IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

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.; and BEACHERS LV, LLC,

Respondents.

Supreme Court 76422

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

RESPONDENT MGM GRAND HOTEL, LLC'S ANSWERING BRIEF ON APPEAL

Jerry Popovich
Gil Glancz
Selman Breitman LLP
3993 Howard Hughes Parkway, Suite 200
Las Vegas, Nevada 89169
Telephone: 702.228.7717
Attorneys for Respondent
MGM GRAND HOTEL, LLC

NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 16.1(a), and must be disclosed.

1. Defendant MGM Grand Hotel, LLC is a Nevada limited liability corporation. It is a subsidiary of MGM Resorts International, a publicly traded company.

2. Jerry C. Popovich, Eric O. Freeman and Gil Glancz of Selman Breitman LLP have represented Defendant MGM Grand Hotel, LLC in this litigation.

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

DATED: August 12, 2019 Selman Breitman LLP

By: */s/ Gil Glancz*

JERRY C. POPOVICH
Pro Hac Vice
California Bar No. 138636
GIL GLANCZ
Nevada Bar No. 9813
3993 Howard Hughes Parkway, #200
Las Vegas, NC 89169
Telephone: 702.228.7717
Facsimile: 702.228.8824

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VII. JURISDICTIONAL STATEMENT

Respondent MGM GRAND HOTEL, LLC (hereinafter "MGM" or "Respondent") agrees with the majority of the Appellants' GAVIN COX and MINH-HAHN COX's (from now on collectively the "Plaintiffs" or "Appellants") Jurisdictional Statement concerning their appeal. However, MGM does not agree with Appellants' statements that Mr. Cox was "selected" to participate and that the jury "inexplicably attributed comparative fault entirely to Mr. Cox without any record as to his fault." The record provides more than ample evidence through testimony, expert testimony, video of the accident, and photographs to support the findings by the jury.

VIII. ROUTING STATMENT

Respondent agrees with the Appellants' Routing Statement concerning their appeal.

IX. STATEMENT OF ISSUES

A. Whether the District Court abused its discretion in denying Plaintiffs' Motion For a New Trial.

B. Whether the District Court abused its discretion by admitting sub rosa surveillance videos of Mr. Cox during the liability phase of trial and whether any resulting prejudice denied Plaintiffs a fair trial.

C. Whether there was a bona fide comparative negligence defense raised by all defendants to support the District Court submitting the issue of comparative negligence to the jury.

D. **Whether there was substantial evidence to support the jury's finding that Defendant MGM's negligence was not the proximate cause of Plaintiffs' alleged damages.**

E. **Whether the District Court abused its discretion in the manner in which it informed the jury that there would be no jury view.**

I. SUMMARY OF ARGUMENT

MGM was awarded a defense verdict after a lengthy liability phase. The verdict was the result of the District Court doing its job properly and the jury doing its job properly.

The District Court's evidentiary decisions which are challenged by the Plaintiffs were made after extensive argument, after due consideration by the District Court, and with the District Court expressing its rationale for the rulings on the record. Plaintiffs have no basis to argue that the District Court failed to exercise its discretion on the challenged rulings. Plaintiffs still just disagree with the rulings and ask this Court to improperly substitute its own analysis in place of the District Court's. The District Court's evidentiary rulings which are challenged by Plaintiffs should be affirmed because there is no showing of an abuse of discretion in the rulings.

The Plaintiffs challenge the way the District Court communicated an evidentiary ruling, about a site visit, to the jury. In an argument that is without basis and borders on the frivolous, Plaintiffs argue the wrong standard of review on this issue in seeking reversal. As evidentiary decisions are subject to an abuse of discretion standard, so too is the manner in which the court chooses to inform the jury of its evidentiary decision. Plaintiffs offer no support in the record on appeal for a showing

of an abuse of discretion. The District Court stated its analysis in response to Plaintiffs' courtroom arguments, along with the basis for the decision. There is no abuse of discretion here.

The District Court's decision to give a comparative negligence jury instruction was based on substantial evidence from experts, percipient witnesses, and exhibits admitted at trial. Plaintiffs ignore the trial evidence and repeatedly argue that there was no basis for comparative negligence to be put before the jury. There was plenty of evidence to support comparative fault, but even if error is found, there is no impact on the defense verdicts by a comparative fault jury instruction being given.

Since the District Court did not commit error as outlined above, the District Court's denial of a new trial on the same issues is right. The District Court issued an extensive order denying the motion, with the reasoning and basis for the ruling. There is no legitimate argument for reversal of the District Court's denial of a new trial for Plaintiffs.

Plaintiffs write much about the lack of a fair trial, but the record on appeal shows that Plaintiffs were given every reasonable opportunity to prove their case and obtain a verdict of liability against MGM. The judgment in favor of MGM should be affirmed in all respects.

II. STATEMENT OF THE CASE

This case involves an accident that occurred on November 12, 2013 during the David Copperfield Show at MGM. Gavin Cox claims he was injured while participating in the "Thirteen" illusion as an audience member, when he was allegedly hurried with no guidance or instruction through a dark area. Plaintiffs claim the area where Mr. Cox injured himself was a construction area that was covered with cement dust which allegedly caused Mr. Cox to slip and fall.

On August 6, 2014, Plaintiffs filed their Complaint against MGM and other defendants. See *Joint Appendix volume 1, pages 00001-00011* ("*JA.v.21.p.00001-00011*"). In their Complaint, Plaintiffs alleged five (5) causes of action against the defendants, including, (1) negligence, (2) respondeat superior, (3) negligent hiring, training, supervision and retention, (4) loss of consortium, and (5) punitive damages.

On October 27, 2014 MGM filed its Answer to the Complaint. *JA.v.1.p.000029-000038.* An Order Granting the Motion to Bifurcate Trial of BACKSTAGE EMPLOYMENT AND REFERRAL, INC. ("Backstage") was filed on February 27, 2017. *JA.v.2.p.000348-000351.* On March 28, 2017, MGM filed the District Court's Order Granting the Motion for Summary Judgment on Plaintiffs' Punitive Damages Claims. *JA.v.2.p.000283-000284.*

Trial began on April 3, 2018. MGM's counsel was able to chip away at Plaintiffs' claims and allegations throughout the trial. On May 11, 2018, following the conclusion of all the defendants' cases, including MGM, Plaintiffs made an NRCP 50(a) Judgment as a Matter of Law Motion with the District Court to dismiss the affirmative defense of comparative negligence. The Motion was denied. *JA.v.22.p.005154.*

On May 29, 2018 the Jury returned with a defense verdict in favor of all defendants. *JA.v.25.p.005920-005923.* The jury found Plaintiff Gavin Cox 100% at fault for his own injuries. The Honorable Mark Denton executed the Judgment on Special Verdict on June 18, 2018 which was entered by the court on June 20, 2018. *JA.v.27A.p.006268-006270.* Notice of Entry of the Judgment on Special Verdict was filed June 21, 2018. *JA.v.27A.p.006265-006267.* The Order on Plaintiffs' Motion for Certification of Judgment was filed on May 8, 2019. *JA.v.28.p.006624-006626.* This Appeal was filed on June 11, 2019. *JA.v.27A.p.006260-006263.*

III. STATEMENT OF RELEVANT FACTS

The "Thirteen" Illusion

1. The "Thirteen" illusion is an illusion that is performed at the David Copperfield show at MGM which involves the disappearance and reappearance of volunteer audience members. *JA.v.5. p.00970-001044.*

2. The illusion had been part of the David Copperfield show at the MGM since 2000 and has been performed roughly 20,000 different times. *JA.v.4.p.000938, JA.v.5.p.1045.*

3. The route for the audience volunteers to participate in the "runaround" portion of the illusion was created using careful consideration for the safety of participants by a number of people involved in the show including Homer Liwag and Ben Buttoner of Backstage and then approved by Chris Kenner of Backstage and David Copperfield of DCDI, as well as MGM. *JA.v.4.p.000935-000936, JA.v.4.p.000941-000943, JA.v.7.p.001495.*

4. The route for the runaround includes portions both inside and outside of the MGM. *JA.v.18.p.004195-004196.*

5. There was extensive evidence that defendants took great care to ensure that participants were safe throughout the illusion as a number of protocols that were in place and followed to ensure safety of the participants during the illusion. *JA.v.5.p.001079-001080, JA.v.4.p.000947-000956, JA.v.7.p.001467-001472, JA.v.5.p.001107. JA.v.16.p.003611-003617, JA.v.13.p.003043-3044, JA.v.14.p.003123, JA.v.11.p.002411-JA.v.11.p.002505.*

6. It takes roughly 30 employees of the respective defendants, other than TEAM CONSTRUCTION MANAGEMENT, INC. and

BEACHERS LV, LLC, that assist in the illusion, who have practiced and rehearsed, for it to work correctly. *JA.v.5.p.001079-001080.*

7. The audience participants for the illusion volunteer when they catch one of several inflatable balls that are thrown into the audience by Mr. Copperfield, and choose to keep the ball. *JA.v.4.p.000952.*

8. Prior to throwing the inflatable balls, Mr. Copperfield informs the audience of the upcoming illusion and to stand up and attempt to catch a ball if they would like to participate in same. *JA.v.5.p.000973-000974.*

9. The audience members that willingly catch the ball are then directed to the side of the stage. During this time the stagehands are screening and visually assessing the potential participants to assess their respective fitness to participate in the illusion. *JA.v.4.p.000953-JA.v.5.000963, JA.v.5.p.000976-000977.*

10. The audience members who are volunteering are observed by Mr. Copperfield, magician assistants and stagehands for signs of intoxication, improper footwear, difficulty walking or climbing stairs, and decisions are made about whether the person can participate in the disappearance portion of the illusion. *JA.v.7.001441-001447.*

11. The audience members who willingly catch the balls are vetted or screened at roughly seven different moments by the employees of DCDI and Backstage before being allowed to participate in the illusion to

ensure that they can safely transverse the disappearance portion of the illusion. *JA.v.4.p.000947-000956, JA.v.7.p.001467-001472, JA.v.16.p.003611-003617.*

12. Before going on to the stage, the potential participants are asked a series of questions, including the most important, whether they have the ability to run. *JA.v.5.p.000967-00969, JA.v.5.000979-000987.*

13. Once the audience volunteers are actually on stage they are directed to follow Mr. Copperfield around the stage so that (1) they understand the follow-the-leader concept and more importantly (2) so that Mr. Copperfield and stagehands can continue the screening process to further evaluate if it appears that there is anything that would prevent the volunteer from safely participating in the disappearance portion of the illusion. *JA.v.5.p.000996-001001, JA.v.5.p.001008-001010.*

14. During the performance of the illusion, the "runaround" route has multiple stagehands posted throughout and leading the way for audience participants. *JA.v.6.p.001239-001240, JA.v.5.p.001034-001044.*

15. During the performance there is also one stagehand that is responsible for taking the first audience participant's hand throughout the runaround portion of the illusion in order to lead the way and set the pace for the other participants to follow-the-leader in a line through the route.

JA.v.5.p.001021-001024, JA.v.5.p.001030-001040, JA.v.5.p.001106-001107.

16. There is another stagehand whose responsibilities include assisting the participants off stage to begin the runaround portion of the illusion and to follow behind the last participant throughout the runaround to ensure no issues arise. *JA.v.5.p.001107.*

17. At no point during the "runaround" portion of the illusion are participants told to run as fast as they are able. Instead, participants are encouraged to keep a pace of a brisk walk. *JA.v.9.p.002089-002090, JA.v.6.p.001245-001246, JA.v.11.p.002392-002393.*

18. The audience volunteers are free to go at their own pace or to stop participating at any time, which participants have chosen to do in the past. *JA.v.6.p.001223-001224, JA.v.7.p.001456-001459, JA.v.7.p.001501-1502*

19. David Copperfield inspects the entire route, at the same pace suggested by the stagehands, roughly ten minutes before the audience participants are led through the same path. *JA.v.6.p.1394, JA.v.7.001531-1535, JA.v.7.p.001546-001547,* JA.v.17.p.003925

Mr. Cox's Participation in the Thirteen Illusion

20. Mr. Cox purchased tickets to attend the David Copperfield show and while there willingly and without hesitation volunteered to

participate in the Illusion even after he was asked about his ability to run. *JA.v.13.p.003035-003036.*

21. Mr. Cox testified that he was the last participant off stage and therefore was the last in the line of participants following the route, however his claim was not supported by the evidence and therefore he admitted he was not the last participant after viewing the video excerpts of the incident. *JA.v.13.p.003075.*

22. Mr. Cox testified that he was running, it was dark, he did not know where he was going and it was "total pandemonium." *JA.v.13.p.003043.*

23. Mr. Cox further testified multiple times that he was running as fast as he could throughout the runaround route. *JA.v.13.p.003048, JA.v.13.p.003051-003052, JA.v.14.p.003112.* He further testified that he did not choose to stop because he was having fun. *JA.v.14. p.003154.*

24. Mr. Cox also testified that he did not even look at the ground. *JA.v.13.p.003079-003080.*

25. Mr. Cox testified at deposition which was discussed at trial that he fell when he was rounding the corner on the outside portion of the runaround and that he slipped on construction dust which made him fall. *JA.v.13.p.003102- JA.v.14.p.003113.*

26. Mr. Cox testified that after he turned the outside corner he felt his feet going up which caused him to slip and fall. *JA.v.13.p. 003051.*

27. Ryan Carvahlo was the stagehand who took the first audience participant's hand throughout the runaround portion of the illusion that night of Mr. Cox's accident, never tells audience volunteers to run during their participation and did not do so that evening. *JA.v.7.p.001451-001452.*

28. Pomai Weall was another stagehand who assisted the audience volunteers off stage and followed behind them during the runaround the night of Mr. Cox's accident, she also never tells volunteers to run and did not do so the night of the accident. *JA.v.11.p.002392-002393, JA.v.7.p.001451-001452.*

29. By the time Ms. Pomai was in view of the area where Mr. Cox had fallen he had already continued participating in the illusion so she never saw him. *JA.v.11.p.002395-002396.*

Expert Investigation

30. At trial, MGM presented expert testimony of John Baker, Ph.D. (*JA.v.18.p.004120-004264, JA.v.18.p.004268-JA.v.19.p.004398*) who specializes in accident reconstruction, injury reconstruction and human factors. *JA.v.18.p.004121.*

31. Dr. Baker found that the point of impact ("POI"), meaning Mr. Cox's impact with the ground was more than twenty feet from where Mr. Cox had said that he slipped and fell. *JA.v.18.p.004169-004173, JA.v.19.p.004385-004386.*

32. Dr. Baker found the site where Mr. Cox tripped was on a straight and essentially level concrete walkway. *JA.v.18.p.004184-004187, JA.v.18.p.004228.* Dr. Baker also found that the POI was fifteen feet, eight inches beyond the concrete ramp leading to the doorway in front of Mr. Cox, and that the ramp in no way had anything to do with Mr. Cox falling. *JA.v.19.p.004318-004321, JA.v.19.p.004340-004341.* Dr. Baker testified that the concrete ramp did not meet the current building code requirements. *JA.v.18.p.004318-004321.*

33. Dr. Baker arrived at the conclusion that Mr. Cox fell because he tripped as a result of not lifting his foot properly and interrupting his stride, on smooth level concrete. *JA.v.18.p.004203-004206, JA.v.18.p.004212, JA.v.18.p.004214, JA.v.19.p.004361-004363.*

34. Dr. Baker found that photos of Mr. Cox's shoes and clothes support these opinions. *JA.v.18.p.004201-004215, JA.v.18.p.004228, JA.v.19.p.4338-004339.*

35. Team Construction Management, Inc. ("TEAM") also presented expert testimony of its own by Dr. Nicholas Yang

(*JA.v.20.p.004624-JA.v.21.p.004969*) a senior biomechanical engineer who determined the biomechanics of the fall. *JA.v.20.p.004625.*

36. Dr. Yang arrived at the conclusion that a toe trip caused Mr. Cox to fall. *JA.v.20.p.004625*. Dr. Yang found that the photos of Mr. Cox's shoes also supported his conclusion (*Id.*) and that the top of the ramp was about nine feet behind where Mr. Cox's feet were located when he tripped. *JA.v.20.p.004664.*

37. Dr. Yang found that Mr. Cox fell approximately twenty feet from the corner where Mr. Cox indicated that he fell. *JA.v.20.p.004668.*

IV. STANDARDS OF REVIEW

A. Standards for Reviewing an Order Denying Renewed Motion for Judgment as a Matter of Law and Motion for New Trial

If the District Court does not grant a motion for judgment as a matter of law that is made at the close of all the evidence, then NRCP 50(b) provides that a "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." A renewed motion for judgment as a matter of law under NRCP 50(b) is subject to the same de novo standard as a motion filed at the close of evidence under NRCP 50(a).1

[1] See NRCP 50 (indicating within the drafter's note to the 2004 amendment that a motion filed

However, this Court's review of the trial court's ruling on a motion for new trial carries a separate standard. "The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this Court will not disturb that decision absent palpable abuse." *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

B. Standard for Reviewing Admission of Evidence or Testimony at Trial

This Court reviews a District Court's decision to exclude or allow evidence for an abuse of discretion. *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). When a different result at trial is probable, but for an erroneous evidentiary ruling, a new trial is warranted. *Cook v. Sunrise Hosp. & Med. Ctr., L.L.C.*, 124 Nev. 997, 1009, 194 P.3d 1214, 1221 (2008). Claims of prejudice concerning errors in the admission of evidence are based upon whether the error substantially affected the rights of the appellant. This demonstration is made when the appellant demonstrates from the record that, but for the error, a different result might reasonably have been expected. *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008).

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under subdivision (b) is the renewal of a motion filed under subdivision (a) and must have been preceded by a motion filed at the appropriate time under subdivision (a)(2)).

An abuse of discretion occurs if the district court's decision is arbitrary and capricious or if it exceeds the bounds of law or reason. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "Arbitrary and capricious" is defined as a willful and unreasonable action without consideration or in disregard of the facts or law, or without a determining principle. *State v. Dist. Ct.*, 118 Nev. 140, 146-147, 42 P.3d 233, 237 (2002).

C. Standards for Reviewing Jury Instructions

A District Court has broad discretion to settle jury instructions. *Skender v. Brunsonbuilt Constr. and Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006). Accordingly, this Court reviews a District Court's decision to give a particular instruction for an abuse of discretion or judicial error. *Id.* Nevertheless, a litigant is entitled to have the jury instructed on all theories of his case which are supported by the evidence. *Beattie v. Thomas*, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983).

D. Standards for Reviewing Issues of Attorney Misconduct

Whether an attorney's comments are misconduct is a question of law, which this Court reviews de novo. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

V. ARGUMENT

A. Plaintiffs Fail to Establish that the District Court Abused its Discretion in Allowing Surveillance Videos of Mr. Cox

(1) Surveillance Videos

Plaintiffs argue that the surveillance videos were not proper impeachment because impeachment is only to testimony on the witness stand. MGM takes the position that the surveillance videos were offered for credibility issues (see below), not necessarily for impeachment. However, Mr. Cox did testify during trial about using assistance to walk even when he was not in the presence of the jury. *JA.v. 13.p.003063.* Even Plaintiffs' criteria for use of the videos has been met.

Counsel for Plaintiffs, Mr. Deutsch, admitted the following to the District Court about the videos:

> "Judge for the purposes of discussion, show Mr. Cox walking with his family without holding hands. They show one of him walking his dog. They show with oxygen on. They show one of him – I think there's maybe two with him walking with his wife, they're walking a dog. I think there's one when he's just walking back to his apartment from court and he's not holding hands with anyone." *JA.v.21.p.004971-004972.*

The surveillance videos and the official video record from the courtroom were not introduced and admitted for the purpose of attacking the character of Mr. Cox or to show he was a bad person. The videos were not introduced and admitted to question Mr. Cox's actual physical conditions or the extent of his injuries as those issues would be dealt with

in the second phase of the trial regarding damages. Rather, the videos were introduced and admitted solely for the purpose of contradicting the specific behavior of Mr. Cox during trial when he repeatedly showed the District Court and jury that he needed assistance while walking. This video evidence as presented was to assist the jury in weighing the credibility of Mr. Cox. Credibility of witnesses and weight to be given their testimony is within the sole province of the trier of fact. See, *Quintero v. McDonald*, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000).

Mr. Popovich, counsel for MGM while arguing for the videos to be admitted stated the following:

> "Your Honor took a – a thumb drive of it (the videos) last night and has informed us at the bench that Your Honor has seen the evidence. And so if the Court determines that the evidence is sufficient to sustain a finding that witness credibility is affected by the evidence, then it should be admitted." *JA.v.22.p.005064.*

The District Court having previewed the videos prior to their admittance agreed that they go to Mr. Cox's credibility. *JA.v.22.p.005062-005067.*

From the first day of trial until the day that the videos were released to counsel for Plaintiffs, Mr. Cox asserted through his nonverbal conduct that he was unable to walk without the assistance of others. *JA.v.13.p.003063.* Mr. Cox's decision to walk to and from the witness stand before and after his testimony under oath, and indeed every other day

in the courtroom, holding on to someone or something for stability, was a carefully choreographed assertion as to his physical condition. *Id.* It was only after the videos were revealed to the District Court and Mr. Cox's counsel that Mr. Cox miraculously was able to navigate without the assistance of another individual in the courtroom for the remainder of the trial. *JA.v.21.p.004972.* The videos simply exposed the in-court deception perpetrated by Mr. Cox. Should the District Court, as Plaintiffs argue, have allowed this deception to continue without rebuttal through a verdict on the liability phase? The answer is clearly no. Instead, the District Court in ruling to admit the videos stated, "I considered that whatever has happened in open court is fair game. And accordingly I'll permit the video." *JA.v.22.p.005067.*

Notably, Plaintiffs have never taken the position that the videos of Mr. Cox are not accurate or do not show the truth. Instead, Plaintiffs argue that the deception of Mr. Cox should have remained hidden until the damages portion of the trial because that is the only portion of the trial where Mr. Cox's medical condition may be discussed since the case was bifurcated. However, Plaintiffs fail to disclose that at the request of their counsel, the jury was read an instruction immediately prior to testimony of Mr. Cox regarding his medical condition. Specifically, the instruction

dealt with the fact that Mr. Cox was claiming a brain injury which could affect his testimony:

> THE COURT: "Ladies and gentlemen, Mr. Cox alleges that, as a result of this accident, one of the injuries he sustained was a traumatic brain injury which may affect the way he testifies during this trial. You may take this allegation into consideration when you are evaluating his testimony." *JA.v.13.p.003008.*

That instruction by the District Court that the Plaintiffs argued must be given to the jury not only informed them of the severity of Mr. Cox's alleged medical condition in the liability phase of the trial, but also sought to influence the jury with respect to Mr. Cox's credibility. In addition, the instruction provided a shield which allowed Mr. Cox free reign to testify without worrying whether his statements could be proven false by conflicting evidence since he could just blame his alleged brain injury for his mistaken recollection.

While Mr. Cox was testifying regarding the circumstances surrounding the accident, he testified regarding his injury, pain and condition immediately following the accident. *JA.v.13.p.003009, JA.v.13.p.003051-003060.* In fact, in discussing his injury, Mr. Cox testified that the fall "ripped the whole of my arm out of its socket, and it ripped all of the tendons out of the socket, and my elbow and my arm ended up in the middle of my body. It had been ripped out and all the tendons had been ripped out." *JA.v.14.p.003143.* Mrs. Cox also testified as

to Mr. Cox's injury, pain and condition immediately following the incident. *JA.v.15.p.003531, JA.v.15.p.003534-003535.* Interestingly, the statement to the jury and the testimony of both Mr. and Mrs. Cox were given without the need for a medical expert's testimony. Plaintiffs now argue medical expert testimony was necessary to explain Mr. Cox's injuries and why he needs to hold on to people for support when in the courtroom (before the video was produced) and why he does not on the exact same day (after the video was produced).

(2) Mr. Cox's Conduct in the Courtroom May be Challenged

Plaintiffs argue that Mr. Cox's testimony while on the stand after taking the oath is the only portion relevant for the jury's consideration. This simply is not the case even though as stated above, Mr. Cox did testify about needing assistance. Nevada law and Jury Instruction 12 that was provided to the jury in this matter cannot be read so narrowly. Jury Instruction 12 is modeled after Nevada Jury Instruction, General Instruction 1GI.6. Jury Instruction No. 12 stated in part as it does in 1GI.6 that "[t]he 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." Nev. J.I. 1GI.6; (*U.S. v. Lizarraga-Cedano*, 191 Fed.Appx. 586 (9th Cir. 2006); *Young Ah Chor v. Dulles*, 270 F.2d 338 (9th Cir. 1959). *JA.v.23.p.005414.*

(3) Mr. Cox Directly Asserted That he Could not Walk Without Assistance

The videos were properly admitted, to rebut specific assertions Mr. Cox made through his physical conduct throughout the trial in the courtroom, and in the jury's presence. NRS 51.045 defines a statement as "nonverbal conduct of a person, if it is intended as an assertion." Plaintiffs argue Mr. Cox walking to and from the witness stand is not a statement as it was nonassertive conduct. However, it is clear that the decision to hold on to someone for stability prior to the videos being revealed was a direct assertion by Mr. Cox. The fact it was an assertion is proved by the way he was suddenly able to walk on his own for the first time, and thereafter without assistance, following the revelation of the videos. Plaintiffs' counsel noted the same when he argued that videos do not impeach Mr. Cox's credibility "considering that today he [Mr. Cox] got up by himself and went outside in the middle of the day to use the restroom." *JA.v.21.p.004971-004972.* Counsel for Backstage correctly informed the District Court that Mr. Cox only did this "after he found out we were going to play the surveillance." *JA.v.21.p.004972.* Had Mr. Cox's conduct not been a deliberate assertion as to his condition, it would seem to reason that

Mr. Cox would have still required assistance at least at some point following the production of the videos, which he did not. *Id.* The only logical reason Plaintiffs would possibly want to keep out videos that simply showed Mr. Cox walking without assistance is because they were deliberately trying to make the District Court and the jurors believe that he couldn't by Mr. Cox's conduct in the courtroom.

The jury can assess a witness' behavior in determining their credibility. The videos showed Mr. Cox in various stages of conduct and this evidence was offered for evidence of his credibility because what was shown outside of the presence of the jury was entirely different than the conduct Mr. Cox showed inside the courtroom in front of the jury. The jury was instructed to assess this behavior in assessing credibility.

(4) The Videos Were Relevant Evidence on the Issue of Credibility

In *Granville v. Parson*, the court stated that "[r]elevant evidence includes evidence relevant to the credibility of a witness. Whether or not evidence that is offered as to the credibility of a witness is admissible depends on a preliminary ruling by the trial court that such evidence would be sufficient to sustain a finding that the witness' "credibility is, indeed, affected thereby. If a reasonable trier of fact may so believe the trial judge must-other considerations aside-admit the evidence even if it would not affect his own evaluation of the witness credibility." 259 Cal. App. 2d 298,

304 (1968). Thus, it does not matter whether the judge's impression of the witness' credibility is affected; it is a matter of whether the District Court thought that the jurors or some of the jurors' belief about Mr. Cox's credibility could be affected. As such, it was clearly within the District Court's discretion to admit.

(5) The Surveillance Videos are not a Collateral Matter

The Plaintiffs claim that the admission of the surveillance video violated NRS 50.085(3), as impeachment by use of a collateral matter. Plaintiffs' arguments are misplaced and the videos specifically rebut the conduct Mr. Cox made in front of the jury. The videos could not be less "collateral." Mr. Cox tried to deceive the District Court and the jury every day, in the courtroom, about his condition, seeking to have the jury rule based on sympathy. The video simply provided evidence to the jury to assist in weighing the credibility of Mr. Cox. The video was legitimately before the court, relevant to the case, and it was not inadmissible extrinsic evidence on collateral matter. Mr. Cox's conduct in the courtroom was a specific assertion, and he made it an issue in the case.

MGM may contradict Mr. Cox's assertion by his courtroom behavior with the surveillance video. This Court allows the introduction of evidence to rebut a party's statements when a party puts his credibility at issue by his direct statements and conduct. *Jezdik v. State*, 121 Nev. 129,

139, 110 P.3d 1058 (2005). The District Court stated that NRS 50.085(3) cannot be used to allow a party to introduce evidence giving the jury a false impression and then bar the other party's attempt to contradict the evidence. *Jezdik,* 121 Nev. 129, 139, 110 P.3d 1058. This exception to NRS 50.085(3) allows a party to introduce evidence rebutting the assertion. *Jezdik,* 121 Nev. 129, 139, 110 P.3d 1058. The surveillance video admission was properly allowed to reflect on Mr. Cox's credibility which was necessary so that the jury was no longer deceived by Mr. Cox's behavior.

(6) Mr. and Mrs. Cox Failed to Provide Rebuttal Evidence

Plaintiffs' claim that they were not given an opportunity to present rebuttal evidence is false. The District Court gave Plaintiffs every opportunity to put Mr. Cox back on the witness stand to explain his actions seen in the videos, explain the different conduct, and explain why he only needs to hold on to someone in court. *JA.v.22.p.005067-005070.* Mr. Cox could certainly testify as to his own physical condition and why it appeared he only needed assistance to walk when he was in the courtroom and not at any other time. These are Mr. Cox's actions and he could provide that explanation.

Plaintiffs' counsel stated several times that they were going to put Mr. Cox on the stand if the videos were shown. They were going to call

Mr. Cox to explain his injuries and why sometimes he needs to hold on to people and sometimes he doesn't. *JA.v.21.p.004971-004972.* The videos were played, but Plaintiffs did not call Mr. Cox, nor did they call Mrs. Cox who could have also testified about her observations. This was not court error, it was Plaintiffs' decision. Plaintiffs cannot now claim prejudice based on their own tactical decision at trial, and argue that they were denied the ability to provide rebuttal evidence when it was their choice not to do so.

Plaintiffs argue that they wanted to call a medical expert to rebut the impact of the surveillance videos. Plaintiffs never preserved this issue by naming the expert, or making any type of offer of proof about what an expert could say. *JA.v.22.005065-005067.* There is nothing in this record to show that Plaintiffs had an available medical expert to explain the differences in Mr. Cox's behavior inside the courtroom and outside the courthouse. *Id.* There was no offer of proof about what an expert could say. Without such evidence before this Court, this argument does not assist Plaintiffs.

The videos would be admissible regardless of the outcome of Plaintiffs' arguments as a witness' 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' 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 had motive and interest to convey to the jury 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.

(7) The District Court's Findings and Decision Regarding the Surveillance Videos

After careful consideration of the briefs, arguments of counsel and analysis of law, on September 17, 2018, the District Court issued its decision on Plaintiffs' Motion for Judgment as a Matter of Law, or Alternatively, for a New Trial. *JA.v.28.p0006553-006559.*

It is clear that the District Court exercised its discretion properly and allowed the surveillance videos to be admitted as evidence of the credibility of Mr. Cox.

(8) Plaintiffs have Failed to Establish That the Claimed Error in Admitting the Videos, if any, Substantially Affected Plaintiffs' Rights to a fair Trial

Even if Plaintiffs could somehow establish there was an abuse of discretion by the District Court to admit the videos as evidence (which

they have not done here), they must still establish that the error substantially affected the rights of Plaintiffs to a fair trial. Nevada case law is clear that even if abuse of discretion can be established, the moving party also has the burden to show that the abuse affected the case. The Nevada Supreme Court has stated in *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971), as cited to in *Beattie v. Thomas*, 99 Nev. 579, 586, 668 P.2d 268 (1983) the following:

> Even if error had been present ..., the appellant has not revealed any particular prejudice other than an adverse verdict. It has failed to show that the errors complained of would have so substantially affected its rights that it could be reasonably assumed that if it were not for the alleged errors, a different result might reasonably have been expected.

The Court in *Beattie* looked to the totality of the evidence presented to determine whether (1) there was an abuse of discretion, and (2) whether said abuse substantially affected the outcome of the trial. *Id.* A finding of an abuse of discretion alone is not grounds for reversal, if the Appellate Court determines that the result would have likely been the same with or without the abuse/error.

The appellant must show that the errors complained of "would have so substantially affected its rights that it could be reasonably assumed that if it were not for the alleged errors, a different result might reasonably have been expected." *El Cortez, 87 Nev. at 213.* Nevada Rules of Civil Procedure 61 accounts for harmless errors as follows:

> RULE 61. HARMLESS ERROR: "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."

Plaintiffs in generalities argue that they were harmed by the admission of the videos because all defendants, including MGM, "were allowed to support their false narrative that Mr. Cox was faking or exaggerating his injuries" in their respective closing arguments. (AOB at 18.) Plaintiffs claim throughout their brief and most pointedly on page 33 of their opening brief that all defendants "had spent the entire trial working in concert to paint Mr. Cox as a liar and a faker." (AOB at 33.) It is interesting to note that in support of its claim regarding a concerted effort by the defense to provide a false narrative and paint Mr. Cox as a liar, Plaintiffs only cite to limited statements made by counsel for MGM during his closing which were ultimately dealt with by an admonition to the jury. Plaintiffs do not cite to any other statements of the defense attempting to provide any sort of "false narrative" at any time of the trial because there are none. MGM and the other defendants only properly commented on the evidence that was already admitted.

Prior to the admission of the subject videos, the jury had already

been presented with significant evidence through testimony and video of the incident showing that Mr. Cox's version of the accident was far off in location of the accident and how the accident happened, to assist them in weighing the credibility of Mr. Cox. *JA.v.13.p.003075 JA.v.13.p.003102-JA.v.14.p.003113, JA.v.18.p.004169-004173, JA.v.19.p.004385-004386.* The videos of Mr. Cox walking without assistance were simply another piece of evidence for the jury to consider as to credibility of Mr. Cox and the weight to be given to his testimony.

B. The Statements by all Defense Counsel During Closing Argument, did not Amount to Misconduct and were Dealt with Appropriately

(1) Standard of Review

Plaintiffs mistakenly claim attorney misconduct during closing arguments warrant a new trial, yet if any misconduct occurred, the jury was properly admonished regarding the same. Whether an attorney's comments are misconduct is a question of law, which this Court reviews de novo. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). The standards that a District Court is to apply to a motion for new trial based on attorney misconduct vary depending on whether counsel objected to the misconduct during trial. *Id.* For objected-to misconduct, a party moving for a new trial bears the burden of demonstrating that the misconduct is so extreme that

objection, admonishment, and curative instruction cannot remove its effect. *Id.* at 17–18, 174 P.3d at 981.

(2) Alleged Misconduct

Plaintiffs claim that statements made by Jerry Popovich, counsel for MGM, during his closing argument (*JA.v.23.p.005379-005400, JA.v.23.p.005446-005479*) were improper and warrant a new trial. Although Plaintiffs argue that Mr. Popovich's closing warrants a new trial, Plaintiffs only object to very limited statements over roughly two pages of the fifty-four pages of Mr. Popovich's closing argument. *JA.v.23.p.005467-005468.*

Plaintiffs did not raise any objections regarding the misconduct for which they complain during Mr. Popovich's closing, or at any time in front of the jury. The objections with respect to alleged misconduct were first raised after Mr. Popovich completed his closing arguments. *JA.v.23.p.005488.*

After some initial argument, the District Court held its decision regarding the alleged misconduct in abeyance to allow the parties a full opportunity to argue their respective positions. *JA.v.23.p005481-005492.* Following the closing arguments of counsel for David Copperfield and David Copperfield's Disappearing, Inc. the parties returned outside the presence of the jury, and argued the merits of Plaintiffs' claims of

misconduct. *JA.v.24.p.005555-005571.* At that time, the District Court asked counsel for Plaintiffs if they objected to the alleged misconduct during Mr. Popovich's closing in the presence of the jury. In response to the District Court's question, Mr. Deutsch, Plaintiffs' counsel incorrectly (See *JA.v.23.p.005467-005469*, no objection made) stated "Yes I did. And, therefore, we believe that – that the – maybe an admonishment of Mr. Popovich is appropriate." *JA.v.24.p.005557.*

Mr. Popovich argued that his statements were simply explaining the motivation for the acts the jury had seen on the videos, that he did not intentionally violate any rules, if any were violated and that his comments did not rise anywhere close to the level of repeated misconduct as set forth in *Lioce. JA.v.23.p.005490, JA.v.24.p.005562-005564, JA.v.24.p.005567-005571.* Mr. Popovich specifically argued that he was simply "describing the motivation for why he [Mr. Cox] behaves in a courtroom differently than he behaves outside." *JA.v.24.p.00556.* The statements relating to Mr. Cox not taking the stand following the admission of the videos to explain how he was not trying to deceive and manipulate the jury were never objected to at the time they were made and they did not constitute arguments regarding personal opinion but were statements arguing the logical inferences from what the jury saw in the courtroom versus what the jury saw on the surveillance videos. This was based on Jury Instruction

No. 8, regarding a party's production of weaker evidence when stronger evidence was available. *JA.v.23.p.005410.* Mr. Popovich accurately argued the evidence presented at trial.

(3) The Admonition Resolved the Misconduct, if any

Regardless, if it was improper, it was brief and a single instance which did not arise to level of repeated misconduct in *Lioce.* Plaintiffs' counsel Deutsch essentially acknowledged the same when he informed the District Court that they were not seeking a mistrial since the comments were just a one-time thing. *JA.v.24.p.005556.* At the time the objections were made, Mr. Popovich had already finished his closing arguments and therefore he would not be allowed to talk in front of the jury any more regardless (other than making objections to Plaintiffs' rebuttal closing argument).

Although the District Court agreed during the parties' arguments that "motives" are important to determine credibility or believability (*JA.v.24.p.005559*) it nevertheless took the matter seriously, and because Plaintiffs believed there was potential attorney misconduct, it was not hesitant to admonish the jury in this instance. The Court having considered the arguments of counsel, the applicable law, statements of Mr. Popovich, and considered the fact the Plaintiffs stated that they wanted an admonition, **not** a mistrial, decided to read the jury the admonition that

was largely drafted by Plaintiffs with the exception of changing the word "impermissible" to "objected to" and "sustained the objection". *JA.v.24.p.005555-005571.* The fact that the District Court did not use the term impermissible is inconsequential.

The District Court explained to the jury that the statements were objected to and were to be disregarded. *JA.v.24.p.005577-005578.* The District Court's sustaining of the objection, and admonishment of the jury to disregard that portion of the argument more than handled this one isolated event.

(4) The District Court's Findings and Decision Regarding the Alleged Misconduct by Counsel

After careful consideration of the briefs, arguments of counsel and analysis of law, on September 17, 2018, the District Court issued its decision on Plaintiffs' Motion for Judgment as a Matter of Law, or Alternatively, for a New Trial. *JA.v.28.p.006553-006559.* Specifically, with respect to the alleged misconduct claimed by Plaintiffs the District Court issued the following decision:

> "The Court is not persuaded by Plaintiffs' misconduct contentions. The Court properly admonished the Jury and made the Jury aware that it was the subject of an objection that the Court had sustained. *See* also Instruction No. 2 (re "[s]tatements, arguments and opinions of counsel. . ."). *JA.v.28.p.006557.*

It is clear that the District Court took the proper steps in addressing Plaintiffs' objection of misconduct. This was not an instance that was so extreme that it could not have been corrected by an admonishment. Thus, the issue was resolved. Regardless, Plaintiffs have not set forth any evidence that "but for" MGM's closing argument a different outcome would have been reached given the amount of evidence against the Plaintiffs and the totality of the record.

C. The Jury was Properly Instructed Regarding Comparative Negligence

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, 554-56, 706 P.2d 147, 150-51.

All Defendants raised a bona fide comparative negligence defense, and NRS 41.141, therefore, required that the instruction be given. Even if the instruction was error, it was harmless error as it relates to Plaintiffs' claims against MGM.

(1) Abuse of Discretion

Plaintiffs cite various non-binding cases from other jurisdictions. However, the cases relied on by Plaintiffs reveal Plaintiffs ' 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). Plaintiffs also cite to several cases that involve purely passive plaintiffs, which are inapplicable in the instant matter. See e.g. *Rose v. Annabi*, 934 A.2d 734 (2007); *Harb v. City of Bakersfield*, 233 Cal. App. 4th 606 (2015); and *Tobia v. Cooper Hosp. Univ. Med. Ctr.*, 136 N.J. 335 (1994).

Nevada law is clear: an instruction on comparative negligence is required if a viable defense of comparative fault is asserted. See *Verner*, 101 Nev. 551, 554-56, 706 P.2d 147, 150-51. Further, this Court has held, as a matter of law that 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 a myriad of cases, such as when a pedestrian is struck while outside a crosswalk (*Anderson v. Baltrusaitis*, 113 Nev. 963, 944 P.2d 797 (1997)); where the plaintiff asserted a theory of *res ipsa loquitur* (*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)).

Plaintiffs rely on only three Nevada cases in less than one page of their nine-page argument on this issue, including an unpublished trial court order that is wholly inapplicable given the facts of this case. Plaintiffs cite an unpublished District Court Order (*Hernandez-Sanchez v. Gibrick*, 2013 WL 6912967 (Nev. Dist. Ct.)) that has no precedential value. Nevada Supreme Court Rule 123 states in pertinent part that an "unpublished opinion or order of the Nevada Supreme Court shall not be regarded as

precedent and shall not be cited as legal authority..." SCR 123. Furthermore, Rule 36 of the Nevada Rules of Appellate Procedure was recently amended so that unpublished opinions of the Nevada Court of Appeals can no longer be cited in court briefs. If unpublished opinions from these appellate courts are not to be used as precedent, then a District Court Order certainly should not.

This Court has generally found that comparative negligence is not a bona fide defense in instances where the conduct of the plaintiff is **entirely passive**, like being rear-ended while stopped. In *Buck by Buck v. Greyhound Lines, Inc.,* for example, the Supreme 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. *105 Nev. 756, 764 (1989);* See also *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); *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).

The instant matter is easily distinguished from the cases cited both in Nevada and out-of-state, as those plaintiffs were entirely passive and did nothing that contributed to the respective accidents. Here, 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. *JA.v.13.p.003035-003036, JA.v.13.p.003043, JA.v.13.p.003048, JA.v.13.p.003051-003052, JA.v.14.p.003112, JA.v.13.p.003079-003080.* Mr. Cox was not a passive plaintiff as Plaintiffs suggest.

(2) MGM Raised a Bona Fide Defense of Comparative Negligence

Nevada law not only supports, but in fact mandates, a comparative fault instruction in this matter. 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. The record as a whole shows that there was ample evidence through testimony, expert testimony, video, and photographs to raise a bona fide defense of comparative negligence and in fact ultimately supported a finding by the jury of comparative negligence.

Plaintiffs, in arguing there was insufficient evidence to support the defense, selectively point out limited evidence and ignore much of the record as a whole. They rely on the false theory that all Defendants did not proffer any evidence that Mr. Cox was negligent or that he contributed to his fall. In support of this false narrative, Plaintiffs cite to the trial testimony of MGM risk manager Mark Habersack in an attempt to show

that Mr. Cox was not negligent and the comparative negligence defense should have been dismissed.

Mr. Habersack was a lay witness and not a percipient witness. *JA.v.11.p.002552-002553, JA.v.11.p.002565-002566, JA.v.11.p.002570-002575.* Mr. Habersack was not even employed at MGM at the time of the incident. *JA.v.11.p.002534.* Moreover, Mr. Habersack has never been a participant in the David Copperfield show. *JA.v.12.p.002643.* Mr. Habersack's lay witness opinion is meaningless, was based on incomplete information, and has no influence on negligence and comparative negligence.

Plaintiffs clearly ignore testimony and evidence from witnesses with knowledge of the illusion, route for participants and circumstances surrounding the accident. Whether or not Mr. Cox exercised reasonable care while participating in the Illusion and navigating his way through what he claims were dark passageways clearly raises a bona fide issue of comparative negligence requiring an instruction to the jury.

Mr. Cox was never forced to do anything he did not willingly choose to do. Instead, Mr. Cox purchased tickets to attend the David Copperfield show and while there willingly and without hesitation volunteered to participate in the Illusion even after he was asked about his ability to run. *JA.v.13.p.003035-003036, JA.v.13.p.003074, JA.v.14.p.003131-003133.*

Throughout the illusion, Mr. Cox was in full control of his own will, body and movements. Although Mr. Cox could have stopped participating in the illusion at any time, he voluntarily elected to continue to participate despite the fact that he claims that the activity was performed in dark and rushed circumstances. *JA.v.6.p.001223-001224.* Mr. Cox made an affirmative choice to not only participate, but to continue to participate, even though he allegedly believed that the activity was being done in an unsafe manner. Mr. Cox is not a passive plaintiff as the Plaintiffs argue.

There was ample evidence that the route where the participants were directed was safe and not dangerous. *JA.v.5.p.001133-001134.* There was evidence that defendants took great care to ensure that participants were safe throughout the illusion. Chris Kenner, the owner of Backstage testified that certain protocols were followed to ensure safety of the participants during the illusion. *JA.v.5.p.001142-001147, JA.v.5.p.001161-001164, JA.v.6.p.001196, JA.v.6.001220.* He further testified that Mr. Copperfield walks the same route just minutes prior to the run around during another illusion to ensure safety. *JA.v.5.p.001135-001136.* Based on this evidence a jury could infer that Mr. Cox may not have been acting reasonably while participating and contributed to his own fall, when he believed it was all pandemonium. *JA.v.13.p.003043*, *JA.v.14.p.003154.*

MGM presented expert testimony of John Baker, Ph.D. (*JA.v.18.p.004120-004264, JA.v.18.p.004268-JA.v.19.p.004398*), who specializes in accident reconstruction, injury reconstruction and human factors. *JA.v.18.p.004121.* Dr. Baker testified that the point of impact ("POI"), meaning Mr. Cox's impact with the ground, was more than twenty feet from where Mr. Cox had testified he slipped and fell. *JA.v.18.p.004169-004173, JA.v.19.p.004385-004386.* Dr. Baker further testified that the site where Mr. Cox tripped was on a straight and essentially level concrete walkway. *JA.v.18.p.004184-004187, JA.v.18.p.004228.* Dr. Baker also testified that the POI was fifteen feet eight inches from the top of the concrete ramp, and that the ramp in no way had anything to do with Mr. Cox falling. *JA.v.19.p.004318-004321, JA.v.19.p.004340-004341.*

Dr. Baker arrived at the conclusion that Mr. Cox fell because he tripped as a result of not lifting his foot properly and interrupting his stride, on smooth level concrete. *JA.v.18.p.004203-004206, JA.v.18.p.004212, JA.v.18.p.004214, JA.v.19.p.004361-004363.* Dr. Baker testified that photos of Mr. Cox's shoes and clothes support these opinions. *JA.v.18.p.004201-004215, JA.v.18.p.004228, JA.v.19.p.4338-004339.*

Team Construction Management, Inc. ("TEAM") also presented expert testimony of its own by Dr. Nicholas Yang (*JA.v.20.p.004624-*

JA.v.21.p.004969) a senior biomechanical engineer who determined the biomechanics of the fall. *JA.v.20.p.004625.* Dr. Yang arrived at the same conclusion of Dr. Baker that a toe trip caused Mr. Cox to fall. *Id.* Dr. Yang also testified that the photos of Mr. Cox's shoes supported his conclusion (*Id.*) and that the top of the ramp was about nine feet behind where his feet were located when he tripped. *JA.v.20.p.004664.* Dr. Yang further testified that Mr. Cox fell approximately twenty feet from the corner where he testified that he fell. *JA.v.20.p.004668.*

The evidence supporting Mr. Cox's comparative negligence was not a generalization or speculative, but evidence from two defense experts that performed separate and different investigations using different methods. Both defense experts reached the same conclusion that Mr. Cox fell because he tripped as a result of not lifting his foot properly to avoid a toe strike that interrupted his stride causing him to fall. There was no testimony that there was anything in his path that caused him to trip. The testimony of these experts clearly raises the issue of comparative negligence, and supported a comparative fault instruction. This is especially true given that Plaintiffs did not offer any expert testimony to refute the defense that Mr. Cox's actions were the cause of his trip and fall.

In addition to the opinions of the experts, there was direct and circumstantial evidence supporting the defense of comparative negligence.

There was testimony that there was sufficient lighting where Mr. Cox fell and the "runaround" route was organized with stagehands posted throughout and leading the way. *JA.v.6.p.001239-001240.* There was testimony that participants were not forced to run as fast as they could and instead that they were encouraged to keep a pace of a brisk walk. *JA.v.9.p.002089-002090, JA.v.6.p.001245-001246, JA.v.11.p.002392-002393.* Mr. Cox at any time could have gone slower. There was testimony that the hallways used in the run around are too short to run full speed as Mr. Cox claimed. *JA.v.9.p.002089.* The video of the incident (*JA.v.5.p.001119-001120, JA.v.19. p.004475-004477*) shows that there were participants behind him and that no one was forcing Mr. Cox. Pomai Weall, an employee for Backstage, follows behind the last participant during the run around testified that she never tells participants to run. *JA.v.11.p.002392-002393.* Ms. Weall further testified that by the time she was in view of the area where Mr. Cox had fallen he had already continued with participating in the illusion so she never saw him. *JA.v.11.p.002395-002396.* If Ms. Weall was directing the participants to run at full speed she would have seen Mr. Cox at some point during his fall or immediately thereafter. If the jury believed Mr. Cox was actually running at full speed as he claimed (*JA.v.13.p.003042-003043, JA.v.13.p.003059*), it would be

easy for them to infer that he himself created a danger and caused himself to fall.

Moreover, the bona fide defense of comparative negligence was also supported by Mr. Cox's own testimony. Mr. Cox testified that he was running, it was dark, he did not know where he was going and it was "total pandemonium." *JA.v.13.p.003043.* He testified multiple times that he was running as fast as he could. *JA.v.13.p.003048, JA.v.13.p.003051-003052, JA.v.14.p.003112.* Mr. Cox testified that he did not even look at the ground. *JA.v.13.p.003079-003080.* This raised the questions to Mr. Cox that if this was the situation, then why did he not take care, slow down and look at the ground, or simply stop his participation in the illusion. If Mr. Cox was involved in something he thought was total pandemonium, he should have exercised ordinary care for his own safety especially given that he could have stopped participating in the illusion at any time. *JA.v.6.p.001223-001224.* A jury could certainly consider the evidence to establish comparative fault on Mr. Cox's part. The failure to do so is negligent. The jury specifically and pointedly found Mr. Cox to be 100% negligent, and that his negligence proximately caused his accident (*JA.v.25.p.005920-005923).* The jury believed there was enough evidence. Comparative negligence was a valid defense with substantial evidence and expert testimony in support.

(3) The District Court's Findings and Decision Regarding Comparative Negligence

After careful consideration of the briefs, arguments of counsel and analysis of law On September 17, 2018, the District Court issued its decision by on Plaintiffs' Motion for Judgment as a Matter of Law, or Alternatively, for a New Trial. *JA.v.28.p.006553-006559.* Specifically, with respect to the comparative negligence instruction, the District Court issued the following decision:

> "The Court agrees with Defendants that the subject matter of comparative negligence was properly framed and tried; that the Jury was properly instructed on the subject; that the evidence supports the Jury's determination that Plaintiff Gavin Cox, an active, not passive, participant in the illusion was negligent..." *JA.v.28.p.006553-006554.*

The issue of comparative negligence was one for the jury to determine, and it did so after receiving weeks of testimony, watching the surveillance video of the incident, being given a correct statement of the law and weighing the evidence before it. The court did not err in submitting comparative negligence to the jury.

(4) Even if the jury was Improperly Instructed Regarding Comparative Negligence, the Error was Harmless as to the Claims Against MGM

Even if the instruction on comparative negligence was given in error, it was harmless as to Plaintiffs' claims against MGM. 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).

Although the jury found that MGM was negligent; the jury determined that the negligence of MGM did not proximately cause the injuries sustained by Plaintiffs; therefore it was not necessary for the jury to even reach the issue of "comparative" negligence between Plaintiffs and MGM.

D. Plaintiffs Fail to Demonstrate that the Jury Disregarded the Jury Instructions and Did Not Understand Proximate Cause

(1) Verdict Form

Plaintiffs' argument that if the jury understood and properly followed the jury instructions and followed the law, it would be impossible to reach the verdict they returned, is riddled with problems. First, the Special Verdict was created by Plaintiffs. Plaintiffs' counsel argued that there should be two questions for every defendant, the first question regarding negligence and the second question regarding the proximate cause of the accident. *JA.v.22.p.005206-005208*. The only changes to the verdict form were on how the routing instructions were to be worded, and those changes were approved by Plaintiffs' counsel. In fact, Plaintiffs' counsel declared in open court that they were familiar with the verdict form and had "no objections" to the verdict form. *JA.v.22.p.005238*.

(2) Applicable Law

The jury was properly instructed on the applicable law. There is substantial evidence supporting the jury's verdict and Plaintiffs have failed to show with evidence in the record that the jury misunderstood the issue of proximate cause. The Court must assume the jury followed the instructions and assume that the jury understood the jury instructions, correctly applied the evidence and considered all the testimony and evidence. *McKenna v. Ingersoll*, 76 Nev. 169, 174-75, 350 P.2d 725, 728 (1960) ("we must assume that the jury understood the instructions and correctly applied them to the evidence) (citing *Nunneley v. Edgar Hotel*, 36 Cal.2d 493, 225 P.2d 497, 502 (1950)). Proximate cause is a question of fact for the jury to decide. *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970). Absent a sufficient showing to the contrary, this Court must assume the jury understood the instructions relating to proximate cause. *McKenna*, 76 Nev. at 175, 350 P.2d at 728.

The questions of the failure to act with reasonable care, and whether such failure caused an accident, are separate and distinct elements of a negligence claim. See *Hammerstein v. Jean Development West*, 111 Nev. 1471, 1476, 907 P.2d 975, 978 (1995) (that the defendant "may have failed to act reasonably . . . is only one element of [a] standard negligence case. The unreasonable behavior must also actually cause the injury"). Even

where duty and breach are assumed as a matter of law, causation must still be proven. See *Insco v. Aetna Health & Life Ins. Co.*, 673 F. Supp. 2d 1180, 1191 (D. Nev. 2009) ("Although sometimes pled as such, negligence per se is not a separate cause of action but a doctrine whereby a court will consider the negligence elements of duty and breach satisfied as a matter of law, **leaving only causation and damages to be determined by the fact-finder**"). (Emphasis added.) It is difficult to reconcile Plaintiffs' argument that a jury could not simultaneously find negligence, but not proximate cause, when courts have repeatedly explained that these are separate elements, both requiring proof.

The jury instructions stated that Plaintiffs had the burden to prove defendant's negligence **and that** negligence was the proximate cause of Mr. Cox's accident. *JA.v.23.p.005424.* Plaintiffs' counsel argued for use of the term "proximate cause" and withdrew all objections to instruction No. 22. *JA.v.22.p.005172, JA.v.22.p.005182.* A finding of negligence does not automatically mean the negligence was the proximate cause of the accident. Instruction No. 18 stated that the jury must decide if one or more of the defendants were negligent **and** whether that defendant's negligence was the proximate cause of the accident. *JA.v.23.p.005420.* The jury was also properly instructed on the law of negligence in Instruction No. 23 (*JA.v.23.p.005425*) and the law on proximate cause of an accident in

Instruction No. 24. *JA.v.23.p.005426.* The jury was properly and fully instructed on the law.

The verdict form had questions regarding negligence and separate questions regarding proximate cause as to each Defendant. *JA.v.25.p.005920-005923.* The jury found negligence, but then the jury found that Plaintiffs failed to prove, by a preponderance of the evidence, that MGM's negligence was the proximate cause of Mr. Cox's trip and fall. This is not an impossible finding, since Mr. Cox could have fallen for a reason other than MGM's negligence.

Plaintiffs provide no authority to suggest that negligence in this context creates an inference or presumption of causation. Instead, even when breach of a duty is shown, a plaintiff still bears the burden of showing causation in trip/slip-and-fall cases. *Rickard v. City of Reno*, 71 Nev. 266, 272, 288 P.2d 209, 212 (1955) (noting that plaintiff had to prove proximate cause). The jury did not manifestly disregard the District Court's instructions.

A jury's verdict, supported by substantial evidence should not be overturned, unless the verdict is "clearly erroneous" when viewed in light of all the evidence presented. See, *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 555-556, 779 P.2d 956, 957, (1989). This Court has ruled that without evidence of proximate cause, an inference of proximate

cause cannot be drawn from the mere fact that someone fell in an area that may have been unsafe. In *Rickard v. City of Reno*, 71 Nev. 266, 288 P.2d 209 (1955), the court rejected the argument that one can infer proximate cause in a slip and fall. In that case, Adele Rickard was on a sidewalk when she was traveling at moderate pace and wearing walking shoes when she stepped into a slight depression where the sidewalk was dirty with silt and dark black slime and she fell. Rickard was unable to testify that the dirty sidewalk caused her to fall. On appeal, the appellant, Rickard argued that "assuming then an unsafe sidewalk condition and plaintiff's forward fall at the place of such unsafe condition as proved, it is appellant's contention that the jury would have the right to draw the inference that such unsafe condition was the proximate cause of her fall." *Id.* The Supreme Court of Nevada concluded in *Rickard* that:

> "if an inference could possibly be drawn from the testimony that the point where Plaintiff fell was actually slippery, the jury would then have had to draw the further inference (based not upon a proved fact but upon the foregoing inference) that upon the forward sloping pavement her feet slipped, not forward but backward. We do not think that such an inference, contrary to the normal experiences of men, to say nothing of the laws of physics, could have reasonably been drawn. Other inferences might also have been indulged as to the possible cause of the fall - sudden giving way of the knees, one foot striking the other, anything that might have caused one or both feet suddenly to stop, with the natural and normal result of a pitching forward of the body. From any viewpoint we are of the opinion that, from the facts proved, the jury could not have drawn a reasonable inference that the defect relied upon was the proximate cause of appellant's fall. We are therefore of the opinion that there was no error in taking the case from the jury." *Id.*

The jury found MGM negligent and found it not the proximate cause

of the accident. Given the evidence and the jury's deliberations, the jury could have found that MGM Grand was negligent because expert Dr. Baker testified that the ramp was not to code (*JA.v.18.p.004318-004321*), yet the negligence was not the proximate cause because the ramp had nothing to do with Mr. Cox's trip and fall; it was over 20 feet from where Mr. Cox fell. *JA.v.19.p.004318-004321, JA.v.19.p.004340-004341, JA.v.20.p.004664.*

The jury could have found that Mr. Cox tripped and fell over his own feet on a straight, level, and adequately lit surface. The fact that the jury did not find MGM the proximate cause of the accident and instead found Mr. Cox negligent and the proximate cause of the accident is further proof that the jury understood the instructions and properly applied the law.

In argument on Plaintiffs' Motion for Judgment as a Matter of Law, or Alternatively, for New Trial, counsel for Plaintiffs concedes there was evidence as to MGM which could support the jury finding negligence but not proximate cause. *JA.v.28.p.006505.* This concession is enough on this issue.

Plaintiffs' references to the *Taylor* and *Hardison* cases are irrelevant and easily distinguished because of the intervening forces in this case. Contrary to *Taylor* and *Hardison*, all Defendants produced substantial

evidence and expert opinions illustrating how Mr. Cox was negligent for causing the fall, refuting Plaintiffs' arguments to the contrary. Mr. Cox was found to be 100% negligent by the jury because he did not take reasonable care to prevent the accident in the circumstances he was in, so that he tripped over his own feet by failing to pick up his foot enough to make a proper stride. His foot hit the ground, interrupting his stride and causing him to fall forward. Furthermore, Mr. Cox tripped while moving forward in a straight line, on a level surface, on lit ground. The fact that the jury went on to find that Mr. Cox was the 100% cause of his fall is evidence that the jury understood the instructions and could make a decision from the strong evidence presented to the jury. There is no evidence that the jury exhibited confusion over the issue of proximate cause. Instead, the jury applied the evidence, testimony and expert opinions in determining that Mr. Cox was negligent **and** the sole proximate cause of his fall.

Therefore, the only question before this Court is whether the jury could have properly followed the proximate cause instructions and still rendered the verdict it did for MGM. "In determining the propriety of the granting of a new trial under NRCP 59(a)(5), the question is whether we are able to declare that, had the jurors properly applied the instructions of the court, it would have been impossible for them to reach the verdict

which they reached." *Weaver 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) ("Although the evidence was in sharp dispute, the record demonstrates that it was not impossible for the jury to find Carr failed to prove that Paredes's negligence caused the injuries and consequent damages he claimed. Thus, the district court did not abuse its discretion in denying Carr's motion for a new trial under NRCP 59(a)(5)"). Plaintiffs have conceded it was possible as to MGM.

(3) The District Court's Findings and Decision Regarding Plaintiffs' Claim that the Jury Disregarded the Jury Instructions and did not Understand Proximate Cause

After careful consideration of the briefs, arguments of counsel and analysis of law on September 17, 2018, the District Court issued its decision on Plaintiffs' Motion for Judgment as a Matter of Law, or Alternatively, for a New Trial. *JA.v.28.p.006553-006559.*

Here, based on all of the evidence presented at trial, the jury plainly could have still rendered the verdict it did by correctly applying the instructions. This is especially true given the fact that Plaintiffs did not provide any witness, expert, or Mr. Cox himself to dispute the opinions of

the MGM witnesses and other defendants' experts as to proximate cause of the injuries to Mr. Cox.

E. The Court's Exercise of Discretion not to Inform the Jury of All of its Bases for Cancelling the Jury View is not a Grounds for a New Trial

Plaintiffs claim that they were prevented from having a fair trial because the reasons for cancelling the jury view were not fully explained to the jury. This argument is mistaken and misplaced. The District Court's decision not to fully 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 Plaintiffs never once requested the District Court to further explain to the jury its ruling disallowing the jury view. *JA.v.18.p.004076-004102, JA.v.18.p.004116-004118.* Failing to do so waives Plaintiffs' 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) (plaintiffs waived right to raise issues on appeal when failing to object or ask for clarification at trial). Here, Plaintiffs did not request the Court to further explain the basis of its decision, and Plaintiffs waived any such arguments in this regard.

All Defendants requested a jury view and Plaintiffs never objected in the presence of the jury. There were no discussions or arguments with respect to the jury view in the presence of the jury. The judge simply stated that he would consider it and there were some things that needed to be discussed and addressed. *JA.v.17.p.003853-003854*. No statements or indications were ever made in front of the jury that Plaintiffs were against the jury seeing the site. *JA.v.18.p.004076-004102, JA.v.18.p.004116-004118*. The District Court did explain the decision by stating to the jury that there would not be a jury view because this case was not conducive to a jury view. *JA.v.18.p.004118*. The District Court did not suggest or imply that Plaintiffs objected to the jury view. If the Judge stated that the reason was based on substantial changes to the site, the jury could have inferred that it was Plaintiffs' objections that got the jury view cancelled. The way in which it was handled showed that all Defendants requested the jury view and the District Court decided the case was not conducive to one.

Even if this Court were to consider Plaintiffs' argument, allowing a jury view is solely within the District 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 the District Court's absolute discretion under NRS 16.100 and did not prejudice Plaintiffs.

Further, Plaintiffs offer no authority for the proposition that a trial judge is required to provide the jury with the detailed reasons for its rulings. Logic dictates the contrary. Doing so would risk confusion amongst the jurors. Trial judges typically do not explain the legal basis for ruling on objections at trial, rarely (if ever) elucidate on what is discussed at bench conferences or outside the jury's presence, and do not 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 typically not shared with the jury. Plaintiffs' suggestion that a trial judge is somehow required to explain his decisions to lay jurors would turn trial practice on its head.

To fully "explain" its reasoning, the District Court would have been required to tell the jury that Plaintiffs filed a writ petition, and that the District Court was persuaded by the Court of Appeals' Justice Silver's dissenting opinion in response to the writ denial. That dissenting opinion was the byproduct of Plaintiffs' writ petition, and one cannot be separated from the other.

Plaintiffs did not want the jury to know that they strongly resisted a jury view, but interestingly Plaintiffs' did not object to the view request in the jury's presence, and now claim prejudice because the jury was not informed on Nevada procedural law, the intricacies of Plaintiffs' writ petition, or how Justice Silver authored a dissent to the writ denial that was persuasive enough to influence the District Court into a reversal on the prior granting of a jury view. Rather than own the fact that their objection was the beginning of the District Court cancelling the jury view, Plaintiffs instead engage in revisionist history to claim the District Court's reconsideration of the issue was somehow removed from Plaintiffs' own objections, and propose that the District Court should have made Plaintiffs' arguments to the jury for them, thereby portraying some fiction that Plaintiffs had nothing to do with the District Court's ruling.

F. A Rule 50 Motion can only be Granted if a Party has not Presented Sufficient Evidence to Obtain Relief and the Court "Must View all Inferences in Favor of the Nonmoving Party"

The standard of appellate review for an order under either NRCP 50(a) or 50(b) is de novo. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-425 (2007). The court in Nelson went further to state that "in applying that standard and deciding whether to grant a motion or judgment as a matter of law, the district court must view the evidence and all inferences in favor on the nonmoving party." *Id.* The key point is that this

Court must view "all inferences in favor of the nonmoving party" and, after doing so, determine if there is sufficient evidence to support the claims made.

Plaintiffs' argument that the District Court erred in denying its Renewed Motion for Judgment as a Matter of Law is groundless. Plaintiffs in their motion argued that that there was not sufficient evidence to support the comparative negligence affirmative defense and jury instruction. As was discussed in great detail above, MGM supported a bona fide comparative negligence defense to allow the issue to go to the jury. The District Court having considered the arguments presented by the parties and having taken the matter under advisement for future consideration the District Court "agreed with MGM that the subject matter of comparative negligence was properly framed and tried; that the jury was properly instructed on the subject; that the evidence supports the jury's determination that Plaintiff Gavin Cox, an active not passive, participant in the illusion was negligent." *JA.v.28.p.006553-006559.*

G. Plaintiffs' Arguments for a new Trial Pursuant to NRCP 59 Have no Legal Merit

The District Court considered the arguments presented by the parties, analyzed the law, took the matter under advisement for future consideration and was fully advised when it denied Plaintiffs' motion for new trial. *JA.v.28.p.006553-006559.* This Court reviews a District Court's

decision to grant or deny a motion for a new trial for an abuse of discretion. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-425 (2007). The decision to grant or deny a new trial rests with the sound discretion of the trial court. See, *Passarelli v. J-Mar Development, Inc.*, 102 Nev. 283, 285, 720 P.2d 1221, 1223 (1986). However, that discretion must be exercised within established guidelines. *Id.* The trial court is precluded from substituting its view of the evidence for that of a jury in the case where the losing party is not entitled to judgment as a matter of law. See, *Beccard v. Nevada Nat. Bank,* 99 Nev. 63, 66 tn.3, 657 P.2d 1154, 1156 fn. 3 (1983). Nevada does not permit the granting of a new trial on the grounds that the verdict was against the weight of the evidence. See, *Bayerische Motoren Werke Aktiengesellsschaft v. Roth*, 252 P.3d 649, 669 in. 9 (Nev. 2011). Only plain error or manifest injustice provides grounds for a new trial. *Kroeger Properties & Development v. Silver State Title Company*, 102 Nev. 112, 715 P.2d 1328 (1986). This was not present in this case. A jury's verdict supported by substantial evidence should not be overturned, unless the verdict is clearly erroneous when viewed in light of all evidence presented. See, *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1889). The Nevada Supreme Court has long adhered to the rule where there is a conflict of evidence, the verdict or decision will not be disturbed on appeal. See, *Frances*, 109 Nev.

At 94, 847 P.2d at 727 (1993) (citing *Avery v. Gilliam*, 97 Nev. 181, 625 P.2d 1166 (1981)).

Plaintiffs cited a number of the District Court's rulings and claim they were unduly prejudiced which were addressed above. The remainder of the issues that Plaintiffs' raised in their motion, which are not raised during the instant appeal, dealt with bifurcation and ordering restrictions on the testimony of certain witnesses.

(1) Bifurcation of the Trial was not an Abuse of Discretion

Bifurcation of the trial was extensively briefed and argued during pre-trial motions. *JA.v.1.p.001874-001932.* The District Court in its September 17, 2018 decision set forth detailed analysis that it performed, and the basis for granting the bifurcation and denial of new trial. *JA.v.28.p.006555-006556.*

It is unquestionable that bifurcation promoted expedition, judicial economy and lessened costs. The liability portion of the trial actually lasted 28 days over seven weeks. With the damages portion expected to last longer, who knows how much wasted time and expense was saved by the trial being bifurcated. A considerable amount of resources would have been wasted if the trial had not been bifurcated. Given the trial's liability outcome, the costs and attorneys' fees saved, it was the right decision, and certainly not an abuse of discretion.

Prejudice was avoided in that all parties were able to focus and present their case on the issues of liability while reserving the separate and distinct issue of damages for the next phase. Trying the liability issues first assured that the jury could make a reasoned, dispassionate decision on liability before being presented with emotional and sympathetic damage issues.

(2) New Undisclosed Witnesses Were not Improperly Limited, and Expert Testimony

The District Court in its September 17, 2018 decision set forth the following related to the undisclosed witnesses of Plaintiffs and the testimony of defense experts Dr. Baker and Dr. Yang:

> "The Court agrees with Defendants that there was no improper limitation on its permission to allow Plaintiffs' undisclosed witnesses testify.[2] Finally, the Court is not persuaded by Plaintiffs' contentions regarding Drs. Baker and Yang. Accordingly, all things considered, the Court also DENIES that aspect of Plaintiffs' alternative Motion seeking a new trial." *JA.v.28.p.006558.*

Plaintiffs claimed in their Motion for New Trial that the three late-disclosed witnesses should not have had their testimony limited. Their arguments are flawed. These witnesses were allowed to testify regarding relevant issues but limited regarding irrelevant and/or improperly

[2] Much of what Plaintiffs contend regarding these witnesses has to do with publicity that this case had, causing them to come forth. The Court went along with Plaintiffs in permitting them to testify. It is notable, parenthetically, that Plaintiffs showed themselves to be adept at fostering publicity about this case from its inception. See e.g. Ex. E. to Backstage's Trial Brief re: New/Undisclosed Witnesses, 4/25/18.

prejudicial issues, and given limiting instructions in instances where their testimony did not apply.

In addition, Plaintiffs claimed in their motion for new trial the opinions of the experts Dr. Baker and Dr. Yang were cumulative. However, just because experts come to similar conclusions, it does not make their testimony cumulative. Although they reached similar conclusions and were within inches of locating the point of Mr. Cox's fall, their investigations were different and independent of each other. *JA.v.18.p.004120-004264*, *JA.v.18.p.004268-JA.v.19.p.004398, JA.v.20.p.004624-JA.v.21.p.004969.* They conducted separate and different investigations with different scopes of work. There was not any prejudicial error in allowing both to testify as they offered different opinions using different methods of investigation.

VI. CONCLUSION

For the foregoing reasons, MGM Grand Hotel, LLC requests that the judgment entered on the jury's verdict be affirmed in all respects.

DATED: August 12, 2019.

Selman Breitman LLP

By: */s/ Gil Glancz*

JERRY C. POPOVICH
Pro Hac Vice
California Bar No. 138636
GIL GLANCZ
Nevada Bar No. 9813
3993 Howard Hughes Parkway,
Suite 200
Las Vegas, NC 89169
Telephone: 702.228.7717
Facsimile: 702.228.8824

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(S) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Time New Roman font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it: contains fewer than 14,000 words (13,674).

3. I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED: August 12, 2019 Selman Breitman LLP

By: */s/ Gil Glancz*

JERRY C. POPOVICH
Pro Hac Vice
California Bar No. 138636
GIL GLANCZ
Nevada Bar No. 9813
3993 Howard Hughes Parkway, Suite 200
Las Vegas, NC 89169
Telephone: 702.228.7717
Facsimile: 702.228.8824

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on the 12th day of August 2019, a true and correct copy of the above and foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties as listed below:

/s/ Bonnie Kerkhoff Juarez
BONNIE KERKHOFF JUAREZ
An Employee of Selman Breitman LLP

SERVICE LIST

Lee Roberts
Howard J. Russell
Weinberg Wheeler Hudgins Gunn & Dial, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
lroberts@wwhdg.com
hrussell@wwhgd.com

Attorneys for Backstage Employment & Referral, Inc.

Roger Strassberg
Gary W. Call
Resnick & Louis, P.C.
5940 S. Rainbow Blvd.
Las Vegas, NV 89118
rstrassberg@rlattorneys.com
gcall@rlattorneys.com

Attorneys for Team Construction Management, Inc. and Beachers LV, LLC

Brian K. Harris
Heather E. Harris
Christian N. Griffin
Harris & Harris
2029 Alta Drive
Las Vegas, NV 89106
bharris@harrislawyers.net
hharris@harrislawyers.net
cgriffin@harrislawyers.net
-and-
Benedict P. Morelli
Adam E. Deutsch
Perry S. Fallick
Morelli Law Firm PLLC
777 Third Ave., 31st Floor
New York, NY 10017
bmorelli@morellilaw.com
adeutsch@morellilaw.com
pfallick@morellilaw.com

Attorneys for Gavin Cox and Minh-Hahn Cox