempting to deceive you. He was claiming a need for assistance, and he was doing it to get your sympathy and ask you to render a verdict on something other than the facts and the law.
>
> But when he thought he was out of your view, when he thought he was away from these cameras, his conduct changed. You saw for yourself he no longer needed assistance. Strolling by himself unassisted, holding the gate open for himself. And we showed he'd been fine for years to demonstrate the contrast between his statements in the courtroom and the reality outside the courtroom. And he was caught on tape. He was busted. The tapes don't lie. He's been faking in this courtroom.
>
> * * *
>
> You've seen the instruction to the jury that you can examine a lot of things to determine the credibility of a witness, to evaluate his credibility. And if **you believe** a witness has lied to you, you can disregard every bit of their testimony that is not corroborated by other independent evidence.
>
> So I would suggest that, through his nonverbal statements to you over the course of weeks upon weeks, that he was lying to you. And you **can** disregard what he has to say. And that's why it's relevant in this phase.

24 JA 005584-005586 (emphasis added).

In the portion of Mr. Roberts' closing addressed in Appellants' opening brief, he is again talking about what the ***evidence*** showed and what reasonable inferences could be drawn. Mr. Roberts argued that the videos "go to Mr. Cox's

credibility," and "the videos we showed you" supported an inference of deception by Appellants. 24 JA 005673. Again, these are not improper personal opinions on a witness's credibility; they are fair argument pointing the jury to the evidence it has seen and heard, and the reasonable inferences that can be drawn from it, including the inference that a witness was not truthful during trial.

The need to fairly assess credibility is precisely why the District Court allowed the sub-rosa videos to be admitted in the first instance. Mr. Roberts specifically asked the jury to apply the jury instructions to the facts of this case. Appellants' entire argument on misconduct is inextricably tied to the fact that the District Court admitted the sub-rosa videos, and there is no suggestion of improper conduct in a vacuum. Appellants claim error in the admission of the sub-rosa videos (which there is none), and this Court should only consider whether there were improper closing arguments based on the evidence that had been admitted. Once the Court acknowledges that the sub-rosa videos were properly admitted, then the closing arguments by Mr. Roberts—which did no more than ask the jury to make reasonable inferences from evidence before it—cannot be considered improper. Mr. Roberts properly invited the jury to make inferences from record evidence as to whether Mr. Cox was being deceitful in his mannerisms.

If Appellants mean to say that anytime an attorney, relying on and referring back to the evidence, points out to a jury that a witness made an untruthful

assertion during trial, then trial courts have been instructing juries incorrectly for years. The jury in this case was instructed:

> The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.
>
> If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.
>
> You are not required, however, to consider such a witness as totally unbelievable; you may accept so much of his or her testimony as you deem true and disregard what you feel is false.

23 JA 005414. Appellants raise no error in the giving of this instruction, and the instruction tracks pattern instruction 1.9 of the 2018 version of the Nevada Jury Instructions: Civil, published by the State Bar.

It cannot be overlooked that the alleged misconduct by Backstage's counsel was unobjected to at the time of trial. 24 JA 005579-005612, 005629-005676, 25 JA 005816-005829. Appellants blur the lines of what was objected to, and what was not. Appellants did not object to Backstage's comments related to the sub-rosa video during closing, and did not ask for an admonishment either. How the District Court could have "failed" to give an admonishment for Mr. Roberts asking the jury to make reasonable inferences from admitted evidence, when none was ever

requested, is a mystery. This requires the Court to analyze the conduct of Backstage's counsel as unobjected-to commentary.

The question before this Court is therefore whether there was "plain error" triggered by counsel's unobjected-to closing arguments. *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008). "[P]lain error requires a party to show 'that **no other reasonable explanation** for the verdict exists.' This standard addresses the rare circumstance in which the attorney misconduct **offsets the evidence** adduced at trial in support of the verdict." *Id.* "[I]rreparable and fundamental error is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different." *Id.* Appellants plainly cannot sustain that burden here. The jury found Backstage was not negligent, and there was plenty of record evidence to support that. Current and former employees testified to the procedures and protocols of the Illusion; former participants did the same; experts testified to the mechanics of Mr. Cox's fall—all evidence that the jury could rely on to reach its verdict. There is plainly a reasonable explanation for the verdict other than alleged attorney misconduct, and that explanation is Appellants simply failed to prove their case.

Last, Appellants contend they are entitled to a new trial because the trial Court failed to make specific findings per *Lioce* in denying their Motion for New Trial. "When the losing party in a civil trial alleges in a post-trial motion that it is

entitled to a new trial because the prevailing party committed attorney misconduct during the trial, the Nevada Supreme Court has held that the district court must make detailed findings regarding the role that the alleged misconduct played at trial and the effect it likely had on the jury's verdict." *Michaels v. Pentair Water Pool & Spa,* 131 Nev. 804, 357 P.3d 387, 394–95 (Nev. App. 2015). The threshold question to determining whether such findings are required is, of course, whether misconduct actually occurred. *Id.* The District Court specifically found that no such misconduct occurred. 28 JA 006557. Not only did the District Court find no misconduct and such alleged misconduct by Backstage was not objected to during trial, *supra*, Appellants raised no such arguments about Backstage's purported misconduct in their Motion for New Trial.[3] Therefore, any such arguments on appeal are plainly waived. 25 JA 005295 – 26 JA 005984, *Michaels*, 357 P.3d at 395–96.

3. The District Court Did Nor Err By Submitting The Issue of Comparative Negligence To The Jury.

It is axiomatic that comparative negligence is an issue of fact for the jury to decide. *Wagon Wheel Saloon & Gambling Hall, Inc. v. Mavrogan*, 78 Nev. 126, 128, 369 P.2d 688, 689–90 (1962)(citing to *Carter v. City of Fallon*, 54 Nev. 195,

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[3] Indeed now Appellants only refer to Mr. Popovich's comments as ones requiring remand for the District Court to make *Lioce* findings. *See* Appellants' Opening Brief at 32. Backstage does not agree that Mr. Popovich made improper comments, but it is only his comments that the District Court was asked to analyze.

201, 11 P.2d 817, 816). *See also Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 291 P.3d 150 (2012); *Anderson v. Baltrusaitis*, 113 Nev. 963, 944 P.2d 797 (1997). "It becomes a question of law only when the evidence is of such a character as to support ***no other*** legitimate inference." *Wagon Wheel Saloon*, 78 Nev. at 128, 369 P.2d at 689–90 (emphasis added). Pursuant to NRS 41.141(2)(a), an instruction on comparative negligence is **required** if such a defense is asserted. *Verner v. Nevada Power Co.,* 101 Nev. 551, 554–56, 706 P.2d 147, 150–51 (1985). The statute applies to any situation where a plaintiff's contributory negligence is properly asserted as a bona fide issue in the case. *See Buck by Buck v. Greyhound Lines, Inc.*, 105 Nev. 756, 764, 783 P.2d 437, 442 (1989). Failure to give such instruction when a bona fide defense is asserted is plain error. *Verner,* 101 Nev. 551 at 554–56, 706 P.2d at 151.

Appellants argue it was error for the jury to be instructed regarding comparative negligence; however, Appellants' argument (which is no more than their own counsel's *interpretation* of the evidence) fails. First, Respondents raised a bona fide comparative negligence defense, and NRS 41.141 therefore required the instruction be given. Second, even if the instruction was error, it was harmless error as it relates to Appellants' claims against Backstage.

A. Respondents Raised a Bona Fide Defense of Comparative Negligence.

This Court has clarified that for NRS 41.141 to be triggered, thereby

requiring a comparative fault jury instruction, comparative negligence simply must be a bona fide issue. Of particular relevance to this case, this Court has held, as a matter of law, contributory and comparative negligence attach in instances where a plaintiff proceeds in darkness in an unfamiliar area. *Tryba v. Fray*, 75 Nev. 288, 288-91, 339 P.2d 753, 754 (1959) (discussing the "darkness rule"). Comparative fault has been asserted as a viable defense for the jury's consideration in myriad cases, such as when a pedestrian is struck while outside a crosswalk (*Anderson v. Baltrusaitis*, 113 Nev. 963, 944 P.2d 797 (1997)); where a plaintiff asserted a theory of *res ipsa loquitor* (*Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 188, 18 P.3d 317, 321 (2001)); or even where a plaintiff simply did not look before stepping backward (*Joynt v. California Hotel & Casino*, 108 Nev. 539, 835 P.2d 799 (1992)).

Whether or not Mr. Cox exercised reasonable care or failed to exercise reasonable care while participating in the Illusion and navigating his way through what he claims were dark passageways raised a bona fide issue of comparative negligence requiring an instruction to the jury. Sufficient evidence was presented at trial to support this defense. Mr. Cox willingly and without hesitation agreed to participate in the Illusion. 13 JA 003035-003039. He testified multiple times that it was dark, there were changes in the light, and that he did not know where he was going. 13 JA 0030345, 003059, 003078, 003094. He testified multiple times that

he was running as fast as he could. 13 JA 003048, 003051-003052, 14 JA 003112. He acknowledged there were multiple factors that contributed to his fall. 14 JA 003168. And he testified that he was looking ahead, not at the ground, to make sure he was going as fast as he could. 14 JA 003112. A jury could certainly consider the evidence to establish comparative fault on Mr. Cox's part.

Appellants conveniently leave out certain admissions Mr. Cox made which were certainly relevant to comparative fault issues. For example, Appellants describe the events leading up to the Illusion and then claim "Gavin was given no information as to what he could expect". Appellant's Opening Brief at 1. They contend "Gavin was given no indication at all as to what was about to occur." *Id.* Mr. Cox admitted, however, that he was specifically asked before accessing the stage whether he could run, to which he answered "yes." 13 JA 0037-003038. By his own testimony, Mr. Cox at least had information that he would be asked to run, which was again evidence the jury had before it to decide both whether Backstage was negligent in carrying out the Illusion (since it at least assured that participants agreed they could run), and whether Mr. Cox was comparatively at fault for falling while running. Appellants' entire argument can be distilled to this: The jury *could* not have found Mr. Cox negligent because Appellants do not believe it *should* have found as such. Whether Appellants believe it is not "unreasonable" for a person to continue to run, when he admittedly knows it is dark and he is confused, that is not

Appellants' call to make: That is a jury question in this State. Appellant's counsel had every opportunity to argue to the jury that Mr. Cox's conduct was entirely reasonable, and did so zealously. The jury's rejection of counsel's interpretation of the evidence is not a basis to overturn the verdict.

Contrary to Appellants' contention that there was no "record evidence" of Mr. Cox's fault, indeed there was sufficient evidence in the form of Mr. Cox's own testimony, the testimony of other past participants, the testimony of experts, and the testimony of Mr. Copperfield and current and past Backstage employees, that supported the following:

1) Mr. Cox was asked if he could run, and said yes;
2) Mr. Cox knew, as soon as the Illusion started, that he was running in what he perceived was dark and confusing circumstances;
3) He continued to participate in the face of such knowledge; and,
4) He tripped when running, and not looking at the ground in front of him.

With this evidence before it, a reasonable jury absolutely could (and this one did) render a verdict finding Mr. Cox at least comparatively at fault. At the very least, the record before this Court certainly does not lead to a conclusion that the jury's verdict was "clearly wrong" such that this Court should substitute its assessment of the evidence on a written record over the jury's assessment, after sitting through 28 days of trial, of the evidence and the credibility of the witnesses.

This Court has generally only found that comparative negligence is not a bona fide defense in instances where the conduct of the plaintiff is entirely ***passive***. In *Buck by Buck*, for example, this Court found comparative negligence was not a bona fide defense to two toddler plaintiffs who were injured when the car they were riding in was struck by a Greyhound bus. *Id. See also Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 100, 363 P.3d 1168, 1171 (2015) (finding comparative negligence was not a bona fide defense against an infant who suffered injuries in a medical malpractice action); *ETT, Inc. v. Delegado*, 126 Nev. 709, 367 P.3d 767 (2010) (finding comparative negligence was not a bona fide defense against a plaintiff who was struck while in a parked car). The instant matter is easily distinguished from these cases as Mr. Cox was not a passive bystander or passenger. Rather, Mr. Cox was engaged in a voluntary activity, perceiving what he claims were dark and rushed circumstances, in control of his own body and movements, after agreeing that he could run, when the incident occurred.

The jury was also presented detailed expert analysis on the mechanics of the fall, which provided further evidence to support a comparative fault defense. Dr. John Baker offered expert testimony about the scuff marks on Mr. Cox's shoes and offered opinions based on his expertise as a human factors expert and forensic engineer that the evidence was consistent with Mr. Cox tripping by catching his toe, rather than slipping on dust. 18 JA 004203-004214. This testimony raised the

issue of comparative negligence, and supported a comparative fault instruction.

Rather than confront binding and persuasive Nevada law on this issue, Appellants cite various non-binding cases from other jurisdictions. Nevada law is clear, however, and there is no need to turn to the law of another jurisdiction. Further, the cases relied on by Appellants reveal their confusion as to what is required to instruct the jury regarding comparative negligence in Nevada, versus what is actually required to find comparative negligence in other jurisdictions. *Compare Townsend. v. Legere*, 242 N.H. 593, 594 (1997); *Jaworski v. Great Scott Supermarkets, Inc.*, 493 Mich. 689, 697, 272 N.W.2d 518, 520 (1978); *Nieves v. Riverbay Corp.*, 95 A.D.3d 458, 459 (N.Y. App. Div. 2012); *Taylor v. Tolbert Enterprises, Inc.*, 439 So.2d 991, 992 (Fla. Dist. Ct. App. 1983), and *Anderson v. L&R Smith, Inc.*, 265 Ga. App. 469, 470 (2004) (all of which deal with the issue of an improper instruction) *with Bergeron v. K-Mart Corp.*, 540 So.2d 406, 408 (La. Ct. App 1989); *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 517 (1980); *Laberra v. Boyd Gaming Corp*, 132 So.3d 1018, 1023 (La. 2014); and *Marshall v. A&P Food Co. of Tallulah*, 587 So. 2d 103, 110 (La. Ct. App. 1991) (all of which deal with the jury's actual finding of comparative negligence, or no such finding, as opposed to the instruction).

Appellants also cite to cases that involve purely passive plaintiffs, which are inapplicable in the instant matter. *See e.g. Rose v. Annabi*, 934 A.2d 734

(2007)(medical malpractice action for failure to timely diagnose colon cancer); *Harb v. City of Bakersfield*, 233 Cal. App. 4th 606 (2015)(Plaintiff suffered a stroke while driving and filed suit against the city, responding police officer, ambulance company, and paramedic for failure to respond and administer medical attention quickly enough and the court found Plaintiff's pre-accident medical condition was not comparative negligence). As they did in their Motion for New Trial, Appellants cite to *Hernandez-Sanchez v. Gibrick*, which although not a binding decision in the first instance, also involved a purely passive Plaintiff: she was sitting at a stop light and was hit from behind. No. 10A643968, 2013 WL 6912967, at *3 (Nev. Dist. Ct. Nov. 25, 2013).

This Court need not be concerned with how other states apply comparative negligence principles, on factually distinct cases, since Nevada law is clear: An instruction on comparative negligence is **required** if a viable defense of comparative fault is asserted. *See Verner*. Regardless of how another state might decide on when a comparative fault instruction is warranted, the trial courts of this State are instructed to submit the fact-intensive question of comparative fault to the fact-finder if the defense presents a bona fide issue. In a case with evidence of how a plaintiff conducted himself as Mr. Cox did, in the face of voluntarily running in a dimly lit area, a bona fide issue of comparative fault is present, and it is up to a jury to determine comparative fault.

Appellants, again and again, wish to substitute their opinion on what the evidence could support on the comparative fault claim with the jury's assessment of that same evidence. That is not a basis for reversal, however. Appellants argue that Mr. Cox's conduct as he proceeded through the Illusion was not unreasonable, and that he acted entirely reasonably, but all Appellants have done is highlight what this Court has said on countless occasions: Whether a party acted reasonably or unreasonably is a question of fact for the jury.

The jury had direct and circumstantial evidence to consider to determine Mr. Cox's comparative fault. Juries are permitted to make reasonable inferences from circumstantial evidence, and Appellants forget that there were several disputes in the testimony about how the Illusion was performed:

- Mr. Cox claimed it was chaotic and manic; Mr. Carvalho and Ms. Weall testified to the contrary;
- Mr. Cox claimed he had no idea where he was going; Mr. Carvalho and Ms. Weall explained that there are people stationed along the route that guide participants;
- Mr. Cox claimed it was dark; Ms. Weall, Mr. Carvalho and Mr. Kenner all disputed that and explained what the lighting conditions were;

- Mr. Cox testified he had to run as fast as possible; Mr. Carvalho, Ms. Weall, and Mr. Kenner explained that is not how participants travel through the Illusion;
- Mr. Cox testified he was the last one in line; Ms. Weall and the video evidence proved that to be incorrect;
- Mr. Cox testified that he slipped; Dr. Baker and Dr. Yang explained that the evidence revealed he tripped.

The jury had before it these various disagreements in perception, and it certainly had direct and circumstantial evidence to find that perhaps Mr. Cox was not paying attention to his surroundings, or not watching where he was going, or just not acting reasonably for his own safety. That was a completely reasonable inference for the jury to make. The jury's verdict finding no negligence on Backstage's part was supported by substantial evidence, and supported at least a jury instruction on comparative fault.

Appellants' reliance on out-of-state authority, when the issue is so simply resolved by a plain reading of NRS 41.141, is wholly misplaced.[4] Nevada law not only supported, but in fact mandated, a comparative fault instruction in this matter. The issue was one for the jury to determine, and it did so after receiving weeks of

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[4] Although likely inadvertent, Appellants appear to go so far as to misquote NRS 41.141 to support their argument. *See* Appellant's Opening Brief at 34. The quote that is attributed to NRS 41.141 is actually language taken from the *Nallan* case from New York relied on by Appellants.

testimony, watching the security video of the Illusion, and weighing the evidence before it. The evidence was not so overwhelming in Appellants' favor as to dictate judgment in their favor, and the District Court's denial of the motion for judgment as a matter of law should be affirmed.

B. Even If The Jury Was Improperly Instructed Regarding Comparative Negligence, The Error Was Harmless As To The Claims Against Backstage.

NRCP 61 states in relevant part:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

If a jury instruction was given in error, that error is harmless if a different result would not have been reached at trial free of that instruction. *See Supera v. Hindley*, 93 Nev. 471, 472, 567 P.2d 964, 964 (1977). Here, even if the instruction on comparative negligence was given in error, it was harmless as to Appellants' claims against Backstage. The jury found Backstage was not negligent; therefore, the jury was never asked to reach the issue of "comparative" negligence between Appellant and Backstage. As Backstage was found not negligent in the first instance, whether or not the jury "compared" Mr. Cox's negligence is of no import.

4. Appellants Do Not Raise The Jury's Manifest Disregard Of Instructions As To Backstage.

A new trial cannot be granted on the grounds that the jury disregarded instructions unless it would have been impossible for the jury to render the same verdict if the instruction was followed. *Weaver Bros. v. Misskelley*, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982). *See also M & R Inv. Co. v. Anzalotti*, 105 Nev. 224, 226, 773 P.2d 729, 731 (1989) ("We need not determine how the jury reached its conclusion that neither defendant was liable; we need only determine whether it was possible for the jury to do so"); *Carr v. Paredes*, 387 P.3d 215 (Nev. 2017). While Backstage seriously doubts this jury disregarded the proximate cause instruction, the jury plainly could have still rendered the verdict it did by correctly applying the instruction.

Regardless, Appellants' arguments regarding the jury's consideration of the proximate cause instruction are directed solely towards Respondents MGM, David Copperfield, and DCDI, and do not apply to Backstage. Since the jury found no negligence by Backstage at all, the proximate cause instruction was not germane to the jury's verdict. There was no inconsistency in the jury's understanding of a proximate cause instruction where there was a verdict finding no negligence on the part of Backstage. Appellants have presented no arguments the jurors disregarded instructions on proximate cause as they pertained to Backstage.

5. The District Court Did Not Err By Not Informing The Jury As To Why It Cancelled The Jury View.

The District Court's decision not to explain its reasoning on disallowing a jury view was not an irregularity in the proceedings. A review of the pertinent portions of the May 8, 2018 trial transcript shows that Appellants never once requested the District Court to explain to the jury its ruling disallowing the jury view. 18 JA 004076-004102. Failing to do so waives Appellants' right to raise this issue in a post-trial motion. *See Fick v. Fick*, 109 Nev. 458, 462, 851 P.2d 445, 448 (1993) (failure to object barred subsequent review); *Edwards Industries, Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036–37, 923 P.2d 569, 576 (1996) (plaintiff waived right to raise issues on appeal when failing to object or ask for clarification at trial). Here, Appellants did not request the District Court to further explain the basis of its decision, and Appellants waived any such arguments in this regard.

Even if this Court were to consider Appellants' argument, allowing a jury view is solely within a trial court's discretion. *See* NRS 16.100. This Court has consistently recognized that a jury view is purely a discretionary decision of the trial court. *See State ex rel. Department of Highways v. Haapanen*, 84 Nev. 722, 723, 448 P.2d 703, 722 (1968); *Eikelberger v. State*, 83 Nev. 306, 310, 429 P.2d 555, 558 (1967). The fact that the District Court later changed its decision on the jury view was within its absolute discretion under NRS 16.100 and did not severely prejudice Appellants.

Further, Appellants offer no authority for the proposition that a trial judge is required to provide the jury with the detailed reasons of its rulings, and in fact, Appellants concede as much in their brief: "While it is true that a District Court is not typically required to explain its reasoning for its decisions to the jury [. . .]." Appellant's Opening Brief at 45. Logic dictates the contrary. Doing so would risk confusion amongst the jurors and is well outside the parameters of a trial judge's duties. Trial judges typically do not explain the legal bases for ruling on objections at trial, rarely (if ever) elucidate on what is discussed at bench trials or outside the jury's presence, and in fact do not even explain to jurors who propose questions to witnesses why certain juror questions are not asked. The trial judge is tasked with applying the law to rule on evidentiary and legal issues; the judge's reasoning is not shared with the jury, which has the task of applying the facts to the law the trial court provides. Appellants' suggestion that a trial judge is somehow required to explain its decisions to lay jurors would turn trial practice on its head.

Moreover, Appellants have failed to show prejudice as the District Court ultimately ruled ***in Appellants' favor*** by denying a jury view. Appellants mischaracterize the District Court's order denying Appellant's Motion for New Trial. The District Court appropriately found in its order that no such discussion was had in front of the jury regarding who requested the jury view. 28 JA 006557-006558. What in fact occurred was counsel for Backstage simply inquired about

the jury view in front of the jury: "[W]e would request that the jury view, if can be accommodated by the jury, take place at least 30 minutes after sunset." 17 JA 003854. Immediately thereafter the District Court responded that it would discuss the jury view outside the presence of the jury. *Id.* Appellants incredibly claim prejudice because the District Court not explaining its reasoning implied to the jury that the view was cancelled because of Appellants. Appellants fail to acknowledge that the jury view was cancelled at Appellants' objection to the view. If Appellants had not opposed the jury view, or more specifically not filed a writ petition, then the District Court would have had nothing to explain to the jury. In fact, to fully "explain" its reasoning, the District Court would have been required to tell the jury that Appellants filed a writ petition, and that the District Court was influenced by Justice Silver's dissenting opinion. That opinion was the by-product of Appellants' writ petition, and one cannot be separated from the other.

Appellants apparently *wanted* the jury to know that Appellants vehemently resisted a jury view, and got exactly what they asked for, but interestingly did not object on the record to the request in the jury's presence. They now claim prejudice because the jury was not educated on Nevada procedural law, or the intricacies of Appellants' writ petition. Rather than own the fact that their objection was the genesis of the District Court cancelling the jury view, Appellants instead engage in revisionist history to claim the District Court's reconsideration of the issue was

somehow divorced from Appellants' own objections, and propose that the District Court should have made Appellants' arguments to the jury for them, thereby portraying some fiction that Appellants had nothing to do with the District Court's ruling.

Appellants then raise the issue of the District Court refusing to allow Appellants to show the jury video of MGM employees alleging cleaning the subject incident area to somehow attack the credibility of the Respondents. *See supra* Section 1. Yet, the District Court's decision to preclude Appellants from showing any such video had nothing to do with credibility, and any arguments regarding the same became moot as soon as the District Court made the decision to cancel the jury view.

A trial court is not required to inform the jury of every basis for its decisions, and the District Court did not commit an irregularity in the proceedings by failing to do so here.

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CONCLUSION

For the foregoing reasons, Respondent Backstage Employment and Referral, Inc. respectfully requests this Court affirm the District Court's Judgment on Special Verdict, and its Order Denying Motion for Judgment as a Matter of Law, or Alternatively, for a New Trial.

Dated this 12th day of August, 2019

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double spaced Times New Roman font.
2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 10,699 words.
3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.
4.

Dated this 12th day of August, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2019, the foregoing **RESPONDENT BACKSTAGE EMPLOYMENT AND REFERRAL, INC.'S ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court's eFlex system, which shall be served in accordance with the service list as follows:

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