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-14-709164-C

RESPONDENTS DAVID COPPERFIELD, AND DAVID COPPERFIELD'S DISAPPEARING, INC.'S JOINT APPENDIX

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DATED: December 5, 2019 Selman Breitman LLP

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on the 5th day of December 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:

SEE ATTACHED SERVICE LIST

/s/ Bonnie Kerkhoff Juarez
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An Employee of Selman Breitman LLP

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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

RESPONDENTS DAVID COPPERFIELD AND DAVID COPPERFIELD'S DISAPPEARING, INC.'S ANSWERING BRIEF ON APPEAL AND DAVID COPPERFIELD'S OPENING BRIEF ON CROSS-APPEAL

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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 David Copperfield's Disappearing, Inc. is a private corporation owned by David Copperfield.
2. Elaine K. Fresch, Jerry C. Popovich, Eric O. Freeman and Gil Glancz of Selman Breitman LLP have represented Respondent David Copperfield's Disappearing, Inc. 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*

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VIII. JURISDICTIONAL STATEMENT

Defendants DAVID COPPERFIELD a/k/a DAVID S. KOTKIN and DAVID COPPERFIELD'S DISAPPEARING, INC. agree with the majority of the Plaintiffs' GAVIN COX and MINH-HAHN COX's (from now on collectively the "Plaintiffs") Jurisdictional Statement concerning their appeal. However, Defendants do not agree with Plaintiffs 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.

IX. ROUTING STATMENT

Defendants agree with the Plaintiffs' Routing Statement concerning their appeal.

Defendants' cross-appeal concerns the denial by the District Court of DAVID COPPERFIELD a/k/a DAVID S. KOTKIN's Motion for Judgment as a Matter of Law following Plaintiffs' case in chief. Respondent timely filed a Notice of Cross-Appeal pursuant to NRAP 4(a)(2) and NRAP 4(a)(6). This Court has jurisdiction pursuant to NRAP 3A(b)(1).

X. 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 that resulted in prejudice to Plaintiffs that denied them a fair trial.

C. Whether there was a bona fide comparative negligence defense raised by MGM 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 Defendants' 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

David Copperfield (sometimes referred to as "Mr. Copperfield") and David Copperfield's Disappearing, Inc. (sometimes referred to as "DCDI") (from now on collectively the "Defendants"), were awarded defense verdicts after a lengthy liability phase of a jury trial. The verdicts were 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 for this Court to improperly substitute its own analysis in place of the District Court's. The challenged evidentiary rulings 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 (given Plaintiffs opposed the jury view), 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 court's denial of a new trial on the same issues is right. The 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 these Defendants. The judgment in favor of Defendants 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 the MGM Grand Hotel ("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 him to slip and fall.

On August 6, 2014, Plaintiffs filed their Complaint against Mr. Copperfield, DCDI 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 Mr. Copperfield and DCDI filed their Answer to the Complaint. *JA.v.1.p.000029-000038*. The 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, Mr. Copperfield and DCDI 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. Defendants' 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 Defendants, 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.* David Copperfield filed his Notice of Cross-Appeal and Case Cross-Appeal Statement fourteen days later on May 22, 2019. *Defendants Appendix, pages DA000010-DA000018.* This Appeal was filed on June 11, 2019. *JA.v.27A.p.006260-006263.*

III. STATEMENT OF FACTS

Defendants pursuant to NRAP 28 (i) hereby adopt by reference the Statement of Facts set forth in MGM Grand Hotel, LLC's Answering Brief on Appeal at pages four through twelve.

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 standard as a motion filed at the close of evidence under NRCP 50(a).[1]

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."

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

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).

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). 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. *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008). 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. If the misconduct is not objected-to, the district court should deem the issue waived unless it is plain error. *Id.* at 19, 174 P.3d at 981–82. Plain error in this context exists "only when the misconduct amounted to 'irreparable and

fundamental error ... that results in a substantial impairment of justice or denial of fundamental rights such that, **but for** the misconduct, the verdict would have been different." *Grosjean v. Imperial Palace*, 125 Nev. 349, 364, 212 P.3d, 1068, 1079 (2009) (quoting *Lioce*, 124 Nev. at 19, 174 P.3d at 982). (Emphasis added.)

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. Defendants take the position that the surveillance videos were offered for credibility issues (see below), not necessarily for impeachment. However, Mr. Cox testified 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).

In fact, Mr. Popovich for MGM GRAND HOTEL, LLC (hereinafter "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 onto 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 rein 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 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 onto 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.* Backstage's counsel 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 could not 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' creditability 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.

Defendants 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 does not. *JA.v.21.p.004971-004974.* 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 Mr. Copperfield and DCDI "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 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, including by counsel for Mr. Copperfield or DCDI, attempting to provide any sort of "false narrative" at any time of the trial because there are none. Mr. Copperfield and DCDI as well as 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). For attorney misconduct to warrant a mistrial or a new trial, the conduct must be egregious.

Plaintiffs claim they are entitled to a new trial because of Elaine Fresch's, counsel for Defendants, closing argument statements. However, at no time did Plaintiffs make objections to any alleged misconduct during her closing or at any time thereafter prior to filing their motion for new trial. *JA.v.23.p.005493-JA.v.24.p.005554*. Consequently, Plaintiffs waived any of their misconduct arguments as to Ms. Fresch. The proper standard for the district courts to use when deciding a motion for a new trial based on unobjected-to attorney misconduct is as follows:

> (1) the district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as having been waived, unless plain error exists. In deciding whether there is plain error, the district court must then determine (2) whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error. In the context of unobjected-to attorney misconduct, irreparable and fundamental error is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.[2]

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[2] See *Ringle v. Bruton*, 2004 120 Nev. 82, 86 P.3d 1032 (2004) ("Irreparable and fundamental error ... is only present when it is plain and clear that no other reasonable explanation for the verdict exists."); *Parodi v. Washoe Medical Ctr.*, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995) ("plain error is error which ... 'had a prejudicial impact on the verdict when viewed in context of the trial as a whole' " (quoting *Libby v. State*, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993))).

Lioce v. Cohen, 124 Nev. 1, 6-7, 174 P.3d 970, 973-74 (2008)

(2) Alleged Misconduct

Presently, the only "misconduct" specifically cited by Plaintiffs in support of their position relating to Defendants' counsel is the fact that Ms. Fresch played the surveillance videos for the jury during her closing argument and stated that the videos were presented as evidence of credibility. (AOB at 27) This clearly is not misconduct. Trial evidence is regularly presented to the jury in closing argument and in no way could this be considered 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 they complain of 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 Mr. Copperfield and DCDI 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 Mr. 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 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 to 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" Defendants' closing arguments a different outcome would have been reached given the amount of evidence against the Plaintiffs and the totality of the record.

(5) 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 Defendants.

(6) 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.

(7) Defendants 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 continue to participate until the end of the illusion. 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 president 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 runaround 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.*

Defendants 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 as 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 runaround are too short to run full speed as Mr. Cox claimed. *JA.v.9.p.002089.* 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 he admitted he was not the last participant after viewing the video excerpts of the incident. *JA.v.13.p.003075.*

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, who follows behind the last participant during the runaround 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 substantially altered his testimony at trial from that of his deposition taken on October 15, 2015, including the location and the circumstances/cause of his accident. Specifically, Mr. Cox at his deposition testified that he slipped near the corner of the building when he was in the midst of turning to head towards the interior and that he slipped on concrete dust causing him to fall. *JA.v.13.p.003102- JA.v.14.p.003113*. Not surprisingly, Mr. Cox testified that his memory of what happened on the date of his accident was fresher at the time of his deposition then it was at trial. *JA.v.13.p.003065*. His recollection of the location and the circumstances/cause of his accident at deposition were proven false at trial. *JA.v.18.p.004169-004173,*

JA.v.19.p.004385-004386. At trial, Mr. Cox testified that he had a drink prior to the David Copperfield show. *JA.v.13.p.003033.* 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, even though he never passed any other participants or bumped into any wall or bodies while doing so. *JA.v.13.p.003048, JA.v.13.p.003051-003052, JA.v.13.p.003080, JA.v.14.p.003112, JA.v.14.p.003124.* Ironically, he also testified that all participants were not running as fast as they could and that show staff were telling him and the rest of the participants which direction to go throughout the runaround. *JA.v.13.p.003043-3044, JA.v.14.p.003123.* Mr. Cox further testified that it was not too dark to see where he was going, but nevertheless he testified that he did not even look at the ground. *JA.v.13.p.003079-003080.* The deposition testimony of Mr. Cox that he had no difficulty running outside and didn't notice anything on the ground was also read into the record. *JA.v.13.p.003094.* Mr. Cox also testified at trial that he had difficulties following the other participants during the runaround portion of the illusion, however, at his deposition which was read into the trial record, Mr. Cox testified that he had no such problems. *JA.v.13.p.003083-003084, JA.v.13.p.003091-003092.*

All the conflicting testimony raises the questions to Mr. Cox that if the situation were as desperate as he conveyed, then why did he not take care, slow down and look at the ground, or simply stop his participation in the illusion. If someone was involved in something they thought was total pandemonium, they should have exercised ordinary care for their own safety especially given that they could have stopped participating in the illusion at any time (*JA.v.6.p.001223-001224)* or at minimum express to someone working at the show that he didn't want to run, not one of which Mr. Cox did. (*JA.v.14.p.003154*). The simple explanation is that Mr. Cox chose not to stop because he was having fun doing the runaround portion of the illusion. *JA.v.14. p.003153-003155.*

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.

(8) 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 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.

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

Even if the instruction on comparative negligence was given in error, it was harmless as to Plaintiffs' claims against Defendants. 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 the Defendants were negligent; the jury determined that the negligence of Defendants 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 Defendants.

C. 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 Defendants' 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 Defendants' 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 Defendants negligent and found them not the proximate cause of the accident. Given the evidence and the jury's deliberations, the jury could have found that MGM 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 twenty feet from

where Mr. Cox fell. *JA.v.19.p.004318-004321, JA.v.19.p.004340-004341, JA.v.20.p.004664.* Likewise, as the route with the ramp was part of the illusion and approved by Defendants, that negligence was not the proximate cause as the ramp had nothing to do with the fall. *JA.v.4.p.000935-000936, JA.v.4.p.000941-000943, JA.v.7.p.001495.*

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 Defendants 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.

Plaintiffs' references to the *Taylor,* 96 Nev. 738 (1980) and *Hardison,* 18 Cal.App. 4th 22(1993) 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 Defendants. "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)").

(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 Appellants did not provide any witness, expert, or Mr. Cox himself to dispute the opinions of the Defendants' witnesses and other defendants' experts as to proximate cause of the injuries to Mr. Cox.

(4) The Court's Exercise of Discretion not to Inform the Jury of All of its Basis 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.

D. 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, Defendants 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 took the matter under advisement for future consideration the District Court "agreed 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.006553-006559.*

E. 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.[3] 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 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

[3] 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.

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. OPENING BRIEF ON CROSS-APPEAL

A. JURISDICTIONAL STATEMENT

On May 3, 2018, at the conclusion of Plaintiffs' case, Respondent DAVID COPPERFIELD (hereinafter "Mr. Copperfield") made an NRCP 50(a) Judgment as a Matter of Law Motion with the District Court to dismiss the Plaintiffs' claims against him as the evidence showed he did not commit any negligent act and therefore did not have any personal liability for Plaintiffs' claims. The District Court denied the motion at that time. *JA.v.16.p.003797-003813.*

B. STATEMENT OF ISSUES PRESENTED

Did the District Court Err in Denying the Motion for Judgment as a Matter of Law of Mr. Copperfield?

C. STATEMENT OF THE CASE

On May 3, 2018, at the conclusion of Plaintiffs' case, Mr. Copperfield made an NRCP 50(a) Judgment as a Matter of Law Motion with the District Court to dismiss the Plaintiffs' claims against him as the evidence showed he did not commit any negligent act and therefore did not have any personal liability for Plaintiffs' claims. Mr. Copperfield's Motion was denied. *JA.v.16.p.003797-003813.*

DCDI has an agreement with MGM for DCDI to put on the David Copperfield Show at the MGM Grand Hotel. JAv.4.p.000925-000931. David Copperfield is the only employee of DCDI. *JA.v.7.p.001474, JA.v.4.*p.000923 He is also the president of DCDI. *JA.v.7.p.001474-001475, JA.v.7.p.001489.* DCDI and Backstage Employment and Referral, Inc. ("Backstage") have an agreement wherein Backstage employs approximately 30 people to assist in producing and performing the show, which includes the "Thirteen" illusion. (*JA.v.5.p.001079-001080*) The scope and extent of Mr. Copperfield's involvement with the David Copperfield show was as an employee and president of DCDI. *See* Trial Exhibit 94, exemplar video of a representative performance in MGM theatre at the MGM.

Mr. Cox alleges that he was injured while he was participating in the "Thirteen" illusion as an audience participant at the David Copperfield show. Mr. Cox alleges that he slipped and fell while running on the outdoor concrete path designated for the participants' travel. There is no dispute that at the time Mr. Cox was participating in the illusion, Mr. Copperfield as an employee of DCDI, was inside the theater on stage performing in front of the audience, and that Mr. Copperfield, individually, did not accompany Mr. Cox and did not allegedly hurry him. *See* Trial Exhibit 94, exemplar video of a representative performance in the theatre

at the MGM.

In support of the claim for Negligence, Plaintiffs attempted to offer proof that the defendants were negligent, in the course and scope of their employment and agency with other defendants. Plaintiffs have offered no proof that Mr. Copperfield was not in the course and scope of his employment with DCDI. There was no evidence admitted at trial that Mr. Copperfield, individually, is personally liable.

Consequently, Plaintiffs' allegations against Mr. Copperfield are focused upon his alleged conduct in performing his duties as an alleged employee/owner of DCDI. **Therefore, Plaintiffs did not allege nor produce any evidence that Mr. Copperfield is individually responsible for the injuries/damages allegedly sustained by Plaintiffs.** Plaintiffs' Complaint clearly alleges that Mr. Copperfield was not acting in his individual capacity at the time of the Mr. Cox's injuries, but was in the course and scope of fulfilling his duties as an agent on behalf of his principal. *JA.v.1.p.00001-00011.* All of Plaintiffs allegations should have been alleged in causes of action against DCDI and other corporate defendant entities, not against an employee and officer of DCDI.

This cross-appeal is offered in case this Court reverses the judgment arising out of the jury's verdict, and orders a new trial. If reversal is this Court's decision, then it is requested that this issue be decided. If this

Court affirms the judgment as argued by Defendants, then this issue is moot.

D. STATEMENT OF FACTS

David Copperfield, DCDI and Backstage

1. David Copperfield is the president of DCDI. *JA.v.7.p.001474-001475, JA.v.7.p.001489.*

2. David Copperfield is also the only employee of DCDI. *JA.v.7.p.001474,* JA.v.4.p.000923.

3. DCDI and Backstage Employment and Referral, Inc. ("Backstage") have an agreement wherein Backstage employs approximately 30 people to assist in producing and performing the David Copperfield Show at the MGM Grand Hotel (*JAv.4.p.000925-000931*) which includes the "Thirteen" illusion. David Copperfield the individual was not a party to the agreement. *JA.v.5.p.001079-001080.*

4. At no time was David Copperfield acting in his individual capacity while performing any services related to the David Copperfield show at MGM. *See* Trial Exhibit 94, exemplar video of a representative performance in MGM theatre.

5. Instead, David Copperfield was acting as an officer of DCDI or within the scope of his employment at DCDI when doing anything related to the David Copperfield show at MGM including, but not limited

to, creating, designing, preparing, implementing protocols, rehearsing and performing. *See* Trial Exhibit 94, exemplar video of a representative performance in MGM theatre.

6. Mr. Copperfield has no ownership or interest in MGM or Backstage. *JAv.4.p.000929.*

7. David Copperfield does not have any direct authority over the employees of Backstage or MGM including with respect to the hiring and firing of said employees. *JA.v.4.p.000931-000933, JA.v.6.p.001386-001387, JA.v.7.p.001441, JA.v.7.p.001449.*

The "Thirteen" Illusion

8. The "Thirteen" illusion is an illusion that is performed during David Copperfield show at MGM which involves the disappearance and reappearance of approximately volunteer audience members. *JA.v.5. p.00970-001044, JA.v.11.p.002411-002416.*

9. The illusion had been part of the David Copperfield show at the MGM since 2000 and had been performed roughly 20,000 different times. *JA.v.4.p.000938, JA.v.5.p.001045.*

10. 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.*

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

12. There was extensive evidence that defendants took great care to ensure that participants were safe throughout the illusion as a number of protocols 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.*

13. 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.*

14. The audience members who 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.*

15. 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.*

16. Before going onto 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.*

17. 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.*

18. 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.*

19. During the performance there is also one stagehand that is responsible for taking the first audience participant 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.*

20. David Copperfield of DCDI does not participate in the "runaround" portion of the illusion as he remains on stage in front of the audience throughout the illusion. *JA.v.7.p.001507.*

21. Mr. Copperfield does not personally direct, encourage, touch or even speak to the audience participants once they leave the stage to begin the disappearing portion (runaround) of the illusion. *Id.*

E. STANDARD OF REVIEW

The standard of appellate review for a motion for judgment as a matter of law under NRCP 50(a) is de novo. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-425 (2007). NRCP 50 holds the following:

> (a) Judgment as a Matter of Law.
>
> (1) If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

> (2) Motions for judgment as a matter of law may be made at the close of the evidence offered by the nonmoving party or at the close of the case. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the opposing party "has failed to prove a sufficient issue for the jury," so that his claim cannot be maintained under the controlling law. The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party. *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482, 851 P.2d 459, 461-62 (1993) (applying the same evidence inferences to a motion under former NRCP 41 (b) and a motion under former NRCP 50(a)); see also *Bliss v. DePrang*, 81 Nev. 599, 601, 407 P.2d 726, 727 (1965) (applying same inferences to a motion under former NRCP 50(a)); *Kline v. Robinson*, 83 Nev. 244, 247, 428 P.2d 190, 192 (1967) (applying the same inferences to a motion under former NRCP 41 (b)). To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party. *Fernandez v. Admirand*, 108 Nev. 963, 968, 843 P.2d 354, 358 (1992).

F. ARGUMENT

(1) David Copperfield is Not Individually Liable for Plaintiffs' Alleged Injuries or Damages

All of Plaintiffs' evidence at trial against Mr. Copperfield was focused upon his alleged conduct in performing his duties as the president and sole employee of DCDI. Plaintiffs did not offer any proof that Mr. Copperfield is individually responsible for the injuries/damages allegedly sustained by Plaintiffs. Plaintiffs failed to offer any proof that Mr. Copperfield was acting in his individual capacity at the time of their alleged injuries, rather everything submitted has been with respect to Mr. Copperfield's work that was performed in the course and scope of fulfilling his duties as an agent on behalf of his principal.

Officers and agents of the corporation must be shielded from personal liability for acts taken on behalf of the corporation in furtherance of corporate goals, policies and business interests. See *Little v. Grisley Mfg.*, 195 MT 419, 424 (MT 1981). According to Nevada law, an officer, director or other agent of a corporation is not personally liable for torts of a corporation or its other officers and agents merely by virtue of holding corporate office, but can only incur personal liability by personal participation in the wrongful activity. See *GK Las Vegas Ltd. Partnership v. Simon Property Group*, 460 F.Supp.2d. 1246 (D.C.Nev.2006). Furthermore, according to the California Court of Appeals in *PMC, Inc. v.*

Kadisha, 78 Cal.App.4th 1368, 1389 (2000), the mere knowledge of tortious conduct by the corporation is not enough to hold a director or officer liable for the torts of the corporation absent other unreasonable participation in the alleged wrongful conduct.

This Court has relied upon the Restatement of Agency on several occasions in regard to relations between principal and agent. For example, see *Whitecap Industries, Inc. v. Rupert*, 67 P.3d 318 (Nev.2003) and *Kaldi v. Farmers*, 21 P.3d 16 (Nev.2001). According to the Restatement (3d.) of Agency §701 (2006),

> Only an agent's own tortious conduct subjects the agent to liability under this rule. An agent is not subject to liability for torts committed by the agent's principal that do not implicate the agent's own conduct; there is no principle of 'respondeat inferior.' *Id.* at cmt. d.

Furthermore, according to the Restatement (3d.) of Agency §701 (2006),

> An agent whose conduct is tortious is subject to liability. This is so whether or not the agent acted with actual authority, with apparent authority or within the scope of employment.... The justification for this basic rule is that a person is responsible for the legal consequences of torts permitted by that person. A tort committed by an agent constitutes a wrong to the tort's victim independently of the capacity in which the agent committed the tort. The injury suffered by the victim of a tort is the same regardless of whether the tortfeasor acted independently or happened to be acting as an agent or employee of another person.... *Id.* at cmt b.

The Alabama Federal District Court in *Kimbrough v. Dial*, 2006 WL 3627102 (D.C. AL 2006) addressed this very issue regarding an agent's personal participation in the alleged tort. The court in *Kimbrough* stated,

> ... defendants maintain that "Dial is an improper party to this

> action since she did not personally contribute to the plaintiff's injuries." Certainly, it is a correct statement of Alabama law that an agent of the corporation cannot be held individually liable for a corporation's negligent or wrongful acts unless she contributed to or participated in them. *See generally ex parte McInnis*, 820 So. 2d. 795, 798-99 (Ala.2001) ("A corporate agent who personally participated, albeit in his or capacity as such agent, in a tort is personally liable for the tort."); *Ex parte Charles Bell Pontiac-Buick Cadillac-GMC, Inc.,* 496 So.2d. 774, 775 (Ala.1986) (In Alabama, the general rule is that officers or employees of a corporation are liable for torts in which they have personally participated, irrespective of whether they were acting in a corporate capacity.").
>
> Defendants cannot prevail under this line of cases because the Amended Complaint adequately pleads participation by Dial. In particular, the Amended Complaint alleges that Dial personally failed to maintain the store in a reasonably safe condition, that she personally failed to warn Kimbrough of the unreasonably dangerous condition, and that she personally caused or allowed the unreasonably dangerous condition to exist. Defendants offer no reasonable basis for concluding that these allegations are insufficient as a matter of law to satisfy Alabama's "personal participation" prerequisite for personal liability for a corporate agent. *Id.* at 3-4.

The Federal Court's reasoning in *Kimbrough* stated above clearly demonstrates why in the present case David Copperfield's Motion for Judgment as a Matter of Law should have been granted. Plaintiffs offered no proof that Mr. Copperfield in his personal individual capacity did anything to cause injury to Mr. Cox. Plaintiffs did not offer any evidence to suggest that Mr. Copperfield personally hurried Mr. Cox through the runaround portion of the illusion or that he was personally responsible for the dust Mr. Cox allegedly slipped on while he was on the route or even knowingly subjected audience participants to known hazards. In fact, Mr. Copperfield was nowhere near Mr. Cox at the time of his accident; rather he was still on stage performing. *See* Trial Exhibit 94, exemplar video of a

representative performance in MGM theatre.

In Plaintiffs' Motion for Judgment as a Matter of Law, or Alternatively, for New Trial, counsel for Plaintiffs argue that the development and implementation of the illusion were negligent and therefore David Copperfield as an individual is negligent. *JA.v.28.006505.* However, Plaintiffs never offered any evidence that the any design aspects of the illusion or implementation of the illusion by David Copperfield was performed outside the scope of his employment at DCDI. The reason is simple, there is no such evidence. There is no dispute that the illusion and the runaround route were created for the David Copperfield show at the MGM which had a contract with DCDI, not David Copperfield. *JAv.4.p.000925-000931.* Further, the implementation of the runaround portion of the illusion is performed by Backstage and MGM, not David Copperfield. *JA.v.7.p.001440-001441.* David Copperfield does not have any direct authority over the employees of Backstage or MGM who assist participants through the runaround portion of the illusion, including with respect to the hiring and firing of said employees. *JA.v.4.p.000931-000933, JA.v.6.p.001386-001387, JA.v.7.p.001441, JA.v.7.p.001449.* Accordingly, there has been no proof of personal participation against Mr. Copperfield in his individual capacity. Thus, Mr. Copperfield is entitled to judgment as a matter of law on Plaintiffs' claims.

(2) David Copperfield Individually Did Not Owe a Duty to the Plaintiffs

Under the general principles of agency, an agent's breach of a duty owed to his or her principal is not itself a basis for holding the agent liable in tort with a third-party since the agent's conduct must breach a duty that the agent owes to the third-party. See Restatement (3d.) of Agency §702.

As the agent and alleged main performer of the David Copperfield show, Mr. Copperfield owed a duty to his principal to conduct the show in a safe manner. Therefore, when plaintiff Gavin Cox volunteered to participate in the show, it was Mr. Copperfield's principal (DCDI), through its agents, which included Mr. Copperfield, that may have owed a duty to Mr. Cox to preserve his safety during his participation in the show. Mr. Copperfield in his individual capacity simply did not owe a duty to Mr. Cox.

Plaintiffs attempted to offer proof that they suffered injuries and damages as a result of the alleged conduct of the defendants in performing the show with Mr. Cox's participation. Plaintiffs argued at trial that all individuals participating in the performance of the show, including David Copperfield, were agents, servants, partners and employees of each and every other defendant and were acting in the course and scope of their agency, partnership or employment. Ironically, Plaintiffs' argument favors judgment as a matter of law in favor of David Copperfield because it sets

forth that Mr. Copperfield was an officer, employee and agent of DCDI who was acting within his scope of his employment at DCDI while performing the show. Accordingly, Mr. Copperfield in his personal individual capacity did not owe a duty to Plaintiffs, but in his agency capacity owed a duty to his principal (DCDI) to perform the show safely. Any breach of that duty provides no basis for holding Mr. Copperfield individually liable to Plaintiffs. Consequently, Mr. Copperfield individually is entitled to judgment as a matter of law.

(3) A Corporate Officer Does Not Have A Personal Duty Towards Plaintiffs and Therefore Does Not Bear Individual Liability

An officer of a corporation does not have a personal duty to any person independent of the duty owed by the corporation. *GK Las Vegas Ltd. Partnership v. Simon Property Group*, 460 F.Supp.2d. 1246. An officer of a corporation is not the personal guarantor of a person's safety. Mr. Copperfield is not individually responsible for Plaintiffs' alleged injuries and damages simply because he is an officer of DCDI.

In *Griffin v. Dolgen Corp.*, 143 F.Supp. 2d 670 (S.D. Miss. 2001), the Court rejected the theory that a manager could be individually liable. The Court stated:

> "to saddle a store manager with personal liability in a case such as this, where there is no evidence that the slippery substance on the floor is attributable to an act of the manager, **would essentially make the store manager the personal guarantor of each customer's safety**. The Court is of the opinion **that liability, if any, more properly belongs to the**

> **store owner who is in a better position through protections such as insurance to bear the cost of such suits**." *Id.* at 672 (Emphasis added).

In this instant case, if there is any liability as argued by Plaintiffs, it would be against DCDI or the other corporate defendant entities, not an individual officer or employee of DCDI. DCDI is the entity putting on the magic show with the contracts, permits and insurance to do so and therefore is in a better position to bear the costs of such suits.

In *Booty v. Shoney's, Inc.,* 872 F.Supp. 1524 (E.D. La. 1995), the Court stated:

> "[w]ith regard to personal fault, **personal liability cannot be imposed upon an employee simply because of his general administrative responsibility for performance of some function of the employment**. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages. *Id.* at 1530 (citing *Canter v. Koehring Co.*, 283 So. 2d 717, 721 (La. 1973)"(emphasis added).

This theory was applied in *Dotson v. K-Mart Corp.*, 891 So. 789, 793 (La. App. 2004) as well, where it was determined that a manager is not automatically personally liable for injuries that may occur on the premises under their watch. The manager is not the personal insurer of safety. *Id.* at 794. Absent personal involvement, an officer or employee is not personally liable. "There was absolutely no evidence to suggest [the manager] had **anything personally to do with the accident** in question through any act of negligence. There was no evidence that he personally saw the wet cards or water dripping on the floor and failed to clean it up or instruct someone

else to clean it up." *Id.* at 794. (Emphasis added.)

In the instant case, there was no evidence offered that Mr. Copperfield had anything personally to do with Mr. Cox's accident. The trial testimony shows that Mr. Copperfield was on stage in front of the audience when Mr. Cox allegedly fell outside of the MGM Grand Hotel. *See* Trial Exhibit 94, exemplar video of a representative performance in MGM theatre. There has been no evidence presented that Mr. Copperfield personally hurried or yelled at Mr. Cox to run, directed any stagehands to hurry Mr. Cox, caused debris, failed to clear debris to be present, or caused Mr. Cox to fall. In fact, all evidence was to the contrary. David Copperfield as an employee of DCDI inspected the runaround route including where Mr. Cox fell to ensure that no dangerous conditions existed merely 10 minutes prior to Mr. Cox traveling on the same exact route. There was no evidence that Mr. Copperfield observed or should have observed some dangerous condition on the route and did nothing to correct it or warn the participants about the same. There was no evidence that any dangerous condition existed. *JA.v.17.p.003925.* Moreover, David Copperfield as an employee of DCDI anticipated that the runaround may go more slowly at times and that is why there are specific mechanisms such as the music and Mr. Copperfield's actions on stage to allow volunteer participants to arrive at their intended destination without being hurried.

JA.v.7.p.001457-001458.

In the instant case, David Copperfield did not have a personal duty towards Plaintiffs that was independent of any duty DCDI or other corporate defendant entities may have owed to Plaintiffs. If a duty was in fact owed to Plaintiffs, it was a duty DCDI or other corporate defendant entities owed, not Mr. Copperfield as an individual. All of Plaintiffs' allegations and purported proof at trial of failings and breaches of duty are as to DCDI or other corporate defendant entities. There was no evidence that Mr. Copperfield as an officer, owner and employee of DCDI personally participated in the wrongful activity alleged by Plaintiffs that was outside the scope of his office and employment. Mr. Copperfield was working for DCDI and DCDI was putting on the show. Nevada law is clear, an officer, director or other agent of a corporation may only incur personal liability by personal participation in the wrongful activity. *GK Las Vegas Ltd. Partnership v. Simon Property Group*, 460 F.Supp.2d. 1246 (D.C.Nev.2006).

The causes of action against Mr. Copperfield should have been ruled in favor of David Copperfield following Plaintiffs' case in chief as Plaintiffs were unable to produce any evidence to support their negligence claims. A cause of action for negligence requires a plaintiff to prove: (1) an existing duty of care, (2) breach, (3) legal causation, and (4) damages.

Turner v. Mandalay Sports Entm't, LLC, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008). Plaintiffs did not establish in their case in chief the first element of Mr. Cox's negligence claim (that Mr. Copperfield had a personal duty to protect Plaintiffs from harm), nor did they establish that Mr. Copperfield personally breached any duty. The mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability. *Carver v. El-Sabawi*, 121 Nev. 11, 15, 107 P.3d 1283, 1286 (2005). Whether a defendant owes a duty of care to a plaintiff is a question of law to be decided by the court. *Turner* at 220; *Scialabba v. Brandise Const. Co., Inc.,* 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). See also *Ashwood v. Clark County*, 113 Nev. 80, 84, 930 P.2d 740, 742 (1997), ("It is the courts and not juries that have the ultimate responsibility of defining duty in relation to particular circumstances and to define the legal standard of reasonable conduct 'in the light of the apparent risk").

Plaintiffs' purported evidence of negligence was related to the handling, setting up and performance of the show, not the personal actions of Mr. Copperfield or any other corporate employees. Mr. Copperfield was not a separate entity acting independently from DCDI. He was an officer and employee of DCDI; this was not an independent venture. The other causes of action against Mr. Copperfield individually (Respondeat

Superior and Negligent Hiring) do not apply to Mr. Copperfield as he is not the employing entity. Mr. Copperfield is the only employee of DCDI and he has no authority to hire or fire employees off the other defendants. *JA.v.7.p.001474, JA.v.4.p.000923, JA.v.4.p.000931-000933, JA.v.6.p.001386-001387, JA.v.7.p.001441, JA.v.7.p.001449.* Because there is no evidence that Mr. Copperfield acted in any capacity other than as an officer and employee of DCDI, no personal liability can be found against him on Plaintiffs' causes of action.

Plaintiffs at no time during trial even attempt to prove that Mr. Copperfield is an employee-tortfeasor with personal liability for his own negligence. Mr. Copperfield was simply an officer and employee of DCDI. Mr. Copperfield did not personally have a duty *other than in his official capacity* and did not personally commit a negligent act *outside that capacity*. Plaintiffs do not offer any evidence to demonstrate Mr. Copperfield was personally negligent. The only evidence that was offered was that Mr. Copperfield in his capacity for DCDI assisted in creating the illusion and that he approved the runaround route.

(4) Since Gavin Cox's Claims Against David Copperfield Fail, The Loss of Consortium Cause of Action Must Also Fail

David Copperfield is entitled to judgment as a matter of law on Plaintiff Minh-Hanh Cox's claim for loss of consortium. A loss of

consortium claim is derivative of the physically injured spouse's claim against the tortfeasor. *Torre v. J.C. Penney Co.,* 916 F.Supp. 1029, 1033 (D. Nev. 1996). Thus, if the physically injured spouse's claim fails, so does the other spouse's loss of consortium claims. *Id.* As discussed above, Mr. Cox's claims against Mr. Copperfield fail. None of Mr. Cox's claims against Mr. Copperfield survive judgment as a matter of law. Thus, Mrs. Cox's loss of consortium claim fails as well. It cannot stand alone since it is derivative of her husband's causes of action.

VII. CONCLUSION

For the foregoing reasons, Defendants David Copperfield a/k/a David S. Kotkin and David Copperfield's Disappearing, Inc. request that judgment entered on the jury's verdict be affirmed in all respects.

In addition, Mr. Copperfield respectfully requests this Court to enter judgment as a matter of law in his favor on Plaintiffs' claims asserted against him in his individual capacity. Plaintiffs did not allege or offer any evidence at trial to demonstrate Mr. Copperfield was personally negligent in any capacity. As such, Mr. Copperfield is entitled to judgment as a matter of law in his favor on all of Plaintiffs' causes of action.

DATED: August 12, 2019 Selman Breitman LLP

By: */s/ Gil Glancz*

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Time New Roman font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it: contains fewer than 18,500 words (17,990).

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.

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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:

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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-14-706164-C

RESPONDENTS DAVID COPPERFIELD, AND DAVID COPPERFIELD'S DISAPPEARING, INC.'S JOINT APPENDIX

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DISTRICT COURT

CLARK COUNTY, NEVADA

GAVIN COX and MINH-HAHN COX, Plaintiffs, 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., Defendants.	Case No.: A-14-705164-C Dept. No.: XIII **JUDGMENT ON SPECIAL VERDICT**

This action came on regularly for trial with the calling of the first witness on April 17, 2018, in Dept. XIII of the Eighth Judicial District Court, Clark County, Nevada, the Honorable Mark R. Denton, District Judge, presiding. Plaintiffs Gavin Cox and Minh-Hahn Cox were represented by Benedict Morelli, Esq. and Adam Deutsch. Esq. of Morelli Law Firm, PLLC and Brian Harris, Esq. of Harris & Harris; Defendant MGM Grand Hotel, LLC was represented by Jerry Popovich, Esq. of Selman Breitman LLP; Defendants David Copperfield aka David S. Kotkin and David Copperfield's Disappearing, Inc. were represented by Elaine K. Fresch, Esq. and Eric Freeman, Esq. of Selman Breitman LLP; Defendant Backstage Employment and Referral, Inc. was represented by D. Lee Roberts, Jr., Esq. and Howard Russell, Esq. of Weinberg, Wheeler, Hudgins,

Gunn & Dial, LLC; and Defendant Team Construction Management, Inc. was represented by Roger Strassburg, Esq. and Gary Call, Esq. of Resnick & Louis, P.C.

The issues having been duly tried, and the jury having duly rendered a Special Verdict to determine questions of negligence and proximate cause as to each defendant, which Special Verdict was filed by the Clerk on May 29, 2018, it is hereby ORDERED, ADJUDGED and DECREED, in accordance with the jury's Special Verdict:

1. Based on the jury's finding that Defendant MGM Grand Hotel, LLC was not the proximate cause of Plaintiff Gavin Cox's accident, Defendant MGM Grand Hotel, LLC has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover its ~~costs~~ taxable costs.
2. Based on the jury's finding that Defendant David Copperfield aka David S. Kotkin was not the proximate cause of Plaintiff Gavin Cox's accident, Defendant David Copperfield aka David S. Kotkin has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover his ~~costs~~ taxable costs.
3. Based on the jury's finding that Defendant David Copperfield's Disappearing, Inc. was not the proximate cause of Plaintiff Gavin Cox's accident, Defendant David Copperfield's Disappearing, Inc. has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover its ~~costs~~ taxable costs.
4. Based on the jury's finding that Defendant Backstage Employment and Referral, Inc. was not negligent, Defendant Backstage Employment and Referral, Inc. has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover its ~~costs~~ taxable costs.
5. Based on the jury's finding that Defendant Team Construction Management, Inc. was not negligent, Defendant Team Construction Management, Inc. has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover its ~~costs~~ taxable costs.

6. The court reserves amendment of this judgment based on any proper requests or motions for costs or fees submitted by any defendant.

SO ORDERED this 18th day of June 2018.

Hon. Mark R. Denton
District Court Judge

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DISTRICT COURT

CLARK COUNTY, NEVADA

GAVIN COX and MINH-HAHN COX, Husband and Wife, Plaintiffs, 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.; DOES 1 through 20; DOE EMPLOYEES 1 through 20; and ROE CORPORATIONS 1 through 20; Defendants.	Case No.: A-14-705164-C Dept. No.: XIII **NOTICE OF ENTRY OF JUDGMENT ON SPECIAL VERDICT**
MGM GRAND HOTEL, LLC, Third-Party Plaintiff, v. BEACHER'S LV, LLC, and DOES 1 through 20, inclusive, Third-Party Defendants.	

YOU WILL PLEASE TAKE NOTICE that a Judgment on Special Verdict was entered on June 20, 2018 in the above-captioned matter. A copy of the Judgment is attached hereto.

DATED this 21st day of June, 2018.

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I hereby certify that on the 21st day of June, 2018, a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT ON SPECIAL VERDICT** was electronically filed / served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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Benedict P. Morelli, Esq. Adam E. Deutsch, Esq. MORELLI LAW FIRM PLLC 777 Third Ave., 31st Floor New York, NY 10017 bmorelli@morellilaw.com adeutsch@morellilaw.com ***Attorneys for Plaintiffs***	Jerry C. Popovich, Esq. SELMAN BREITMAN, LLP 6 Hutton Centre Dr., Suite 1100 Santa Ana, CA 92707 jpopovich@selmanlaw.com ***Attorney for Defendants David Copperfield's Disappearing, Inc., David Copperfield aka David S. Kotkin and MGM Grand Hotel, LLC***
Gary Call, Esq. Melissa L. Alessi, Esq. RESNICK & LOUIS, P.C. 5940 S. Rainbow Blvd. Las Vegas, NV 89118 (702) 997-3800 Office (702) 997-3800 Fax gcall@rlattorneys.com malessi@rlattorneys.com ***Attorneys for Defendants Team Construction Management, Inc. and Beacher's LV, LLC***	Michael V. Infuso, Esq. Keith W. Barlow, Esq. Sean B. Kirby, Esq. GREENE INFUSO, LLP 3030 S. Jones Blvd., Suite 101 Las Vegas, NV 89146 minfuso@greeneinfusolaw.com kbarlow@greeneinfusolaw.com skirby@greeneinfusolaw.com ***Attorneys for MGM Grand Hotel, LLC***

An Employee of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

GAVIN COX and MINH-HAHN COX, Plaintiffs, 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., Defendants.	Case No.: A-14-705164-C Dept. No.: XIII **JUDGMENT ON SPECIAL VERDICT**

This action came on regularly for trial with the calling of the first witness on April 17, 2018, in Dept. XIII of the Eighth Judicial District Court, Clark County, Nevada, the Honorable Mark R. Denton, District Judge, presiding. Plaintiffs Gavin Cox and Minh-Hahn Cox were represented by Benedict Morelli, Esq. and Adam Deutsch. Esq. of Morelli Law Firm, PLLC and Brian Harris, Esq. of Harris & Harris; Defendant MGM Grand Hotel, LLC was represented by Jerry Popovich, Esq. of Selman Breitman LLP; Defendants David Copperfield aka David S. Kotkin and David Copperfield's Disappearing, Inc. were represented by Elaine K. Fresch, Esq. and Eric Freeman, Esq. of Selman Breitman LLP; Defendant Backstage Employment and Referral, Inc. was represented by D. Lee Roberts, Jr., Esq. and Howard Russell, Esq. of Weinberg, Wheeler, Hudgins,

Gunn & Dial, LLC; and Defendant Team Construction Management, Inc. was represented by Roger Strassburg, Esq. and Gary Call, Esq. of Resnick & Louis, P.C.

The issues having been duly tried, and the jury having duly rendered a Special Verdict to determine questions of negligence and proximate cause as to each defendant, which Special Verdict was filed by the Clerk on May 29, 2018, it is hereby ORDERED, ADJUDGED and DECREED, in accordance with the jury's Special Verdict:

1. Based on the jury's finding that Defendant MGM Grand Hotel, LLC was not the proximate cause of Plaintiff Gavin Cox's accident, Defendant MGM Grand Hotel, LLC has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover its ~~costs~~ taxable costs.

2. Based on the jury's finding that Defendant David Copperfield aka David S. Kotkin was not the proximate cause of Plaintiff Gavin Cox's accident, Defendant David Copperfield aka David S. Kotkin has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover his ~~costs~~ taxable costs.

3. Based on the jury's finding that Defendant David Copperfield's Disappearing, Inc. was not the proximate cause of Plaintiff Gavin Cox's accident, Defendant David Copperfield's Disappearing, Inc. has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover its ~~costs~~ taxable costs.

4. Based on the jury's finding that Defendant Backstage Employment and Referral, Inc. was not negligent, Defendant Backstage Employment and Referral, Inc. has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover its ~~costs~~ taxable costs.

5. Based on the jury's finding that Defendant Team Construction Management, Inc. was not negligent, Defendant Team Construction Management, Inc. has judgment that Plaintiffs Gavin Cox and Minh-Hahn Cox take nothing by way of their operative complaint, and that this defendant shall recover its ~~costs~~ taxable costs.

6. The court reserves amendment of this judgment based on any proper requests or motions for costs or fees submitted by any defendant.

SO ORDERED this 18th day of June 2018.

Hon. Mark R. Denton
District Court Judge

ASTA
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Attorneys for Defendant DAVID COPPERFIELD'S DISAPPEARING, INC., DAVID COPPERFIELD aka DAVID KOTKIN, and MGM GRAND HOTEL, LLC.

Selman Breitman LLP
ATTORNEYS AT LAW

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

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.; DOES 1 through 20; DOE EMPLOYEES 1 through 20; and ROE CORPORATIONS 1 through 20,

Defendants.

AND RELATED CROSS-ACTIONS.

Case No. A-14-705164-C
Dept.: XIII

Supreme Court No.: 76422

DEFENDANT DAVID COPPERFIELD'S CASE CROSS-APPEAL STATEMENT

Pursuant to Nevada Rule of Appellant Procedure 3(a)(1), Defendant/Respondent/Cross-Appellant David Copperfield ("Copperfield") hereby submits the following Case Appeal Statement:

1. Name of Appellant Filing this Case Appeal Statement:

David Copperfield aka David S. Kotkin

2. Judge Issuing the Decision, Judgment or Order Appealed from:

Eighth Judicial District Court Case No. A-14-705164-C entitled Gavin Cox and Minh-Hahn Cox v. MGM Grand Hotel, LLC, et al. The Honorable Mark Denton.

3. Appellant and Appellant's Counsel:

David Copperfield aka David S. Kotkin

Trial and Appellate Counsel for Appellant:

Elaine K. Fresch, Esq.
Eric O. Freeman, Esq.
Gil Glancz, Esq.
Selman Breitman LLP
3993 Howard Hughes Parkway, Suite 200
Las Vegas, NV 89169
Tel. 702-228-7717
Fax. 702-228-8824

4. Respondents and Respondents' Counsel:

Gavin and Minh-Hahn Cox

Trial and Appellate counsel for Respondents:

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Heather E. Harris, Esq.
Christian N. Griffin, Esq.
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Tel. 702-880-4529
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-and-

Benedict P. Morelli, Esq.
Adam E. Deutsch, Esq.

Perry S. Fallick, Esq.
Morelli Law Firm PLLC
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Tel. 212-751-9800
Fax. 212-751-0096

5. Attorneys Not Licensed to Practice Law in Nevada:

Benedict P. Morelli, Esq., Notice of Entry of Order Granting Plaintiffs' Motion to Associate Counsel filed August 10, 2016.

Adam E. Deutsch, Esq., Notice of Entry of Order Granting Plaintiffs' Motion to Associate Counsel filed August 10, 2016.

Perry S. Fallick, Esq., Notice of Entry of Order Granting Plaintiffs' Motion to Associate Counsel filed April 6, 2017.

Jerry C. Popovich, Esq. Notice of Entry of Order Granting Defendant David Copperfiled's Motion to Associate Counsel filed January 23, 2017.

6. Appointed/Retained Trial Counsel:

Counsel for all parties is retained, not appointed.

7. Appointed/Retained Appellate Counsel:

Counsel for all parties is retained, not appointed.

8. Leave to Proceed in Forma Pauperis:

Not Applicable.

9. Date Proceeding Commenced in District Court:

August 6, 2014 (Complaint filed).

10. Brief Description of the Nature of the Action and Result in District Court, Including Type of Order Being Appealed:

This case involved an incident that occurred on November 12, 2013 at the David Copperfield Show at the MGM Grand Hotel/Casino. Plaintiffs are husband and wife Gavin Cox and Minh-Hanh Cox. Plaintiff Gavin Cox claimed he was injured while participating in an illusion as an audience member. Plaintiffs alleged that he was injured while participating in the illusion when he was allegedly hurried with no guidance or instruction through a dark area that

was under construction. Plaintiffs claimed the area was a construction area that was covered with construction dust which caused Mr. Cox to slip and fall. The Defendants denied the allegations of Plaintiffs as each disputed liability, causation and damages claimed by Plaintiffs. A bifurcated trial in this matter began on April 3, 2018. The jury found for all Defendants as they attributed 100% of comparative fault to Mr. Cox.

Issues on appeal

1. Defendant/Respondent/Cross-Appellant David Copperfield is appealing the District Court's March 28, 2017 Order Granting in Part and Denying in Part Defendant David Copperfield's Motion for Summary Judgment on All Claims Against Defendant David Copperfield; Findings of Fact and Conclusions of Law.
2. Defendant/Respondent/Cross-Appellant David Copperfield is appealing the District Court's May 3, 2018 Order Denying David Copperfield's Motion for Judgment as a Matter of Law.
3. Defendant/Respondent/Cross-Appellant David Copperfield is appealing the District Court's granting with respect to Plaintiffs' Trial Brief to Permit Testimony of Newly Discovered Fact Witnesses on April 25, 2018.[1]
4. Defendant/Respondent/Cross-Appellant David Copperfield is appealing the District Court's denial of David Copperfield's Trial Brief filed May 10, 2018 to Preclude Plaintiffs from Calling Improper Rebuttal Witnesses.

11. Prior Proceedings in the Supreme Court:

During the 7-week trial, two Writs were taken to the Court of Appeals:

Court of Appeals of the State of Nevada – No. 75609, David Copperfield's Disappearing, Inc., David Copperfield and David S. Kotkin, and MGM Grand Hotel, LLC, Petitioners v. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, and the Honorable Mark R. Denton, District Judge, Respondents; and Gavin Cox and Minh-Hahn Cox, Real Parties in Interest.

Court of Appeals of the State of Nevada – No. 75762, Gavin Cox and Minh-Hahn Cox,

[1] Note: The witnesses subject to this issue testified the same day on April 25, 2018, thus no order was filed with respect to the same.

Petitioners v. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, and the Honorable Mark R. Denton, District Judge, Respondents; and MGM Grand Hotel, LLC, David Copperfield's Disappearing, Inc., David Copperfield, Backstage Employment and referral, Inc. and Team Construction Management, Inc., Real Parties in Interest.

Plaintiffs previously filed a Notice of Appeal from the jury verdict and Case Appeal Statement on July 11, 2018. Plaintiffs filed an Amended Notice of Appeal on December 6, 2018. The appeal was assigned Supreme Court No.: 76422.

12. Child Custody or Visitation:

Not Applicable.

13. Possibility of Settlement:

This appeal does not involve the possibility of settlement. Mediation was held in this matter on October 18, 2018. No settlement was reached.

DATED: May 22, 2019

SELMAN BREITMAN LLP

By: */s/ Elaine K. Fresch*

ELAINE K. FRESCH
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ERIC O. FREEMAN
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Attorneys for Defendant DAVID COPPERFIELD'S DISAPPEARING, INC., DAVID COPPERFIELD aka DAVID KOTKIN, and MGM GRAND HOTEL, LLC.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on May 22, 2019 a true and correct copy of the above and foregoing document was e-filed and e-served on all registered parties in the Eighth Judicial District Court efiling program.

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

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ELAINE K. FRESCH
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Attorneys for Defendant DAVID COPPERFIELD'S DISAPPEARING, INC., DAVID COPPERFIELD aka DAVID KOTKIN, and MGM GRAND HOTEL, LLC.

Selman Breitman LLP
ATTORNEYS AT LAW

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

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.; DOES 1 through 20; DOE EMPLOYEES 1 through 20; and ROE CORPORATIONS 1 through 20,

Defendants.

AND RELATED CROSS-ACTIONS.

Case No. A-14-705164-C
Dept.: XIII

Supreme Court No.: 76422

DEFENDANT DAVID COPPERFIELD'S NOTICE OF CROSS-APPEAL

NOTICE IS HEREBY GIVEN that Defendant/Respondent/Cross-Appellant DAVID COPPERFIELD aka DAVID S. KOTKIN (hereinafter "David Copperfield"), by and through his counsel of record, SELMAN BREITMAN, hereby appeals to the Supreme Court of Nevada from the Notice of Entry of Orders regarding: 1) Granting in Part and Denying in Part Defendant David Copperfield's Motion for Summary Judgment on All Claims Against Defendant David Copperfield; Findings of Fact and Conclusions of Law entered in this action on March 28, 2017; 2) Minute Order Denying David Copperfield's Motion for Judgment as a Matter of Law entered in this action on May 3, 2018; 3) District Court decision on Plaintiffs' Trial Brief to Permit Testimony of Newly Discovered Fact Witnesses on April 25, 2018[1]; and 4) the District Court's denial of David Copperfield's Trial Brief on May 11, 2018 to Preclude Plaintiffs from Calling Improper Rebuttal Witnesses.

DATED: May 22, 2019

SELMAN BREITMAN LLP

By: */s/ Elaine K. Fresch*

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Attorneys for Defendant DAVID COPPERFIELD'S DISAPPEARING, INC., DAVID COPPERFIELD aka DAVID KOTKIN, and MGM GRAND HOTEL, LLC.

[1] Note: The witnesses subject to this issue testified the same day on April 25, 2018, thus no order was filed with respect to the same.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on May 22, 2019 a true and correct copy of the above and foregoing document was e-filed and e-served on all registered parties in the Eighth Judicial District Court efiling program.

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

GAVIN COX; AND MIHN-HAHN COX, HUSBAND AND WIFE,
Appellants/Cross-Respondents,
vs.
DAVID COPPERFIELD, A/K/A DAVID S. KOTKIN,
Respondent/Cross-Appellant,
vs.
MGM GRAND HOTEL, LLC; BACKSTAGE EMPLOYMENT AND REFERRAL, INC.; DAVID COPPERFIELD'S DISAPPEARING, INC.; TEAM CONSTRUCTION MANAGEMENT, INC.; AND BEACHERS LV, LLC,
Respondents.

No. 76422

FILED

AUG 29 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER TO SHOW CAUSE

This is an appeal from a jury verdict dismissing the complaint. Respondent/cross-appellant has filed a notice of cross-appeal proposing to challenge several interlocutory orders. Preliminary review of the docketing statement and the documents submitted to this court pursuant to NRAP 3(g) reveals potential jurisdictional defects in the notice of cross-appeal.

Appellants/cross-respondents filed a complaint against respondents and respondent/cross-appellant for personal injuries. Respondent/cross-appellant David Copperfield and respondents David Copperfield's Disappearing, Inc., and MGM Grand Hotel, LLC, crossclaimed against appellants for contribution and indemnity. MGM Grand also filed a third party complaint against respondent Beachers LV,

LLC, for indemnity and contribution and allocation and Beachers counterclaimed against MGM Grand for identical claims. The cross-claims and third-party claims were stayed pending the trial on liability. The jury found appellants 100% responsible for their injuries and no liability on the part of any of the defendants. The jury verdict rendered the crossclaims and third party claims moot, and all claims against all parties were finally resolved by the judgment. *Lee v. GNLV, Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (a final judgment is one that finally resolves all claims and issues against all parties to an action and leaves nothing to the district court's consideration except postjudgment issues such as attorney fees and costs). Judgment was entered on the jury's verdict on June 20, 2018, finding against the plaintiffs and appellants and in favor of each of the defendants and respondents.

Appellants timely filed their notice of appeal on July 1, 2018. An amended notice of appeal was filed November 26, 2018, after the district court denied appellants' motion for new trial. *See* NRAP 4(a). Respondent/cross-appellant filed his notice of cross-appeal on May 22, 2019, 10 months after the appeal was docketed in this court. Appellants/cross-respondents and respondents have filed their opening and answering briefs. Respondent/cross-appellant filed a combined answering brief on appeal and opening brief on cross-appeal on August 12, 2019.

First, the notice of cross-appeal appears to be untimely filed under NRAP 4(a)(2) because it was filed well over 14 days after the original notice of appeal. *See* NRAP 26(c).

Second, the order purporting to certify the judgment as final pursuant to NRCP 54(b) appears to be improper because a final judgment had already been entered on June 20, 2018. There can be only one final

judgment in a case. *Alper v. Posin*, 77 Nev. 328, 363 P.2d 502 (1961), *overruled on other grounds by Lee*, 116 Nev. at 426, 996 P.2d at 417. The certification does not create a new finality from which a party can appeal.

Third, it is unclear how respondent/cross-appellant is aggrieved by the judgment. Under NRAP 3A(a), only "aggrieved parties" may appeal. "A party is 'aggrieved' within the meaning of NRAP 3A(a) 'when either a personal right or right of property is adversely and substantially affected' by a district court's ruling." *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994); (*quoting Estate of Hughes v. First Nat'l Bank*, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980)). A party is aggrieved by an order only if it "'will be directly benefited by its reversal.'" *Leonard v. Belanger et al.*, 67 Nev. 577, 593, 222 P.2d 193, 200 (1950) (*quoting Gibbons v. Cannaven*, 66 N.E.2d 370, 377 (Ill. 1946). Respondent/cross-appellant proposes that "[t]his cross-appeal is offered in case this Court reverses the judgment arising out of the jury's verdict, and orders a new trial." This is an improper basis for a cross-appeal. Instead, "it is [ ] settled that the appellee may, *without taking a cross appeal*, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994) (emphasis added).

Accordingly, respondent/cross-appellant shall have 30 days from the date of this order within which to show cause why this cross-appeal should not be dismissed for lack of jurisdiction. Failure to demonstrate that this court has jurisdiction may result in this court's dismissal of this cross-appeal. The briefing schedule in this appeal and cross-appeal shall be suspended pending further order of this court. Appellants/cross-

respondents may file any reply within 14 days from the date that respondent/cross-appellant's response is served.

It is so ORDERED.[1]

C.J.

cc: Morelli Law Firm PLLC
Harris & Harris
Lewis Roca Rothgerber Christie LLP/Las Vegas
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
Selman Breitman, LLP/Las Vegas
Resnick & Louis, P.C./Las Vegas
Selman Breitman, LLP/Santa Ana
Greene Infuso, LLP

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[1]This court takes no action in regard to the stipulation filed on August 12, 2019. Respondent/cross-appellant David Copperfield and respondents MGM Grand Hotel; Backstage Employment and Referral; and David Copperfield's Disappering, Inc. filed their briefs and appendix on August 12, 2019. The motion for extension of time filed by respondents Team Construction Management and Beachers LV is denied as moot.

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-17-751759-C

RESPONDENT/CROSS-APPELLANT DAVID COPPERFIELD AKA DAVID S. KOTKIN'S NOTICE OF WITHDRAWAL OF CROSS-APPEAL

Elaine K. Fresch
Gil Glancz
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3993 Howard Hughes Parkway, Suite 200
Las Vegas, Nevada 89169
Telephone: 702.228.7717
Attorneys for Respondent/Cross-Appellant

Respondent and Cross-Appellant David Copperfield aka David S. Kotkin (hereinafter "David Copperfield") hereby moves to voluntarily withdraw the cross-appeal mentioned above.

I, Elaine K. Fresch, as counsel for the respondent/cross-appellant, explained and informed David Copperfield of the legal effects and consequences of this voluntary withdrawal of this cross-appeal, including that David Copperfield cannot hereafter seek to reinstate this appeal and that any issues that were or could have been brought in this appeal are forever waived. Having been so informed, David Copperfield hereby consents to a voluntary dismissal of the above-mentioned cross-appeal.

VERIFICATION

I recognize that pursuant to the Nevada Rules of Appellate Procedure, I am responsible for filing a notice of withdrawal of the cross-appeal and that the Supreme Court of Nevada may sanction an attorney for failing to file such a notice. I therefore certify that the information provided in this notice of withdrawal of the cross-appeal is true and

complete to the best of my knowledge, information and belief.

DATED: September 24, 2019 SELMAN BREITMAN LLP

By: */s/ Elaine K. Fresch*

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Attorneys for Respondent
David Copperfield aka David S. Kotkin

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on the 24th day of September 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:

SEE ATTACHED SERVICE LIST

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

SERVICE LIST

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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-17-751759-C

RESPONDENT/CROSS-APPELLANT DAVID COPPERFIELD AKA DAVID S. KOTKIN'S RESPONSE TO THE NEVADA SUPREME COURT'S ORDER TO SHOW CAUSE AS TO THE COURT'S JURISDICTION

Elaine K. Fresch
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Telephone: 702.228.7717
Attorneys for Respondent/Cross-Appellant

COMES NOW, Respondent/Cross-Appellant David Copperfield aka David S. Kotkin (hereinafter "David Copperfield"), by and through his attorneys, Selman Breitman LLP, hereby responds to the August 29, 2019 Nevada Supreme Court's Order to Show Cause as to the Court's Jurisdiction.

In considering the Court's position that David Copperfield is not an aggrieved party, David Copperfield is withdrawing his cross-appeal **only,** docketed in Nevada Supreme Court, Case No. 76422. The withdrawal of the cross-appeal does not have any impact on the Answering Brief on Appeal filed by David Copperfield and David Copperfield's Disappearing, Inc. on August 12, 2019, which remains in full effect. The filing of a notice of withdrawal of the cross-appeal will be forthcoming.

DATED: September 24, 2019 SELMAN BREITMAN LLP

By: */s/ Gil Glancz*

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Facsimile: 702.228.8824
Attorneys for Respondent
David Copperfield aka David S. Kotkin

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on the 24th day of September 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:

SEE ATTACHED SERVICE LIST

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

SERVICE LIST

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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

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

GAVIN COX; AND MIHN-HAHN COX, HUSBAND AND WIFE,
Appellants,
vs.
DAVID COPPERFIELD, A/K/A DAVID S. KOTKIN, MGM GRAND HOTEL, LLC; BACKSTAGE EMPLOYMENT AND REFERRAL, INC.; DAVID COPPERFIELD'S DISAPPEARING, INC.; TEAM CONSTRUCTION MANAGEMENT, INC.; AND BEACHERS LV, LLC,
Respondents.

No. 76422

FILED

NOV 08 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING CROSS-APPEAL AND REINSTATING BRIEFING

In response to this court's order to show cause why the cross-appeal should not be dismissed for lack of jurisdiction, respondent/cross-appellant David Copperfield concedes he is not an aggrieved party and moves for a voluntary dismissal of the cross-appeal. Cause appearing, the motion is granted. The cross-appeal is dismissed. NRAP 42(b). The clerk of this court shall amend the caption to conform to the caption on this order.

The clerk of this court shall strike the combined answering brief and opening brief on cross-appeal and joint appendix filed on August 12, 2019. The briefing schedule is reinstated as follows. Respondents David Copperfield; David Copperfield's Disappearing, Inc.; Team Construction Management, Inc.; and Beachers LV, LLC, shall have 30 days from the date of this order to file answering briefs. Thereafter, briefing shall proceed in

accordance with NRAP 31(a)(1). Failure to timely file the answering briefs may result in the imposition of sanctions, including resolution of this appeal without answering briefs from these respondents. NRAP 31(d).

It is so ORDERED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Cadish, J.
Cadish

cc: Hon. Mark R. Denton, District Judge
Paul M. Haire, Settlement Judge
Morelli Law Firm PLLC
Harris & Harris
Lewis Roca Rothgerber Christie LLP/Las Vegas
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
Selman Breitman, LLP/Las Vegas
Resnick & Louis, P.C./Las Vegas
Selman Breitman, LLP/Santa Ana
Greene Infuso, LLP
Eighth District Court Clerk