Case No. 76422

In the Supreme Court of Nevada

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

Appellants,

vs.

MGM GRAND HOTEL, LLC; DAVID COPPERFIELD AKA DAVID S. KOTKIN; BACKSTAGE EMPLOYMENT AND REFERRAL, INC.; DAVID COPPERFIELD'S DISAPPEARING, INC.; TEAM CONSTRUCTION MANAGEMENT, INC.; AND BEACHERS LV, LLC,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Mark Denton, District Judge
District Court Case No. A-14-705164-C

RESPONDENT TEAM CONSTRUCTION MANAGEMENT, INC.'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent Team Construction Management, Inc. is a corporation. It has no parent, and no publicly-held company owns 10% or more of its stock.

Roger Strassburg, Gary W. Call, and Melissa Alessi of Resnick & Louis, P.C. represented Team Construction in district court. Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith of Lewis Roca Rothgerber Christie, LLP represents Team Construction on appeal.

Dated this 9th day of December, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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ROUTING STATEMENT

Team Construction agrees with plaintiffs that the Supreme Court may retain this case as an appeal "raising as a principal issue a question of statewide public importance." NRAP 17(a)(12).

ISSUES PRESENTED

1. Whether the district court abused its discretion when admitting sub rosa surveillance videos for the jury to assess Mr. Cox's credibility after Mr. Cox testified to and feigned a need for assistance walking in his personal-injury trial.

2. Whether the district court was obligated to explain its evidentiary ruling in plaintiffs' favor to cancel a jury view.

3. Whether the district court abused its discretion by instructing the jury on comparative negligence when trial testimony showed that Mr. Cox fell because he failed to pick his foot up while running.

4. Whether the jury's finding that MGM, DCDI, and Mr. Copperfield were negligent but not a proximate cause of Mr. Cox's fall necessarily rendered the verdict inconsistent.

5. Whether the district court abused its discretion in denying plaintiffs' motion for a new trial.

STATEMENT OF THE CASE

This is an appeal from a defense verdict and the a denial of a new trial in a personal-injury, trip-and-fall case, Eighth Judicial District Court, Clark County; the Honorable Mark Denton, District Judge.

Mr. Cox tripped and fell while volunteering as an audience member in the "Thirteen Illusion" act of the David Copperfield Show at MGM. He and his wife then sued defendants, alleging that Mr. Cox was injured and that defendants were negligent. Team Construction and its co-defendants asserted a comparative negligence defense against Mr. Cox.

In phase one of plaintiffs' personal-injury trial, Mr. Cox feigned a need for assistance walking while in the jury's view. But his feint was exposed by way of sub rosa surveillance videos.

Also at trial, Team Construction and its co-defendants presented evidence that Mr. Cox caused his own fall. Two experts opined that Mr. Cox tripped—not slipped—when he failed to pick his foot up while running, catching his toe on the ground.

The jury found that Team Construction was not negligent, none of the defendants proximately caused Mr. Cox's fall, and Mr. Cox was 100% at fault.

Plaintiffs appeal from the defense verdict and multiple district court rulings issued throughout the seven-week jury trial.

STATEMENT OF FACTS

A. The "Thirteen Illusion" Act Uses Only Volunteers Who Say They Can Safely Run

The Thirteen Illusion act is performed during the David Copperfield show at the MGM.[1] (4 JA 935–38; *see also* 5 JA 970–1044.) Audience members volunteer to participate in the illusion by catching and keeping one of many inflatable balls tossed into the audience. (4 JA 744, 946, 952, 973–74; 11 JA 2415–16.)

But before participating in the illusion, the volunteers are asked questions to ensure that the volunteers can safely participate, including whether the volunteer is capable of running. (5 JA 967–70; 979–87.)

[1] Team Construction refers to the other defendants herein as follows: MGM Grand Hotel, LLC as "MGM"; David Copperfield aka David S. Kotkin as "Mr. Copperfield"; Backstage Employment and Referral, Inc. as "Backstage"; David Copperfield's Disappearing, Inc. as "DCDI"; and Beachers LV, LLC as "Beachers."

The volunteers are further vetted through the initial portion of the act, during which stagehands observe the volunteers as they follow Mr. Copperfield around the stage. (5 JA 996–1011; 7 JA 1441–47.)

The vetted volunteers participate in the "runaround" portion of the illusion. (5 JA 974, 1008, 1024; 18 JA 4195–96.) During the runaround, the volunteers are guided by stagehands through a backstage area and an exterior pathway. (5 JA 1021–1024, 1030–44, 1106–07.) The route was designed with safety protocols by multiple professionals and includes approximately thirty stagehands assisting throughout. (4 JA 933–36, 941–43, 947–56; 5 JA 988, 1028–31; 1079–80, 1107; 7 JA 1467–72; 9 JA 2054–57, 2066–72; 11 JA 2411–2505; 13 JA 1244–48, 3043–44; 14 JA 3123; 16 JA 3611-17.) While one stagehand leads the first volunteer through the runaround and sets a suggested pace, volunteers can go at their own pace and can stop participating at any time. (6 JA 1223-24; 7 JA 1456–59, 1501–02.) Volunteers have stopped participating in the illusion prior to Mr. Cox's fall. (6 JA 1223–24.)

The illusion has been performed approximately 20,000 times since 2000. (4 JA 938; 5 JA 1045.)

B. Mr. Cox Volunteers to Run in the Illusion

In November 2013, Mr. Cox traveled to Las Vegas to celebrate his birthday by, in part, seeing the David Copperfield show. (13 JA 3013–14.) He purchased front-row tickets for himself and his wife for the evening act on November 12, 2013. (13 JA 3032.)

When Mr. Copperfield began to perform the Thirteen illusion that night, Mr. Cox hoped to be a volunteer audience member. (*See* 13 JA 3035 ("I was kind of disappointed because I didn't think I had a chance [of taking part in] the trick").) And he in fact caught and kept one of the inflatable balls tossed into the audience. (*Id.*) He then completed the volunteer vetting process by confirming that he could run and by following Mr. Copperfield around the stage. (13 JA 3037–38.)

C. During the Illusion, Mr. Cox Falls but Keeps Going, and He Tells Inconsistent Stories about Why

Mr. Cox began the runaround portion of the illusion. (13 JA 3041–42.) He described the runaround route as "pitch black" in parts. (13 JA 3045.) But Mr. Cox admitted that he ran as fast as he could anyway, without looking at the ground, and that he never chose to stop participating because he was enjoying being part of the illusion. (13 JA 3043, 3046, 3048, 3050–51, 3079–80; 14 JA 3154.)

Mr. Cox then tripped and fell. (13 JA 3051.) He initially alleged that he slipped and fell on construction dust while turning a corner and running up a ramp during the outside portion of the runaround. 13 JA 3052; 14 JA 3109–13; 14 JA 3112. He later suggested he fell because of running with urgency, not because of the dust. 13 JA 3059.

Further, while Mr. Cox initially claimed that he was the last vetted volunteer in line throughout the runaround, he later admitted that he was not. (13 JA 3075–76.) Indeed, the stagehand assigned to follow the last volunteer that night did not see Mr. Cox fall or lying on the ground. (11 JA 2395–96.) Mr. Cox instead had continued to participate in the illusion before the stagehand reached the area at which Mr. Cox fell. (*Id.*)

Despite continuing to participate in the illusion immediately after falling, Mr. Cox claimed that the fall "ripped the whole of [his] arm [and his tendons] out of its socket" resulting in his "elbow and [his] arm end[ing] up in the middle of [his] body." (14 JA 3143.) He testified that a "pain [shot] through [him] like [he] never, ever felt before. It was like a lightning bolt going through the whole of [his] shoulder and left-hand

side." (13 JA 3051.) He described himself as being "in agony." (13 JA 3053.)

D. Mr. Cox and His Wife File Suit

Plaintiffs sued defendants on August 6, 2015, asserting that Mr. Cox slipped and fell because defendants were negligent. (1 JA 1-11.) The district court granted defendants' request to bifurcate the trial into two phases: liability and damages. (2 JA 347–351.)

E. The Parties Litigate Liability in the First Phase of the Trial

Phase one of trial lasted approximately seven weeks. (2 JA 425–3 JA 568; 25 JA 5807–5919.) The testimony and rulings pertinent to this appeal are summarized below.

1. Mr. Cox trips by catching his toe on the ground

The trial evidence showed that Mr. Cox was negligent and caused his fall. Mr. Cox testified that he ran as fast as he could even though the he thought the run around was poorly lit—even "pitch black" in certain areas. (13 JA 3043–48, 3050–51, 3079–80, 3094; 14 JA 3112–14, 3154.) But instead of choosing to run slower or to stop participating as a

volunteer altogether, Mr. Cox continued to run as fast as he could through the dark. (13 JA 3053; 14 JA 3154.)

In addition, two experts testified that Mr. Cox fell because he tripped by catching his toe on the ground. (18 JA 4120–4302; 19 JA 4303–98; 20 JA 4624–95, 4742–80; 21 JA 4781–4969.) Dr. John Baker, a human factors engineer, opined that the scuff marks on Mr. Cox's shoes show that Mr. Cox tripped when he caught his toe on the ground, breaking his stride. (18 JA 4202–07, 4211–14, 4120; 19 JA 4336–63.) Dr. Baker explained the difference between tripping over your own feet and slipping on a substance. (18 JA 4207.) He also opined that Mr. Cox tripped on practically level (1-degree incline) ground 22 feet from where Mr. Cox claims to have slipped and that the nearby ramp did not contribute to his trip. (18 JA 4169–70, 4185–87, 4228; 19 JA 4340–41.)

Dr. Nicholas Yang, a senior biomechanical engineer, analyzed Mr. Cox's fall. (20 JA 4624–95, 4742–80; 21 JA 4781–4969, 20 JA 4625.) Dr. Yang determined that Mr. Cox did not slip and fall on the allegedly dust-covered ramp; he tripped and fell after he caught his toe on the ground. (20 JA 4663–68.) Dr. Yang also concluded that Mr. Cox fell "approximately 20 feet from the corner" where Mr. Cox alleged to have

fallen. (20 JA 4668.) Finally, Dr. Yang testified to the mechanics of how Mr. Cox fell and got back up. (20 JA 4757.)

2. The district court grants, then cancels, a jury view

In the jury's presence, defendant Backstage asked to take the jury to the site of Mr. Cox's fall. (17 JA 3053–54.) The court heard argument on the motion outside of the presence of the jury and granted the motion. (17 JA 3054, 3936–71.)

Plaintiffs filed an emergency writ petition to stop the jury view. (17 JA 4003–18 JA 4067.) The Nevada Court of Appeals denied the writ, allowing the view to go forward, but then-Judge Silver dissented. (17 JA 4068–70.)

Plaintiffs ultimately succeeded in preventing the jury view, however. They obtained and presented sub rosa surveillance video of defense counsel cleaning the site after the district court granted the motion. (18 JA 7078–79.) Persuaded by Judge Silver's dissent, the district court *sua sponte* reconsidered its ruling and denied the motion for a jury view. (18 JA 4076–4102.) When the jury returned, the court explained that it canceled the jury view because "this case [was] not conducive to

[a jury view]." (18 JA 4118.) Plaintiffs did not request further explanation to the jury. (*See id.*)

3. After Mr. Cox's feigns an inability to walk without assistance, the court admits sub rosa surveillance videos to contradict him

Unasked, Mr. Cox raised the issue of how his fall had disabled him. Before he began testifying, the district court instructed the jury that Mr. Cox's alleged injuries might affect his testimony:

> 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 trial. You may take this allegation into consideration when you are evaluating his testimony.

(13 JA 3008.) Then Mr. Cox feigned a need for assistance walking or maneuvering around the courtroom, communicating to the jury that his fall took away his ability to walk normally. (22 JA 5068–69.) He did this while under oath in front of the jury. (13 JA 3030.) And on cross-examination, Mr. Cox testified that he also used assistance when "the jury is not around":

> Q: I noticed, as you took the stand this morning, that you were holding the marshal's arm.
> A: Uh-huh.
> Q: Did you request his assistance?
> A: No.
> Q: Did your attorney request his assistance?

A: No.
[Objection omitted.]
Q: Do you get assistance when you're downstairs in the courthouse?
A: In what way?
Q: Do you hold onto someone's arm when you're downstairs and the jury is not around?
A: Yes.

(13 JA 3063.)

Defendants moved to submit sub rosa surveillance videos to expose Mr. Cox's deception. (22 JA 5062.) In the videos, Mr. Cox is seen walking with his family without assistance, walking his dog without assistance, and walking home from court without assistance. (21 JA 4971–72.) The district court admitted the videos for credibility purposes. (21 JA 4972; 22 JA 5067.)

The district court heard oral argument on the admissibility of the sub rosa surveillance videos multiple times before ruling. (20 JA 4708–19; 21 JA 4971–74; 22 JA 5033–35, 5061–70.) During the last argument, defendants clarified that they sought to admit the videos for "general credibility." (22 JA 5062.) Plaintiffs responded that impeachment evidence could not be admitted without "an affirmative statement or an as-

sertion[.]" (22 JA 5065.) The district court admitted the videos, declaring that "whatever has happened in open court is fair game." (22 JA 5067.)

The district court also ruled that while plaintiffs could recall Mr. Cox to rebut the videos, expert rebuttal testimony was not warranted. (22 JA 5068.) Plaintiffs chose not to recall Mr. Cox.

The court later instructed the jury in Jury Instruction No. 12 that it could consider a witness's "manner upon the stand" and "motives, interests or feelings" when assessing the witness's credibility. (23 JA 5414.)

4. The parties argue credibility during closing arguments

In closing arguments, plaintiffs and defendants addressed the credibility of adverse witnesses and adverse theories. Indeed, plaintiffs' counsel, Mr. Morelli, raised the issue of credibility first, stating to the jury:

> I spent a fairly long time talking to you about [testimony of witnesses], and about it's not only what they say when they get on the witness box, which is here somewhere. It's not only about what they say, it's how they say it, how they look when they say it, what's their demeanor. So important.

> Because all of us do that. We don't only decide what someone says to us. We decide who's saying it, what do they look like when they're saying it, and what reason do they have for telling us what they're telling us. That's important for us to know.

(23 JA 5269.) He continued, "And now I tell you that the testimony must ring true to you. It must make sense. Common sense." (23 JA 5270.) He then declared, "[Defendants are] asking you to throw the Cox family out of court." (23 JA 5272.) And he characterized defendants as liars:

> But I know that we've all been forced to listen to, during this case, what I term the three great lies. What? The three great lies. What are they, Morelli? They don't run. Really? They volunteer. Really? And no one has ever been injured, fallen and been injured during the Thirteen Illusion. Three great lies.

(23 JA 5274; *see also* 23 JA 5275 (asserting that Team Construction offered its own lies).)

Following Mr. Morelli, defendants argued that Mr. Cox was not credible based on the sub rosa surveillance videos in comparison to his courtroom conduct and on his testimony that he used assistance when walking. MGM's counsel highlighted that Mr. Cox portrayed himself during plaintiffs' case-in-chief as needing assistance and emphasized that the videos should be used to assess Mr. Cox's credibility—not his

damages. (23 JA 5466–68.) Counsel then opined that Mr. Cox had no credibility and that he sought "the green box" or "a payoff" at the end of trial. (23 JA 5468.)

Plaintiffs did not object to the argument at the time. (*See* 23 JA 5468–69.) After MGM concluded its summation, plaintiffs lodged two unrelated objections, and the court recessed for lunch. (23 JA 5481–88.) Only after returning from the lunch recess and having "had an opportunity to review the transcript" did plaintiffs object to the arguments regarding Mr. Cox's credibility. (23 JA 5488–90.) Plaintiffs clarified that they did not want a mistrial—only an admonishment. (23 JA 5491.)

During their closings, Mr. Copperfield and DCDI played the sub rosa surveillance videos. (23 JA 5552.) They compared Mr. Cox's ability to walk without assistance in the videos to both his inability to walk in the courtroom without assistance and his testimony that he holds on to another's arm when not in the jury's view. (23 JA 5553.) Again, plaintiffs did not object to the argument. (23 JA 5552–54.)

Defendant Backstage also asked the jury to consider the sub rosa surveillance videos and Mr. Cox's courtroom conduct. (24 JA 5673–74.) Plaintiffs did not object. (*Id.*)

Thus, plaintiffs objected only to MGM's closing argument. Plaintiffs told the district court that they objected to MGM's argument in front the jury. (23 JA 5557.) They did not. (*See* 23 JA 5487–90.) Plaintiffs objected only after the court returned from the lunch recess but prior to the jury's reentering the courtroom. (*Id.*)

After the district court heard oral argument regarding a possible admonishment and made its findings on the record (23 JA 5555–71), the district court adopted plaintiffs' proposed admonishment with minor changes, to which plaintiffs agreed. (24 JA 5561–62.) The jury was admonished as follows:

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

(24 JA 5578.)

F. The Jury Finds that Team Construction Was Not Negligent and that Mr. Cox Was the Sole Proximate Cause of his Fall

The verdict form asked two questions as to each defendant and as to Mr. Cox: (1) whether the party was negligent and (2) whether the party was a proximate cause of the accident. (25 JA 5920–23.)

The jury found that Team Construction was not negligent. (25 JA 5922.) While it found that MGM, Kotkin, and Copperfield Disappearing were negligent, the jury found that none of the defendants was a proximate cause of Mr. Cox's fall. (25 JA 5920–22.) The jury instead found that Mr. Cox was the sole proximate cause of his accident. (25 JA 5920–22.)

The jury did not need to reach the issue of comparative negligence since it found that no defendant was the proximate cause of Mr. Cox's accident. (25 JA 5923.) But the jury nevertheless apportioned the negligence consistent with its finding on proximate cause—by assigning 0% to each defendant and 100% to Mr. Cox. (*Id.*)

Plaintiffs admit that they did not object to any inconsistency before the jury was excused. (28 JA 6503.)

G. The District Court Denies Plaintiffs' Motions for Judgment as a Matter of Law and for a New Trial

Plaintiffs moved for renewed judgment as a matter of law and for a new trial. (25 JA 5925–27C JA 6326.) After argument (28 JA 6497–6552), the district court denied the motion in a written opinion, (28 JA 6553–59; *see also* 28 JA 6560–61). The district court expressly rejected plaintiffs' argument that MGM's counsel committed misconduct during closing arguments. (28 JA 6557.) The court also found that it issued a proper admonishment after making the jury aware of the alleged misconduct, the objection, and the court's ruling to sustain the objection. (28 JA 6557.)

SUMMARY OF THE ARGUMENT

1. Admitting sub rosa surveillance video in response to Mr. Cox's feigned need for assistance walking was not reversible error

Mr. Cox feigned a need for assistance walking during his personal-injury trial. In response, the district court admitted sub rosa surveillance videos that exposed the feigned conduct. The collateral-fact rule did not bar the admission of the videos for four reasons: (1) Mr. Cox's feigned conduct was not collateral to his personal-injury trial; (2) Mr.

Cox's motive for feigning a need for assistance cannot be a collateral issue as a matter of law; (3) Mr. Cox misrepresented that he needed assistance walking and was severely injured through both nonverbal and verbal testimony; (4) Mr. Cox's unsworn courtroom conduct, including the feigned need for assistance walking, was objectively relevant to his credibility.

Additionally, expert rebuttal testimony to the sub rosa surveillance videos was not warranted under the circumstances. Further, the videos were proper to address in closing arguments. To the extent that any misconduct occurred in closing arguments, the district court sufficiently admonished counsel and the jury to cure the effect of the misconduct. Finally, admitting the sub rosa surveillance videos was not reversible error.

2. Mr. Cox was comparatively negligent

Team Construction and its co-defendants raised a bona fide comparative negligence defense. Two expert witnesses testified to Mr. Cox's negligent omissions—his tripping when he failed to adequately pick up his foot while running. The district court was obligated to instruct the

jury on comparative negligence as a result. Further, any error in instructing the jury on comparative negligence is not reversible as to the verdict for Team Construction, because the jury found that Team Construction was not negligent.

3. The jury did not manifestly disregard the proximate cause instruction and did not issue an inconsistent verdict

Plaintiffs waived any inconsistency in the verdict. In any event, the jury did not manifestly disregard the district court's instructions. The jury could find MGM, DCDI, and Mr. Copperfield negligent but not a proximate cause of Mr. Cox's fall, because the two issues—breach of a duty of care and causation—are independent elements of a negligence claim. Further, if the verdict was inconsistent as alleged, the inconsistency is inconsequential to the verdict for Team Construction because the jury found Team Construction was not negligent.

4. The district court was not obligated to explain its evidentiary ruling to cancel the jury view in depth to the jury

Plaintiffs did not preserve their argument that the district court needed to explain in greater depth its evidentiary ruling in plaintiffs' fa-

vor to cancel a jury view. But even if plaintiffs had preserved the argument, a district court is not obligated to explain its evidentiary rulings to the jury, especially not in the partisan terms that plaintiffs propose. Finally, any error resulting from the lack of an explanation for the evidentiary ruling was harmless.

ARGUMENT

Mr. Cox feigned a need for assistance walking during his personal-injury trial. Plaintiffs now argue that "cumulative error" resulted in an unfair trial based on a "false narrative." To be clear, Mr. Cox put forth the only false narrative at trial, and the district court did not abuse its discretion by allowing the narrative to be challenged.

I.

MR. COX IS NOT ENTITLED TO A NEW TRIAL MERELY BECAUSE SUB ROSA SURVEILLANCE EXPOSED HIS DECEPTION

The jury, as the trier of fact, determines the credibility of a witness. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 366 (2009); *Quintero v. McDonald*, 116 Nev. 1181, 524 (2000). If a witness lies, the opposing party can challenge the witness's credibility in nine different

ways. *Lobato v. State*, 120 Nev. 512, 518 (2004) (listing the modes of impeachment).

No fair trial would prohibit a defendant from challenging a plaintiff's credibility on the critical issue in the case—whether the plaintiff is as injured as he claims to be. Plaintiffs here seek to avoid that common-sense rule, however, by resort to a technicality: the rule that a witness generally cannot be impeached with extrinsic evidence on irrelevant issues—a limitation known as the "collateral-fact rule," codified at NRS 50.085(3). Plaintiffs forget, however, that "most methods of impeachment are *exempt* from the collateral-fact rule." *Jezdik v. State*, 121 Nev. 129, 136–37 (2005) (emphasis added).

Mr. Cox, who wanted to convince the jury to award him money for his injuries, feigned in the jury's view and while under oath as a witness that he needed assistance walking. The court properly admitted sub rosa surveillance videos showing Mr. Cox walking normally to expose his deception—not to dispute his damages. This evidence was directly relevant to Mr. Cox's (1) credibility as a witness in his personal-

injury trial; (2) motive; (3) misleading testimony; and (4) feigned courtroom conduct. It was not an abuse of discretion, let alone reversible error, to admit the videos.

A. Standard of Review: Abuse of Discretion

This Court reviews a district court's decision to admit evidence for an abuse of discretion and demands a "showing of palpable abuse" before interfering with the decision. *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913 (2008).

B. Mr. Cox's Testimony that His Injuries Severely Impaired His Ability to Walk Is Not a Collateral Issue

The sub rosa surveillance videos did not, as plaintiffs claim, impeach Mr. Cox on a collateral issue. They undercut Mr. Cox's false, unsolicited testimony on a critical issue and underscored Mr. Cox's motive for falsely testifying.

1. The Collateral-Fact Rule Does Not Exclude Evidence Relevant to the Main Issues in the Case or to the Witness's Motive

"Collateral facts are by nature outside the controversy, or are not directly connected with the principal matter or issue in dispute." *Lobato*, 120 Nev. at 518.

Consistent with this policy, the collateral-fact rule in NRS 50.085(3) has been applied narrowly: cross-examination, rather than extrinsic evidence of prior inconsistent statements or specific instances of conduct that did not result in conviction, must be used to impeach a witness on an issue "*entirely collateral to the issues being decided at trial*." *See Rembert v. State*, 104 Nev. 680, 683 (1988) (disallowing extrinsic evidence of a defendant's termination from previous employment for impeachment purposes in a battery and sexual assault prosecution) (emphasis added); *see also Lobato*, 120 Nev. at 519; *Jezdik*, 121 Nev. at 137. But Mr. Cox's feigning an injury was not "entirely collateral" to the issues in this personal-injury trial.

Where a witness's testimony on issues that *are* "directly connected with the principal matter or issue in dispute," that testimony may be impeached with extrinsic evidence. *See Lobato*, 120 Nev. at 518. For that reason, a witness's motive for testifying in a certain manner "is never collateral to the controversy." *Lobato*, 120 Nev. at 519. A party may thus use extrinsic evidence to impeach a witness by exposing a motive or bias to testify in a certain manner despite NRS 50.085(3). *Id.* While a district court generally has wide discretion to control attacks on

a witness's credibility during cross-examination, a "trial court's discretion is narrowed where bias [or] motive is the object to be shown, and an examiner must be permitted to elicit any facts which might color a witness's testimony." *Id.* at 520 (internal punctuation omitted).

2. Mr. Cox's Feigned Need for Assistance Was Not a Collateral Fact

Mr. Cox's feigned need for assistance walking due to his alleged injuries from his fall is not a collateral fact to which NRS 50.085(3) applies. This was a personal-injury trial. Both in his behavior and in his verbal testimony—Mr. Cox testified to being in agonizing pain and to having his body parts ripped from their sockets as a result of his fall—Mr. Cox was soliciting the jury's sympathy on a core issue: whether Mr. Cox's may recover from defendants for his alleged injuries.

Plaintiffs cannot hide behind the curtain of bifurcation. In violation of NRAP 36(c)(3), they rely on a footnote in *Burrows v. Riley*, Case No. 71350, 2018 WL 565431 (Nev. App. Jan. 19, 2018) (AOB 18–19), a noncitable, unpublished order from the Court of Appeals. But even if *Burrows* were citable, it does not hold, as plaintiffs contend, that sub rosa videos should always be excluded from the liability portion of a bi-

furcated personal-injury trial. There, the Court of Appeals merely declined to review a district court's discretionary decision to strike six unnecessary witnesses who would have rebutted a sub rosa video that was not admitted into evidence. 2018 WL 565431, *4 n.4. Although the Court of Appeals suggested that the district court had not admitted the sub rosa video "[b]ecause [it] was a bifurcated trial and only liability was at issue," 2018 WL 565431, *4 n.4, the appellate court never looked at the propriety of *that* call. And the Court of Appeals did not suggest that it would have been an abuse of discretion for the district court to come out the other way—to admit the video.

Further, in mischaracterizing *Burrows*, plaintiffs miss an important point: The videos here were not offered as evidence of damages; the videos were offered to expose Mr. Cox's deception after he, on his own, raised the issue of his need for assistance during the liability phase. Having opened the door on this critical issue in the case, the district court properly admitted the videos for the jury to consider when assessing Mr. Cox's credibility.

Plaintiffs also rely on *Rembert v. State*, 104 Nev. 680 (1988), but that case actually highlights the difference between a truly collateral issue and one like this—central to plaintiffs' plea to the jury. (AOB at 23–24.) In *Rembert*, the defendant was charged with five counts of sexual assault and two counts of battery with intent to commit a crime. 104 Nev. at 681. To show he had no opportunity to commit the crimes, he presented evidence of his work history. *Id.* at 683. On cross-examination, the defendant testified that he left his job driving limousines because he did not enjoy the work. *Id.* at 683. The district court later permitted the prosecution to impeach the defendant by introducing testimony that the limousine company had terminated the defendant's employment. *Id.* But for purposes of establishing the defendant's alibi, the *reason* for the defendant's leaving his job was irrelevant. So this Court held that the district court erred by admitting "extrinsic evidence on a matter entirely collateral to the issues being decided at trial." *Id.*

In contrast, Mr. Cox's deception directly related to the issues to be decided at trial and for which he hoped to gain the jury's sympathy.

3. The Sub Rosa Surveillance Videos Reveal Mr. Cox's Motive: To Obtain a Sympathetic Liability Verdict Based on a Misrepresentation of His Injuries

Mr. Cox also made the sub rosa surveillance videos relevant motive evidence through his hyperbolic testimony and his feigned courtroom conduct. He testified that the pain he felt was like a "lightning bolt" and was a pain he "never, ever felt before." (13 JA 3051.) He told the jury he was "in agony" after his fall. (13 JA 3053.) He even testified that the fall "ripped the whole of [his] arm [and his tendons] out of its socket" resulting in his "elbow and [his] arm end[ing] up in the middle of [his] body." (14 JA 3143.) Yet, Mr. Cox was able to stand up from his fall, continue running, and finish the illusion. (11 JA 2395–96.)

Mr. Cox prefaced this hyperbolic testimony by feigning a need for assistance walking during the plaintiffs' case-in-chief. (*See* 13 JA 3063; 20 JA 4708–19; 21 JA 4971–74; 22 JA 5033–35, 5061–70.) And he continued to use assistance to and from the stand while testifying over the course of two days. (13 JA 3030, 3063.) He abandoned his feigned need only after defendants moved to admit the sub rosa surveillance videos.

The videos exposed Mr. Cox's motive, revealing that he intended to seek the jury's sympathy in their assessment of liability while crafting an image of significant injuries in preparation for the second phase of trial. The videos show that Mr. Cox did not require assistance while walking, despite orchestrating his courtroom conduct to communicate otherwise to the jury. He instead strolled his neighborhood and walked his dog post-fall without assistance.

The videos also show that Mr. Cox feigned a need for assistance to bolster his hyperbolic testimony. While Mr. Cox may have been injured by his fall, his physical state at trial—and even in the months prior—did not require him to use assistance while walking. Conversely, Mr. Cox used assistance whenever maneuvering around the courtroom during the plaintiffs' case-in chief and during the time at which he was under oath as a witness. Because the videos revealed Mr. Cox's motive by exposing that he feigned a need for assistance, the videos were relevant and admissible as to Mr. Cox's motive.

C. The Sub Rosa Videos Were Admissible Because Mr. Cox Sought to Mislead the Jury

The collateral-fact rule does not apply even if Mr. Cox's credibility were a collateral issue because the sub rosa videos were necessary to correct Mr. Cox's misleading the jury.

1. Extrinsic Evidence Is Admissible to Correct Specific, Misleading Testimony by a Party

This Court has declined to "pervert the shield provided by NRS 50.085(3) into a license for a [party] to purposefully, or even inadvertently, introduce evidence giving the jury a false impression through an absolute denial of misconduct." *Jezdik*, 121 Nev. at 139. The collateral-fact rule does not bar extrinsic evidence that "contradicts specific factual assertions raised during [a party's] direct examination." *Id.* at 138–39 (approving of the specific contradiction doctrine). The extrinsic evidence is admissible if it "squarely contradict[s]" the misleading testimony. *Id.* at 139.

2. Mr. Cox Feigned a More Severe Injury to Mislead the Jury

Here, Mr. Cox testified that he needed assistance walking both nonverbally through assertive conduct and verbally on the witness

stand. The videos were properly admitted to contradict his misleading testimony.

3. The sub rosa surveillance videos directly contradict Mr. Cox's nonverbal and verbal factual misrepresentations.

The district court properly admitted the sub rosa surveillance videos since Mr. Cox testified, verbally and nonverbally, to needing assistance while walking. This Court recognized an exception to the collateral-fact rule in *Jezdik*: the collateral-fact rule does not bar extrinsic evidence that "contradicts specific factual assertions raised during [a party's] direct examination." 121 Nev. at 138–39 (approving of the specific contradiction doctrine). The extrinsic evidence must only "squarely contradict" the misleading testimony. *Id.* at 139.

The *Jezdik* exception allows for the admission of the videos to correct Mr. Cox's misleading testimony. Mr. Cox explicitly testified to agonizing pain and using assistance walking. He asserted through his nonverbal testimony that he required assistance walking. Thus, the district court did not abuse its discretion when admitting the videos, because the videos squarely contradict Mr. Cox's misleading non-verbal and verbal testimony.

D. Mr. Cox's Misleading Conduct, Combined with Verbal Testimony, Was Subject to Impeachment

Plaintiffs improperly seek to excuse Mr. Cox's ruse by arguing that his courtroom conduct was not testimony—or was not *sworn* testimony—and so is immune from impeachment. (AOB 17.) But Mr. Cox was under oath at least some of the times he feigned a need for assistance walking, and his conduct amounts to an assertion. And even if it were not sworn testimony, it would still be subject to impeachment.

1. Mr. Cox Feigned a Need for Assistance Walking Before and After Taking His Oath

Mr. Cox feigned a need for assistance walking while under oath. He was sworn under oath on April 30, 2018 and remained sworn when the district court adjourned for the night. He returned the next day to continue his testimony, under oath the entire time.

Because he was not released from his oath in between testifying, Mr. Cox performed his assisted walk to and from the witness stand at least twice while under oath—when leaving the stand on the evening of April 30, 2018 and when taking the stand on the morning of May 1,

2018. And the jury was present and able to observe Mr. Cox's orchestrated conduct. Accordingly, Mr. Cox feigned a need for assistance while, in part, while under oath.

2. The Jury Was Entitled to Evaluate Mr. Cox's Credibility Based on Unsworn Courtroom Conduct, Too

Mr. Cox's feigned need for assistance walking could be considered by the jury even if it was not a sworn assertion.

a. UNSWORN COURTROOM CONDUCT MAY BE CONSIDERED FOR CREDIBILITY PURPOSES

Jurors do not operate with closed eyes. Thus, unsworn courtroom conduct objectively relevant to the issue before the jury may be considered for evidentiary purposes. *People v. Prince*, 250 Cal. Rptr. 154, 158 (Cal. Ct. App. 1988) (allowing the jury to consider a defendant's nontestimonial courtroom conduct in a competency determination); *Morgan v. Dep't of Fin. & Prof'l Regulations*, 871 N.E.2d 178, 191 (Ill. App. Ct. 2007) (permitting an administrative law judge, as the finder of fact, to consider in-court, unsworn demeanor of a witness) (citing to 1 J. Wigmore, Wigmore on Evidence § 274, at 558 (2d. ed. 1923); s*ee also Tanksley v. State*, 113 Nev. 997, 1001 (acknowledging that a "cold record is a poor substitute for demeanor observation" because trial courts have an

opportunity to observe party's demeanor and conduct throughout proceedings); *CVS/Caremark Corp. v. Washington*, 121 So. 3d 391, 400 (Ala. Civ. App. 2013) (affirming a finding of total disability based on the trial court's credibility determination, which was made in part by the trial court's observation of the party's movement in the courtroom).

And when credibility has been made an issue, unsworn courtroom conduct is relevant to the determination of a witness's credibility. S*ee Prince*, 250 Cal. Rptr. at 158; *see also M.B. v. L.T.*, 58 N.Y.S.3d 491, 492–93 (N.Y. App. Div. 2017) (holding that the court "properly considered [the party's] demeanor and behavior in the courtroom, including during the divorce proceeding, in assessing [the party's] credibility."); *In re Pascacio R.*, 726 A.2d 114, 119 (Conn. App. Ct. 1999) ("The law is clear that courtroom conduct may be considered by the trial court in reaching its decision. It is the peculiar province of the trial court to observe the demeanor of the parties and their witnesses and to draw inferences therefrom as to the motives underlying their testimony and conduct.").

b. MR. COX'S FEIGNED NEED FOR ASSISTANCE WALKING WHILE IN THE COURTROOM IS RELEVANT TO HIS CREDIBILITY

Here, the district court and the jury observed Mr. Cox's feigned need for assistance throughout plaintiffs' case-in-chief during the personal-injury trial. Mr. Cox then testified to agonizing pain, which bolstered the appearance that he required assistance walking. By testifying to his pain and bolstering his testimony through his feigned conduct, Mr. Cox made his credibility as to his need for assistance an issue. It was therefore proper for the district court to allow the jury to consider Mr. Cox's feigned courtroom conduct in conjunction with the contradictory sub rosa surveillance videos.

3. Mr. Cox's Feigned Conduct Is an Impeachable Statement

Plaintiffs cannot escape accountability on the notion that Mr. Cox's conduct was not testimony. Analogizing to the definition of a "statement" under NRS 51.045, Mr. Cox's feigned need for assistance is a statement because he intended to communicate to the jury that he was significantly injured through his feigned conduct.[2]

[2] To be clear, Team Construction does not contend that Mr. Cox's feigned need for assistance or that the sub rosa surveillance videos fall

NRS 51.045 defines a "statement" as either: (1) an oral or written assertion or (2) a person's nonverbal conduct intended as an assertion. NRS 51.045; *see also Assertive Conduct*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Nonverbal behavior that is intended to be a statement"); *Assertion*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A person's speaking, writing, *acting*, or failing to act with the intent of expressing a fact or opinion").

Mr. Cox intended to communicate to the jury when he feigned a need for assistance walking. Through his conduct, he intended to assert that he was severely injured—so much so that he could not maneuver around the courtroom without assistance.

Mr. Cox's sudden ability to walk free of assistance only after defendants' offered the sub rosa surveillance videos confirms that his conduct was assertive. His feigned need for assistance both preceded and succeeded his testimony. Because he only stopped feigning a need for assistance after the videos were offered as evidence, Mr. Cox's feigned conduct was demonstrably assertive.

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under NRS 51.035. These are Mr. Cox's own assertions as a party opponent, so they are not hearsay.

4. Mr. Cox Bolstered His Conduct with Verbal Testimony that He Needed Assistance

In addition to his non-verbal assertions, Mr. Cox explicitly testified to being in severe pain and to using assistance walking while outside the jury's presence. He testified that the pain immediately following his fall was: agonizing, the worst pain he had ever felt, similar to a lighting bold traveling through his body. And when asked if he used assistance walking when outside of the jury's presence, he answered, "Yes." Mr. Cox crafted his verbal testimony to correlate with his feigned need for assistance walking.

E. Expert Testimony to Rehabilitate Mr. Cox's Credibility Was Not Warranted

Plaintiffs argue that the district court abused its discretion by denying their request to call an expert witness in rebuttal to the sub rosa surveillance videos. (AOB 25–26.) But expert testimony rebuttal was not warranted under the circumstances.

1. A District Court has Discretion in Deciding Whether or Not to Admit Expert Rebuttal Testimony

"The admissibility of expert rebuttal testimony lies within the sound discretion of the trial court." *Carr v. Paredes*, 387 P.3d 215, *1

(Nev. 2017) (citing *Hallmark v. Eldridge*, 124 Nev. 492, 498 (2008)). Further, "[e]xpert rebuttal witnesses are proper if they contradict or rebut the subject matter of the original expert." *Id.*

2. The District Court Did Not Abuse its Discretion in Denying Plaintiffs' Motion to Call an Unidentified Rebuttal Expert

The district court was within its discretion to deny plaintiffs' request to call an expert witness to rebut the sub rosa surveillance videos, for three reasons. First, Mr. Cox was available to be recalled. He could have explained the discrepancy between his inabilities in the courtroom and his abilities in the videos. Indeed, Mr. Cox had been granted leeway in his testimony already: the district court previously instructed the jury that Mr. Cox allegedly suffered a traumatic brain injury that could affect his testimony and that the jury could consider the alleged injury when evaluating his testimony.

Second, defendants offered impeachment evidence only to the extent necessary to rebut Mr. Cox's opening the door to false statements about his injuries, not to litigate Mr. Cox's damages. Just as Mr. Cox's misleading conduct was not accompanied by expert testimony, the sub rosa surveillance videos were admitted without an expert witness to

testify regarding Mr. Cox's damages. The videos were admitted only to expose Mr. Cox's feigned need for assistance walking and to contradict his misleading testimony. And the videos became necessary only as a result of Mr. Cox's feigned conduct and hyperbolic testimony. Under the circumstances, expert rebuttal evidence delving into Mr. Cox's damages was not warranted.

Third, in addition to having broad discretion over the admissibility of evidence, "the district court has inherent power 'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *United States v. U.S. Dist. Court for N. Mariana Islands*, 694 F.3d 1051, 1058 (9th Cir. 2012), *as amended* (Oct. 16, 2012) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Plaintiffs sought to call an expert to testify to Mr. Cox's medical condition. Had an expert been permitted to testify on the medical conditions, defendants would have been entitled to call a rebuttal expert on the issue of Mr. Cox's medical condition. This sequence would have stretched an already lengthy trial to cover issues reserved for the second phase of trial. With Mr. Cox available to personally explain his conduct, it was not an abuse of discretion for the district court to deny

an unnecessary and premature battle of the experts over issues reserved for phase two of trial.

F. Admitting the sub rosa surveillance videos was not reversible error.

Even if admitting the sub rosa surveillance videos was an abuse of discretion, it was harmless.

1. Harmless Error Is Not Reversible

A party "is entitled to a fair trial, not a perfect one." *Rudin v. State,* 120 Nev. 121, 136 (2004). "To be reversible, an error must be prejudicial and not harmless." *Khoury v. Seastrand*, 132 Nev. 520, 539 (2016) (citing NRCP 61). To prove an error was prejudicial, the moving party "must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached." *McClendon v. Collins*, 132 Nev. 327, 333 (2016).

2. Trial Testimony Shows Mr. Cox Caused his Fall and Tarnished his Credibility even in the Absence of the Sub Rosa Surveillance Videos

Even if the district court abused its discretion in admitting the sub rosa surveillance videos, the error was harmless for two reasons. First, the trial evidence shows that Mr. Cox caused his fall. Defendants

presented Dr. Baker and Dr. Yang as experts that opined as to the cause of Mr. Cox's fall. Both experts opined that Mr. Cox failed to adequately raise his foot while running, causing him to trip from his toe catching the ground. The experts also opined that Mr. Cox fell on flat ground, twenty feet after the location at which plaintiffs alleged that Mr. Cox fell. Plaintiffs chose not to present an expert to rebut the experts' opinions as to causation.

The trial evidence also shows that Mr. Cox was not credible even without the sub rosa surveillance videos. Mr. Cox said he was the last volunteer audience member to run the course. Video evidence proved him wrong. Mr. Cox testified to falling near a ramp, after turning a corner. Again, video evidence proved him wrong. Mr. Cox also testified that his arm was ripped from its socket and was lying in the middle of his body, that he was "in agony," and that he was feeling pain "like [he] had never, ever felt before." However, the stagehand following the volunteers that night never saw Mr. Cox on the ground because Mr. Cox stood up and finished the illusion. All of this evidence undermined Mr. Cox's credibility independent from the sub rosa surveillance videos.

G. Plaintiffs Are Not Entitled to a New Trial Based on Closing Argument about Mr. Cox's Credibility

1. Credibility Arguments during Closing Arguments Were Not Misconduct

Plaintiffs do not raise the issue of attorney misconduct as to Team Construction. (AOB 26–34.) But plaintiffs argue that defendants' closing arguments were collectively improper because of two comments in closing argument. These comments were not misconduct. Further, even if the comments were misconduct, the district court sufficiently admonished the jury to remedy any effect of the misconduct.

a. CLOSING ARGUMENTS REGARDING THE ISSUES AND FACTUAL DISPUTES RAISED AT TRIAL ARE PROPER

Whether an attorney's comments amount to misconduct is a question of law that is reviewed de novo. *Lioce v. Cohen*, 124 Nev. 1, 20 (2008). Asking a jury "to look beyond the law and the relevant facts in deciding the cases before them" is misconduct." *Id.* at 6. Additionally, an attorney's personal opinions "may amount to prejudicial misconduct." *Id.* at 21–22.

b. DEFENDANTS' CLOSING ARGUMENTS PROPERLY ADDRESSED CREDIBILITY AND OTHER FACTUAL DISPUTES AT TRIAL

Defendants' closing arguments were proper. Mr. Cox made his credibility an issue in phase one of trial, so it was not misconduct for defendants to argue that the evidence showed Mr. Cox was incredible. Defendants' arguments did not ask the jury to look beyond the law and the relevant facts. The arguments asked the jury to consider the evidence *in this case*, e.g., Mr. Cox's hyperbolic testimony, Mr. Cox's feigned courtroom conduct, and the sub rosa surveillance videos.

Indeed, plaintiffs also argued in closing arguments that the jury should assess the various witnesses' credibility when determining the verdict. Mr. Morelli implored the jury to question not only what a witness said but why the witness said so testified. (23 JA 5269.) And plaintiffs even termed defendants' theories of the case as "the three great lies." (23 JA 5274.)

Plaintiffs cite *Centeno-Alvares v. Coe*, No. A510230, 2008 WL 8177830 (Nev. Dist. Ct. 2008) to argue that the references to a "green box" and a "payoff" were improper. (AOB 28.) But if the Court considers that unpublished district-court decision, it should also consider what happened on appeal. *Coe v. Centeno-Alvares*, 281 P.3d 1162 (Nev. 2009)

(unpublished disposition).[3] There, this Court concluded that references to "pay day" and "pot of gold" were not "misconduct that would independently warrant a new trial." *Coe v. Centeno-Alvares*, 281 P.3d 1162, *2 n. 1 (Nev. 2009) (affirming the district court's grant of new trial because of the cumulative effect of the parties' failed attempts to comply with a court ruling).

2. The District Court Cured the Effect of the Alleged Misconduct Through a Sufficient Admonishment

If closing arguments contained any misconduct, the district court cured the effect of the alleged misconduct through a sufficient admonishment.

a. NEVADA LAW APPLIES DIFFERENT STANDARDS TO MISCONDUCT ALLEGATIONS DEPENDING ON WHETHER A TIMELY OBJECTION TO THE ALLEGED MISCONDUCT WAS MADE

This Court set forth the standards for reviewing alleged attorney misconduct in *Lioce v. Cohen*, 124 Nev. 1 (2008). If party fails to timely object to attorney misconduct, the party generally waives its right to challenge the conduct on appeal unless plain error exists. *Id.* at 19. A

[3] Team Construction does not seek to skirt the limits of NRAP 36(c)(3) but provides the unpublished disposition to complete the summary of the related unpublished district court opinion that plaintiffs cite.

party that failed to timely object to attorney misconduct must therefore show "that no other reasonable explanation for the verdict exits." *Id.*

Further, if a party timely objected and the court sustained the objection, the party "moving for a new trial bears the burden of demonstrating that the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect." *Id.* at 17. The sufficiency of an admonishment depends on the severity and the pervasiveness of the misconduct. *Carr,* 387 P.3d at *3 (citing *Lioce* for support).

The district court must make specific findings on both the record and in its order when ruling on an objection to alleged attorney misconduct. *Id.* at 19–20.

b. THE CONDUCT TO WHICH PLAINTIFFS FAILED TO TIMELY OBJECT DID NOT RESULT IN PLAIN ERROR

Plaintiffs objected only to references to a "green box" and a "payoff." In challenging the remaining portions of the closing arguments, plaintiffs must show that there is no reasonable explanation for the verdict, that is, plain error. *Lioce*, 124 Nev. at 19.

The expert testimony in this matter provides a reasonable explanation for the jury's verdict separate from counsel's reference to Mr.

Cox's credibility in closing arguments. The two experts in this matter both opined that Mr. Cox tripped by catching his toe on the sidewalk after he failed to raise his foot high enough while running. No expert testimony was offered to rebut the conclusion. Thus, it was reasonable for the jury to find that Mr. Cox caused his injury, not defendants.

c. THE EFFECT OF THE CONDUCT TO WHICH PLAINTIFFS OBJECTED WAS CURED BY ADMONISHMENT.

Plaintiffs likewise fail to meet their burden in relation to the conduct to which they objected. Preliminarily, plaintiffs delayed their objection to the statements until after MGM's counsel concluded his closing argument and after the court recessed for lunch. The untimely objection prevented the district court from issuing an admonishment at the time of the alleged misconduct.

But even so, the district court issued a sufficient admonishment when plaintiffs eventually objected. The court instructed:

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

(24 JA 5578.)

The district court's admonishment was sufficient to cure any effect of the objected-to misconduct given the limited and the mild nature of the alleged misconduct. The two references did not "encourage the jurors to look beyond the law and the relevant facts in deciding the cases before them." *Lioce*, 124 Nev. at 6. The references related to a relevant and disputed issues: Mr. Cox's credibility and motive. Further, there were only two references. The alleged misconduct here cannot compare to the repeated and severe misconduct in *Lioce*. Plaintiffs, in fact, far from seeking a mistrial, acknowledged that the alleged misconduct did not warrant anything more than an admonishment. (23 JA 5491.)

3. The District Court Made Specific Findings of Fact in its Oral and Written Rulings

The district court made specific findings of facts both on the record and in its written order. Frist, the district court heard oral arguments from the parties once plaintiffs objected to the alleged misconduct. It then explained how the trial would proceed, making its findings on the record and adopting the plaintiffs' proposed admonishment with minor changes.

Likewise, in its written order, the district court found that a new trial was not warranted on the basis of misconduct because it had issued a sufficient admonishment in response to the alleged misconduct. The district court specifically found that it made the jury aware of the objection-to misconduct and of its ruling to sustain the objection. The district court therefore satisfied its obligations under *Lioce*.

II.

COMPARATIVE NEGLIGENCE WAS A BONA FIDE DEFENSE

A. The District Court Properly Denied Plaintiffs' Motions for Judgment of a Matter of Law

Plaintiffs were not entitled to judgment as a matter of law on the issue of comparative negligence. A motion for judgment as a matter of law may only be granted "if the opposing party has failed to prove a sufficient issue for the jury so that [the party's] claim cannot be maintained under the controlling law." *Nelson v. Heer*, 123 Nev. 217, 223 (2007). To rule on a motion for judgment as a matter of law, a court must view the evidence in favor of the nonmoving party. *Id.* at 223–24. A ruling on a motion or a renewed motion for judgment as a matter of law is reviewed de novo. *Id.* at 224.

The district court did not err by denying plaintiffs' motions for judgment as a matter of law on the issue of comparative negligence. Comparative negligence was a bona fide defense. However, if it was error, submitting the issue to the jury was harmless as to the verdict for Team Construction.

1. A Bona Fide Comparative Negligence Defense Must Be Submitted to the Jury as a Matter of Law

"[I]ssues of negligence are properly resolved by a jury." *Brascia v. Johnson*, 105 Nev. 592, 595 (1989). In fact, this Court has repeatedly instructed judges and parties that a jury must determine issues of comparative negligence in personal-injury matters. *See, e.g., id.* (reversing the grant of a new trial because the jury "determined that both [parties] were negligent" in accord with the jury's "fact-finding power" and Nevada's policy to "to send issues of negligence … to the jury."); *see also Nehls v. Leonard*, 97 Nev. 325, 329 (1981) (reversing the district court's grant of summary judgment in a personal-injury matter to allow a jury to determine if a party was comparatively negligent).

In Nevada, a district court must instruct the jury of a comparative negligence defense when the defense is a bona fide issue. NRS 41.141(2); *Buck ex rel. Buck v. Greyhound Lines, Inc.,* 105 Nev. 756, 764

(1989). The failure to instruct the jury on a bona fide comparative negligence defense would be reversible error. *Verner v. Nev. Power Co.*, 101 Nev. 551, 556 (1985). "It is only when different minds can reasonably arrive at but one result that [the issue of negligence] becomes a question of law, justifying a district court in taking the issue from the jury." *Nehls*, 97 Nev. at 329.

2. The District Court Was Obligated to Submit Team Construction's Comparative Negligence Defense to the Jury Because It Was a Bona Fide Defense

The trial record shows that Mr. Cox was negligent, just as the jury found. Plaintiffs cite several foreign cases for the proposition that a defendant cannot raise a comparative negligence defense without concrete evidence. (AOB 35–37.) But each case involves a trial record entirely devoid of evidence to support a finding that the injured party was negligent. *See Nieves v. Riverbay Corp.*, 95 A.D.3d 458, 459 (N.Y. App. Div. 2012) ("The court properly declined to charge the jury on comparative negligence since there was no valid line of reasoning based on the trial evidence that would support a finding of comparative negligence."); *Labarrera v. Boyd Gaming Corp.*, 132 So. 3d 1018, 1024 (La. Ct. App. 2014) (finding the record "absolutely devoid of any evidence of even a theory"

as to how the plaintiff's shoes were dangerous because the witness never looked at the shoes and never conducted a single test on the shoes); *Marshall v. A&P Food Co. of Tallulah*, 587 So. 2d 103, 110 (La Ct. App. 1991) ("Nothing in the record indicates that [the plaintiff] was inattentive or otherwise careless in his conduct."); *Bergeron v. K-Mart Corp.*, 540 So. 2d 406 (La Ct. App. 1989), *writ denied*, 544 So. 2d 408 (La. 1989), and *writ denied*, 544 So. 2d 412 (La. 1989) (a patron at a self-service store "is not required to look for hidden dangers but he is bound to observe his course to see if his pathway is clear" in the manner of a reasonably prudent person); *King v. Kroger Co.*, 787 So. 2d 677, 681 (Miss. Ct. App. 2001) (finding the open-and-obvious defense was not a complete bar to recovery when "there was not a single instance of negligence on the part of [the plaintiff] that could have supported a comparative negligence finding by the jury other than the fact that [the plaintiff] should have apparently recognized the mopped floor."); *Clark v. Kmart Corp.*, 640 N.W. 2d 892, 898 (Mich. App. 2002) (finding the trial court did not error in omitting a comparative negligence jury instruction be-

cause a patron at "a self-service store is entitled to presume that passageways provided for his use are reasonably safe, and is not under an obligation to see every defect or danger in his pathway.").

Plaintiffs particularly rely on *Townsend v. Legere*, 688 A.2d 77 (N.H. 1997). (AOB 36.) The plaintiff there slipped and fell outside of an apartment complex while walking her dog, and the defendant attempted to prove contributory negligence based on the bare circumstances of the fall: (1) there was a light dusting of snow; (2) the plaintiff weighed just thirty-five pounds more than the dog; (3) the dog had tugged on its leash on *other* occasions (but no evidence of that here); and (4) expert testimony that slip-and-fall accidents *can in general* be attributable to a pedestrian. *Id.* at 78 (emphasis added). The *Townsend* court held that the defendant failed to adduce sufficient evidence at trial for the trial court to instruct the jury on comparative negligence. *Id.* at 80.

This case is unlike *Townsend*. Team Construction presented an expert witness that studied Mr. Cox's fall *in the accident at issue*. MGM presented an expert that also studied Mr. Cox's fall. The two experts

studied evidence specific to this case: videos of Mr. Cox's fall, the clothing Mr. Cox wore when he fell, and the site at which Mr. Cox fell. The specific evidence in this case led the experts to independently opine that Mr. Cox failed to sufficiently pick up his foot while running, causing him to trip from his toe catching the ground. He did not slip.

Further, testimony from the stagehands and producer showed that Mr. Cox was not required to run or to finish the illusion. The illusion had been performed 20,000 times before Mr. Cox volunteered as a participating audience member. Throughout those 20,000 performances, multiple volunteers completed the illusion at their own pace or decided to not complete the illusion. Mr. Cox chose neither of those, electing instead to race at a pace beyond his capabilities and tripping over his own foot.

Mr. Cox testified to his carelessness. After volunteering for the illusion, he answered that he could run during the vetting process. He then chose to run as fast as he could despite the allegedly dark lighting. He continued to run as fast as he could in the exterior portion of the runaround. And he never chose to stop participating in the illusion because he was enjoying himself. Indeed, he continued to participate as an

audience volunteer even after his fall. Mr. Cox's testimony in conjunction with the testimony from the experts, the stagehands, and the producer support show that Team Construction asserted a bona fide comparative negligence defense.

B. The District Court Did Not Abuse Its Discretion by Denying a New Trial

Plaintiffs argue that instructing the jury on comparative negligence warrants a new trial because the instruction improperly shifted the jury's focus to Mr. Cox's conduct. (AOB 40–42.) But just like their argument for judgment as a matter of law, this argument relies on a finding that Team Construction's defense was not bona fide. (*Id.*) The argument therefore fails because the trial evidence shows that the defense was a bona fide issue. *See supra*, Section II. Thus, the district court did to abuse its discretion in denying a new trial. *Nelson*, 123 Nev. at 223 (quoting *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036 (1996) (motions for new trial are reviewed for abuse of discretion). Nor did it abuse its discretion in instructing the jury on the issue of comparative negligence. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 319 (2009) ("This court reviews for abuse of discretion a district court's decision to give a jury instruction.")

Plaintiffs' reliance on *Harb v. City of Bakersfield,* 183 Cal. Rptr. 3d 59 (Cal. Ct. App. 2015) and *Tobia v. Cooper Hosp. Univ. Med. Ctr.*, 643 A.2d 1 (N.J. 1994) does not counsel otherwise. In *Harb*, the plaintiff sought damages for a delay in medical treatment after suffering a stroke. 183 Cal. Rptr. 3d at 62. The court held that the plaintiff could not be found comparatively negligent for the damages resulting from delayed treatment based on his pre-accident conduct (failing to maintain his high blood pressure), because the conduct "merely trigger[ed] the occasion for aid or medical attention." *Id.* at 62, 80.

In *Tobia*, the court considered how the infirmity of a hospital patient related to the doctrine of contributory negligence. 643 A.2d at 2. The plaintiff fell from a stretcher in the emergency room after the attending caretaker left the patient unattended and failed to raise the side rails or lock the wheels of the stretcher, which violated the hospital's policies and procedures. *Id.* at 2–3. After finding that the defendant's theory of contributory negligence was internally inconsistent, the court held that the contributory negligence instruction was error. *Id.* at 4–5. The jury's focus on the plaintiff's conduct was therefore improper because the contributory negligence instruction was error. *See id.*

Unlike *Harb* and *Tobia*, the trial record developed by Team Construction made comparative negligence a bona fide issue. The bona fide defense "trigger[ed] the application of NRS 41.141. *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1007–08 (2015). Indeed, because sufficient trial evidence supported an instruction of comparative negligence, Nevada law obligated the district court to submit the issue of comparative negligence to the jury. *Verner,* 101 Nev. at 556; NRS 41.141(2). The jury's consideration of Mr. Cox's conduct was therefore proper.

C. Any Error in Instructing the Jury on Comparative Negligence Is Not Reversible as to the Verdict for Team Construction

Even if comparative negligence were not a bona fide defense, the issue is immaterial to the verdict on Team Construction's liability because Team Construction was not negligent. So even if Mr. Cox did not cause, in part or entirely, his fall, Team Construction is not liable to plaintiffs. Any error in allowing the jury to consider Mr. Cox's negligence is harmless.

III.

THE JURY DID NOT MANIFESTLY DISREGARD THE LAW OR ISSUE AN INCONSISTENT VERDICT ON PROXIMATE CAUSE

Plaintiffs next argue that the jury manifestly disregarded the law and issued an inconsistent verdict by disregarding the district court's instruction on proximate cause. (AOB 43–51.) Plaintiffs failed to preserve this argument. But even had they preserved this argument, the argument has no merit. This is especially true as applied to Team Construction, which the jury found not negligent.

A. Plaintiffs Waived Any Inconsistency in the Verdict

Plaintiffs waived the right to argue that the jury verdict was inconsistent.

1. Objections to a Verdict's Inconsistency Must Be Made before the Jury Is Discharged

A party generally waives its right to challenge a verdict as inconsistent if the party fails to object to the verdict on that basis prior to the discharge of the jury. *Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 272 – 73 (1981); *see also Brascia*, 105 Nev. at 596 n.2. A party can be excused from its failure only if the verdict is logically incompatible. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1111

(2008) (recognizing an exception to the wavier rule if a special verdict and a general verdict are "logically inconsistent.").

2. Plaintiffs Failed to Timely Object to the Inconsistency of the Verdict

Plaintiffs failed to object to the jury verdict on the basis of inconsistencies prior to the discharge of the jury. Plaintiffs, in fact, admitted to this failure during oral argument on their renewed motion for judgment as a matter of law or, alternatively, a new trial. Plaintiffs therefore waived this argument.

Further, Plaintiffs' failure to preserve the argument cannot be excused because the verdict is not logically incompatible for the reasons set forth below.

B. The Jury Did Not Disregard the Court's Instructions

Even if plaintiffs did not waive the argument, the verdict was logical and in accordance with the jury instructions.

1. To Warrant a New Trial for Manifest Disregard of a Jury Instruction, a Jury Verdict Must Have Been Impossible to Reach

A new trial cannot be granted under NRCP 59(a)(1)(e) for a jury's disregarding the court's instructions unless the court can "declare that,

had the jurors properly applied the instructions of the court, it would have been impossible for [the jury] to reach the verdict which they reached." *Weaver Bros. v. Misskelley*, 98 Nev. 232, 234 (1982). Further, a court must "adopt that view of a case under which a jury's special verdicts may be seen as consistent." *Lehrer McGovern Bovis, Inc.*, 124 Nev. at 1111–12.

2. The Jury's Verdict Was Consistent with Plaintiffs' Failure to Prove Causation as an Independent Element to their Negligence Claim

It was not impossible for the jury to find that Mr. Cox was the sole proximate cause of his fall while simultaneously finding that MGM, DCDI, and Mr. Copperfield breached some duty.

A plaintiff must establish four independent elements to prevail on a negligence claim: (1) the existence of a duty of care; (2) a breach of the duty of care; (3) legal causation; and (4) damages. *Klasch v. Walgreen Co.*, 127 Nev. 832, 837 (2011). Plaintiffs assert that the jury necessarily disregarded the proximate cause instruction by finding that MGM, DCDI, and Mr. Copperfield were negligent and that Mr. Cox was the sole proximate cause for his fall. (AOB 45.) But this conflates their burden on breach with their burden on causation: "[B]efore negligence can

be actionable, that is to say before it can be charged against a party to a lawsuit, such negligence must be a proximate cause of the damage complained of." *Alex Novack & Sons v. Hoppin*, 77 Nev. 33, 39 (1961); *see also* 57A AM. JUR. 2D *Negligence* § 131 (2004) ("A negligent act is not in itself actionable, and only becomes the basis of an action where it results in injury to another. Accordingly, the damage or injury is the gravamen of a cause of action for negligence.").

This is one of the essential teachings of the classic decision in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). As Justice Cardozo aptly observed, "Proof of negligence in the air, so to speak, will not do." *Id.* at 99. Even more to the point is Justice Andrews's opinion: "We deal in terms of proximate cause, not of negligence." *Id.* at 102.

> Where there is the unreasonable act, and some right that may be affected there is negligence *whether damage does or does not result*. That is immaterial. Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. …
>
> It may well be that there is no such thing as negligence in the abstract. "Proof of negligence in the air, so to speak, will not do." …[Negligence involves] not merely a relationship between man and those whom he might reasonably expect his act would injure. Rather, a relationship between him and those whom he does in fact injure.

Id. (emphasis added). Plaintiffs' argument disregards that there must be negligence (i.e., duty and breach) *as well as* causation and damages for the tort of negligence to be actionable. A jury is under no obligation to find causation just because it finds duty and breach. These are independent elements, and they are independent for each defendant.

Here, there is no inconsistency in the jury's answers on the verdict form because the questions pertain to two different elements. The verdict form required the jury to answer two questions for each defendant to determine if any defendant was liable to Mr. Cox. The first question pertained to the first and second essential elements of a negligence claim: (1) the existence of a duty of care and (2) a breach of that duty. The second question pertained to the third essential element: causation.

The district court properly denied plaintiffs' motion for a new trial accordingly.

C. The Alleged Inconsistencies in the Verdict Do Not Apply to Team Construction

In any event, the alleged inconsistencies are harmless as applied to Team Construction. The jury found Team Construction was not negligent, unlike defendants MGM, DCDI, and Mr. Copperfield. The alleged inconsistencies—the affirmative findings of negligence and the negative

findings of causation—do not apply to the verdict issued for Team Construction. Indeed, Team Construction cannot be liable to plaintiffs if it was not negligent. *Klasch*, 127 Nev. at 837. It follows then that the alleged inconsistencies, if error, are harmless as applied to the verdict for Team Construction.

IV.

THE DISTRICT COURT WAS NOT REQUIRED TO FURTHER EXPLAIN WHY IT WAS CANCELLING THE JURY VIEW

Finally, plaintiffs argue that the district court was obligated to offer plaintiffs' preferred explanation for why the court cancelled the jury view. (AOB 51-54.) This argument fails for two reasons.

A. Plaintiffs Failed to Preserve this Argument by Not Requesting Further Explanation for the Jury at Trial

This argument first fails because plaintiffs failed to preserve it. A party's failure to object or to seek clarification at trial waives the party's right to raise the issue on appeal. *Edwards Industries, Inc.*, 112 Nev. at 1036–37. Despite multiple opportunities to do so, plaintiffs never requested that the district court explain its reasoning to cancel the jury view. It did not ask the court to explain its reconsideration to the jury

during the oral arguments on the court's decision to reconsider its ruling. Nor did it request the court to provide further explanation to the jury when the court informed that jury view was cancelled because "this case [was] not conducive to [it]." (18 JA 4118.) Plaintiffs therefore waived this argument.

B. The Law Does Not Obligate the District Court to Explain its Evidentiary Rulings in Depth to the Jury

This argument also fails because evidentiary rulings do not need to be explained in depth to a jury. Plaintiffs acknowledge that "a district court is not typically required to explain its reasoning for its decisions to the jury." (AOB 54.) But plaintiffs place that extra burden on the district court in this instance, contending that they were denied a fair trial and severely prejudiced when the district court did not explain its reasons for canceling the jury view in depth to the jury in contravention to substantial justice. (AOB 51–54.)

Plaintiffs cite no law that obligates a court to explain its evidentiary rulings to a jury. (*See id.*) Instead, plaintiffs point to NRCP 59(a)(1) and NRCP 61. NRCP 59 provides:

> The court may, on motion, grant a new trial on all or some of the issues—and to any party—for any of the following causes or grounds *materially affecting the*

> *substantial rights of the moving party*: (A) irregularity in the proceedings of the court, jury, master, or adverse party or in any order of the court or master, or any abuse of discretion *by which either party was prevented from having a fair trial*[.]

NRCP 59(a)(1) (emphasis added). NRCP 61 similarly provides:

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, *the court must disregard all errors and defects that do not affect any party's substantial rights*.

NRCP 61 (emphasis added). Neither rule provides a basis on which to disturb the jury verdict because the lack of an explanation for the court's reconsideration did not deny plaintiffs a fair trial or affect their substantial rights.

Plaintiffs essentially premise their argument on the assumption that prejudice automatically follows when a party asserts a losing position in front the jury. Not only do plaintiffs fail to cite law in support of this premise, but plaintiffs fail to recognize that they did not even assert their position in front of the jury.

The jury was not privy to the arguments concerning the jury view, and the court assumed the responsibility of canceling the jury view.

While Backstage sought a jury view on behalf of all defendants in the jury's presence, plaintiffs did not object in front of the jury. The court also did not hear any argument in front of the jury. Thus, the jury merely heard that a jury view was requested, initially granted, and then canceled by the court because the case was "not conducive to [a jury view]." (18 JA 4118.) The jury knows at most that the court determined a jury view would not helpful to the case.

Further, a party "is entitled to a fair trial, not a perfect one." *Rudin,* 120 Nev. at 121. As plaintiffs highlight by citing NRCP 59(a)(1) and NRCP 61, an error must affect the plaintiffs' substantial rights before a new trial may be granted.

Here, the evidence overwhelmingly supports the jury's verdict that Mr. Cox tripped as a result of his negligence. Defendants presented two expert witnesses. Both experts opined that Mr. Cox fell because he tripped over his own feet and that he tripped on level ground far from where he claimed to have fallen. Plaintiffs did not provide a rebuttal expert on the issue of causation. They instead relied on Mr. Cox's account of his fall and on testimony that other volunteer audience members had

fallen throughout the production of the show in a small number of the 20,000 performances.

Plaintiffs apparently sought an explanation that the jury view was cancelled due to the alleged misconduct of defendants' counsel. Plaintiffs contend that the explanation was required in light of the district court's decision to admit the sub rosa surveillance videos of Mr. Cox. But as discussed *supra*, the videos of Mr. Cox were relevant to evidence already before the jury: Mr. Cox's hyperbolic testimony and feigned need for assistance. Plaintiffs' sub rosa surveillance video of defendants' counsel was not relevant to any evidence already before the jury. It also did not relate to any argument made before the jury. Indeed, the court shielded the jury from the issue and took responsibility for the cancellation by stating the case was "not conducive to [a jury view]." (18 JA 4118.)

Indeed, plaintiffs' preferred explanation would itself have misled the jury because Team Construction's counsel was not involved in the alleged misconduct. To cast blame at defense counsel generally would have prejudiced Team Construction and created a true appellate issue.

The district court properly exercised its discretion in stating his ruling neutrally.

CONCLUSION

The jury verdict should stand. The district court did not commit reversible error in its trial rulings, and the jury followed the district court's instructions and issued a consistent verdict. This Court should affirm the judgment in favor of respondents accordingly.

Dated this 9th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 12,626 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 9th day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on December 9, 2019. Electronic service of the foregoing "Respondent Team Construction Management, Inc.'s Answering Brief" shall be made in accordance with the Master Service List.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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