Case No. 79424

IN THE SUPREME COURT OF THE STATE OF NEVADA

DESIRE EVANS-WAIAU, individually; GUADALUPE PARRA-MENDEZ, individually;

Appellants,

v.

BABYLYN TATE

Respondent.

APPELLANTS' OPENING BRIEF

Appeal from the Eighth Judicial District Court
Clark County, Nevada
Case No. A-16-736457-C

PRINCE LAW GROUP

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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 so that the judges of this Court may evaluate for possible disqualification or recusal.

1. Appellants Desire Evans-Waiau and Guadalupe Parra-Mendez are individuals.
2. Identify all parent corporations and any publicly held company that owns 10% or more of the parties' stock:

   NONE

3. Names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

   Dennis M. Prince – PRINCE LAW GROUP

   Kevin T. Strong – PRINCE LAW GROUP

   Jack F. Degree – BURG SIMPSON ELDREDGE HERSH & JARDINE

. . .

4. If any litigant is using a pseudonym, disclose the litigant's true name:

NONE

DATED this 17th day of April, 2020.

/s/ Kevin T. Strong

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this appeal pursuant to NRAP 3A(b)(1). On July 15, 2019, the Judgment upon the Jury Verdict was entered by the district court. 10A.App.2393. The Notice of Appeal was timely filed on August 14, 2019. 10A.App.2397; Nev. R. App. P. 4(a)(1).

II. ROUTING STATEMENT

This case is assignable to the Nevada Court of Appeals pursuant to NRAP 17(b)(5). This Court should retain jurisdiction given its complexities and that the claimed damages exceed $2,000,000.00.

III. ISSUES PRESENTED

1. Did the district court err by allowing Respondent Babylyn Tate's ("Tate") counsel to make repetitive arguments regarding Tate's "ability to pay" a judgment?

2. Did the district court err by allowing the jury to hear the audio portion of video taken by Appellant Desire Evans-Waiau's ("Evans-Waiau") fiancé, Jorge Parra-Meza ("Parra-Meza") depicting the vehicle damage from the subject collision?

3. Did the district court err by instructing the jury that drivers shall not drive a vehicle without brake lamps that provide sufficient illumination under Nevada law?

4. Did the district court err by allowing Tate's counsel to make "attorney-driven" or "medical buildup" arguments without an evidentiary basis?

5. Did the district court err by allowing the testimony of Tate's retained medical expert, Joseph Schifini, M.D., because he was unable to offer any opinions to a reasonable degree of medical probability?

IV. STATEMENT OF THE CASE

This personal injury case arises from a rear-end motor vehicle collision that occurred on October 30, 2015. On April 22, 2019, the trial in this matter commenced for five days and resulted in a mistrial because Tate's counsel referred to the investigating officer's failure to issue a citation in violation of *Frias v. Valle*, 101 Nev. 219, 221 (1985). On May 14, 2019, a second jury trial commenced. On June 3, 2019, the jury returned a general verdict in favor of Tate and against Appellants. 11A.App.02392.

V. STATEMENT OF FACTS

On October 30, 2015, Tate, while driving a 2014 Acura RDX, crashed into the back of Evans-Waiau's 1998 Honda Accord, who was stopped near the Las Vegas Strip. 7A.App.1600-01, 1656. At trial, Tate repeatedly admitted she never saw Evans-Waiau's vehicle stopped until immediately before the impact because everything "happened very fast." 7.A.App.01617, 01624, 01637. Therefore, Tate failed to maintain a distance safe enough to avoid the collision.

There was no dispute Appellants Evans-Waiau and Guadalupe Parra-Mendez ("Parra-Mendez") were both injured as a result of the collision. Tate's orthopedic expert, Jeffrey Wang, M.D., opined Evans-Waiau was injured. 7A.App.01531. Parra-Mendez's injury claim was unrefuted because Dr. Schifini assumed she was injured, which was inadmissible. 8A.App.01918-19. The principal dispute centered on the severity of Evans-Waiau's injuries suffered as a result of the collision.

Evans-Waiau incurred past medical expenses totaling $180,617.82. 10A.App.02309. She underwent extensive medical treatment to her cervical spine that included multiple sets of pain management injections confirming she suffered a disc injury to the C6-7. 4A.App.00789, 00793,

00795. The severity of this disc injury necessitated a cervical fusion surgery, which Evans-Waiau underwent on September 1, 2016. 5A.App.01032-33. Having undergone the cervical fusion surgery at 25 years old, Evans-Waiau will require a second cervical fusion surgery in the future at a cost of $237,540.00, according to her treating neurosurgeon, Jason Garber, M.D. 5A.App.01083; 10A.App.02314.

A. Evans-Waiau Drove Westbound on Flamingo Road to Take Her Children Trick-or-Treating at The Linq

Before the subject collision, Evans-Waiau was 22 years old and happily together with Parra-Meza. 6A.App.01303, 01342. They were together for over ten years at the time of trial. 6A.App.01303. Together, they had one young daughter named Mayra. 6A.App.01304. Evans-Waiau also raised her step-daughters with Parra-Meza, Sienna and Aaliyah, as her own. *Id.*

During the early evening hours of Friday, October 30, 2015, Evans-Waiau drove her car on US-95 and exited onto Flamingo Road. 6A.App.01315-16. Parra-Mendez, her sister-in-law, sat in the front passenger's seat and the three children sat in the backseat. 6A.App.01315. Evans-Waiau continuously drove westbound on Flamingo

Road. 6A.App.01316. She drove in the far right-hand lane of Flamingo Road towards Linq Lane. 6.A.App.01317.

Evans-Waiau stopped at the intersection of Flamingo Road and Linq Lane for a red light. *Id.* She stopped behind one car in front of her. 6A.App.01318. Evans-Waiau's right turn signal was activated. *Id.*

Traffic was heavy and there were pedestrians on the sidewalk at the intersection. 6A.App.1317. After the car in front of her turned right, Evans-Waiau then moved her car forward and stopped. 6A.App.1320. Her right turn signal was still activated. *Id.*

B. As Evans-Waiau Attempted to Turn Right, She Stopped for a Pedestrian Who Entered the Crosswalk and Tate Crashed into Her from Behind

Thereafter, Evans-Waiau started to turn right onto Linq Lane. As she began her turn, the traffic light turned green. 6A.App.01321. After the light turned green, Evans-Waiau saw a pedestrian enter the crosswalk. *Id.* She then applied her brakes and stopped. 6A.App.01321-22.

While stopped for the pedestrian, Evans-Waiau felt a strong impact when Tate crashed into her car from behind. 6A.App.01322-23.

C. Evans-Waiau Requested that Police Respond to the Collision Scene

Following the collision, Evans-Waiau was nervous and concerned for her children. 6A.App.01324. She exited her car and spoke to Tate, who had also exited her SUV. 6A.App.01325. They each asked one another if they were okay. *Id.* Although Evans-Waiau did not physically feel injured at the moment, she felt nervous. 6A.App.01326. As a result, she called the police to report the collision. *Id.* Tate also call the police. *Id.*

Evans-Waiau was told by police that she would have to wait for an officer to respond and that she could just exchange information with Tate. 6A.App.01327. However, she was uncomfortable merely exchanging insurance information without an officer present because of the extensive damage to her car. *Id.*

The officer arrived on the scene approximately one and a half to two hours later. 6A.App.01329, 01393. Evans-Waiau and Tate exchanged insurance information while the officer was present. *Id.* Afterward, Evans-Waiau took her children trick-or-treating at The Linq. *Id.*

D. Tate's Testimony Established Her Liability for the Collision

Tate traveled directly behind Evans-Waiau on Flamingo Road to proceed through Linq Lane and turn right onto Las Vegas Boulevard. Tate noticed traffic was heavy. 7A.App.01615. She also saw pedestrians on the north side of Flamingo Road near Linq Lane before the collision occurred. 7A.App.01619.

Tate admitted she never saw Evans-Waiau's vehicle until she "hit her." 7A.App.01616. Tate admitted everything leading up to the collision happened very fast because she was traveling fast before and at the time of the impact. 7A.App.01624. Tate acknowledged that Evans-Waiau did nothing to cause the crash before it happened:

> Q. Okay. And all you remember is the first -- is that -- the first time you noticed my client's vehicle, so we're clear, is immediately before the impact, correct?
>
> A. Yes.
>
> Q. Okay. So there's nothing she did before leading up to those moments, cut in front of you, or braked in the middle of the road, anything like that, to cause you any problem with your driving, correct?
>
> A. No, because I was –
>
> . . .
>
> A. -- traveling -- yes, you are correct.

. . .

> Q. And you didn't see Desire stopped there, making a turn right until at the last minute, correct?
>
> A. Correct.

7A.App.01617-18.

The evidence proved Tate caused the crash and injured both Appellants. Yet, the jury returned a verdict that did not even find Tate negligent. The conduct of Tate's counsel throughout trial played a direct and substantial role in this outcome. This was not surprising given his previous misconduct caused a mistrial.

E. Tate's Counsel Caused a Mistrial During the First Trial

During his opening statement at the first trial, Tate's counsel mentioned the investigating officer did not issue a ticket:

> Plaintiff said she's fine. Showed no signs of injury. The plaintiff, Mrs. Evans, said, I'm fine. Everybody in my car is fine. But she demanded that the police appear in case she needed it later. **The police came but they didn't write a ticket to anybody; not to the plaintiff, not to the defendant, no tickets were issued**.

1A.App.00195 (emphasis added).

Evidence of a citation is inadmissible. *Frias*, 101 Nev. at 221. Tate's counsel deliberately told the jury no citation was issued to secure

an inference that Tate was somehow not at fault. Counsel's motivation to obtain this inference was obvious given the context in which the statements were made. Tate's counsel repeatedly claimed Evans-Waiau requested police to respond to the scene for an ulterior motive before the misconduct occurred:

> The plaintiff insisted, I want the police to come anyway. I'm not hurt, my passengers are not hurt, but I want the police to come anyway in case I need it later. I want a report in case I need it later.

1A.App.00193.

Ultimately, the trial court granted Evans-Waiau's request for a mistrial.

In the second trial, Tate's counsel was not deterred from making alternative, inflammatory arguments to portray Evans-Waiau as a fraud and Tate as a sympathetic victim. These tactics fundamentally impacted the outcome and prevented Appellants from receiving a fair trial on the merits.

F. The Pertinent District Court Rulings

1. Ability to pay arguments

During closing argument, Tate's counsel argued about various scenarios to describe how long it would take a family of four to save

$1,000,000.00 and $2,000,000.00, the amounts Evans-Waiau asked the jury to award for pain and suffering. 10A.App.002363, 00268-69. He argued about how difficult it would be for anyone to save even an extra $5,000.00 a year and that it would take hundreds of years to pay such a verdict. 10A.App.02368-69.

Appellants' counsel timely objected because this argument improperly referred to one's ability to pay or satisfy a judgment. 10A.App.02364. The district court substantively overruled the objection. 10A.App.02368.

2. The jury heard Parra-Meza use numerous profanities on a video recording

On the night of the collision, Parra-Meza captured video footage at his residence of the damage to the family's only car. 8A.App.01856, 01875. Parra-Meza used multiple profanities in his description of the damage that were heard on the video footage. 8A.App.01886. Appellants' counsel objected on grounds of hearsay and relevancy. 8A.App.01839. Despite its inflammatory nature, the district court admitted the hearsay audio because it was allegedly relevant to potential bias. 8A.App.01843.

3. Jury instructions regarding working taillights

Evans-Waiau's vehicle had cosmetic darkened covers over the rear taillights at the time of this collision. 8A.App.01857. The evidence at trial established the taillights functioned properly. 8A.App.01857-58. The district court gave multiple jury instructions articulating that, under Nevada law, a driver shall not operate a vehicle without working taillights. 9A.App.02230-32. There was no evidence to establish the taillights were not visible or illuminated when the crash happened to warrant such an instruction.

4. Tate's counsel was permitted to argue Evans-Waiau's injury claim was fraudulent and her damages were built up because of attorney referrals and medical liens

Tate's counsel made arguments inviting the jury to believe Evans-Waiau's injury claim was fabricated from the very beginning. The district court allowed Tate's counsel to imply that Evans-Waiau insisted that a police officer respond to the scene in case she needed to file a lawsuit later. 10A.App.02237.

The district court allowed Tate's counsel to use evidence of medical liens, attorney referrals, and future cost letters to argue Evans-Waiau's medical care was built up by her attorney when there was no such

evidence. 10A.App.02340-41, 02344, 02347-48. This ruling contravened the district court's pre-trial order that such argument must have a basis in the evidence before made. 1A.App.00052.

5. The district court allowed Tate's retained medical expert to testify even though his testimony failed to assist the jury

Tate retained Dr. Schifini, a pain management physician, as a medical expert. At trial, Dr. Schifini testified he was unable to conclude whether Appellants were or were not injured from the crash to a reasonable degree of medical probability. 8A.App.01918-19, 9A.App.01960-61. Appellants sought to strike Dr. Schifini's testimony since it was not competent to assist the jury. 8A.App.01976. Nonetheless, the district court allowed Dr. Schifini to provide medical opinions without proper foundation. 9A.App.02189.

VI. SUMMARY OF THE ARGUMENT

From the moment trial began, Tate's counsel sought to avoid trying this case on the merits. Undeterred by a mistrial that was directly caused by his misconduct, Tate's counsel employed a myriad of improper arguments and invitations for the jury to make unreasonable inferences regarding the veracity of Evans-Waiau's injury claim. These tactics permeated the entirety of the jury trial from the opening statement,

examination of witnesses, and closing argument. The effect of the improper argument and misconduct directly undermined the integrity of all contested factual issues and, when considered together, warrant reversal.

Liability should not have been factually disputed. Tate admitted Evans-Waiau did nothing to cause or contribute to the collision. 7A.App. 01617. Tate admitted she never saw Evans-Waiau's car stopped until she hit her because she was traveling very fast. *Id.* Tate further admitted she could have avoided the crash. 7A.App.01629. The evidence established Appellants were injured from the collision. 7A.App.01531; 8A.App.01918-19. The primary dispute was the extent of Evans-Waiau's injuries. Yet, the jury inexplicably returned a general verdict in Tate's favor. 10A.App.02392. This verdict was wrong because it was influenced by Tate's counsel's deliberate misconduct and improper arguments, which were so pervasive that they cumulatively deprived Appellants of a fair trial.

From the inception of his opening statement, Tate's counsel misrepresented what the evidence in the case would show. He suggested to jurors that Evans-Waiau waited two hours for police to respond to the

scene, even though she felt no injury at the scene, in case she later decided to pursue an injury claim. 3A.App.00717. Tate's counsel incessantly argued the police did not need or want to come since there was no injury. 10A.App.02337, 02340. Yet, Tate's own expert, Dr. Wang, concluded Evans-Waiau was injured. 7A.App.01531. Thus, Tate's counsel **knew** there were injuries caused by the collision rendering her report of no injury at the scene inconsequential. He also knew Evans-Waiau was obligated to report the collision to police under Nevada law. Thus, he deliberately mislead the jury to infer Evans-Waiau had an improper motive from the beginning.

Tate's counsel's misrepresentations about the evidence persisted when he asked the jury to infer that Evans-Waiau's treatment was unnecessary simply because she treated on a "litigation lien." 3A.App.00721, 00730, 00733. Of course, her treatment on liens was irrelevant to the reasonableness and necessity of her care, which was confirmed by Tate's other retained medical expert, Dr. Schifini. 9A.App.02109-10. Tate's counsel similarly knew there was no evidence for the jury to infer Evans-Waiau's counsel directed her medical care simply because he referred her to a surgeon and requested a future cost

letter. None of Tate's retained medical experts supported this argument. 7A.App.01560, 9A.App.02108-09, 02140.

As if portraying Evans-Waiau as a liar, cheat, and a fraud was not enough, Tate's counsel argued his client would never be able to pay a substantial judgment. Tate's counsel told jurors it would take his client, or anyone, hundreds of years to save enough money to pay the verdict Evans-Waiau requested. 10A.App.02368-69. This was a golden rule violation because Tate's counsel invited jurors to consider that it would equally take them hundreds of years to save enough money to pay a judgment. He also intentionally made this argument to ensure jurors returned a verdict based on sympathy for Tate, not the evidence, which improperly encouraged jury nullification. Given the general verdict in favor of Tate, in spite of the evidence establishing her liability for the collision and that Appellants were injured as a result, the undue influence this argument had on the jury cannot be questioned.

The jury was allowed to hear an audio recording of Parra-Meza, in which he used the expletive, "fuck," six times to describe the damage to the car on the night of the collision. 10A.App.02340. While the district court allowed the audio to be played because it was allegedly relevant to

bias, Tate's counsel never introduced it for that purpose. Instead, he used the audio to further portray Evans-Waiau in a negative light to influence jurors' view of her.

Tate's counsel suggested that darkened cosmetic covers rendered the illumination of the taillights on Evans-Waiau's care unsafe and a factor in the collision. 10A.App.02329, 02339. This was flatly wrong. The unrefuted testimony from Evans-Waiau and Parra-Meza proved the taillights were fully functional when the collision happened. 6A.App.01318, 8A.App.01887. Tate also never disputed liability for the subject collision based on the taillights' lack of visibility. 7A.App.01630. Yet, the district court gave negligence *per se* instructions that the law required taillights to safely illuminate for other drivers even though the evidence established the lights worked properly. 9A.App.02230-32

The district court improperly allowed speculative expert testimony from Dr. Schifini. Dr. Schifini was unable to opine whether Appellants were injured to a reasonable degree of medical probability even though he reviewed all of their medical records. 8A.App.01918-19, 01961. The lack of certainty necessary for Dr. Schifini's testimony to reliably assist the jury rendered his testimony inadmissible.

"A jury's verdict will not be overturned by substantial evidence unless the verdict was clearly erroneous when viewed in light of all the evidence presented." *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 698 (1998). The jury's general verdict in favor of Tate was so extremely contradicted by the evidence presented. The cumulative impact from Tate's counsel's improper argument and the district court's clearly erroneous evidentiary rulings is the only logical explanation for this egregiously unfair outcome.

VII. ARGUMENT

"A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial." Nev. R. App. P. 3A(a).

A. By Allowing Tate's Counsel to Argue Tate Could Never Pay the Requested Damage Award, the Jury Rendered a Verdict Based on Sympathy, Not Evidence

"All parties are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion and prejudice." *Van Buren v. Minor*, 247 So.3d 1040, 1051 (La. Ct. App. 2018); *Jones v. State*, 101 Nev. 573, 577 (1985). An attorney may not urge jurors to look beyond the law and the relevant facts in deciding the case before them. *Lioce v. Cohen*, 124

Nev. 1, 6 (2008). Improper argument is presumed to be injurious and a basis for new trial. *Id.*; *see also, Moser v. State*, 91 Nev. 809, 814 (1975).

Counsel may not introduce into his argument to jurors statements unsupported by the evidence produced in the trial. *State of Nev. v. Kassabian*, 69 Nev. 146, 149 (1952). The purpose of closing argument is to enlighten the jury in analyzing, evaluating, and applying the evidence. *Taylor v. State*, 132 Nev. ___, 371 P.3d 1036, 1045 (2016). Closing arguments which go beyond the inferences the evidence will bear are clearly prohibited. *Wickliffe v. Sunrise Hospital, Inc.*, 104 Nev. 777, 781 (1988).

Tate's counsel developed a plan to garner sympathy from the jury regarding Tate's precarious financial condition well before making his inability to pay argument. He deliberately elicited testimony from Tate detailing her role as the sole breadwinner for her retired husband, who had a heart attack, and three daughters. 7A.App.01608. Tate further expressed the financial difficulties her family faced because she missed time from work to attend the trial. *Id.* As a result, Tate presented to the jury as someone who was in a precarious financial situation. Her counsel

purposefully portrayed Tate in this light to help garner sympathy when he argued Tate's inability to pay a judgment.

Tate's counsel argued that it would take a family hundreds of years to save enough money to satisfy the judgment amount Appellants requested. 10A.App.02368-69. This argument invited the jury to sympathize with Tate and the verdict reflected that. 10A.App.02392.

1. Ability to pay arguments are improper as a matter of law

"The law has long required that the rich man and the poor man stand before the jury as equals so that all parties receive a verdict unaffected by their economic status." *Samuels v. Torres*, 29 So. 3d 1193, 1196 (Fla. Dist. Ct. App. 2010). "A defendant's ability or inability to pay a judgment is no more relevant to the issue of liability than is the fact of insurance. A case should be tried on the merits without reference to the wealth or poverty of the parties." *White v. Piles*, 589 S.W.2d 220, 222 (Ky. Ct. App. 1979).

> Justice is to be accorded to rich and poor alike, and a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case.

Hoffman v. Brandt, 421 P.2d 425, 428 (Cal. 1966).

"Comments on the wealth of a party have **repeatedly and unequivocally been held highly prejudicial and often alone have warranted reversal**." *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1130 n.1 (10th Cir. 2009) (emphasis added).

"Litigants are entitled in an action for compensatory damages to a trial on the merits without regard to their financial status." *Seay v. Urban Medical Hospital, Inc.*, 323 S.E.2d 190, 192 (Ga. Ct. App. 1984). Compensatory damages are intended to make the plaintiff whole and are not dependent upon a defendant's ability to pay a resulting judgment. *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). "[T]he ability of a defendant to pay the necessary damages injects into the damage determination a foreign, diverting, and distracting issue which may effectuate a prejudicial result." *Id.* Plainly stated, the financial condition of the parties is irrelevant in a tort action for compensatory damages. *Rush v. Hamdy*, 627 N.E.2d 1119, 1125 (Ill. App. Ct. 1993).

This Court has previously determined it is attorney misconduct to reference a defendant's wealth during closing argument. *Canterino v. Mirage Casino-Hotel*, 117 Nev. 19, 25 (2001). Argument about a defendant's inability to pay a judgment is equally prejudicial because it

invites the jury to render a verdict based on sympathy, not the extent of damages proved by the evidence or the law. A rule prohibiting argument referencing the wealth of a defendant, but not the defendant's poverty, endorses a contradictory application of the law to the detriment of plaintiffs seeking compensatory damages. This is precisely why argument about a defendant's poverty should similarly be prohibited.

2. Tate's counsel's ability to pay argument was misconduct

"Whether an attorney's comments are misconduct is a question of law, which is reviewed de novo. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. ___, 319 P.3d 606, 611 (2014). The entire context of an attorney's argument, not isolated phrases, must be considered to truly appreciate the "nature and effect" of attorney misconduct. *Sabella v. Southern Pac. Co.*, 449 P.2d 750, 753 (Cal. 1969). On appeal, this Court's analysis focuses on the "scope, nature, and quantity of misconduct as indicators of the verdict's reliability." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 365 (2009).

To fully grasp the undue influence that resulted from the inability to pay argument made by Tate's counsel, it is imperative to consider the nature and extent of Evans-Waiau's damages. Evans-Waiau's past

medical expenses totaled $180,617.82, which included expenses resulting from a cervical spine surgery. 5A.App.01032-33, 10A.App.02309. Evans-Waiau's treating neurosurgeon, Dr. Garber, opined that she will require future cervical spine surgery due to adjacent segment disease caused by the first fusion due to her age. 5A.App.01083. The cost for Evans-Waiau's future cervical spine surgery totaled $237,540.00. 10A.App.02314. Appellants' counsel requested the jury to award Evans-Waiau $1,000,000.00 for past pain and suffering and $2,000,000.00 for future pain and suffering. 10A.App.02316, 02320.

Tate described her financial hardship with her family:

> Q. Okay. You've been here every day of this trial for about three weeks. You haven't been able to go to work?
>
> A. No. I have missed a lot of hours of work. My husband don't work, he retired because -- sorry. He had a heart attack so -- sorry.
>
> . . .
>
> A. **I'm the only one working, but it's okay. I told my husband we'll be okay.**
>
> Q. So you've missed some time from work. I know you do some volunteer work. Can you tell us about your volunteer work?
> A. I work four days a week, four 12 hour shifts.

7A.App.01658 (emphasis added).

At the inception of his closing argument, Tate's counsel referred to the substantial amount of damages for Evans-Waiau's medical care:

> What we have here today, why are we here? It's a $180,000 apology; that's why we're here. An apology. Plus more in the future, for an apology.

10A.App.02327.

Tate's counsel continuously argued Tate's apology was not worth the money damages suffered by Evans-Waiau:

> At some point, at some point should somebody feel taken advantage of? She said she was sorry after an accident and that's why she's here. **That was [a] $180,000 apology or a $3.4 million apology**.

10A.App.02361 (emphasis added).

Tate's counsel made this argument to help orchestrate a direct appeal for jurors to put themselves in Tate's position and consider what would happen when facing a financially ruinous judgment:

> The value of the dollar outside the courtroom is this, if the **average family** of four makes $50,000 a year, if the average family of four saves $50,000 a year makes $50,000 a year and let's pretend **that family** never had to pay a mortgage, never had to pay rent, never had to buy groceries, never ever [sic] to pay for a barber, never had to hail a cab, never went to the movies, never went to a restaurant, never paid a bill. **It would take that**

> **family that makes $50,000 a year**, if they never paid for any clothing they never paid for children's clothing, never paid for schoolbooks, they never made a car payment, they never paid for gas, they never paid for electricity, it would save [sic] that family of four 20 years to save $1 million.
> . . .
>
> If that **average family of four** managed at the end of the year to have $5,000 more in the bank than they have the previous year, they'd be doing -- **that's better than most of us**. That's $5,000 at the end of the year that they didn't have the previous year. **A lot of people aren't able to do that**.
>
> And if that family was able to save $5,000 a year, **how long would it take them to save $1 million? It would take them 200 years to save a million dollars. That's how much money they're asking for. 200 years. A million dollars. That's 1/3 of one element of one of the damages they're claiming this case.**
>
> **It would take them 600 years to save $3 million. That's not Monopoly money they're asking for. They're asking for real money. Real money.**

10A.App.02363-64, 02368-69 (emphasis added).

Tate's counsel carefully chose his words to directly argue that under any circumstances, Tate could never save enough money to satisfy the financially ruinous judgment Appellants asked the jury to award. As a result, jurors returned a general verdict in Tate's favor thereby directly

ignoring evidence establishing Tate's liability for the collision and that Tate's own expert concluded Evans-Waiau was injured. 10A.App.02392. Under any reasonable interpretation, this verdict was solely influenced by sympathy that was directly garnered by the ability to pay arguments.

3. Appellants' counsel timely objected to the improper ability to pay argument

In *Lioce*, 124 Nev. at 17, this Court set forth clear and specific standards regarding its analysis of alleged attorney misconduct.

> When a party objects to purported attorney misconduct but the district court overrules the objection[,] the court must consider 'whether an admonition to the jury would likely have affected the verdict' and 'whether a party's substantial rights were affected by the court's failure to sustain the objection and admonish the jury.'

Capanna v. Orth, 134 Nev. ___, 432 P.3d 726, 732 (2018).

After Tate's counsel argued it would take twenty years for a family of four earning $50,000.00 to save $1,000,000.00 if they had no bills, Appellants' counsel timely objected. 10A.App.02364. The district did not meaningfully sustain the objection. 10A.App.02368. Tate's counsel was still permitted to argue the length of time it would take someone to save enough money to satisfy the damages Appellants requested. 10A.App.02369.

The district court endorsed Tate's counsel's improper argument by ignoring its intended effect, to garner sympathy for Tate. The verdict rendered in Tate's favor was reflective of the substantial influence this improper argument carried over jurors.

4. Improper ability to pay arguments justify a new trial

Even "a single instance of misconduct can justify reversal." *Cassim v. Allstate Ins. Co.*, 94 P.3d 513, 526 (Cal. 2004). Numerous courts from around the country have concluded that argument or reference to a defendant's poverty or inability to pay a judgment, standing alone, was a basis for new trial. *See e.g.*, *Hoffman*, 421 P.2d at 430; *Samuels*, 29 So. 3d at 1197; *Rush*, 627 N.E.2d at 1125.

In *Hoffman*, the plaintiff appealed a judgment entered for the defendant stemming from an action for personal injuries arising from a car accident. 421 P.2d at 426. The defendant was a retired machinist. *Id.* During closing argument, the defendant's attorney argued the requested award would cause defendant to be placed in a home for the indigent. *Id.*

On appeal, the California Supreme Court reversed the judgment and concluded:

> The possibility, even if true, that a judgment for plaintiffs would mean that defendant would have to go to the Laguna Honda Home, had no relevance to the issues of the case, and the argument of defense counsel was clearly a transparent attempt to appeal to the sympathies of the jury on the basis of the claimed lack of wealth of the defendant. As such, it was clearly misconduct.

Id. at 428.

Hoffman is emblematic of the substantial harm that undermines the fundamental fairness of a trial when argument about a defendant's inability to pay a judgment is made. Tate's counsel's argument was no different because he directly implored the jury to accept that it was essentially impossible for anyone in Tate's position to save enough money to pay the damage award requested by Evans-Waiau. By the time jurors heard Tate's counsel's ability to pay argument, they knew Tate was the only source of income for her family and financially responsible for her ill husband and three daughters. 7A.App.01658. They also knew the toll that the trial had on her ability to earn money because she missed a lot of hours of work. *Id.* This testimony informed the jurors' mindset when they considered the ability to pay arguments. Thus, jurors were left with the impression that Tate, if faced with a ruinous judgment, would be financially incapable of supporting her family.

Jurors were lead to totally believe that an average person, like themselves and Tate, could not save an extra $5,000.00 a year. 10A.App.02368-69. They also knew that, even if Tate could save an extra $5,000.00 a year, it would still take her hundreds of years to save enough money to pay a multi-million-dollar judgment. *Id.* As a result, it is highly likely these feelings of sympathy affected the jury's verdict. No other rational reason explains why jurors reached a verdict that was so disproportionate to the evidence presented.

Appellants had no available means to neutralize the prejudice of the ability to pay arguments Tate's counsel made. For example, Appellants were precluded from introducing evidence of Tate's liability insurance. The rationale behind precluding the admission of liability insurance is that jurors may impose a substantial damage award even if the evidence does not support it. The same rationale applies to an ability to pay argument because it influences the jury to impose a reduced damages award even if the evidence proves otherwise. There is no logical reason why argument regarding a defendant's ability to pay should be treated any differently than argument or evidence regarding the defendant's insurance coverage.

5. Tate's counsel's Golden Rule argument

Attorneys may not make a golden rule argument, which is an argument asking jurors to place themselves in the position of one of the parties. *Lioce*, 124 Nev. at 22. Golden rule arguments are improper because they infect the jury's objectivity. *Id.* The arguments "urge jurors to place themselves in a party's position to allow recovery as they would want were they the party." *Shaffer v. Ward*, 510 So.2d 602, 603 (Fla. Dist. Ct. App. 1987). To be impermissible, the argument "must strike at that sensitive area of financial responsibility and hypothetically request the jury to consider how much they would wish to [pay] in a similar situation." *Id.*

Tate's counsel referred to a family of four's ability to save an extra $5,000.00 a year as doing "better than most of us." 10A.App.02368. This comment was made in the context of arguing that it would take hundreds of years for anyone to save $1,000,000.00, or $3,000,000.00, for total pain and suffering. 10A.App.02368-69. By referring to the collective "us," Tate's counsel asked jurors to place themselves in Tate's position and consider that it would take them hundreds of years to pay the millions of dollars in damages Evans-Waiau asked them to award. Jurors were

basically told they, as average people like Tate, could never save enough money to pay a substantial judgment under the exact scenario facing Tate. Asking jurors to consider that even they would not be able to save enough money to pay the substantial damages facing Tate was precisely the type of argument prohibited by this Court as golden rule argument. *Capanna*, 432 P.3d at 731-32.

6. Tate's counsel encouraged jury nullification

This Court "will not overturn a jury's verdict if the verdict is supported by substantial evidence unless [considering] all the evidence . . . , the verdict was clearly wrong." *Nev. Power Co. v. 3 Kids, LLC*, 129 Nev. 436, 442 (2013). Tate testified that she never observed Evans-Waiau's car until the moment she hit her. 7A.App.01616. While there was an alleged dispute about why Evans-Waiau was stopped, this did not excuse Tate's obligation to maintain a safe distance to stop and avoid the collision. *Posas v. Horton*, 126 Nev. 112, 117 (2010). Tate was faced with a vehicle that, in her mind, suddenly stopped. 7A.App.01625. However, this was clearly "an obstacle that normally arises in driving situations," and certainly one Tate should have anticipated. *Id.* Yet, jurors determined Tate was not negligent. 10A.App.02392. The jurors figured

that, even if Tate were at fault, she could never pay the substantial damage award Evans-Waiau requested. This attitude was caused by the ability to pay argument Tate's counsel made, which encouraged jury nullification.

> Jury nullification is the knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue . . . or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.

Capanna, 432 P.3d at 731.

Argument that requests jury nullification constitutes attorney misconduct. *Gunderson*, 130 Nev. at 78. This misconduct manifests itself by "alluding to a matter that is irrelevant given the law or unsupported by admissible evidence given the facts." *Id.*

Tate's counsel asked jurors to ignore whether the evidence and the law supported Evans-Waiau's requested damages. Instead, he advocated jurors to consider just how unrealistic it was for anyone in Tate's position, including them, to pay a multi-million-dollar verdict. 10A.App.02368-69. Jurors already knew Tate was in a precarious financial situation as she was the only financial provider for her husband and three children. 7A.App.01658. They knew she already missed significant work to attend

the trial. *Id.* They knew she would be solely financially responsible for any judgment entered. As a result, jurors were easily convinced by Tate's counsel to look beyond the evidence and consider the negative impact that a financially ruinous judgment would have on Tate. Therefore, Tate's counsel's ability to pay argument resulted in jury nullification.

B. <u>The Admission of Parra-Meza's Audio Recording</u>

During the later evening hours after the collision, Parra-Meza used his cell phone to capture video footage of the damage Tate caused to the family's only car. 8A.App01856, 01875. Understandably, Parra-Meza was upset about the damage and, as a result, stated various profanities while describing the damage. 8A.App01876. Evans-Waiau and Parra-Meza's children were heard in the background. 8A.App.01876.

The video footage was taken by Parra-Meza at his home. 8A.App.01875. During opening statement, Tate's counsel incorrectly stated Parra-Meza captured the video at the collision scene and said somebody would have to pay for the damage:

> The plaintiff's husband came to the scene and in kind of angry words examined the car and was mad saying somebody was going to have to pay for that. I don't know if that was before or after Babylyn left.

3A.App.00720.

Parra-Meza never came to the scene of the collision and never said anything about someone paying for the damage, which is yet another example of Tate's counsel misstating the evidence. 8A.App.01855-56.

Classifying Parra-Meza's words as angry set the stage for Tate's counsel to, once again, inflame the passions of the jurors to prejudice them against Evans-Waiau. Although the district court initially excluded the audio portion during Evans-Waiau's testimony, it inexplicably allowed Tate's counsel to introduce it during Parra-Meza's testimony. 6A.App.01380. The district court determined the recording was somehow relevant to bias even though property damage was not an issue. 8A.App.01846. The ruling did not address the relevancy of the audio wherein Parra-Meza used profanities. *Id.* Unsurprisingly, Tate's counsel only played the profanity-laced tirade to the jury:

> You can see the fuckin' bumper is fuckin' totaled. Look at the shape of this fuckin' big ass dent right here, too. The lights are obviously out. Light's fuckin' out here. I don't know how the fuck this happened but look, a big ass dent here, a big ass dent here, Fuck.

10A.App.02340.

This audio was played twice, once during Parra-Meza's cross-examination and again during closing argument. 8A.App.01876, 10A.App.02340. Contrary to the representations Tate's counsel made during opening statements, there was no audio recording or statement made at the scene that someone would have to pay for this damage. 8A.App.01855-56.

Notably, Tate's counsel never asked Parra-Meza about that alleged statement. 8A.App.01876-77, 01880. Thus, Tate's counsel had no intention to play the audio for the purpose of establishing alleged bias or motive to seek a personal injury claim. Rather, Tate's counsel wanted the jury to hear the audio solely to view both Evans-Waiau and Parra-Meza in a negative light. By allowing Tate's counsel to admit evidence that was clearly more prejudicial than probative, the district court erred.

1. Parra-Meza's audio recording was inadmissible hearsay

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." *Coleman v. State*, 130 Nev. 229, 235 (2014). Generally speaking, hearsay is inadmissible "unless it falls within one of the recognized exceptions to the hearsay exclusionary rule. *Franco v. State*, 109 Nev. 1229, 1236 (1993).

The recording of Parra-Meza contained out-of-court statements because they were made at his home after the collision. 8A.App.01875. Although Parra-Meza testified at trial and was subject to cross-examination, the audio recorded statements were not inconsistent with his testimony. Nev. Rev. Stat. 51.035(2)(a). They were not used to rebut any charge of "recent fabrication or improper influence or motive" against him. Nev. Rev. Stat. 51.035(2)(b). Tate's counsel never even posed a question to Parra-Meza establishing any alleged improper influence or motive in the context of the audio recording. 8A.App.01876-77, 01880.

Similarly, the audio recorded statements were hearsay because Parra-Meza was not a party to the case. Parra-Meza's prior status as a party was limited to his role as guardian to pursue his children's injury claims, which resolved before trial.

Finally, Parra-Meza's hearsay statements did not fall into any of the enumerated exceptions outlined in NRS 51.075 to 51.305, which the district court acknowledged. The district court admitted the recording as evidence of bias. However, during his cross-examination of Parra-Meza, Tate's counsel merely played the video and only asked if it was his voice on the video, if his children were in the background, and the ages of his

children at the time. 8A.App.01876-77. Even during closing argument, Tate's counsel did not suggest that Parra-Meza's anger manifested itself into any sort of relevant bias. 10A.App.02340.

2. Parra-Meza's recorded statements were irrelevant and highly inflammatory

The trial court is obligated to preclude the admission of evidence when its probative value, if any, is substantially outweighed by the danger of unfair prejudice. Nev. Rev. Stat. 48.035(1). "NRS 48.035 requires the district court to act as a gatekeeper by assessing the need for the evidence on a case-by-case basis and excluding it when the benefit it adds is substantially outweighed by the unfair harm it might cause" *Harris v. State*, 134 Nev. ___, 432 P.3d 207, 211 (2018). This Court has defined unfair prejudice as "an appeal to the emotional and sympathetic tendencies of the jury, rather than the jury's intellectual ability to evaluate evidence." *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 933 (2011).

Para-Meza's audio recording had no probative value to the issues in the case. Parra-Meza's recording did not address who caused the collision or even the injures Evans-Waiau suffered. 10A.App.02340. These were the only contested issues at trial. The utter lack of relevant

information contained in the audio recording illustrates the prejudice suffered by Evans-Waiau that resulted from its introduction.

The district court failed to appreciate the substantial prejudice the audio recording caused Evans-Waiau. During closing argument, Tate's counsel only played the portion of Parra-Meza's audio recording in which he used the "F" word six times. 10A.App.02340. This was intentionally done to portray Evans-Waiau and Parra-Meza in a negative light to the jury. The audio recording also made it appear as though Parra-Meza used profanities around his young children. 8A.App.01876. This undoubtedly angered jurors because the recording suggested Evans-Waiau allowed young children to hear Parra-Meza use profanities.

The only logical conclusion is that Tate's counsel intentionally used the audio recording to improperly assassinate the character of Evans-Waiau and Parra-Meza. This was a blatant appeal to juror prejudice that unfairly influenced the jury's determination.

C. The District Court Gave Jury Instructions that were Unsupported by the Evidence and Unduly Influenced the Jury Regarding Liability

During his opening statement, Tate's counsel referenced cosmetic darkened taillight covers installed on Evans-Waiau's car to suggest Tate

was unable to see the taillights illuminate before the crash happened. 3A.App.00716. This was one of many examples of Tate's counsel misrepresenting the evidence. Evans-Waiau and Parra-Meza both testified that the taillights were fully functional before and at the time of the collision. 6A.App.01318, 8A.App.01887. They both testified that the darkened covers did not reduce the visibility of the taillights when they were illuminated. *Id.* Tate's testimony demonstrated that the visibility of the taillights played no factor in causing the subject collision. 7A.App.01630. Yet, the district court provided two negligence *per se* jury instructions:

> There were [sic] in force at the time of the occurrence a law which reads as follows:
>
> 1. A person shall not drive, move, stop or park any vehicle, or cause or knowingly permit any vehicle to be driven, moved, stopped or parked, except for purposes of repair, on any highway if such vehicle:
>
> (a) Is in such unsafe condition as to endanger any person or property.
>
> (b) Is not equipped with lamps, reflectors, brakes, horn and other warning and signaling devices, windows, windshield, mirrors, safety glass, mufflers, fenders, and tires, and other part and equipment in the position, condition and adjustment required by the laws of this State as to such parts and equipment of a vehicle on the

> highways of the State at the time, under the conditions and for the purposes provided in such laws.
>
> . . .
>
> There were [sic] in force at the time of the occurrence in question a law which reads as follows:
>
> 1. Every motor vehicle must be equipped with two tail lamps mounted on the rear, which, when lighted, emit a red light plainly visible from a distance of 500 feet to the rear.

9A.App.02230-32.

"A party is entitled to have the jury instructed on all of her case theories **that are supported by the evidence**." *Bass-Davis v. Davis*, 122 Nev. 422, 447 (2006) (emphasis added). Jury instructions should not be given if they are inapplicable to the evidence and may mislead the jury. *Bogert v. Clawson*, 308 P.2d 880, 881 (Cal. Ct. App. 1957).

The district court's instructions regarding illuminated taillights were based on speculation and conjecture related to a cosmetic feature on the taillights of Evans-Waiau's vehicle. That cosmetic feature, which consisted of darkened covers over the taillights, played no role in the cause of the collision and there was no evidence to establish otherwise. Evans-Waiau specifically testified that she never had issues with her

taillights working properly. 6A.App.01318. Parra-Meza testified the taillight covers had no impact on the visibility of the taillights:

> Q. [Do] the rear taillights light up day or night?
>
> A. Yes.
>
> Q. Okay. You can see blinkers, right blinkers, left blinkers even at night with those things on?
>
> A. Correct.
>
> Q. Okay. In the year and a half you had the vehicle had you ever had any malfunctions with those rear lights or brake lights, taillights?
>
> A. No.
>
> . . .
>
> Q. The taillights or the black covers on those taillights, when the brakes are applied or when the blinker is on, whether it's day or night, do those light up like a big, red bulb?
>
> A. Yes.
>
> Q. Okay. So they don't affect whether or not people can actually see the lights, right?
>
> A. Correct.

8A.App.01857-58.

Tate's counsel mislead the jury that the evidence proved Tate crashed into Evans-Waiau's car because she was unable to see the taillights before the crash:

> And as you can see here, the taillights appear to be aftermarket taillight [sic] that are smoked or blacked out, making them more difficult to see.
>
> . . .
>
> And as I said, Babylyn will testify and she testified before and she told everyone on the day of the accident, I didn't see any turn signal, **I didn't see any lights**. I don't know why there was a car suddenly stopping in front of me, and I did my best to avoid it.
>
> . . .
>
> Babylyn Tate has said from the beginning, she said, I saw this car slamming to a stop in front of me. I saw no pedestrians. I could not see the brake lights.

3A.App.00714, 00716, 00743 (emphasis added).

Tate's counsel knowingly distorted the reason why Tate failed to observe Evans-Waiau's vehicle stopped before the collision occurred. During her direct examination, Tate repeatedly testified that she never noticed Evans-Waiau's vehicle until almost immediately before impact. 7A.App.01616-17. Tate never testified that she failed to avoid the

collision because Evans-Waiau's taillights were dim or difficult to see; nor could she because, by her own admission, she did not have enough time to appreciate their degree of illumination.

On cross-examination, Tate testified that she did not notice the taillights before the impact. 7A.App.01649. She never clarified that she was unable to see the taillights from any distance because they were dim or darkened when the collision occurred. *Id.* She only testified about how they appeared on a photograph:

> Q. We can see on the left side here that would be where the damage occurred, correct?
>
> A. Correct.
>
> Q. Okay. Do you notice anything about the taillights?
>
> A. It was really low.
>
> Q. Do they look darkened, blacked out?
>
> A. It's -- yeah.

7A.App.01656.

Tate was never questioned about how the taillights appeared at the time of the collision. *Id.* Yet, her counsel insisted that Tate was unable to see the taillights because they were dim. 3A.App.00743. This was a

blatant misrepresentation of the evidence that resulted in an instruction that mislead the jury.

For Tate's counsel to suggest she failed to see the taillights because they were darkened is a stark example of how he manipulated the evidence to obtain multiple instructions that implied Evans-Waiau was negligent. The district court's instructions to the jury about the taillights had no evidentiary basis.

Tate's counsel was undeterred by Tate's failure to testify that the taillights played a causal role in the subject collision. In fact, he doubled-down on this proposition by arguing the jury to conclude the taillights were not safely illuminated before the crash merely because Evans-Waiau was involved in another rear-end accident:

> Jury instruction number 35. Every motor vehicle must be equipped with tail lamps mounted on the rear, which when lighted, emit a red signal – red light, plainly visible from a distance of 500 feet to the rear. But, the evidence shows that these were smoked out.
>
> . . .
> What else have we learned? They've been involved in two accidents hit from the rear-end with those same smoked-out taillights. This one and another one.

10A.App.02329.

Tate's counsel repeated this statement, almost verbatim, again to the jury to improperly suggest that two unrelated rear-end car accidents were caused by "smoked-out taillights." 10A.App.02339. It should come as no surprise that the jury never heard any evidence that the subsequent July 2016 rear-end accident was caused by the "smoked-out" taillights. 6A.App.1398. Instead, Tate's counsel merely assumed Evans-Waiau's involvement in a second rear-end car accident must have meant the darkened taillight covers caused the subject collision to facilitate a false narrative. This was insufficient for the district court's misleading instructions.

Although Parra-Meza acknowledged it was possible brighter taillights were safer, he was not specifically referring to the subject taillights. 8A.App.01879. If the taillights were not visible, then Tate would have testified to the same. Tate's counsel simply fabricated an issue surrounding the illumination of Evans-Waiau's taillights to somehow convince the district court to instruct the jury regarding the same. This was prejudicial error.

D. Tate's Counsel was Improperly Allowed to Make Arguments Implying Evans-Waiau's Injury Claim was Fraudulent

"Jurors are confined to the facts and evidence regularly elicited in the course of the trial proceedings." *Meyer v. State*, 119 Nev. 554, 568 (2003). It is permissible for jurors to draw reasonable inference from the evidence. *Randolph v. State*, 117 Nev. 970, 984 (2001). Jurors may also rely on their common sense and experience when reaching a verdict. *Meyer*, 119 Nev. at 568.

From the inception of this trial, Tate's counsel undertook an effort to influence the jury's view that Evan-Waiau's injury claim was a sham. He invited jurors to conclude Evans-Waiau was a fraud because she asked police to respond to the scene even though she was not injured at the scene. 3A.App.00717, 00719-20. However, Tate's counsel knew all along that the defense medical expert opined that Evans-Waiau was injured. Yet, he further suggested Evans-Waiau's injury claim was bogus because she underwent treatment on "litigation liens." 10A.App.02344, 02348, 02357. Finally, he encouraged jurors to infer that Evans-Waiau's ongoing treatment and need for surgery was the product of "attorney-driven" care designed to build up her medical damages. 10A.App.02348. None of the requested inferences were supported by the evidence as even

Tate's own medical experts concluded. Therefore, the argument from Tate's counsel was improper.

1. Evans-Waiau's request for police to respond to the scene was required as a matter of law

"An attorney shall not state to the jury 'a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant.'" *Lioce*, 124 Nev. at 21. "The purpose of the opening statement is to acquaint the jury and the court with the nature of the case." *Watters v. State*, 129 Nev. 886, 890 (2013).

> An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. **To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct**.

Hopkinson v. State, 632 P.2d 79, 112 (Wy. 1981) (emphasis added).

During opening statements, Tate's counsel suggested Evans-Waiau insisted that police respond to the scene of the collision for a questionable purpose. That purpose was to obtain a police report just in case she later decided to claim that she was injured from the crash. 3A.App.00717,

00719-20. None of the evidence introduced during trial remotely supported such an implication for several reasons.

When the collision occurred, the Las Vegas Metropolitan Police Department made the administrative decision to stop responding to "less-serious crashes, meaning no one was injured or suspected of impairment."[1] Although this policy was short-lived,[2] Tate's counsel maintained Evans-Waiau acted with a deceitful purpose in requesting the police respond to the scene. 3 A.App.00717, 00719-20.

Contrary to the opening statement of Tate's counsel, no evidence was presented to question Evans-Waiau's motive behind her request for police to respond to the scene. She adequately described that her nervous feelings persisted, which is why she believed it was best for police to respond to the scene:

---

[1] Steven Slivka, *Metro stops responding to non-injury crashes on March 3*, Las Vegas Review-Journal (February 25, 2014), http://www.reviewjournal.com/news/metro-stops-responding-to-non-injury-crashes-on-March-3

[2] Wesley Juhl, *Las Vegas police once again responding to noninjury crashes*, Las Vegas Review-Journal (January 6, 2016), http://www.reviewjournal.com/local/local-las-vegas/las-vegas-police-once-again-responding-to-noninjury-crashes/

Q. All right. What happened when you called Metro? Did they say that it was -- whether they would send anybody out or not? What did they tell you initially?

A. They said that they -- that if I wanted somebody to come, I would have to wait --

Q. Okay.

A. -- to make a police report.

Q. Did they tell you that since -- nobody was hurt, to just exchange information?

A. Yes.

Q. Okay. Why didn't you want to do that? Why were you concerned?

A. I wanted to make sure that, you know, that's -- I thought that's what you're supposed to do, call the cops and exchange of information.

Q. Okay. Is that what you felt was the best thing to do?

A. Yes.

Q. Were you thinking about any kind of lawsuit or anything at that point in your –

A. No.

Q. Were you worried about your car?

A. Yes.

Q. Was there damage to your car?

A. Yes.

6A.App.01326-27.

Tate provided no testimony to remotely dispute the reason why Evans-Waiau wanted a traffic accident report. 7A.App.01665. Thus, there was no evidence from which a jury could infer at all that Evans-Waiau wanted police to come to the scene solely for her to later fabricate an injury claim. In fact, Evans-Waiau was legally obligated to contact the police and wait until an officer responded to the scene, which should have automatically precluded this argument from Tate's counsel.

Under Nevada law, a driver involved in a crash "resulting in injury or death to any person or damage to any vehicle or other property which is driven or attended by any person" has a duty to give information and render aid. Nev. Rev. Stat. 484E.030(1). To satisfy this duty, a driver must contact the police:

> 2. If no police officer is present, the driver of any vehicle involved in such crash after fulfilling all other requirements of subsection 1 and NRS 484E.010, insofar as possible on his or her part to be performed, **shall forthwith report such crash to the nearest office of a police authority or of the Nevada Highway Patrol**

> **and submit thereto the information specified in subsection 1**.

Nev. Rev. Stat. 484E.030(2) (emphasis added).

The Nevada Department of Motor Vehicles similarly specified that a driver in a car crash of any type should notify the police:

> **What to do in a Crash**
>
> - Stop.
> - Get medical help for the injured.
> - Warn traffic.
> - Notify law enforcement

1A.App.00242.

Evans-Waiau was required, as a matter of law, to report the collision to law enforcement. The statute was clearly authored to make sure drivers stay at the collision scene to safely and completely exchange the necessary information before leaving the scene. Even if Evans-Waiau was not injured, her car still suffered thousands of dollars in damage for which she may have needed to a report to pursue a property damage claim with Tate's insurer. The intent of this law validated Evans-Waiau's concerns, which is why there was nothing inherently wrong with calling the police to report the collision and waiting for an officer to arrive at the

scene. By allowing Tate's counsel to suggest the evidence supported an inference that Evans-Waiau insisted police respond to the scene for a fraudulent purpose, the district court effectively penalized Evans-Waiau for following the law. This was clear error.

The evidence did not invite the jury to reasonably infer that Evans-Waiau requested police respond to the scene just in case she wanted to later make an injury claim. Yet, Tate's counsel asked the jury to reach this conclusion during closing argument:

> The Plaintiff said she was fine; showed no signs of injury. The Plaintiff told her, I'm fine, I don't want any help, everybody in my car is fine, we're going trick-or-treating, but I'm demanding that the police arrive, because I want a report in case I need it later. Why? She admitted on the stand, she was told by the police, we're not coming, nobody was injured, you don't need a report, **we don't want to come**; there's no reason to come if nobody was injured.
>
> And she said, oh, no, I'll wait as long as it takes. And she waited how long? Two hours with her kids strapped in car seats in the back, who were not hurt. Nobody -- nobody was claiming to be hurt at this point. But wanted to wait for two hours with her kids strapped in the car seats in the back, to wait to get a piece of paper from a cop. Two hours.
>
> . . .
>
> **At this point, the case ought to be over, right?**

10A.App.02337 (emphasis added).

Attorneys have long been cautioned to avoid resorting to "inflammatory, prejudicial argument." *City of Orlando v. Pineiro*, 66 So. 3d 1064, 1069 (Fla. Dist. Ct. App. 2011). Attorneys are obligated to limit their arguments to those that have a factual basis in the evidence. *Kassabian*, 69 Nev. at 149. Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response . . . rather than the logical analysis of the evidence in light of the applicable law." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985).

Tate's counsel ignored the evidence in the case by advocating the jury to infer Evans-Waiau wanted police to arrive so that she could obtain a report just in case she later decided to claim injury. He even went so far as to repeatedly say the police did not "want" to come. 10A.App.02337 This was demonstrably false as there was no testimony establishing the police told Evans-Waiau nobody wanted to respond to the scene. He simply leveraged the administrative policy in force at the time to improperly question Evans-Waiau's motives.

The purpose of this argument was to, once again, influence the jury to view Evans-Waiau as a fraud. Of course, the evidence completely contradicted such argument in a myriad of ways. Specifically, a police report was never issued. This undermines any supposed inference that Evans-Waiau wanted police to respond so that she could rely on a report to make an injury claim.

Moreover, there was no dispute that Evans-Waiau was actually injured as a result of the subject collision. Tate's retained medical expert, Dr. Wang, opined Evans-Waiau was injured as a result of the collision. 7A.App.01531. The mere fact that Evans-Waiau felt no injury at the collision scene was similarly insufficient to invite an inference that Evans-Waiau always intended to fabricate in injury claim. This suggestion was directly debunked by Tate's other retained medical expert, Dr. Schifini:

> Q. No matter where you're injured in the body whether it be a disc or some other body part, the body's going to go through this inflammatory process that it's going to take time for the body to start to heal and the pain to develop, correct?
>
> A. Yes.

> Q. **That's often times why it takes hours or even a day or two for someone to start to feel symptoms, correct?**
>
> A. **Yes.**
>
> Q. **So when Desire started reporting symptoms the next morning following this motor vehicle collision, that's within the time period where people can start to develop symptoms and have problems, right?**
>
> A. **Yes, it is.**

8A.App.01971-72 (emphasis added).

Tate's counsel encouraged the jury to question Evans-Waiau's credibility based on his personal opinion that Evans-Waiau was not to be trusted merely because she wanted police to respond to the scene. It was his persistent improper argument, not the evidence, that prejudiced the jury against Evans-Waiau. This prejudice caused a verdict that was tainted with distrust of Evans-Waiau's injury claim. *Lioce*, 124 Nev. at 21-22. Ironically, Tate's counsel, in the first trial, relied on the officer's response to the scene to impermissibly imply his client was not at fault because a citation was not issued. 1A.App.00195. Once that argument caused a mistrial, he decided to use the police response to attack Evans-Waiau's motivation. This underscores the deliberate attempts by Tate's

counsel to infect jurors' objective view of the evidence by inviting them to base their verdict on his distrust of Evans-Waiau.

2. Tate's counsel requested jurors to infer Evans-Waiau's medical treatment was questionable because she treated on liens

A verdict must be supported by substantial evidence and cannot be based on speculation or conjecture. *Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, 346 (5th Cir. 1985). A jury's ability "to draw inferences from the evidence does not extend so far as to allow a wholly unreasonable inference or one which amounts to mere speculation and conjecture." *Id.*

Argument that goes beyond the inferences the evidence in the case will bear constitutes reversible error. *Wickliffe*, 104 Nev. at 781 (1988); *Kassabian*, 69 Nev. at 151-52. On numerous occasions during trial, Tate's counsel referred to Evans-Waiau's treatment on "litigation liens" to invite the jury to question the necessity of her care. 3A.App.00721, 00730, 00733, 10A.App.02344, 02348, 02357. No evidence was presented to prove a connection between Evans-Waiau's treatment on a lien and the reasonableness or necessity of the treatment she received. Medical liens

have not even been found relevant for this purpose under Nevada law. As a result, this argument from Tate's counsel was improper.

"[A] medical lien refers to an oral or written promise to pay the medical provider from the plaintiff/patient's personal injury recovery." *Khoury v. Seastrand*, 132 Nev. ___, 377 P.3d 81, 94 (2016). Evidence of medical liens is not *per se* admissible to show bias. *Id.* This Court recently acknowledged that the degree of relevance of medical liens to show bias is "limited, particularly when the medical liens indicate that the plaintiff will still be responsible for his or her medical bills if she does not obtain a favorable judgment." *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. ___, 396 P.3d 783, 790-91 (2017). This Court has never concluded liens are relevant to establish care was medically unnecessary.

Tate's counsel repeatedly characterized the liens upon which Evans-Waiau received treatment as "litigation liens" or "lawsuit liens" to impugn the necessity of her care. 3A.App.00721, 00730, 00733, 10A.App.02344, 02348, 02357. This characterization was misleading as much of her treatment on medical liens began before she even filed her lawsuit on May 10, 2016. Evans-Waiau's treatment with Align Chiropractic began on November 2, 2015, over six months before she filed

her lawsuit. 6A.App.01331. Evans-Waiau's treatment with her pain management physician, Hans Jorg Rosler, M.D., began on December 16, 2015, nearly five months before she filed her lawsuit. 4A.App.00762.

Critically, Tate's retained orthopedic surgeon, Dr. Wang, causally related a portion of the treatment Evans-Waiau received on medical liens to the subject collision:

> Q. All right. Now, you believe that all of the care that [Evans-Waiau] received through February 2016, that was reasonable and appropriate; correct?
>
> A. Yes.
>
> Q. You thought the chiropractic care was reasonable and appropriate, didn't you?
>
> A. Yes.
>
> Q. You thought the referral for an MRI was reasonable and appropriate; correct?
>
> A. Yes.
>
> . . .
>
> Q. It was also reasonable for the chiropractor who suspected a possible disc issue to refer Desire to the pain management physician, Dr. Rosler, for an evaluation; correct?
>
> A. Yes.

. . .

> Q. So when Desire agreed to undergo the left-sided selective nerve root block at the recommendation of Dr. Rosler, that was reasonable for her to do that; right?
>
> A. Well, I think it's reasonable for him to recommend it. I wouldn't recommend the injection, but I don't fault them for doing that.
>
> . . .
>
> Q. But you agree that Dr. Rosler's recommendation, that was itself reasonable?
>
> A. Yes.

7A.App.1531-32.

Dr. Schifini, Tate's other retained expert, similarly opined that a portion of the medical treatment Evans-Waiau underwent on medical liens was reasonable and necessary.[3] 8A.App.1965-66. Neither expert testified that any of Evans-Waiau's treatment was unreasonable because she treated on medical liens, including her cervical spine surgery. 7A.App.01559-60, 9A.App.02109-10. Thus, Evans-Waiau's decision to treat on a lien did not undermine the reasonableness or necessity of her

[3] This testimony is referenced to illustrate that medical liens were irrelevant as to the necessity of care. Appellants do not concede Dr. Schifini's opinions were admissible under Nevada law.

medical care. Yet, Tate's counsel planted the inaccurate idea that both the lawsuit and the liens influenced Evans-Waiau's medical providers' treatment recommendations to undermine the necessity of her care.

Tate's counsel used the phrase "litigation lien" to mislead the jury that Evans-Waiau's treating neurosurgeon, Yevgeniy Khavkin, M.D., treated her on a lien **solely** to recommend that she undergo surgery:

> So Dr. Khavkin saw this plaintiff only one time; one time.
>
> . . .
>
> Signed her up on a litigation [lien] and billed her to write a letter saying she needed a really expensive surgery at two levels and it should all be billed to this lawsuit, signed her up on a lien.

3A.App.00733-34.

Contrary to this assertion, Dr. Khavkin did not recommend Evans-Waiau to undergo an "expensive" cervical spine surgery because she signed a medical lien and filed a lawsuit. Rather, Dr. Khavkin considered her subjective pain complaints, performed a physical evaluation, and reviewed her medical records from Dr. Rosler. 5A.App.01186. This formed the basis for Dr. Khavkin's recommendation that Evans-Waiau undergo a cervical fusion surgery at C5-6 and C6-7. *Id.*

Tate's use of the phrase "litigation liens" in this context impermissibly suggested that Dr. Khavkin was encouraged to build up Evans-Waiau's medical care based on something other than medical necessity. No evidence was presented to support this flimsy argument. Evans-Waiau even obtained a second opinion for surgery from another neurosurgeon, Dr. Garber. 6A.App.01349. Dr. Garber, who did not treat Evans-Waiau on a lien, recommended she undergo the exact same cervical fusion surgery that Dr. Khavkin recommended, albeit at the C6-7 level only. 5A.App.1025-26, 1039.

On September 1, 2016, Dr. Garber performed the recommended cervical fusion surgery. 5A.App.1032. Evans-Waiau's ongoing cervical spine pain and related symptoms substantially improved afterward. 6A.App.01359. Tate's retained orthopedic spine surgeon, Dr. Wang, was not critical of Dr. Garber's surgical recommendation. 7A.App.1559-60. He just did not agree that the pathology was present to justify the surgery. *Id.* This opinion, however, in no way suggested or implied that Dr. Khavkin originally recommended a medically unnecessary surgery to build up Evans-Waiau's medical bills simply because she treated on a

lien. Even Dr. Schifini took no issue with Evans-Waiau's treatment on a lien:

> Q. [I]n your practice, you, at times, treat patients on a lien basis, right?
>
> A. That's correct.
>
> Q. Right. And you expect to be paid, regardless of what happens, don't you?
>
> A. Correct.
>
> Q. Right. And there's nothing wrong with, at times, treating patients on a lien basis, right?
>
> A. No.
>
> Q. All right. Nothing illegal about it?
>
> A. No.
>
> Q. Okay. And, you're not critical of my client if they treated in part, if some of it's on a lien; some of it's not on a lien, right?
>
> A. That's correct.

9A.App.02109-10.

The evidence presented in this case did not justify argument requesting jurors to infer Evans-Waiau received medically unnecessary care merely because she treated on a lien. Such argument must be based on admissible medical expert testimony because it insinuates the

treating physician had no medical reason to administer the care. *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 529 (2011). Tate deliberately argued for the jury to draw that inference even though he knew it was unsupported by the evidence. This argument improperly invited the jury to question the necessity of Evans-Waiau's care based on speculation.

3. Requesting a surgical cost letter did not support "attorney-driven" arguments

Before trial commenced, the district court entered an order precluding any "statement, argument or reference that Plaintiffs' injury claims or damages are "attorney-driven" or that this is a "medical buildup case," without a supporting factual basis. 1A.App.00052. "Medical buildup concerns a party seek[ing] necessary but costly medical treatment that they would otherwise forego in order to generate a larger award. *Rish v. Simao*, 132 Nev. ___, 368 P.3d 1203, 1210 n.5 (2016). A motion that requests to preclude a defendant from suggesting a case is attorney-driven or a medical buildup case relates to the exclusion of "evidence or statement implying that medical treatment was sought as a result of litigation – or at the suggestion of Plaintiff's attorneys." *Id.*

Tate's counsel argued that it was reasonable to infer Evans-Waiau was recommended for surgery by suggesting Dr. Khavkin drafted a future cost letter recommending surgery because Evans-Waiau's counsel requested it: [4]

> [Dr. Khavkin] signed her up on a litigation lien that day and wrote a letter to her attorney saying she needed an expensive surgery based on what she told him and that it's all Babylyn Tate's fault.
>
> . . .
>
> [Dr. Khavkin] didn't investigate what she was saying was true. He wrote a cause letter for attorneys.

10A.App.02348.

Tate's counsel initially attempted to elicit testimony from Dr. Schifini to suggest Dr. Khavkin only saw Evans-Waiau to write a surgical cost letter. 8A.App.01932-33. Evans-Waiau's counsel objected to the question and the district court sustained that objection. 8A.App.01934.

On cross-examination, Dr. Schifini confirmed there was nothing questionable about authoring or requesting a cost letter:

---

[4] Lawyers need cost letters to disclose a proper computation of damages under NRCP 16.1

> Q. All right. Now, [Dr. Khavkin] authored a letter, kind of outlining what the cost of that might be if she were to have the surgery in the future, right?
>
> A. That's correct.
>
> Q. You author cost letters in your practice, don't you?
>
> A. I do.
>
> Q. And, there's nothing inappropriate or wrong with that, correct?
>
> A. No.
>
> . . .
>
> Q. Mr. Winner said to you that Desire was referred to Dr. Khavkin for a surgical cost letter. That's not accurate, is it? He was referred -- she is referred to a neurosurgical consultation, correct?
>
> A. I -- I think that's more appropriate

9A.App.02108-09, 02140.

No evidence was presented that Evans-Waiau's attorney requested the surgery Dr. Khavkin should recommend and to causally relate to the subject collision merely because he asked for a future cost letter. Future cost letters are a normal part of the injury claim process when an injury victim requires surgery or other future care. Yet, Tate's counsel specifically instructed jurors that Dr. Khavkin wrote a "cause letter for

attorneys." 10A.App.02348. This choice of words inaccurately suggested that surgery was recommended and deemed causally related to the subject collision because Evans-Waiau's counsel asked for it. The jury was lead to believe that Evans-Waiau's counsel directed her care simply because he asked for a future cost letter. Not even Tate's retained experts believed this was true. 7A.App.01551, 9A.App.02108-09. Tate's counsel effectively advocated that the jury ignore the medical evidence and, instead, believe there was a conspiracy between Evans-Waiau's attorney and her surgeon. This argument was reckless and improper.

Tate's counsel continued to advocate that Evans-Waiau's attorney played a role in Evans-Waiau's surgical recommendation because he referred her to Dr. Garber:

> Jason Garber on referral from Paul Powell. And you heard him on the stand saying well, I was referred from Dr. Rosler. So didn't you ask the patient who referred you? Well, I'm not sure. You know, we showed him his own records. She was referred by Paul Powell and he gets referrals from Paul Powell.
>
> . . .
>
> You have here July 12, 2016 she told Dr. Garber, I've had all these complaints down both arms, down both legs, my back, my mid-back, my neck. I've had all these symptoms since October 30,

> 2015. That's false. . . . Why would she say that to him? So that he could write a letter saying she needed surgery and blame it on her. Blame it on her. **That's why Paul Powell made the referral.**
>
> . . .
>
> And she went to a series of other doctors including a surgeon her lawyer **made her go see who told him chiropractic failed. Give me a surgical cost letter.**

10A.App.02350, 02352 (emphasis added).

Tate's counsel was grossly inaccurate with his description of the circumstances surrounding Evans-Waiau's referral to Dr. Garber. Evans-Waiau's counsel did not make her go treat with Dr. Garber. He merely referred her for a second opinion. 4A.App.01000, 6A.App.01349. The stark distinction between these two basic concepts was lost upon Tate's counsel, who continuously suggested that the referral, standing alone, was designed to build up Evans-Waiau's damages. *Rish*, 368 P.3d at 1210 n.5. This was not supported by the evidence as Evans-Waiau was already recommended for surgery before she saw Dr. Garber. 5A.App.01014. Furthermore, Dr. Garber had no financial stake in the outcome of the case because he did not administer care on a lien. 5A.App.1032. There was equally no evidence presented upon which the

jury could infer that Evans-Waiau's counsel asked Dr. Garber to recommend future surgery and to "blame it on Tate." 10A.App.2350. Thus, Tate's counsel repeatedly violated the district court's order because he had no factual basis to support his argument that the referral to Dr. Garber evidenced medical buildup. *Rish*, 368 P.3d at 1210 n.5

There was nothing questionable about Evans-Waiau's referral to Dr. Garber from her attorney. None of Tate's retained medical experts testified that Evans-Waiau's treating physicians administered unnecessary care solely to build up her case medically. 6A.App.01422-7A.App.1568, 8A.App.01902-9A.App02143. None of Tate's retained medical experts testified that Evans-Waiau's medical treatment fell below the standard of care. *Id.* Dr. Schifini himself admitted that an attorney referral was inconsequential in relation to evaluating the reasonableness of treatment:

> Q. Right, so you don't have a problem if a lawyer sends you a patient, right?
>
> A. No.
>
> Q. So while there's this discussion about Mr. Powell being referred, there's not a problem with because hey, I think this physical therapy group, chiropractic facility provides good care, sending

> people. There's nothing wrong with that. You're not critical of that, are you?
>
> A. No.
>
> . . .
>
> Q. Okay. So that issue has no effect, right? Whether it's referred – how they get there on the care, as long as the care is appropriate that's what your focus is, right?
>
> A. Yes.
>
> Q. All right. Now if a client doesn't – or a patient doesn't necessarily know where to go or to turn a lawyer may be able to give them the name of a doctor to at least start some medical care to start the process, right?
>
> A. It's reasonable, yes.

8A.App.01957-58.

Evans-Waiau's referral to Dr. Garber or any of her providers was insignificant to the jury's determination of causation and damages. Reference to the same by Tate's counsel invited the jury to believe Evans-Waiau's recommended care was driven by her attorney without any basis. The evidence actually proved there was no link between the referral from Evans-Waiau's attorney and her need for care. Evans-Waiau was

irreparably harmed because the jury rendered its verdict based on speculation. *Gramanz v. T-Shirts & Souvenirs*, 111 Nev. 478, 485 (1995).

E. The District Court Abused its Discretion by Allowing Dr. Schifini to Testify Because He Provided No Opinions to Assist the Jury

One of the touchstones governing the admissibility of expert testimony in Nevada is that the testimony must assist the jury. *Hallmark v. Eldridge*, 124 Nev. 492, 498 (2008). At trial, Tate's retained expert, Dr. Schifini, admitted he was unable to offer a medical causation opinion:

> Q. You're saying you don't have an opinion that Desire Evans was hurt or not hurt. You're giving no opinion on that, right?
>
> A. But I gave an opinion that said if we **assume** she was hurt, but I -- but there's **not an opinion to a reasonable degree of medical probability which is required in the court**.
>
> Q. So then you have no opinion that Desire Evans was hurt to a reasonable degree of medical probability in this crash, correct?
>
> A. Correct.
>
> Q. You have no opinion that Desire Evans was not hurt to a reasonable degree of medical probability in this case, correct?
>
> A. I think by default, yes. That's true.

. . .

> Q. And so, even though they're -- with regard to Guadalupe for a moment.
>
> A. Yes.
>
> Q. I think if I read your report correctly, now if you assume -- you have no opinion whether she was injured or not injured, right?
>
> A. Correct.

8A.App.01960-61, 9A.App.2107 (emphasis added).

Dr. Schifini was unable to determine, with any degree of reliability, whether Appellants were or were not injured. In turn, he was unable to opine about the relatedness of their care. As such, Dr. Schifini failed to provide opinions with the degree of assuredness necessary to assist the jury.

1. Medical expert testimony must have a reliable and particularized factual foundation to assist the jury

This Court formally recognizes three "overarching requirements" that form the "blueprint for admissibility" of expert testimony and opinions. *Higgs v. State*, 126 Nev. 1, 16-17 (2010). One requirement is that "his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue." *Hallmark*, 124

Nev. at 498. An expert's testimony will assist the jury "only when it is relevant and the product of reliable methodology." *Id.* at 500. An expert opinion is based on a reliable methodology if the opinion is:

> (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) **based more on particularized facts rather than assumption, conjecture or generalization**.

Id. at 500-501 (emphasis added).

The proponent of expert testimony bears the burden of proof to show the expert's testimony is reliable. *State v. Bremer*, 113 Nev. 805, 808-09 (1997). This Court reviews a district court's decision to permit expert testimony for an abuse of discretion. *Krause Inc. v. Little*, 117 Nev. 929, 933-34 (2001).

2. Dr. Schifini's inability to offer reliable medical causation opinions resulted in testimony that failed to assist the jury

"To assist the trier of fact, medical expert testimony regarding causation must be made to a reasonable degree of medical probability." *Williams*, 127 Nev. at 529. This level of specificity ensures jurors have a reliable evidentiary basis to make an informed decision:

> If [a] medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which a jury can make a decision with sufficient certainty so as to make a legal judgment.

Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 158 (2005).

Dr. Schifini reviewed "boxes and boxes" of medical records, imaging studies, deposition testimony, and the reports from Evans-Waiau's treating physicians presumably to help him formulate opinions. 8A.App.01918. Although the medical records documented their respective pain complaints and treatment, Dr. Schifini was still unable to conclude whether or not the subject collision caused them injuries. 8A.App.01960-61, 9A.App.2107. Therefore, Dr. Schifini's testimony lacked sufficient certainty necessary to provide competent assistance for jurors to consider the medical evidence. *Morsicato*, 121 Nev. at 158; *see also, Krause*, 117 Nev. at 939. (expert testimony is not needed to understand the severity of an injury only when the injury is readily observable). His testimony invited the jury to speculate that the medical records were insufficient to establish whether the subject collision caused injuries to Appellants. This was an abuse of discretion because jurors

were permitted to rely on a Dr. Schifini's assumptions to decide the principal issue of causation instead of a sufficiently certain opinion.

Dr. Schifini was similarly unable to provide reliable testimony regarding the reasonableness and necessity of Appellants' care. A medical expert cannot offer an opinion about what treatment is reasonable if he is unable to even determine with any level of certainty what injury was actually suffered. Both opinions are dependent upon each other because the extent of an injury dictates the necessity of treatment. Dr. Schifini only assumed the subject collision caused Appellants' injuries and, as a result, arbitrarily decided what treatment was reasonable and necessary for them. 8A.App.01930. Dr. Schifini's testimony simply reinforced that the medical records were insufficient to establish Appellants were injured and required treatment without any basis.

The assistance requirement is designed to ensure jurors are aided to evaluate evidence that falls outside of their knowledge. This is especially important regarding contested issues of medical causation as jurors must depend on experts to evaluate the evidence. Dr. Schifini's testimony failed to satisfy the assistance requirement under *Hallmark*

and invited the jury to speculate about medical causation. *Gramanz*, 111 Nev. at 485. Therefore, the district court abused its discretion.

3. Dr. Schifini failed to dispute Appellants' medical causation theory

Once a plaintiff has made a prime facie showing of medical causation, a defendant may address the plaintiff's case in three ways: (1) cross-examine the plaintiff's medical experts, (2) contradict the plaintiff's medical expert with his own expert, and/or (3) proposed an independent alternative causation theory. *Williams*, 127 Nev. at 530. "If medical expert testimony is offered to establish causation, it must be stated to a reasonable degree of medical probability. *Id.* "However, if expert testimony is offered to contradict the party opponent's expert testimony, the offered testimony must only be competent and supported by relevance evidence or research." *FGA, Inc. v. Giglio*, 128 Nev. 271, 284 (2012). For defense expert testimony to properly contradict the plaintiff expert's testimony, the defense expert "**must include the plaintiff's causation theory in his analysis**." *Id.* (emphasis added). "Otherwise, the testimony would be incompetent not only because it lacks the degree of probability necessary for admissibility but also because it does nothing to controvert the [plaintiff's causation theory]." *Id.*

Dr. Schifini's testimony demonstrated his failure to rely upon the particularized facts to offer valid medical causation opinions. Dr. Schifini was equally unable to provide competent testimony to contradict Appellants' treating physicians' causation opinions because none of his testimony was based on medical evidence or research. Rather, it was based on his assumption that Appellants were injured from the crash. 8A.App.01960-61, 9A.App.2107. Dr. Schifini lacked a sufficient evidentiary basis to consider Appellants' medical causation theory at all. This rendered any alleged analysis used to substantiate his so-called medical opinions deficient. *FGA, Inc.*, 128 Nev. at 284. A medical expert must acknowledge the potentiality of various causes, including those presented by the injured plaintiff, to effectively controvert "a key element of the plaintiff's prime facie case." *Williams*, 127 Nev. at 530. By failing to rely on the particularized facts, Dr. Schifini did not provide competent testimony to contradict Appellants' causation theory under *Williams* and *FGA, Inc.*

VIII. CONCLUSION

For the reasons set forth above, Appellants respectfully request this Court to reverse the district court's judgment and remand this matter for a new trial on all issues.

DATED this 17th day of April, 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). This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 Business, in 14-point, double-spaced Century Schoolbook font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,996 words.

3. Finally, I hereby certify that I have read this appellate 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.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 17th day of April, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Supreme Court of Nevada on the 17th day of April, 2020. Electronic service of the foregoing document entitled **APPELLANTS' OPENING BRIEF** shall be made in accordance with the Master Service List as follows:

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