IN THE SUPREME COURT STATE OF NEVADA

GAVIN COX and MINH-HAHN COX, Husband and Wife,	)	Supreme Court No.: 76422
Appellants,	)	District Court No.: A-14-705164-C
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.	)	

APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The law firms representing GAVIN COX and MINH-HAHN COX ("Appellants") in the District Court and in this Court are MORELLI LAW FIRM, PLLC, and HARRIS & HARRIS. The undersigned counsel of record certifies no other persons or entities as described in NRAP 26.1(a) must be disclosed.

DATED this 6th day of January, 2020

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By: _____

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ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING SUB ROSA SURVEILLANCE VIDEOS OF MR. COX DURING THE LIABILITY PHASE OF THE TRIAL AND THE RESULTING PREJUDICE DENIED APPELLANTS A FAIR TRIAL.

The District Court abused its discretion in admitting sub rosa surveillance videos of Mr. Cox during the liability phase of trial and that error substantially affected Appellants' rights, necessitating a new trial. Contrary to Respondents' contentions, admission of the sub rosa videos was reversible error: (i) because the videos bear exclusively on damages; (ii) because *unsworn conduct* is not impeachable; only *sworn testimony* is impeachable and at no time did Mr. Cox testify that he always needs assistance while walking; (iii) because *even if* Mr. Cox's movements in the courtroom were somehow impeachable, they could not be impeached via extrinsic evidence, rendering the admission of the videos a patent violation of NRS 50.085(3); and (iv) because admission of the videos unduly prejudiced Appellants.

In support of their contention that the sub rosa videos were admissible, Respondents make arguments that defy basic, well-founded evidentiary principles and common sense. Respondents do not dispute that the videos had absolutely nothing to do with liability. Rather, they argue that the videos were admissible to impeach Mr. Cox's credibility about the extent of his injuries and that Mr. Cox's movements in the courtroom somehow constitute impeachable "statements." This

is a novel, unsupported legal argument that, if accepted, would have substantial, far-reaching implications. Indeed, Respondents' argument suggests that every single action a witness takes in the courtroom (or maybe even in the courthouse, or beyond) is impeachable. Such an argument turns evidence law on its head. It completely undermines all of the basic, well-founded evidentiary rules regarding impeachment, namely, that only sworn testimony may be impeached. Unsworn movements in a courtroom while not on the witness stand are not impeachable.

Respondents claim that "Mr. Cox asserted through his nonverbal conduct that he was unable to walk without the assistance of others," and that in so doing, he perpetrated an "in-court deception" about his physical condition which "they had every right to contradict." These arguments are wrong or misguided on several fronts. First, Mr. Cox did not engage in some elaborate scheme to deceive the jurors about his physical condition as the Respondents posit. When Mr. Cox first approached the witness stand to give testimony, the Court Officer *volunteered unsolicited* to give Mr. Cox assistance to the stand which Mr. Cox merely accepted. Moreover, there were reasonable, medical justifications for Mr. Cox's conduct in and outside of the courtroom and Appellants were denied the opportunity to permit limited medical testimony concerning the same in order to rebut the sub rosa videos. Second, the current rules of evidence did furnish Respondents a mechanism for responding to Mr. Cox's in-court conduct — they

could have cross-examined him at length about it, but they chose not to do so. Third, a witness' movements in a courtroom while not on the witness stand are simply not impeachable and Respondents do not cite any case law in support of their misguided argument.

Respondents further contend that Mr. Cox's movements in the courtroom constituted "statements" pursuant to hearsay rule NRS 51.045 because they were somehow intended as assertions. *Even if* that were true — and it is not because, according to the clear caselaw, assertions only include actions like pointing to an assailant from the witness stand, not merely walking with assistance — said "statements" are still not impeachable because they were not made under oath.1 Moreover, whether or not Mr. Cox's movements in the courtroom constitute "hearsay statements" is irrelevant. The question is not whether the movements were hearsay. The question is whether Respondents were permitted to impeach Mr. Cox's movements, and the answer is categorically no. Respondents vastly underestimate the magnitude of the holding they ask this Court to render. They seek to upend clear, well-founded impeachment rules to hold that any conduct in a

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1 Team Construction argues that some of Mr. Cox's movements in the courtroom were sworn because Mr. Cox remained under oath overnight between his two days of trial testimony. It cites no legal authority for that contention. *Even if* some of Mr. Cox's movements in the courtroom could be deemed to have been "under oath," they still do not constitute impeachable testimony and certainly cannot be impeached via extrinsic evidence.

courtroom can be impeached. There is absolutely no justification for such a broad expansion of well-established impeachment rules.

Even if Mr. Cox's movements in the courtroom *were* impeachable — and there is no basis in law or logic to support that contention — Respondents were not permitted to impeach with the sub rosa videos. NRS 50.085(3) expressly prohibits the use of extrinsic, collateral evidence to attack a witness' credibility. The plain language of NRS 50.085(3) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence." NRS 50.085(3) (emphasis added). Here, Respondents proffered the sub rosa videos, which are indisputably extrinsic evidence, solely for the purpose of attacking Mr. Cox's credibility. Respondents admitted as much at trial. *JA003063.* Thus, admission of the videos was a patent violation of NRS 50.085(3).

Respondents cite *Jezdik v. State*, 121 Nev. 129 (2005) and argue that an exception to NRS 50.085(3) applies, but their reliance on *Jezdik* is misplaced. The *Jezdik* court held "that the district court properly allowed admission of rebuttal evidence in response to improper evidence of character either intentionally or inadvertently introduced during defense counsel's direct examination of Jezdik." *Id.* at 132 (emphasis added). The Court described the collateral-fact rule and the exception that can apply:

> Under [the collateral fact rule], it is error to allow the State to impeach a defendant's credibility with extrinsic evidence relating to a collateral matter. Facts are collateral if they are outside the controversy, or are not directly connected with the principal matter or issue in dispute. Yet, under NRS 50.085(3), a party can impeach a witness on collateral matters during cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness and no extrinsic evidence is used.
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> However, authorities have noted an exception to the collateral-fact rule when the State seeks to introduce evidence on rebuttal to contradict specific factual assertions raised during the accused's direct examination. Under this exception, the defendant's false statements on direct examination trigger or "open the door" to the curative admissibility of specific contradiction evidence.

Id. at 136–37 (emphasis added) (internal quotations and citations omitted). At his criminal trial, Mr. Jezdik "placed his character in issue through testimony that he had never been 'accused of anything prior to these current charges.'" *Id.* at 136 (emphasis added). Under those circumstances, the court concluded that an exception to NRS 50.085(3) applied to prevent Jezdik from "giving the jury a false impression through an absolute denial of misconduct and [ ] frustrat[ing] the State's attempt to contradict this evidence through proof of specific acts." *Id.* at 139. Notably, the court admonished: "However, when a party resorts to extrinsic evidence to show a specific contradiction with the adversary's proffered testimony, the evidence should squarely contradict the adverse testimony." *Id.* (emphasis added). The court concluded that it was not an abuse of discretion to permit the State to impeach Jezdik's misleading sworn testimony with extrinsic evidence. *Id.*

at 140. The other cases Respondents cite on this subject are likewise criminal cases in which extrinsic evidence was deemed admissible to contradict criminal defendants' sworn testimony during direct examinations. *See United States v. Garcia*, 900 F.2d 571 (2d Cir. 1990); *United States v. Rodriguez*, 539 F. Supp. 2d 592 (D. Conn. 2008); *United States v. Barrett*, 766 F.2d 609 (1st Cir. 1985).

Here, in contrast, Mr. Cox never testified that he could not walk unassisted. That is the crucial point Respondents continue to overlook. Respondents have not cited a single case in any jurisdiction that permits impeachment of a witness' movements in the courtroom, and they certainly have not cited any case which permits the use of extrinsic, collateral evidence for such purported impeachment. As Mr. Cox did not provide any sworn testimony that he always walks with assistance, there was nothing to impeach on that issue. There is certainly no testimony that the videos "squarely contradict," as the *Jezdik* decision requires.2

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2 Respondents cite to a single page of trial testimony and argue that Mr. Cox did testify that he used assistance walking outside of the jury's presence and that said testimony is impeachable with the sub rosa videos. *JA003063*. However, Mr. Cox never testified that he *always* walks with assistance or that he *cannot* walk without assistance. His only testimony on the subject was as follows:

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 this morning?
A. No.
Q. Did your attorney request his assistance?
A. No.
MR. MORELLI: Objection, Your Honor. Does this have anything to do with liability, because, if so, we can talk about the hospital a little bit.

As *Jezdik* and the other cases Respondents cite are readily distinguishable, they do not justify the admission of the surveillance videos in violation of NRS 50.085(3).

Respondents also erroneously argue that NRS 50.085(3) does not apply because the issue of whether Mr. Cox could walk unassisted was not collateral to this liability phase of trial. Collateral facts are those which are "not directly connected to the issue in dispute." See Black's Law Dictionary (10th ed. 2014). This was a liability trial only. The only issues in dispute were whether Respondents were negligent and whether that negligence proximately caused Mr. Cox's injuries. The nature and extent of Mr. Cox's injuries and whether or not he could walk unassisted are in no way relevant to Respondents' liability. The very purpose of bifurcation is to separate issues of liability and damages. If Respondents wished to comingle issues of liability and damages, they should not have requested bifurcation. As the surveillance videos have absolutely nothing to

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MR. ROBERTS: *It has to do with credibility*, Your Honor.
MR. ROBERTS:
Q. Do you get assistance when you're downstairs in the courthouse?
THE COURT: Overruled.
THE WITNESS: In what way?
Q. Do you hold onto someone's arm *when you're downstairs* [in the courthouse] and the jury is not around?
A. Yes.
Even if an exception to the extrinsic evidence rule did apply here, the sub rosa videos, which depicted Mr. Cox walking outside his home, not downstairs in the courthouse, did not "squarely contradict" any of his testimony.

do with Respondents' liability, they unquestionably address a collateral matter, and, as extrinsic evidence, could not be used to impeach Mr. Cox's credibility.

Also wholly unavailing is Respondents' conclusory argument that the videos were admissible because they were probative of Mr. Cox's "bias and motives." In support of this argument, Respondents cite *Lobato v. State*, 120 Nev. 512 (2004) for the proposition that "extrinsic 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)." 120 Nev. 512 (emphasis added). This argument is unfounded for several reasons. First, Mr. Cox did not testify that he always needs assistance when walking. As such, the surveillance videos were not probative of Mr. Cox's purported bias or motive for "testifying in a certain way," as described in *Lobato*. The bias exception allows a party to introduce extrinsic evidence to expose why a witness has *testified* in a particular manner, like a jailhouse informant who made a deal with the State. There is no analogue here. Respondents do not argue that the videos demonstrate that any particular portion of Mr. Cox's *testimony* is biased. Rather, they argue that they should be permitted to use extrinsic evidence based only on general, conclusory assertions that Mr. Cox is "biased or has motive" to *move* a certain way in the courtroom while not even on the stand. This broad application of the bias exception is not contemplated by the *Lobato* decision.

Second, Respondents never argued at trial that they were proffering the videos for the purpose of establishing Mr. Cox's bias or motive; they proffered them solely for the purpose of impeaching his credibility. *JA 004709-4715, 004971-4973*. Respondents' contradictory *post hoc* explanation for their use of the videos is insufficient to justify their improper admission. Third, contrary to Respondents' contentions, the surveillance videos are not probative of any particular bias or motive on Mr. Cox's part and a finding that the surveillance videos are admissible for that purpose would undermine the collateral source rule entirely. Indeed, in every single action where a party testifies, said party is generally "biased" toward their own positions and has general "motive" to prevail. As such, permitting admission of extrinsic evidence based only on general, conclusory assertions of a party's bias or motive would render the collateral-fact rule effectively meaningless in the context of party testimony. Accordingly, Respondents' argument that the videos were properly admitted because they were probative of "bias and motives" is erroneous.

Respondents also spend significant portions of their Answering Briefs explaining that jurors are tasked with evaluating witness' credibility and inaccurately accusing Appellants of taking a "narrow" view of evidence law. Appellants do not dispute that jurors are permitted to consider a witness' conduct and demeanor in evaluating his credibility. Respondents cite cases and Jury

Instruction 12 which provide that a witness' credibility should be determined by, *inter alia*, his or her manner upon the stand. However, those cases do not support Respondents' contention that Mr. Cox's unsworn movements in the courtroom are impeachable. There is a huge difference between *what the jury can consider* in evaluating a witness' credibility and what is *impeachable*. Respondents apparently conflate these two concepts and in so doing seek to throw all of the basic evidentiary principles about impeachment out the window. To be clear, the jury was free to evaluate Mr. Cox's manner upon the stand, and they should have been able to do so without the improper admission of sub rosa videos.

Respondents claim in conclusory terms that even if it was error to admit the surveillance videos, said error was harmless. On the contrary, the admission of the videos severely prejudiced Appellants and substantially affected their right to a fair trial. Respondents' counsel spent large portions of their summations discussing the videos and how they affected Mr. Cox's credibility. Counsel for Copperfield and DCDI even replayed the videos during her summation, amplifying the prejudicial effect. Accordingly, not only were the videos erroneously admitted, but the jury was *expressly and repeatedly* told they should consider the videos in assessing Mr. Cox's credibility right before deliberation. Because of Respondents' counsel's improper conduct during summation and the District Court's erroneous rulings, Respondents were improperly permitted to submit a narrative to the jury that Mr.

Cox was a liar who was exaggerating his injuries, and Appellants were improperly and prejudicially left without adequate remedy. Admission of the videos — which indisputably have absolutely no bearing on liability and which Respondents improperly and repeatedly used to attack Mr. Cox's credibility — unquestionably and unduly prejudiced Appellants and denied them a fair trial. Indeed, Team Construction expressly acknowledged in its Answering Brief below that the jury's verdict was premised upon Mr. Cox's credibility: "The jury, as indicative of its decision, found Mr. Cox to be less than credible and thus rendered a decision in favor of Defendants." *JA 006331*. This statement perfectly summarizes the severely prejudicial manner in which this trial unfolded. Where, as here, a court violates NRS 50.085(3) in admitting extrinsic evidence to attack a witness' credibility on a collateral matter, reversal is necessary. *See Rembert v. State*, 104 Nev. 680 (1988) ("As the jury's verdict in this case was dependent on its assessment of the witnesses' credibility, we cannot say that the district court's error was harmless beyond a reasonable doubt").

The severely prejudicial effect of the videos was further compounded by the fact that Respondents were permitted to make patently improper statements about how the videos affected Mr. Cox's credibility. The District Court erred: (1) in failing to admonish Mr. Popovich's misconduct during his summation as required by *Lioce v. Cohen*, 124 Nev. 1 (2008) and its progeny; and (2) in failing to make

the requisite findings about said misconduct in its decision on Appellants' post-trial motion. Respondents assert that Mr. Popovich's statements during summation did not rise to the level of misconduct because they "properly addressed credibility" and merely provided commentary on "logical inferences" drawn from the evidence. They also argue that Mr. Popovich only made one improper comment which cannot constitute misconduct. On the contrary, Mr. Popovich made numerous improper statements about Mr. Cox's credibility during his summation and those frankly shocking statements clearly *were* misconduct as they were precisely akin to the types of comments admonished in *Lioce*.3 Mr. Popovich's misconduct unquestionably prejudiced the jury against Appellants because he blatantly told the jurors that Mr. Cox is a liar who is only after Respondents' money. Respondents' attempt to paint Mr. Popovich's improper comments as isolated, benign, and harmless is patently belied by the record.

Respondents also argue that even if Mr. Popovich's statements were misconduct, the District Court properly responded by telling the jury that the statements were "objected to" and should be disregarded. However, that argument

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3 Mr. Popovich made the following improper statements: (1) he said that Mr. Cox had "been deceiving this jury from day one"; (2) he twice said that Mr. Cox had "been manipulating this jury from day one"; (3) he asked whether Mr. Cox had any credibility left and then responded that he did not; (4) he said "you shouldn't believe a word that comes out of [Mr. Cox's] mouth because the only reason to do that is the green box at the end"; and (5) he said that [Mr. Cox] "just wants a payoff." *JA 005466-5469.*

ignores the plain dictates of *Lioce* which mandates that misconduct of the type at issue here — wholly improper statements about a party's credibility made during summation — is to be treated differently than other objectionable conduct. In failing to admonish the jury that Mr. Popovich's statements were improper as required by *Lioce*, the District Court completely undermined the purpose of the *Lioce* holding. Moreover, in deciding Appellants' motion for a new trial, the District Court also failed to "make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the [*Lioce*] standards . . . to the facts of [this case]." *Lioce*, 124 Nev. at 20–21. As the District Court failed to properly analyze and make specific findings about the claims of attorney misconduct that Appellants made in their motion for a new trial, this case must at least be remanded for that purpose. *See Michaels v. Pentair Water Pool & Spa*, 131 Nev. Adv. Op. 81, 357 P.3d 387, 394 (Nev. App. 2015); *Jimenez v. Blue Martini Las Vegas, LLC*, Case No. 72539, 2018 WL 3912241, at *1–2 (Nev. App. July 27, 2018).

II. THE DISTRICT COURT ERRED IN SUBMITTING THE ISSUE OF COMPARATIVE NEGLIGENCE TO THE JURY.

Contrary to Respondents' conclusory assertions, the question of comparative negligence should have never been submitted to the jury because it was never a bona fide issue in this case. There was absolutely no evidence that Mr. Cox acted unreasonably. Indeed, the evidence at trial established that Mr. Cox was merely

following Respondents' directions. He was participating in Respondents' Illusion on their property, running along the path Respondents provided, and at the pace and in the manner the Respondents directed. He did not leave the intended path or otherwise defy Respondents' instructions. He did not go rouge or engage in any unreasonable behavior that contributed to his injuries. Rather, the evidence demonstrated that Mr. Cox acted entirely reasonably under the circumstances.

Notably, Respondents only argued about comparative negligence *after* Appellants moved to dismiss the defense. They did not argue Mr. Cox was comparatively negligent during trial or during summations. Despite failing to present any evidence or arguments as to comparative negligence at trial, Respondents now proffer *post hoc* arguments to try to justify the comparative negligence instruction. Respondents speculate that Mr. Cox *could have* been negligent: (1) in voluntarily participating in the illusion; (2) in looking ahead, rather than down at the ground, while he was running; or (3) in "tripping." However, none of that conduct constitutes comparative negligence.

First, Respondents' argument that there exists a bona fide issue as to comparative negligence merely because Mr. Cox voluntarily participated during the "runaround" is completely unfounded and unavailing. In so arguing, Respondents effectively admit that the 13 Illusion was dangerous and that having people participate in it was negligent. In other words, if it was negligent for Mr.

Cox to willingly participate, it was also negligent for Respondents to have him to do so. As further described below, this makes Respondents' negligence at least a concurrent proximate cause of the accident. Moreover, Mr. Cox's decision to participate was not unreasonable. He reasonably trusted Respondents to provide him with a safe experience (which they unquestionably had a duty to do). As a paying patron, Mr. Cox reasonably expected that Respondents would not expose him to danger. As he had never participated in the Illusion before and was given no warnings about what it entailed, it was not unreasonable for him to follow Respondents' path and comply with their instructions. Respondents accuse Mr. Cox of negligence for voluntarily participating in their Illusion on their property and effectively equate his actions to those of an individual who knowingly agrees to undertake a dangerous, high-risk activity with known and obvious risks. But in participating in the Illusion, Mr. Cox did not knowingly agree to be rushed outside the back of a theater in dim lighting through an unknown route covered in construction dust. Accordingly, Respondents' implication that Mr. Cox's decision to participate constitutes comparative negligence somehow akin to agreeing to participate in an obviously dangerous activity is completely unfounded. Moreover, the District Court specifically addressed and rejected Respondents' argument that the "assumption of the risk" doctrine applies to this case in its summary judgment decision — a ruling Respondents never appealed. Respondents also argue that Mr.

Cox "could have gone slower" or ceased his participation, but Mr. Cox was merely following Respondents' instructions. Respondents should not be permitted to escape liability for placing Mr. Cox in a dangerous situation of their own creation by shifting the blame to Mr. Cox.

Also unfounded is Respondents' contention that Mr. Cox acted unreasonably merely because he was looking toward the door at the time of his fall and not down at the ground. Such conduct was not unreasonable considering the circumstances. Mr. Cox was being rushed around in a dimly lit, new place and was following Respondents' directions; it was entirely reasonable to be looking ahead to see where he was going rather than down at his feet. In this regard, Appellants cited several slip-and-fall cases in their Opening Brief which provide examples of plaintiffs acting reasonably even though they were not looking at the ground at the time of their falls. Respondents do not cite a single Nevada case to support their contention that Mr. Cox was comparatively negligent in looking ahead, rather than at the ground, at the time of his fall.

Likewise untenable is Respondents' claim that Mr. Cox was comparatively negligent in "tripping by catching his toe." *Even if* Mr. Cox did trip, tripping — particularly in circumstances like those at issue here — is not negligence. And contrary to Respondents' suggestions, none of their experts testified that Mr. Cox was negligent. Nor do Respondents cite any authority or evidence for their

contention that "tripping" constitutes comparative negligence. They merely ask this Court to assume that because Dr. Baker opined that Mr. Cox tripped (rather than slipped), there must be a bona fide issue as to comparative negligence. However, Respondents have proffered absolutely no support for that contention.

Moreover, MGM Grand's Head of Risk Management specifically testified that MGM's investigation indicated that Mr. Cox did nothing wrong in participating in the Illusion. *JA 002672-2673*. MGM urges this Court to disregard Mr. Habersack's testimony because he "was a lay witness and not a percipient witness" and because he "was not even employed at MGM Grand at the time of the accident." As such, MGM argues, "Mr. Habersack's lay witness testimony is meaningless, was based on incomplete information, and has no influence on negligence and comparative negligence." These arguments are wholly unavailing.

First, Mr. Habersack is the representative MGM chose to produce at trial and as MGM's Rule 30(b)(6) witness for deposition. As MGM chose to produce Mr. Habersack to testify twice, it cannot credibly claim he has insufficient knowledge. Second, as MGM's Head of Risk Management, Mr. Habersack was unquestionably qualified to testify as to MGM's findings in its investigation. That Mr. Habersack was not employed with MGM at the time of Mr. Cox's fall is of no import. Indeed, he was not asked for his personal opinion as to how or why Mr. Cox fell. Rather, he was asked to confirm *MGM's findings* about Mr. Cox's fall, which he did when

he testified that it was a correct statement that "MGM has no facts that Mr. Cox did anything wrong in performing the illusion." *JA 002672-2673*. Accordingly, Mr. Habersack did not give "lay witness opinion" or an opinion "based on incomplete information" as MGM claims. Rather, he testified as to the findings of MGM's own investigation. As there is no evidence Mr. Cox acted unreasonably and MGM testified that its own investigation reflects Mr. Cox did nothing wrong, comparative negligence was never a bona fide issue in this case and should never have been submitted to the jury. *Even if* the Court were to ignore Mr. Habersack's testimony (and it should not), there is still no evidence of comparative negligence and Respondents did not even argue the defense at any point during the trial.

The comparative negligence cases Respondents cite are readily distinguishable. In *Tryba v. Fray*, 75 Nev. 288 (1959), the plaintiff was injured when she stepped through a doorway into "complete darkness" and fell into a construction ditch at her place of employment. *Tryba*, 75 Nev. at 292. The plaintiff was aware that "for a number of days" prior to her fall, workers had been constructing a sump near the subject doorway. *Id.* The day before her fall, "she had heard the compressors and jack hammers working." *Id.* Here, unlike Ms. Tryba, Mr. Cox was not injured after choosing to step into complete darkness. Nor was he in a place that he had been ever before or that he knew was under

construction. Accordingly, the circumstances surrounding *Tryba* and Mr. Cox's fall are entirely different, and Respondents' reliance on *Tryba* is misplaced.

In *Anderson v. Baltrusaitis*, 113 Nev. 963 (1997), the plaintiff was struck by a vehicle while crossing a street outside of a crosswalk in violation of NRS 484.327(1). Violation of a traffic law is obvious comparative negligence, and, as Mr. Cox never entered an active roadway or violated any laws, there are simply no comparable circumstances here. In *Woosley v. State Farm Ins. Co.*, 117 Nev. 182 (2001), the court concluded that a comparative negligence instruction was warranted because the evidence established that the decedent driver's speeding and inappropriate swerving could have contributed to the subject accident. 117 Nev. at 185–86. Accordingly, in *Woosley*, there was specific evidence demonstrating that the decedent acted unreasonably in particular ways and that his own unreasonable actions contributed to his injuries. Here, there was no such evidence. In *Joynt v. California Hotel & Casino*, 108 Nev. 539 (1992), the plaintiff took a step backwards without looking (knowing that there was a statue behind him) and was injured when he fell over the base plate of the statue. 108 Nev. at 541. As in the other comparative negligence cases Respondents cited, the unreasonableness of Mr. Joynt's actions is clear. In the case *sub judice*, there are simply no actions on Mr. Cox's part that were unreasonable.

Similarly distinguishable is *Taylor v. Tolbert Enterprises, Inc.*, 439 So. 2d 991 (Fla. Dist. Ct. App. 1983), a slip and fall case wherein the defendant presented tangible evidence that the plaintiff knew of a particular hazard and failed to take reasonable steps to avoid said hazard. 439 So. 2d at 992. Specifically, the court concluded there was an issue of fact as to comparative negligence because the plaintiff testified she observed the slippery condition on the steps before her fall and proceeded anyway. *Id.* Unlike Ms. Taylor, there is no evidence that Mr. Cox knew of the particular hazards before his fall, ignored them, and unreasonably proceeded anyway. Again, Mr. Cox was unaware of what the Illusion would entail, he reasonably trusted that Respondents would not put him in danger, and he reasonably followed their instructions. As the cases Respondents cite are plainly distinguishable, they do not support the contention that the District Court properly instructed the jury on comparative negligence.

Contrary to Respondents' contentions, the District Court's errors as to the comparative negligence instruction were not harmless; they were severely prejudicial and affected Appellants' ability to receive a fair trial. As there was absolutely no evidence Mr. Cox acted unreasonably or contributed to his fall, the issue should have never been submitted to the jury. By improperly submitting the issue of comparative negligence to the jury even though it was not a viable defense, the District Court improperly permitted the jurors to focus on Mr. Cox's

conduct. *See*

Harb v. City of Bakersfield, 233 Cal. App. 4th 606 (2015); *see also*

Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335 (1994). That the comparative negligence charge improperly focused the jury's attention on Mr. Cox's conduct in this case is demonstrated by the fact that the jury *went out of its way* to find Mr. Cox comparatively negligent on the verdict sheet, even though they were not supposed to reach that issue based on the clear instructions on the Special Verdict. Indeed, the instructions before question six on the Special Verdict instructed the jury not to proceed to the questions concerning Mr. Cox's negligence if it concluded that Respondents were either not negligent or not a proximate cause of Mr. Cox's injuries, and, despite so finding, the jury ignored the instructions and answered the questions about comparative negligence anyway. By improperly submitting the issue of comparative negligence to the jury even though it was not a viable defense, the District Court permitted the jurors to focus on Mr. Cox's conduct and created the opportunity for the jurors to reach an inconsistent verdict, which, is exactly what occurred. In light of the foregoing, Appellants are entitled to judgment as a matter of law pursuant to Rule 50(b), or, alternatively, a new trial, because the District Court erred: (1) in denying the Appellants' Rule 50(a) motion as to Respondents' comparative negligence affirmative defense; (2) in charging the

jury on comparative negligence; and (3) in including comparative negligence on the verdict sheet.

III. THE JURY'S MANIFEST DISREGARD OF THE DISTRICT COURT'S INSTRUCTIONS AND APPLICABLE LAW RESULTED IN AN INCONSISTENT VERDICT THAT WARRANTS A NEW TRIAL.

The negligence of MGM Grand, Copperfield, and DCDI was a proximate cause of Mr. Cox's accident as a matter of law. While Respondents are generally correct that a jury may find negligence but not proximate cause, this is not such a case. Here, Appellants proved, and the jury properly found, that MGM Grand, Copperfield, and DCDI were all negligent for their respective roles in designing and implementing the 13 Illusion. However, because the jury manifestly disregarded the District Court's instructions on proximate cause, it ignored the overwhelming evidence and inexplicably found Respondents' negligence was not at least a concurring proximate cause of Mr. Cox's accident. Had the jury properly applied the District Court's instructions, it would have been impossible for them to find that the negligence of MGM Grand, Copperfield, and DCDI was not at least a concurring proximate cause of Mr. Cox's accident. There is no reasonable and just alternative other than to conclude that manifest injustice would result if this Court failed to recognize a failure on the part of the jury to understand the concept of proximate cause in reaching its verdict. *See Frances v. Plaza Pac. Equities, Inc.*, 109 Nev. 91, 94–95 (1993) (granting new trial). Thus, a new trial is warranted.

The only issue presented to the jury regarding the negligence of MGM Grand, Copperfield, and DCDI was whether those parties negligently designed and implemented the 13 Illusion. Since the inception of this action, Appellants' only claims of negligence have been based on Mr. Cox's participation in the 13 Illusion "when he was hurried with no guidance or instruction through a dark area under construction." *JA 000004-0007*. At the end of trial, the jury correctly concluded, based on the evidence presented, that MGM Grand, Copperfield, and DCDI were all negligent and that the trick had been negligently designed and implemented. Yet, if the jury had correctly applied the law and the District Court's instructions, it would have been impossible for them to find an absence of proximate cause as to those same Respondents. Specifically, the jury disregarded Jury Instruction No. 24 by ignoring that the negligence of MGM Grand, Copperfield, and DCDI was, at an absolute minimum, a concurring proximate cause of the accident. The critical question here becomes whether the jury could reasonably have found that there was an independent intervening act, one that Respondents could not have reasonably foreseen, that absolved them of being a proximate cause of Mr. Cox's accident. Otherwise, Respondents' negligence was a proximate cause as a matter of law. *See Hardison v. Bushnell*, 18 Cal. App. 4th 22, 26 (1993).

The answer to that question is clear. Because there was absolutely no evidence of any independent intervening act which was not reasonably foreseeable,

Respondents' conduct must be deemed a proximate cause of Mr. Cox's accident as a matter of law. As Respondents were responsible for hurrying Mr. Cox through the dark "runaround" route; failing to maintain adequate lighting; failing to devise a trick that would be safe for all participants; failing to warn participants of all hazards prior to participating; and subjecting participants to known hazards, and because there was no evidence of any independent intervening act which was not reasonably foreseeable, Respondents' conduct should be deemed a proximate cause as a matter of law.

The type of harm at issue here — a participant falling during the "runaround" — was clearly reasonably foreseeable, *JA 001089-1090*, as evidenced by Respondents admittedly being on notice of multiple previous falls during the same "runaround" portion of the trick performed at the MGM Grand. *JA 001093; JA 002922-2952; JA 005040-5058.* Because Respondents were on notice that participants, such as Mr. Cox, could fall and be injured during the "runaround" portion of the 13 Illusion, it was reasonably foreseeable that such accidents could occur again in the future. Accordingly, Respondents cannot be absolved of being a proximate cause of Mr. Cox's accident and their negligence must be deemed a proximate cause of the accident as a matter of law. *See Hardison*, 18 Cal. App. 4th at 26. None of the scenarios Respondents offer establish that the accident would not have occurred without the negligence of MGM Grand, Copperfield, and DCDI

in designing and implementing the 13 Illusion, or that there was an unforeseeable independent intervening act that broke the causal chain.

Even if the negligence of MGM Grand, Copperfield, and DCDI in placing Mr. Cox in an inherently dangerous situation was arguably not the only cause of the accident, it was, at a minimum, a *concurring* cause of the accident which, in foreseeable and continuous sequence, produced the accident and without which the accident would not have occurred. *See* Jury Instruction No. 24. There was no superseding intervening force between the negligence of MGM Grand, Copperfield, and DCDI, and Mr. Cox's fall. In fact, it is undisputed Mr. Cox was following Respondents' directions and there is no evidence he did anything to contribute to his accident. *JA 002672-2673.*

Respondents mistakenly argue Mr. Cox could have fallen for a reason other than Respondents' negligence, namely tripping over his own feet. Respondents miss the point entirely. Again, *but for* the negligence of MGM Grand, Copperfield, and DCDI in designing and implementing an unsafe trick, in knowingly subjecting participants such as Mr. Cox to said dangerous trick, and in failing to warn of those known dangers, Mr. Cox's accident would have never occurred. Since there was unrefuted evidence that as a direct result of being randomly selected to participate, Mr. Cox was caused, "in foreseeable and continuous sequence," to fall while participating in the "runaround" portion of the

13 Illusion, the jury, in failing to find that Respondents' negligence was a proximate cause of the accident, manifestly disregarded the District Court's instructions and reached an impossible verdict. *See* Jury Instruction No. 24. Accordingly, Respondents' negligence was at least a concurring proximate cause as a matter of law.4

Respondents cite to *Rickard v. City of Reno*, 71 Nev. 266 (1955) for the proposition that 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*, the Supreme Court affirmed a Rule 41(b) dismissal because of the lack of proof of the cause of plaintiff's fall. In doing so it stated: "It is undoubtedly true that an inference of proximate cause may be drawn from the proved facts. Here there is no proof that plaintiff's feet slipped, nor indeed that the sidewalk was slippery at the point where she fell." Accordingly, in *Rickard*, there was no evidence as to the cause of the fall. Here, in contrast, there is significant evidence to support the finding that Mr. Cox fell because of the negligence of MGM Grand, Copperfield,

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4 Respondents' reliance on expert opinion testimony does not change the analysis. Even assuming for the sake of argument that Mr. Cox did trip "over his own feet by failing to pick up his foot enough to make a proper stride," he still could not be considered the sole proximate cause of his accident had the jury properly followed the law. Mr. Cox tripping was not an independent intervening act, one that Respondents could not have reasonably foreseen, that absolved them of being a proximate cause of Mr. Cox's accident. In fact, all of the evidence presented proved the exact opposite — that a participant falling during the "runaround" was reasonably foreseeable because Respondents were on notice that it had happened numerous times in the past.

and DCDI in negligently designing and implementing the Illusion. Specifically, the evidence demonstrated that Mr. Cox was given the impression that if he did not run as fast as he could, the Illusion would fail. Mr. Cox was hurried through a dark corridor, multiple hallways, a set of doors, and suddenly outside into a dark and unfamiliar area. Mr. Cox was then told to run around two corners and while turning the second corner, there was an unexpected ramp, on which he slipped and fell. Mr. Cox was never warned about the sudden incline of the ramp, which violated the Nevada Building Code. *See JA 003031-3059.* A finding of negligence on any of these grounds would require a finding of causation if the jury had followed the District Court's instructions.

Appellants met their burden as to proximate cause by proving through a preponderance of the evidence that Respondents were negligent in designing and implementing a dangerous trick, and that Mr. Cox was caused to fall as a result of being chosen to participate in that dangerous trick. Despite Respondents' arguments to the contrary, Appellants do not argue that the jury was required to find causation just because it found negligence. Rather, Appellants argue that all of the record evidence at trial clearly established that Mr. Cox's accident was reasonably foreseeable and that but for MGM Grand, Copperfield, and DCDI negligently designing and implementing a dangerous trick, the accident would never have occurred. The evidence showed — and the jury found — that MGM

Grand, David Copperfield, and DCDI all failed to act reasonably under the circumstances by putting Mr. Cox in a position where it was foreseeable he could fall and be injured. Such negligence was undoubtedly at least *a* concurring proximate cause of the accident. Had the jury not manifestly disregarded the proximate cause instruction from the District Court, it would have been impossible for them to not reach the same conclusion. Accordingly, a new trial is warranted.

CONCLUSION

For all the reasons set forth herein and in Appellants' Opening Brief, the jury's verdict should be reversed and Appellants should be granted a new trial.

Respectfully submitted this 6th day of January, 2020.

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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 7,000 words (6840).
3. I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED this 6th day of January, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of January, 2020, I served a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF,** addressed to the following counsel of record at the following address(es):

____ **VIA U.S. MAIL**: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

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