Case No. 79424

In the Supreme Court of Nevada

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

Appellants,

vs.

BABYLYN TATE, individually,

Respondent.

APPEAL

from the Eight Judicial District Court, Clark County, Nevada
The Honorable PATRICK FLANAGAN, District Judge
District Court Case No. A-16-736457-C

RESPONDENT'S APPENDIX
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DISTRICT COURT

CLARK COUNTY, NEVADA

DESIRE EVANS-WAIAU, INDIVIDUALLY; GUADALUPE PARRA-MENDEZ, INDIVIDUALLY; JORGE PARRA-MEZA, AS GUARDIAN FOR MYRA PARRA, A MINOR; JORGE PARRA-MEZA, AS GUARDIAN FOR AALIYAH PARRA, A MINOR; AND JORGE PARRA-MEZA, AS GUARDIAN FOR SIENNA PARRA, A MINOR,

Plaintiffs,

vs.

BABYLYN TATE, INDIVIDUALLY, DOES I-X, AND ROE CORPORATIONS I-X, INCLUSIVE,

Defendants.

Case No. A-16-736457-C

Dept. No. 17

TRIAL BRIEF REGARDING DEFENDANT'S RIGHT TO CONTEST PLAINTIFFS' *PRIMA FACIE* SHOWING OF CAUSATION AND DAMAGES

AND

OFFER OF PROOF

Case Number: A-16-736457-C

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Defendant Babylyn Tate submits the following points and authorities that will be relevant to various aspects of her right to fully contest Plaintiffs' *prima facie* showing of causation and damages. Defendant also anticipates making an oral motion for the Court to reconsider a few pre-trial rulings (discussed below) that have not yet been distilled to orders, at some point before opening statements. *See* NRCP 7(b)(1)(A) ("A request for a court order must be made by motion . . . in writing unless made during a hearing or trial"). Although undersigned counsel disagrees with several of this Court's rulings, we do not seek reconsideration of every error that may be raised on appeal but rather point the Court to a couple *in limine* rulings that are clearly erroneous, highly prejudicial and correctable:

(1) The Court should reconsider its granting of **Plaintiffs' Motion in Limine No. 13** ("to Exclude Argument, Reference, or Expert Opinion that Plaintiff['s] Neck Pain was Symptomatic During the Immediate Years Prior to and Immediately Before the Subject Collision"). The ruling impermissibly operates to shift the burden of proof and takes essential determinations of credibility from the jury—determinations which Defendant is entitled to have the jury make.[1]

As an **offer of proof**, to resolve any reasonable concern about foundation (although it should not be necessary), Defendant attaches declarations from its medical experts, Dr. Jeffrey Wang and Dr. Joseph Schifini, to expound in detail how Plaintiff Evans-Waiau's other accidents fit into their analysis. (*See* "Declaration of Joseph J. Schifini, M.D.," attached as Exhibit A; *and* "Declaration of Jeffrey Wang, M.D.," attached as Exhibit B.)

[1] For related reasons, Defendant may need request that the Court clarify its ruling granting of **Plaintiffs' Motion in Limine No. 14** ("to Preclude Defendant from Characterizing Plaintiff Desire Evans-Waiau's Neck Pain Following the Subsequent July 10, 2016 Motor Vehicle Accident as Anything Other than a Temporary Exacerbation").

(2) The Court should reconsider the ruling granting **Plaintiff's Motion in Limine No. 15** ("to Exclude Irrelevant and/or Unduly Prejudicial Information"), which excludes evidence of representations by Plaintiff Evans-Waiau (or her agent) during other lawsuits, as well as both plaintiffs' employment history. The evidence at issue is admissible as a matter of law. And it is prejudicial error to exclude it.

POINTS AND AUTHORITIES

I.

IT IS REVERSIBLE ERROR TO EXCLUDE EVIDENCE OF PLAINTIFF'S 2010 PRIOR MOTOR-VEHICLE ACCIDENT

It appears the Court may have lost sight of the burden of proof in its decision to exclude the facts of Plaintiff Evans-Waiau's prior 2010 accident, likely misinterpreted or misapplied the Nevada cases regarding medical causation, and perhaps misunderstood the particular relevancy of the evidence. (That flawed rationale also underlies the Court's rulings that limit discussion of Evans-Waiau's subsequent 2016 accident, which may render those rulings erroneous, as well, depending on how the Court eventually applies them.)

A. The 2010 Accident and the Treatment of Evans-Waiau's Cervical Spine that Followed is Relevant to Causation, Credibility, and the Interpretation of Recent Symptoms

1. The Court Must Remember the Burden of Proof When Making Pre-trial Evidentiary Rulings

Unfortunately, it is a common mistake for judges to lose sight of the burden of proof when assessing the relevancy or foundation for evidence or expert opinion that a *defendant* seeks to introduce. Last year, in *Mathews v. State of Nevada*, the Supreme Court reversed a judgment and remanded for a new trial where the district court had erroneously excluded a defense expert on a rationale that seemed to imply an assumption that the prosecutor's theory was correct. 134 Nev. Adv. Op. 83, 424 P.3d 634, 638 (2018). Assessing the

sufficiency of foundation of admission of evidence must be done in light of the burden of proof:

> The "assistance requirement" [or other foundation for admissibility] must be assessed in the context of what the burden of proof is and who bears that burden.
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> * * *
>
> In concluding that [the defense expert's] testimony lacked an adequate factual foundation, the district court presumed that the State's experts were correct and consequently placed the burden on [the defendant] to prove beyond a reasonable doubt that [the injury] occurred accidentally. But this was not [the defendant's] burden of proof to bear. *Id.*

In other words, trial courts must view the admissibility of defense testimony and evidence in light of plaintiff's burden of proof, and maintain neutrality regarding the truth of plaintiff's allegations regarding mechanisms of injury and causation.

Although the putative expert opinion in *Matthews* did not involve medical causation, (as discussed further below) the principal applies just the same to the admission of facts in the context of medical causation.[2] And it applies to defense medical-causation opinions, which may unabashedly propound merely possible causes to reveal the dogmatism of plaintiff's experts who feign confidence about the purported cause of a injury/conditions "to a reasonable degree of medical probability." *See, e.g., Leavitt v. Siems*, 130 Nev. Adv. Op. 54, 330 P.3d 1, 6 (2014) (the expert "testified that it was a possibility that use of

[2] *See, generally, Rish v. Simao*, 132 Nev. Adv. Op. 17, 368 P.3d 1203, 1209 (2016) (jury must hear facts because "the nature of the impact is a factor for the trier of fact to consider in determining the causation of the injuries that form the basis of the claim," and because the burden of proof lies with plaintiff, the jury may always disregard plaintiff's experts); *Fox v. Cusick*, 191 Nev. 218, 221, 533 P.2d 466, 468 (1975); (that proximate cause is generally an issue of fact, the Court held that "[w]ith regard to the matter of injury and damage, it was within the province of the jury to decide that an accident occurred without compensable injury").

numbing eye drops caused [plaintiff's] vision to deteriorate and that the drops contributed to her lack of improvement").

The Court's fundamental error regarding the burden of proof may stem from plaintiffs' mischaracterization of *Kleitz v. Raskin*, 103 Nev. 325, 326, 738 P.2d 508, 509 (1987). Plaintiffs relied heavily on *Kleitz* when urging the Court "to preclude defendant from characterizing plaintiff Desire Evans-Waiau's neck pain following the subsequent July 10, 2016 motor vehicle accident as anything other than a temporary exacerbation," claiming it stands for the proposition that:

> If a plaintiff *attributes* her injuries to one particular incident, then it is the defendant's burden if he wishes to apportion damages and assert that plaintiff's injuries were caused by a separate incident. *Kleitz v. Raskin*, 103 Nev. 325, 326 (1987) (citing Restat. 2d Torts § 433B comment d (1965)).

(See Plaintiffs' Motion in Limine No. 14, filed July 23, 2018, at 7 (emphasis added).) Klietz does ***not*** support that proposition, however. A plaintiff must do more than merely "attribute" the alleged injury to the subject accident; and she must do more than present a *prima facie* showing, which is all plaintiffs have done here thus far. Rather, a "plaintiff must prove" that the subject accident was a cause of the injury she alleges to the satisfaction of the jury at trial. *See Kleitz*, 103 Nev. at 327, 738 P. 2d at 510. Only then, "[o]nce this is established, the burden shifts to the defendant to apportion damages." *Id.*, *citing Phennah v. Whalen*, 621 P.2d 1304 (1980) ("Once a plaintiff has proved that each successive negligent defendant has caused some damage, the burden of proving allocation of the damages amount themselves is upon the

defendants; if the jury find [sic] that the harm is indivisible, then the defendants are jointly and severally liable for the entire harm.").[3]

Thus, even in cases where *Kleitz* applies—which it does not here—it is entirely consistent with *Matthews* regarding the burden of proof. The *Klietz* burden-shifting doctrine will not apply in this case because nearly nine months transpired between the subject 2015 accident in this case and subsequent 2016 accident (as opposed to only 33 days in *Kleitz*) and there was an intervening resolution of symptoms here. Nevertheless, even under *Kleitz*, the jury must find that the subject accident caused the injury alleged and that the injury is indivisible before any burden may shift. *See Kleitz*, 103 Nev. at 328 n. 2, 738 P. 2d at 510 n. 2

It is especially important for the Court to reserve judgment in this case, moreover, as even the nature of the injury itself is disputed. Unlike other cases discussing foundation for defense-medical-expert opinions,[4] in this case, even the actual injury or ailment(s) underlying the neck-pain symptoms is a disputed question for the jury. It is merely Plaintiff's theory that Plaintiff suffered a problem with her disk at C6-7.

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[3] The *Kleitz* court emphasized that a burden of proof would shift only as to damages. Theoretically, the shifting of the burden to prove causation might be appropriate "when two separate tortfeasors act near simultaneously and it is unclear which one of the two caused the injury." *See Kleitz*, 103 Nev. at 328 n. 2, 738 P. 2d at 510 n. 2. There, it was inappropriate to switch the burden of proof as to causation where a month transpired between torts. Here, almost seven months transpired between the subject accident and the subsequent collision.

[44] *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 111 P.3d 1112 (2005) (scabies), *Williams v. The Eighth Judicial District Court of State*, 127 Nev. 518, 262 P.3d 360 (2011) (hepatitis C) and *Leavitt v. Siems*, 130 Nev. 503, 330 P.3d 1 (2014) (blindness),

2. Plaintiff's Expert's Failure to Account Adequately for the 2010 Accident Undermines Confidence in the Quality of their Analysis

The facts of the Plaintiff's 2010 motor vehicle accident are relevant for a few reasons. To begin with, the jury should know that when Plaintiff's doctors and her medical expert reached causation conclusions in this case (singling out the subject accident as the "more likely than not" cause of her neck-pain) they were not aware that the 2010 accident caused an injury to Plaintiff's cervical spine. They learned of it and acknowledged it dismissively only later, after already having settled their conclusions. That failure to properly account for the 2010 accident discredits the reliability of Evans-Waiau's experts' analyses.

An expert's conclusion is only as reliable as the facts and rationale behind it because the expert's technique and calculations must be controlled by known standards of a reliable methodology. *Hallmark v. Eldridge*, 124 Nev. 492, 501, 189 P.3d 646, 651-52 (2008). The opinion must rest "more on particularized facts rather than assumption, conjecture, or generalization." *Id.*, 189 P.3d at 651 (2008); *Williams*, 262 P.3d at 367. To do so, the expert must do more than invoke the words "to a reasonable degree of medical probability." *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 326 P.3d 440, 444 (2014); *Hallmark*, 124 Nev. at 502, 189 P.3d at 653 (it is not sufficient to "simply affirm[] that [one's] opinions are supported by 'a reasonable degree of medical and biomechanical certainty.'").

a. THE DEFENDANT MUST BE ABLE TO DISPUTE PLAINTIFF'S PROCESS OF ELIMINATION

In this case, while Plaintiff's medical experts do not expressly identify their methodology, construing their analysis charitably, they have engaged in typical "differential diagnosis" to reach a conclusion about the nature of Plaintiff's injury and "differential etiology" to identify the subject accident as the cause of that injury—put simply, the process of elimination.

In differential diagnosis, the expert first "rules in" all of the scientifically plausible ailments and then "rules out" those that are eliminated by testing or clinical symptomology. Similarly, in differential etiology, the expert (1) "rules in" all scientifically plausible causes of the plaintiff's injury, and then (2) "rules out" the least plausible causes of the injury until the most likely cause remains. *Calusen v. M/V New Carissa*, 289 F.3d 1049, 1057 (9th Cir. 2003); *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1205, 1209 (10th Cir. 2002). The *most* likely identified ailment and cause will support a plaintiff's prima facie case only if they are also more likely than every other possible ailment/cause—including unknown causes—combined.

"A differential diagnosis [or etiology] that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999); *accord Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 179 (6th Cir. 2009). Potential causes may be ruled out only for good reason "using scientific methods and procedures," not "subjective beliefs or unsupported speculation." *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). The expert's opinion is unreliable if he "utterly fails to offer an explanation for why the proffered alternative cause was ruled out." *Calusen*, 339 F.3d at 1058 (quoting *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir. 2001)).

Even if a plaintiff's expert's opinion is sufficiently reliable to be admissible, the jury still must assess it for weight and may discount or reject it[5]

[5] The jury "has the right to consider the credibility of witnesses and disbelieve testimony, even though uncontradicted." *Fox v. First Western Sav. & Loan Ass'n*, 86 Nev. 469, 472, 470 P.2d 424, 426 (1970). This includes even unrebutted expert testimony. NEV. JURY INSTRUCTIONS – CIVIL, INST. 3 Ex. 1 ("You are not bound . . . by [expert] opinion . . . and you may reject it, if, in

for failure to rule in a plausible cause or to prematurely rule one out. And rigorous cross-examination is particularly appropriate where, as here, Plaintiff's experts allege a disk injury because that would be "consistent with" subjective symptoms.[6] The jury also may question where, as here, Plaintiff's theory relies heavily on the coincidence of timing[7] and here experts

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your judgment, the reasons given for it are unsound."); *accord Smith v. Andrews*, 959 A.2d 597, 606 (Conn. 2008) ("the jury is under no obligation to credit the evidence offered by any witnesses, including experts; even if that evidence is uncontroverted" (internal quotation marks omitted)); *Dionne v. LeClerc*, 896 A.2d 923, 929 (Me. 2006) ("a fact-finder, whether it be a jury or a court, is not required to believe witnesses, even if the testimony of those witnesses, be they experts or lay witnesses, is not disputed . . . and has the prerogative selectively to accept or reject it, in terms of the credibility of the witnesses or the internal cogency of the content"); *Olander Contracting Co. v. Gail Wachter Invs.*, 643 N.W.2d 29, 41 (N.D. 2002) ("The jury need not accept undisputed testimony, even of experts."); *Lucks v. Lakeside Mfg., Inc.*, 830 N.Y.S.2d 747, 749 (App. Div. 2007) ("the jury was entitled to discredit the testimony of the plaintiff and his expert, in whole or in part, even though the defendant adduced no contradictory evidence").

[6] *C.f., Barret v. Rhodia, Inc.*, 606 F.3d 975, 983–85 (8th Cir. 2010) (symptoms only "consistent with" exposure to hydrogen sulfide gas were insufficient to establish causation; while experts could establish general causation, experts could not establish specific causation).

[7] "Courts have long held that a differential diagnosis based only on the assumption of causation due to a temporal relationship is 'entitled to little weight in determining causation.'" *Korte v. Mead Johnson & Co.*, 824 F. Supp. 877, 894 (S.D. Iowa 2010) (quoting *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 278 (5th Cir. 1998)). The Eleventh Circuit explained:

> Proving a temporal relationship does not establish a causal relationship. Simply because a person takes drugs and then suffers an injury does not show causation. This is the classic "post hoc ergo hoc" fallacy which assumes causation from temporal sequence. It literally means "after that because of this." It is called a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a causal relationship.

Kilpatrick v. Breg, Inc., 613 F.3d 1329, 1343 (11th Cir. 2010) (citations and internal quotations omitted). As the Eighth Circuit explained the inherent problem in a temporally based theory of causation: "Instead of reasoning from

acknowledged the 2010 accident only after reaching their conclusions (when confirmation bias skews).[8]

3. That Plaintiff Withheld Information About the 2010 Accident from Her Physicians Undermines the Reliability of her Self-Reported Medical History, Upon Which Her Entire Causation Theory Rests

The fact that Plaintiff did not disclose to her doctors and medical experts that her cervical spine was injured in the 2010 accident and even underwent an MRI for imaging of that injury also is important. A juror may reasonably doubt expert opinions that rely heavily on self-reported medical history that is so self-servingly edited by the Plaintiff herself while she is in the midst of litigation.[9] *See Hallmark*, 124 Nev. at 500, 189 P.3d at 651 (2008) (the expert opinion must rest "more on particularized facts rather than assumption, conjecture, or generalization").

Courts permit the medical experts of personal-injury plaintiffs to rely on self-reported medical history and subjective pain complaints to support a *prima facie* showing of causation,[10] despite the dubious nature of such data from

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known facts to reach a conclusion, the expert[] . . . reasoned from the end result in order to hypothesize what needed to be known but what was not." *Sorensen v. Shaklee Corp*., 31 F.3d 638, 649 (8th Cir. 1994).

[8] "Conducting tests after an expert has already reached a conclusion is frowned on by courts." *Claar v. Burlington N. R.R. Co*., 29 F.3d at 502-03 (excluding medical expert's causation report); *Estate of Mitchell v. Gencorp*, 968 F. Supp. 592 (D. Kan. 1997); *Viterbo v. Dow Chem*., 826 F.2d 420, 423 n. 2. (5th Cir. 1987).

[9] *See Grant v. Baggott*, 36 Pa. D. & C.4th 298, 304–05 (Com. Pl. 1997), aff'd, 723 A.2d 240 (Pa. Super. Ct. 1998) ("Five days following the collision, plaintiffs began physical therapy with practitioners referred to them by their attorney in lieu of their own physician and dentist. Such could well further jaundice the jury's view of their credibility and motives for seeking medical treatment, as well as this litigation.").

[10] Some courts hold that such reliance is per se unjustified without objective testing and evaluation. *E.g.*, *Henry v. St. Croix Alumina, LLC*, 2009 WL 982631, at *8 (D. Virgin Is. 2009) ("[T]he sole evidence of symptoms . . . consists

scientific perspective, only because ***"the accuracy and truthfulness of the underlying medical history is subject to meaningful exploration on cross-examination and ultimately to jury evaluation."*** *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1020 (7th Cir. 2000); *Majors v. Owens*, 365 P.3d 165, 169 (Utah App. 2015) ("Once the expert's opinion was admitted, the court explained, the defense would 'have the opportunity to explore the factual basis' for the opinion and 'point out the dispute over the facts on which the expert relies.'"); *see also Krause v. CSX Transp.*, 1:11-CV-0098 GTS/RFT, 2013 WL 6163990 (N.D.N.Y. Nov. 20, 2013) (denying summary judgment to plaintiff that relied on his own testimony and quoting *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 702 F.3d 685, 696 (2d Cir. 2012)). Just because representations in medical records are deemed sufficiently reliable to warrant exception to the hearsay rule (NRS 51.115) enough to be *admissible* does not render them presumptively accurate. The jury may weigh their credibility and weight as with any other statements by a party.[11]

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of self-reports procured only for purposes of litigation. On this basis alone, the differential diagnoses . . . lack[] sufficient reliability . . . ."); *cf. Cram v. Sun Ins. Office, Ltd.*, 375 F.2d 670, 674 (4th Cir. 1967) ("Clearly the credibility of a witness is a factual issue which precludes summary judgment."), *quoted in Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 81 (5th Cir. 1987).

[11] The jury has other reasons to be skeptical about the reliability and completeness of Plaintiff's self-reported, medical history. For example, besides Plaintiff's choosing to not inform her doctors about the prior neck injury, she also strains credibility by claiming she never experienced any back or neck discomfort whatsoever in the years before her accident, despite working in jobs where she lifted more *50 lbs. every hour, every day*. (see Deposition of Desire Evans-Waiau, attached as Exhibit "C", at 18-21, 26-28, 38-40.) She claims to have never taken even aspirin, Tylenol or Advil for muscle pain in her neck or back. (Depo. at 38-39.) Nor did she ever have headaches. (Depo. 39.) While Plaintiff may indeed be superhuman, a reasonable jury might be concerned that the stark simplicity of her self-reported medical history is just too convenient to be plausible. *See In re Gardner*, 360 F.3d 551, 561 (6th Cir.2004) (court not

Reasonable jurors may discount the credibility or Plaintiff's medical history *even if they ultimately accept the theory of Plaintiff's experts* that the 2010 accident is irrelevant to her recent symptoms and alleged disk injury. The potential relevance of another accident only a few years before (in which she injured the same area of her body and experienced the same symptoms) should be clear to any person. Because of that obvious potential relevance, Plaintiff should have left it to her doctors to determine whether the information is important—especially when she was asking them to offer causation opinions in a court of law. Indeed, her choice to make that relevancy determination herself affects the reliability of her entire medical history.[12]

4. Plaintiff's Past Symptoms Following a Neck Injury Inform the Interpretation of her Recent Symptoms

In this case, the history of Plaintiff's idiosyncratic symptoms following 2010 accident also is relevant practically for diagnostic purposes now. Plaintiff's experts will claim that the presence of "cervical radiculopathy," shooting pain down Plaintiff's arm in the months following the subject accident, proves there was an injury to her C6-7 disk, as opposed to a soft-tissue injury.

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required to accept self-serving testimony, even if uncontradicted, if it finds the testimony improbable, unreasonable or questionable)); *United States v. Turner*, 651 F.3d 743, 752 (7th Cir. 2011) (discussing propriety of attorney highlighting the "the improbable and convenient nature of testimony"); *United States v. Bentham*, 414 F. Supp. 2d 472, 475 (S.D.N.Y. 2006) ("Taken as a whole, the story seems too convenient."); *People v. Payton*, 405 N.E.2d 18, 20 (Ill. App. 1980) ("The jury in rendering a guilty verdict here could have felt defendant's lapse of memory about what happened in the car was too convenient to be believed."). Similarly, the convenient attribution of her neck pain only to the 2015 accident and lower back pain only to the 2016 accident, both of which spawned litigation immediately, also strains credulity.

[12] *See* NEV. J.I. 2.07 (regarding jurors' province to determine credibility of witnesses, and "If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.")

And her doctor surgically removed that disk based partly on the assumption that the cervical radiculopathy indicated a discogenic problem.

Yet, as discovered during the course of litigation, the medical records following the 2010 indicate she suffered a cervical spine injury with radiating pain and possible cervical radiculopathy. (See Exhibit "B") Advanced imaging was performed on the cervical spine (an MRI) at that time. (*Id.*). But Plaintiff alleges that that radiating pain eventually subsided years before the subject accident. (*Id.*) This is significant, as it indicates either that any discogenic issue causing cervical radiculopathy did not start suddenly following the subject accident, or (more likely) Ms. Evans-Waiau is a person who experiences radiating pain and possible cervical radiculopathy even from soft tissue injuries that resolve over time. (*Id.*) In either case, it certainly undercuts Plaintiff's theory that cervical radiculopathy (1) proves she had a discogenic condition, as opposed to a soft tissue injury, and (2) that the allegedly sudden appearance of the symptom after the 2015 accident proves that the collision with Defendant caused the disk injury.

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Finally, Plaintiff's decision to withhold information from her doctors about the 2010 cervical injury and the idiosyncratic symptomology that followed—probably with the intention of keeping her medical history simple for litigation purposes—*undercuts her good faith in the pursuit of treatment.* Undersigned counsel anticipates that Plaintiff's counsel may request a jury instruction to the effect that Defendant is responsible for the cost of any medical procedures, to ameliorate any back or neck pain, regardless of whether it was medically appropriate or not, as long as she pursued treatment in good faith. To be clear, that concept is legally inaccurate, and it would be erroneous for the Court to ever give such an instruction. But if the Court even contemplates giving such an instruction, the evidence of the 2010 accident must be admitted for its relevance to Plaintiff's good faith in seeking treatment, as

well.

B. There is More than Sufficient Foundation to Discuss the 2010 Accident

Respectfully, in addition to misunderstanding the extent of the relevance of the 2010 accident, the Court has mistaken the foundational requirements for introducing evidence of about the 2010 accident. This is clear from the Court's minute orders in which it excluded reference to the (prior) 2010 accident and set some parameters on discussion of the (subsequent) 2016 accident on the rationale that defense experts had not "addressed" Plaintiff's causation theory sufficiently to qualify that information under *Williams v. District Court*.

This is an erroneous interpretation and application of *Williams*. First, *Williams* addresses only limitations on defense expert opinions; it does not limit the introduction of evidence that a defense attorney would use to cross-examine the plaintiff's medical experts. Evidence of the 2010 accident may be admissible even if the Defendant calls no expert at all. Second, the defense experts *do* sufficiently address Plaintiff's causation theory to justify discussion of the 2010 accident under the *Williams* test. Defense experts are not required to "embrace" (*i.e.*, accept and validate) a plaintiff's causation theory before criticizing it, as Plaintiff's counsel has argued[13] and the Court appears to have believed.

Additionally, as an offer of proof, Defendant attaches declarations from two of her experts, Dr. Joseph Schifini (Exhibit "A") and Dr. Jeffrey Wang (Exhibit "B"), to assuage any reasonable question the Court might have regarding foundation for the 2010 accident—should the Court still believe that

[13] *See* "Plaintiffs' Reply in Support of Motion in Limine No. 14: to Preclude Defendant from Characterizing Plaintiff Desire Evans-Waiau's Neck Pain Following the Subsequent July 10, 2016 Motor Vehicle Accident as Anything Other than a Temporary Exacerbation," filed August 22, 2018, at 4:2 ("Dr. Schifini and Dr. Wang failed to embrace Plaintiffs' medical causation theory").

expert testimony is necessary for the Defendant to discuss the 2010 accident and that the defense experts have not sufficiently articulated how the 2010 accident fits into their criticism of the Plaintiff's experts and treating physicians.

1. No Expert Testimony Is Necessary

There is adequate foundation to raise the prior 2010 accident (as well as the subsequent 2016 accident) even without the defense experts.

a. DEFENSE COUNSEL MAY ASK PLAINTIFF'S EXPERTS AND TREATING PHYSICIAN'S ABOUT THE OTHER ACCIDENTS ON CROSS-EXAMINATION

Even under *Williams*, the defendant may introduce the facts of other possible causes during "cross-examination" of plaintiff's experts[14] to probe the strength and depth of their opinions as discussed above. As the Utah Court of Appeals explained in the context of denying a defendant's motion to exclude a plaintiff's expert who relied heavily on the plaintiff's self-reported medical history and only lackadaisically addressed other potential causes:

> Defendants' argument that the physicians should also have eliminated other potential contributors to the [plaintiff's] physical condition provides fodder for cross-examination and seems more targeted to the weight of their opinions, not the admissibility.

[14] *Williams* contemplates that defendants need not hire an expert to refute plaintiff's claim. While plaintiff must prove medical causation to a greater-than-50% likelihood by expert testimony, once proved, defendants can rebut causation in any of three ways: (1) cross-examine plaintiff's experts; (2) contradict plaintiff's experts with their own; or (3) propose an alternative causation theory. *Williams*, 262 P.3d at 368 & n.8. Naturally, defendants may cross-examine plaintiff's expert without presenting their own. *See Stinson v. England*, 633 N.E.2d 532, 537 (Ohio 1994) ("He may cross-examine the expert of the other party. [Or] [h]e may adduce testimony from another expert which contradicts the testimony of the expert for his adversary." (emphasis added)), cited in *Williams*, 262 P.3d at 368.

Majors v. Owens, 365 P.3d 165, 169 (Utah App. 2015). Indeed, it would deny due process to require defendants to retain an expert to defend against plaintiff's claim.

By granting Plaintiff's motion to exclude reference to the 2010 accident, this Court appears to have made the same mistake of logic that the Nevada Supreme Court debunked in *Rish v. Simao*—i.e., the erroneous assumption that merely because cases like *Hallmark* and *Williams* limit when and how experts may opine on certain topics that expert opinion is a prerequisite to addressing those topics at all. That's not true. Consideration of facts potentially relevant to medical causation is not reserved to experts.[15] The jury may still weigh facts in assessing the credibility of plaintiff's theory even if there is no defense expert to connect dots for them. *Id*. There are special limitations on expert opinions because of the special risks inherent in "expert" testimony generally.[16] Put

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[15] *Rish*, 132 Nev. Adv. Op. 17, 368 P.3d 1203, 1209 (2016) (despite the confidence of plaintiff's medical experts in attributing fusion surgeries to the subject motor-vehicle accident, "the nature of the impact is a factor for the trier of fact to consider in determining the causation of the injuries that form the basis of the claim."); *see also Fox v. Cusick*, 191 Nev. 218, 221, 533 P.2d 466, 468 (1975) (Finding that proximate medical cause is generally an issue of fact, and holding that "[w]ith regard to the matter of injury and damage, it was within the province of the jury to decide that an accident occurred without compensable injury").

[16] NRS 50.275 and cases like *Hallmark* recognize that courts must play an important gatekeeping function with respect to experts due to the potential weight of their testimony and their privileged role at trial. First, their testimony comes with an implicit imprimatur; they are called "experts" and offered as learned professionals. *See Ake v. Oklahoma*, 470 U.S. 68, 82 n.7 (1985); *Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992) (error to allow expert to comment on veracity of witness, because expert lends "stamp of undue legitimacy" to testimony) (internal citation and quotation omitted). Second, experts may offer opinions that are not based on personal knowledge. Unlike facts, these opinions are more resistant to cross examination, and because they cannot be objectively false they are resistant to the in terrorem effect of perjury. *See generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993) (courts must scrutinize expert qualifications because

simply, just because an expert can't say something doesn't mean that no one can.

b. IT IS UNDISPUTED THAT THE 2010 ACCIDENT OCCURRED AND CAUSED CERVICAL SPINE PAIN

While the Court certainly may limit bare conjecture about far-fetched ideas, keeping in mind the burden of proof (*see Matthews v. State*, above), the Court may just employ its typical, liberal admission standards. And, here, there is more than adequate foundation to justify defense counsel asking the Plaintiff's experts about the other accidents and mentioning any insufficiency of their responses during closing argument. First, there is no question that ***the accidents did, in fact, occur*** and the subsequent medical care documented. Defendant is not encouraging the jury to imagine that another automobile accident may have occurred and caused injury. Second, the destructive potential of automobile accidents to cause the injuries is within the common sense of jurors already. *See, generally, Rish,* 368 P.3d at 1209; *Fox*, 191 Nev. at 221, 533 P.2d at 468. Third, plaintiffs' experts themselves acknowledge that automobile accidents can cause the type of injuries plaintiff alleges. *C.f., Williams*, 127 Nev. at 530, 262 P.3d at 368 ("In instances where the expert is expressing an opinion as to causation, it is irrelevant whether the testimony is offered by the plaintiff or the defendant."); *see also* Nev. J.I. 2EV1 ("In determining whether a party has met his burden, you will consider all the

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opinion testimony dispenses with the ordinary requirement of first-hand knowledge).

These rationales, however, do not apply with respect to facts themselves or lay-witness fact testimony. Nothing in *Hallmark* (or any case from this Court of which we are aware) suggests that a court must exclude percipient testimony whenever expert testimony is disallowed on the same subject. To the contrary, the Nevada Supreme Court has consistently held that causation issues are fact issues for the jury. *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981); *Barreth v. Reno*, 77 Nev. 196, 198, 360 P.2d 1037, 1038 (1961).

evidence, whether produced by the plaintiff or defendant."). And that general proposition is the fundamental, silent premise of their own opinions—*i.e.*, it's not as if they performed some accident reconstruction analysis or otherwise studied this accident and know more about it than the 2010 or 2016 accidents.

Put simply, holding Plaintiff's experts to account for their consideration of the facts of the other two motor vehicle accidents—or lack thereof—does not threaten the introduction of "junk science" into the courtroom.

2. The Defense Experts Address it Appropriately Under Williams v. District Court

Defendant also may introduce evidence of the other accidents via the expert testimony of her rebuttal experts, Dr. Schifini and Dr. Wang. "Any expert testimony introduced for the purpose of establishing causation must be stated to a reasonable degree of medical probability." *Williams v. Eight Judicial*, 127 Nev. at 530, 262 P.3d at 368 (2011). Critically, however, "defense experts may offer opinions concerning causation that either contradict the plaintiff's expert or furnish reasonable alternative causes to that offered by the plaintiff" without having to meet that standard. *Leavitt v. Siems*, 130 Nev. 503, 508, 330 P.3d 1, 5 (2014) (internal quotation marks omitted). "[O]nce a plaintiff's causation burden is met, the defense expert's testimony may be used for either cross-examination or contradiction purposes without having to meet the reasonable-degree-of-medical-probability standard, so long as the testimony consists of competent theories that are supported by relevant evidence or research." *Id*. at 54, 330 P.3d at 5.

Here, the other accidents are relevant to traverse the rationale underlying Plaintiff's causation theory, as well as to demonstrate the vacuity of the Plaintiff's experts' analysis. (See above.) And, in light of the defense experts' extensive experience and expertise, and their review of the Plaintiff's history and symptomology, their reference to the other accidents is competent

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and supported by relevant evidence or medical research. *See id*. at 54, 330 P.3d at 6 ("Dr. Hansen's testimony meets these requirements because his assessment was premised on his personal observations that were based on his training and experience with numbing eye drops' toxicity through his residency, cornea clinics, and 20 years of practice."). Even if their reference to the 2010 or 2016 accidents involve an element of speculation, moreover, it is for the jury to determine how much weight to give such speculation, not for the Court to preclude it altogether. *See id*. ("[E]ven if portions of his testimony were speculative, it was for the jury to assess the weight to be assigned to his testimony.").

It is true, as this Court noted in its minute order, "that this lowered standard [for defense medical experts] is necessarily predicated on whether the defense expert includes the plaintiff's causation theory in his or her analysis." *Williams*, 127 Nev. at 530, 262 P.3d at 368. This does not mean, however, that the defense counsel must "embrace" or validate Plaintiff's theory of causation, as Plaintiff has suggested in her pre-trial briefing. It means simply that defense experts cannot be deemed to criticize plaintiff's expert reports which they have never reviewed or discussed.[17] It really is a matter of common sense.

Here, the Court erred in stating that Defendant's experts have not included the opinions of Plaintiffs experts in their analysis. Their reports do, in fact, repeatedly include review and criticism of Plaintiff's experts and physicians, both implicitly and explicitly. (See, e.g., Exhibits "4" and "5" to Plaintiffs' Motion in Limine No. 13.) Fairness and due process also require that the defense-expert reports be read for the implied criticism of a plaintiff's

[17] *C.f., FGA, Inc. v. Giglio*, 128 Nev. 271, 284-85, 278 P.3d 490, 498-99 (2012) (affirming exclusion of defense medical-expert testimony where he neither offered an affirmative causation opinion nor discussed the analysis of plaintiff's experts).

causation theory in general, as most of a plaintiff's proof will come through the testimony of plaintiff's treating physicians, who never disclose reports. The defense experts demonstrate their confrontation of the treating physicians anticipated opinions by reviewing and evaluating their medical records, knowing that the treating physicians will extrapolate from them to attribute to causation.

Plaintiffs likely will argue that the experts' reports must have been more detailed, setting out every detail of why the other accidents are relevant and articulating every premise of their analysis. That is not the law. The purpose of an expert report is "not to replicate every word that the expert might say on the stand." *Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir. 2009); *Williams v. Univ. Med. Ctr. of S. Nev.*, No. 2:09-CV-00554-PMP, 2010 WL 2802214, at *4 (D. Nev. July 14, 2010) (The essential purpose of expert disclosure is not to state verbatim what an expert will testify to at the time of trial). Rather, it is to convey the substance of the expert's opinion so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary. *Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir. 2009); *Robinson v. D.C.*, 75 F. Supp. 3d 190, 195 (D.D.C. 2014) ("[t]he expert report ... is not the end of the road, but a means of providing adequate notice to the other side to enable it to challenge the expert's opinions and prepare to put on expert testimony of its own."). "The rule contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report." *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006) (holding that an expert witness is not limited to simply reading his report); 8 C. WRIGHT, A. MILLER & E. COOPER, FED. PRAC. & PROC. § 2031.1 (3d ed.) ("At the same time, the expert is not limited to reading his or her report from the stand; reasonable elaboration and explanation is expected and appropriate.") Accordingly, an expert is permitted to expound on opinions previously expressed. *Faulkner v.*

Arista Records LLC, 46 F. Supp. 3d 365, 378 (S.D.N.Y. 2014) (permitting an expert declaration that provided additional information on a variety of issues raised in in the expert report); *Emig v. Electrolux Home Products Inc.*, No. 06 Civ. 4791, 2008 WL 4200988, at *3 & n. 3 (S.D.N.Y. Sept. 11, 2008) (allowing expert affidavit that "offers more information and elaboration on opinions previously expressed" in expert report); *Pritchard v. Dow Agro Scis.*, 263 F.R.D. 277, 285 (W.D. Pa. 2009) (holding that declaration of plaintiff's expert provided did not contain new or contradictory opinions, but instead offered elaboration of expert's initial opinions in his expert report); *see also Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007) (noting that the rule contemplates that the expert will supplement, elaborate upon, and explain his report in his oral testimony).[18]

Here, the reports put Plaintiffs on reasonable notice. And Plaintiffs could have deposed the experts if they desired further detail. They elected not to do so.

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3. Though Unnecessary—to Assuage Any Reasonable Concern—the Defense Experts Spell Out the Logic of their Reasoning in Detail

For the above reasons, it was error to exclude the evidence of the 2010 accident—and limit discussion of the 2016 accident—based on the record

[18] It is particularly appropriate to interpret expert reports charitably in the area of personal injury, where plaintiffs are able to present expert testimony from treating physicians with very little notice of their specific analysis. For all intents and purposes, defendants are expected to surmise the details from treatment notes. *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 335 P.3d 183 (2014). (holding held that a plaintiff's treating physician does not need to provide an expert report under NRCP 16.1(a)(2)(B) and can testify regarding any opinions he or she formed during the course of treating the plaintiff so long as all documents supporting those opinions are disclosed to the defendant). It would be ridiculously lopsided to hold defendants to standard of producing experts that provide nearly as much detail as their trial testimony.

already provided to the Court. As an offer of proof, however, to answer any reasonable question or concern the Court might have regarding the relevance of the other accidents to the experts' analysis, Defendant attaches declarations of Dr. Schifini (Exhibit "A") and Dr. Wang (Exhibit "B"), that provide additional detail and explicate premises that Defendant believed were reasonably implied. They substantiate all of the relevance as set out above.

If any follow-up is necessary, that can be handled in *voir dire*, outside the presence, when those experts appear at trial.

II.

REPRESENTATIONS MADE BY PLAINTIFF (OR HER AGENTS) IN LITIGATION ABOUT HER OTHER ACCIDENTS ARE ADMISSIBLE, RELEVANT TO HER CREDIBILITY, AND ELUCIDATE THE NATURE OF THE OTHER ACCIDENTS

The Court precluded Defendant from introducing Plaintiff's pleadings from other lawsuits that arose from the 2010 and 2016 accidents on two grounds (articulated in separate rulings to related motions). First, while injuries arising from the other accidents may be relevant to the extent experts rely on them, "[t]he fact that Plaintiff previously filed 'claims' or 'lawsuits' is irrelevant and therefore, excluded."[19] Second, because the 2018 complaint arising from the 2016 accident is unverified, "the Court does not find the statements in said complaint to be a party admission but rather legal conclusions made by Plaintiff's attorney."[20] Both rationales are erroneous.

[19] Minute Order of Nov. 1, 2018, granting "Plaintiff's Motion in Limine No. 15: To Exclude Irrelevant and/or Unduly Prejudicial Information."

[20] Minute Order of January 18, 2019, denying "Defendant's Motion in Limine No, 1D: Plaintiff Evans-Waiau's Subsequent Injuries and Claims Are Relevant and Admissible."

A. Plaintiff's Statements Are Probative of the Extent of her Injuries and Go to the Credibility of Representations Underpinning her Medical Experts' Opinions

A key task for the jury will be to assess the veracity of Plaintiff's statements about the extent and timing of her alleged injuries, pain, and treatment, which she attributes to the subject accident. After all, most of Plaintiff's proof hangs on her word—direct proof via testimony, as well as indirectly through the statements she made to her treating physicians, on which the medical experts reply. As demonstrated above, the credibility of all of those statements will be subject to cross-examination. *See, e.g., Cooper*, 211 F.3d at 1020 ("the accuracy and truthfulness of the underlying medical history is subject to meaningful exploration on cross-examination and ultimately to jury evaluation"); *Majors*, 365 P.3d at 169 ("Once the expert's opinion was admitted, the court explained, the defense would 'have the opportunity to explore the factual basis' for the opinion and 'point out the dispute over the facts on which the expert relies").

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Like any other party about any other issue, Plaintiff will be accountable to the jury for varying statements regarding the extent and timing of her alleged injuries, pain, and treatment, as well as the people and incidences she blames. *See* NRS 50.135. Representations in the lawsuits are relevant to Plaintiff's credibility and the nature of those accidents, which bears on causation. The litigation context of those statements, moreover, is relevant credibility and bias.

B. Statements in Unverified Pleadings in Other Cases Are "Evidentiary Admissions," Albeit Not "Judicial Admissions"

For purposes of admissibility, the distinction between the direct statements of a party versus representation and characterizations of her attorneys is irrelevant. Under Nevada's hearsay statute, "statements" of a party (which do not constitute hearsay) include not just "(a) The party's own

statement, in either the party's individual or a representative capacity," but also statements "by a person authorized by the party to make a statement concerning the subject," and "by the party's agent or servant concerning a matter within the scope of the party's agency or employment, made before the termination of the relationship." NRS 51.035(3). And the Nevada Supreme Court has made clear that attorneys are agents who bind their clients by the actions they take and representations they make. *See Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204, 322 P.3d 429, 434 (2014) ("an attorney's act is considered to be that of the client in judicial proceedings when the client has expressly or impliedly authorized the act"), *citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396–97 (1993) (noting that in a representative litigation system, "clients must be held accountable for the acts and omissions of their attorneys").

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The Court determined the unverified complaints, filed in other cases, do not constitute "judicial admissions" of the Plaintiff. Be that as it may, they are at least "evidentiary admissions" and statements of a party opponent, which Plaintiff will be free to controvert or explain. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276–77 (2011) (explaining the difference between "judicial admissions" and "evidentiary admissions"). It is error to exclude them. *Trans W. Leasing Corp. v. Corrao Const. Co.*, 98 Nev. 445, 448, 652 P.2d 1181, 1183 (1982) (district court erred in concluding that factual allegations in superseded pleadings could not be used in evidence).

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As one appellate court explained:

> Statements contained in pleadings filed in other actions may also be used as evidentiary admissions as long as they are inconsistent with the party's present contentions. . . . Statements contained in pleadings filed in prior actions remain admissible even though the action in which they were filed has been withdrawn or dismissed. They are also admissible even though the pleading in which they were contained was not verified. The party who made the

> admission may give evidence that the pleading was filed on incorrect information or without his actual knowledge. However, this evidence goes only to the weight, not the admissibility, of the pleading.

Pankow v. Mitchell, 737 S.W.2d 293, 296–97 (Tenn. Ct. App. 1987), *see also Staples v. Hoefke*, 235 Cal. Rptr. 165, 175 (Ct. App. 1987) ("To the extent the court relied on the unverified nature of the cross-complaint as a basis for exclusion, the ruling was in error. It is presumed that even an unverified pleading is filed with the consent of the client and should be regarded as an admission."). Thus, these complaints should not be concealed from the jury.

III.

PLAINTIFF'S EMPLOYMENT HISTORY IS RELEVANT TO HER LOST INCOME AND EARNING CAPACITY

The Court excluded evidence of Plaintiffs' terminations from employment, reasoning that neither parties' economists refer to those facts in their analysis of lost earning "capacity."[21] (*See* Minute Order of November 1, 2018.) This, too, is reversible error that the Court should take the opportunity to correct now.

The erroneous ruling stems from two mistaken notions of law. First, the Court appears to believe that the determination of damages for lost-income and lost-earning-capacity is the exclusive province of experts, such that facts are relevant only to the extent that the experts consider them. But that's not true. As discussed above, it's not true even in the context medical causation. (*See* above.) And Plaintiff has never cited any authority to contrary.

Second, merely because the *experts'* opinions regarding earning capacity is based on broad statistical analysis of the population at large (assuming all other things are equal) does not mean that the *jury* does not consider the facts

[21] The ruling granted "Plaintiffs' Motion in Limine No. 15: to Exclude Irrelevant and/or Unduly Prejudicial Information," filed July 23, 2018.

specific to the employment of these Plaintiffs. The economists' opinions are helpful only to provide a statistical baseline for the jury's reference. But the jury would be free to adjust that figure upward or downward, or disregard it altogether based on the particular facts in this case.

Where, as here, plaintiffs seek damages for lost-earning capacity via expert opinions based on broad characterizations, statistical averages and societal norms, it is reversible error for the Court to exclude the particular facts of the plaintiffs' actual work history that presages a future *less fruitful than the average* laborer in their statistically averaged category. "[A] plaintiff's work history and quality of past job performance is admissible evidence probative of the plaintiff's claimed damages in the form of future lost income or future lost earning capacity" *Egan v. Butler*, 772 S.E.2d 765 (Va. 2015) (holding that work history, including "reasons for leaving the job," are relevant—so much so that an expert who fails to consider it is unreliable); *Thigpen v. Dodd's Truck Lines, Inc.,* 498 S.W.2d 816, (Mo. App. 1973) (where plaintiff brought up the issue of earning capacity, defendant was entitled to introduce evidence that he had been fired for reasons unrelated to her injury). In *Egan*, the Virginia Supreme Court found reversible error, where the trial court "excluded evidence of the quality of [plaintiff's] past job performance" and reasons for him leaving previous jobs. *Id.* As here, "[i]n each instance, the court held that evidence of past work had no bearing of future income." *Id.* And, as here, "[u]tilizing this incorrect legal standard to bar admission of relevant evidence was an abuse of discretion." *Id.* Put simply, "defense evidence [of sporadic employment history] is entitled to as much consideration by the jury as that introduced by the claimant, who raised the issue of earning capacity and argued it to the jury." *Brown v. Sisto*, 532 So.2d 683, 685 (Fla. App. 1988) (Once plaintiff claimed lost earning capacity from a "sporadic earning history," it was abuse of discretion to preclude defense from introducing evidence of the plaintiff's history of arrests and

incarceration).[22]

IV.

RECONSIDERATION IS APPROPRIATE

Under the circumstances, this Court should exercise its power to correct this error. *See Insurance Co. of the West v. Gibson Tile Co., Inc.*, 122 Nev 455, 466 n.4, 134 P.3d 698, 705 n.4 (2006) (Maupin, J., concurring); *see also Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005) ("interlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration, and do not constitute the law of the case").

A. Reconsideration Is Favored as an Efficient Alternative to Appeal

A motion to reconsider is preferred over an appeal as a quicker, easier and less expensive method of correcting error. *See, e.g., Osman v. Cobb*, 77 Nev. 133, 136, 360 P.2d 258, 259 (1961). As one court explained:

> In doing what he did here [moving for relief from judgment under Rule 60(b) rather than proceeding directly to appeal], it would appear that he followed what we deem ordinarily to be the better practice of bringing to the attention of the trial court at some appropriate time before appeal the errors which it is claimed have been committed. The district court already familiar with the case is thereby given an opportunity to correct any mistakes it might have made and the parties will avoid the expenses and delays involved in appeals.

[22] The Court excluded the evidence of termination also because, in the case of Plaintiff Parra-Mendez, there is a note in her employment file indicated that she "resigned verbally over the phone," even though Parra-Mendez initially recalled being fired. In other words, this appears to be a "You can't fire me because I quit" situation, which the employer was willing to document as such. (Id.) Where there is a conflict in evidence about what occurred, all relevant evidence should be submitted to the jury for the jurors to decide what happened. NRS 48.025(1) (generally "all relevant evidence is admissible").

Beshear v. Weinzapfel, 474 F.2d 127, 130 (7th Cir. 1973). Where the district court can correct an error on a motion for reconsideration, it should.

B. Reconsideration Is Appropriate to Avoid Error Even Where the Circumstances Have Not Changed

"[A] district court may reconsider a previously decided issue if . . . the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Reconsideration is appropriate "[a]lthough the facts and the law [are] unchanged [if] the judge [is] more familiar with the case by the time the second motion [is] heard, and [is] persuaded by the rationale of the newly cited authority." *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 218, 606 P.2d 1095, 1097 (1980).

Reconsideration is warranted in many circumstances, including:

> … when (1) the matter is presented in a "different light" or under "different circumstances"; (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Wasatch Oil & Gas, LLC v. Reott, 263 P.3d 391, 396 (Utah Ct. App. 2011). It is appropriate whenever the Court may have overlooked or misapprehended pertinent facts or law, or for some other reason mistakenly arrived at its earlier decision. *See* NRAP 40; *Nelson v. Dettmer*, 46 A.3d 916, 919 (Conn. 2012); *Viola v. City of New York*, 13 A.D.3d 439, 441 (N.Y. App. Div. 2004).

C. Supplemental Points and Explanations Are Proper

Every point that Defendant raises in this motion merely expounds on its previous filings. And, therefore, because everything in this motion would be suitable to raise in an appeal from the Court's prior ruling, it is appropriate to raise now. *See Western Technologies, Inc. v. All American Golf Center*, 122 Nev.

869 n.8, 139 P.3d 858 n 8. (2006) (while new issues may not be raised on appeal, additional authorities and arguments are appropriate); 4 C.J.S. *Appeal and Error* § 309 (updated Dec. 2011) ("On appeal, a party may bolster his preserved issues with additional legal authority or make further arguments within the scope of the legal theory articulated to the trial court, but may not raise an entirely new legal theory."). Certainly, a trial court may consider any points on reconsideration that the moving party could raise in an appeal from the trial court's prior order. Any other rule would be unfair to the trial court.

CONCLUSION

For the above reasons, the district court should correct the erroneous rulings before the trial begins.

Dated this 16th day of April, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Joel D. Henriod*

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2019, I served the foregoing "Trial Brief Regarding Defendant's Right to Contest Plaintiffs' *Prima Facie* Showing of Causation of Damages and Offer of Proof" on counsel by the Court's electronic filing system to the persons listed below:

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EXHIBIT A

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EXHIBIT A

DECLARATION OF JOSEPH J. SCHIFINI, M.D.

I, JOSEPH J. SCHIFINI, declare as follows:

1. I, JOSEPH J. SCHIFINI, M.D., am a licensed medical doctor, practicing in Las Vegas, Nevada. I have certifications issued through the American Board of Anesthesiology, the American Academy of Pain Management, and the American Board of Pain Medicine. I have been practicing medicine in Nevada since 1997. I teach Anesthesiology and Pain Management at the University of Nevada, Las Vegas, and University of Nevada, Reno Schools of Medicine, and at Touro University. I currently sit on the Medical Executive Committee and the Governing Body Committee at the HCA/Columbia Las Vegas Surgery Center.

2. I am knowledgeable as to all matters stated in this declaration, and know them to be true. The opinions provided in this Declaration are stated to a reasonable degree of medical probability.

3. I believe the statements I make in this Declaration are already implicit in the reports I have completed in this case, especially my commentary following review of the reports of plaintiff's experts. However, I submit this Declaration as an offer of proof to provide extra detail and logical connections in my rebuttal criticism of Plaintiff's causation theory, and of the medical relevance of other motor vehicle accidents in which Ms. Evans-Waiau has been involved. Thus, while this Declaration largely is redundant of my previous reports, I express a few connections and premises that I previously implied.

4. As part of my medical practice, I commonly perform evaluations of patients who claim to have suffered industrial injuries. As part of those evaluations, I determine the extent and permanency of my patients' reported injuries and whether or not they are capable of returning to work. Workers compensation insurance carriers and the State of Nevada (which retained to during the workers compensation appeals process) rely upon my treating and forensic medical opinions in evaluating workers compensation claims.

5. I have qualified as an expert witness in both State and Federal courts to provide testimony regarding treatment provided by a variety of physicians and specialties, including spine, orthopaedic, and neurologic injuries. I am trained and qualified to read and interpret radiologic images.

6. As part of my clinical practice I am required to review medical records from a wide variety of medical specialties and form opinions regarding the treatment provided to individuals. This includes evaluating whether they have reached maximum medical improvement or whether they require further treatment. In that capacity, my position is similar to that of a primary care physician in that I evaluate medical treatment provided across a wide spectrum of specialties, determine a patient's prognosis, and recommend the best route for a patient's continued treatment. This includes reviewing medical records related to spinal injuries, soft tissue injuries, neurologic injuries, orthopaedic injuries, and a variety of other injuries.

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7. As part of my review of Desire Evans-Waiau's treatment, I reviewed all of the available medical records documenting her treatment before and after the motor vehicle accident of October 30, 2015. The multiple reports I have authored in my capacity as a forensic expert in this case contain summaries of all the treatment provided to Ms. Evans-Waiau by her various medical providers and consultants.

8. I have reviewed and considered the opinions of Ms. Evans-Waiau's medical treatment providers and experts. Her treatment providers and experts causally relate virtually all of her treatment for any sort of cervical spine pain (whether treatment of soft tissues, facets, or intervertebral disks) to the motor vehicle accident of October 30, 2015. I fault both their conclusions and their cursory application of scientific methodology. These experts and/or treating physicians assume that Ms. Evans-Waiau's claimed cervical spine pain must have been caused by a traumatic injury to the cervical spine. In order to reach this conclusion, they simply disregard the possibility that a pre-existing injury, a pre-existing degenerative condition, or a subsequent injury could have caused Ms. Evans-Waiau's claimed symptoms because such pre-existing conditions are sometimes asymptomatic and Ms. Evans-Waiau claims not to have been symptomatic until the motor vehicle accident; and because they disregard her having reached maximum medical improvement approximately three months after the subject accident and assume her symptoms after that date were a simple continuation of the accident-related symptoms. Building on these faulty premises, expressly or by implication, Ms. Evans-Waiau's medical experts and/or treatment providers link all cervical spine pain and all of the ongoing and varying cervical spine treatments to the October 30, 2015 motor vehicle accident:

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   a. Ms. Evans-Waiau's experts and treating physicians opine that automobile accidents *in general* can be a mechanism for cervical spine injury. They have not meaningfully considered the particular facts of this accident beyond the fact that it occurred.

   b. Ms. Evans-Waiau's experts and treating physicians assume as fact her self-reported historical recollections and representations in the form of a medical history, in which Ms. Evans-Waiau (who has no medical training) relates her cervical spine pain to the subject accident.

   c. Ms. Evans-Waiau's experts and treating physicians did not seem to be initially aware that she had previously presented with radiating pain in the neck and shoulders and did not take these symptoms into account when formulating their causation opinions. They did not meaningfully reconsider their opinions once they learned of the prior accident and injury.

   d. Ms. Evans-Waiau's experts and treating physicians did not take into account the likelihood that her pre-accident employment as a warehouse laborer, which required her to regularly lift up to 50 pounds, could have accelerated degenerative disk disease and caused pain when forming their causation opinions.

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e. Ms. Evans-Waiau's experts and treating physicians did not eliminate other plausible causes of her symptoms before forming the opinion that the October 30, 2015 accident caused a traumatic disk injury which would require surgery. Having failed to address other possible causes of her symptoms before the July 10, 2016 accident, they were unable to conclude that the October 30, 2015 accident, as opposed to the July 10, 2016 accident, was the more significant cause of her ongoing cervical spine pain.

f. Ms. Evans-Waiau's experts and treating physicians failed to meaningfully consider whether the prior neck and shoulder pain was radiating pain resulting from a soft-tissue injury, or radicular pain resulting from a disc injury. They failed to meaningfully consider whether the pain complaints resulting from the October 30, 2015 accident were radiating pain instead of radicular pain, as they concluded. If the pain complaints after her October 30, 2015 accident were radiating pain (likely caused by soft-tissue compression of peripheral nerves), they failed to consider that this patient's history including the 2010 accident may demonstrate a susceptibility to temporary radiating pain resulting from soft-tissue sprain/strain injuries.

g. Ms. Evans-Waiau's experts and treating physicians conclude that the subject accident must have caused the need for a multitude of various treatments for cervical spine pain because (i) temporally, it appears from the self-reported medical history that the cervical spine pain started after the October 30, 2015 motor vehicle accident, (ii) they do not recognize *anything else* that would have caused the cervical spine pain, and (iii) therefore, by an incomplete process of elimination, the October 30, 2015 motor vehicle accident must be the cause of any and all cervical spine pain treatment in perpetuity.

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9. Even assuming for the sake of argument that Ms. Evans-Waiau's ongoing cervical spine symptoms were traumatically induced, which I do not believe, her experts and treating providers' unsupported conclusion that the subject motor vehicle accident was the trigger for all of Ms. Evans-Waiau's post-accident cervical spine treatment fails because it relies on a faulty application of their own quasi-differential-diagnosis methodology.

10. Simply stated, in addition to their arbitrary exclusion of the possibility that Ms. Evans-Waiau's complaints could have been caused by her pre-existing degenerative problems, her experts and treating providers also failed to consider other potential, non-degenerative causes of her cervical spine complaints. These would include the prior motor vehicle accident, the subsequent motor vehicle accident, and her work activities. The experts and treating providers do not articulate any good cause for excluding, or for failing to meaningfully consider, these possibilities. These other possible explanations for her pain are plausible enough to logically preclude any principled conclusion that the motor vehicle accident of October 30, 2015, can be isolated as a more-likely-than-not cause of all the claimed complaints and medical care "to a reasonable degree of medical probability."

a. They ignore the significance of her 2010 motor vehicle accident, which was severe enough to warrant cervical spine MRI imaging.

b. They ignore the significance of her work history, which reasonably could have contributed to degenerative disk disease. This is noteworthy because there is no objective evidence of a traumatic spinal injury in the radiological imaging.

c. They downplay the significance of her July 10, 2016 motor vehicle accident, which, by all indications, was more forceful and appears to have caused more immediate pain than the October 30, 2015 accident.

d. Ms. Evans-Waiau's treatment providers and experts also disregard that possibility that her injuries may have been limited to soft tissue sprain/strain injuries based entirely on her subjective pain complaints and spinal injections which had little or no diagnostic value. This is particularly problematic due to the fact that her subjective pain complaints are better explained by a soft tissue sprain/strain diagnosis than the discogenic injury diagnosis for which they advocate.

11. If Ms. Evans-Waiau's treating physicians and experts were evaluating this matter in a logically consistent manner, they should have, at the very least, considered the 2010 and 2016 accidents as potential causes given that they have opined that traffic accidents in general can be a sufficient mechanism to cause injury, even if they are minor. They did not consider these other accidents as potential cause and did not explain why they ruled out these possibilities.

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12. Ms. Evans-Waiau's 2010 motor vehicle accident must be at least considered as a possible cause of her complaints for the following reasons:

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a. Ms. Evans-Waiau stated during her deposition that it caused a lower back injury. She denied a neck or shoulder injury from that accident. This is not consistent with her medical treatment records following the accident. Dr. Kathleen Smith documented complaints of traumatically-induced headaches and neck pain with possible cervical radiculopathy in 2010.

b. Dr. Smith ordered a cervical spine MRI but did not order a lumbar spine MRI. This suggests that the cervical spine and possible cervical radiculopathy were of greater concern to her treating doctor.

c. These are same type of pain complaints to the same body parts that Ms. Evans-Waiau complained of after the October 30, 2015 motor vehicle accident.

d. Assuming that Ms. Evans-Waiau had radiculopathy after the 2010 accident, as Dr. Smith hypothesized, and assuming that her complaints after the October 30, 2015 accident were related to a disk injury or condition, as Ms. Evans-Waiau's experts stated, it is plausible that her radiculopathy after the 2015 accident could relate back to an injury or condition caused by the 2010 accident. Her experts and treating providers failed to consider this. Dr. Yevgeniy Khavkin did not know about the 2010 accident when he recommended surgery, and Dr. Garber dismissed it without

analysis or discussion based on Ms. Evans-Waiau self-reporting she was symptom-free from July 2010 until shortly after the October 30, 2015 accident.

e. Either way, the 2010 accident is medically relevant to determining the nature of her symptoms after that date and the cause of treatment provided after that date, including treatment provided in 2015 and 2016.

13. Ms. Evans-Waiau's July 10, 2016 motor vehicle accident must be considered as a possible cause of her complaints for the following reasons:

a. The available evidence suggests the impact was more forceful than the October 30, 2015 motor vehicle accident. Ms. Evans-Waiau was transported by ambulance from the accident scene to the emergency room after the July 10, 2016 motor vehicle accident. She denied pain at the scene of the October 30, 2015 motor vehicle accident and there is no evidence of pain complaints until three days later. Furthermore, the July 10, 2016 motor vehicle accident totaled Ms. Evans-Waiau's vehicle. The October 30, 2015 motor vehicle accident did not. While property damage does not always correlate with likelihood of or degree of injury, common sense dictates that more forceful impacts are more likely to cause more property damage, more forceful impacts are more likely to cause injuries, and more forceful impacts are more likely to cause more significant injuries.

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b. Dr. Jason Garber's written reports describe Ms. Evans-Waiau's injuries after the July 10, 2016 motor vehicle accident as an "aggravation". His use of this word is significant. The medical term "aggravation" describes a permanent worsening of a pre-existing condition, whereas "exacerbation" describes a temporary or transient worsening. Dr. Garber used the term "aggravation" in each instance where he described the effect of the July 10, 2016 motor vehicle accident on Ms. Evans-Waiau.

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c. Despite stating that the July 10, 2016 motor vehicle accident caused an "aggravation," Dr. Garber refused to apportion his treatment of Ms. Evans-Waiau among the October 30, 2015, and July 10, 2016 motor vehicle accidents. He should have done so.

d. While the November 10, 2015 MRI study of Ms. Evans-Waiau's cervical spine identified a minor disc protrusion at C6-C7, there is no evidence that it was traumatic in nature or that it caused her pain complaints. The timing of her reported symptoms is not consistent with a traumatic disk injury resulting from the October 30, 2015 accident.

e. Dr. Garber first saw Ms. Evans-Waiau shortly after her July 10, 2016 motor vehicle accident. He knew at that time he would be treating her for the October 30, 2015 motor vehicle accident. She informed him that she had recently been in another accident. He appears to have immediately disregarded this as a possible cause of her complaints without doing any additional medical investigation. He requested to

see her November 2015 MRI images and did not request that she present for updated MRI images to compare and contrast with the November 2015 images. He then recommended and performed a cervical spinal fusion surgery which he related solely to the October 30, 2015, accident without seriously considering the possible effect of the July 10, 2016 accident.

f. Dr. Garber relied in part on two injections performed by Dr. Hans-Jorg Rosler in recommending surgery. The injections had little to no diagnostic value and should not have been relied upon to make a surgical recommendation. Ms. Evans-Waiau was sedated with Propofol for both injections. She was completely unconscious during the administration of those injections and could not have reported her perceptions during or shortly after the procedure, which reduced their diagnostic value. Furthermore, Dr. Rosler performed selective nerve root blocks. A selective nerve root block is different than a transforaminal epidural injection, as it only attempts to address the left C7 nerve root, not the anterior epidural space at the C6-7 level. Therefore, diagnostic conclusions regarding discogenic pain are significantly limited or eliminated based on the type of injection Dr. Rosler chose to perform and the manner in which it was performed. The injections did not meaningfully inform Dr. Garber's decision to perform surgery.

g. Dr. Khavkin and Dr. Garber concluded Ms. Evans-Waiau needed surgery as a result of the October 30, 2015 motor vehicle accident without performing timely neurodiagnostic testing. They did not perform this testing prior to the July 10, 2016 accident. Dr. Rosler's selective nerve root block injections did not fill this role. As such, they cannot medically or scientifically eliminate the July 10, 2016 accident being causally related to the conditions for which they determined she needed surgery.

h. Ms. Evans-Waiau's symptoms following the October 30, 2015 motor vehicle accident were more consistent with a soft tissue sprain/strain affecting the peripheral nerves, which could mimic a traumatic disk injury. Dr. Garber and Dr. Khavkin ignored and downplayed the likelihood of a soft-tissue injury when recommending surgery. Having failed to perform timely neurodiagnostic testing and having failed to diagnose true radiculopathy prior to surgery, it is not medically or scientifically reasonable for Dr. Garber to conclude that the July 10, 2016 accident caused nothing more than "an aggravation" of her pre-existing condition. It is not medically reasonable to forego or limit discussion of the effect of that accident on Ms. Evans-Waiau.

i. Assuming that the surgery Dr. Garber performed was necessary to correct a disk injury, a conclusion I do not endorse, then it remains plausible that the October 30, 2015, motor vehicle accident caused nothing more than soft tissue sprain/strain injuries with muscle spasms that temporarily affected the peripheral nerves, leading to radicular-like symptoms that would be expected to, and did, resolve with time. It remains plausible that the July 10, 2016, accident caused the disk injury or condition for which Dr. Garber operated.

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j. If Ms. Evans-Waiau suffered an injury to the structure or intervertebral disks of her cervical spine, a conclusion I do not endorse, then her treatment providers and experts should have compared the two accidents and explained from a medical perspective why one caused the injury but not the other, or why the July 10, 2016 accident was not medically important. Their surgical work-up fails to adequately address this. The July 10, 2016 accident remains a possible alternate causative event.

k. The July 10, 2016 accident is medically relevant to determining the nature of her symptoms after that date and the cause of treatment provided after that date. At the very least it caused an aggravation, not merely exacerbation, and should have been considered for apportionment purposes. At most, it is the sole cause of the need for surgery.

l. In summary, I disagree with Ms. Evans-Waiau's medical treatment providers and experts as to the scope of injury she sustained in the October 30, 2015 motor vehicle accident. But assuming that their diagnosis is correct, they failed to medically establish a diagnosis of radiculopathy before the July 10, 2016 accident and failed to explain why the July 10, 2016 motor vehicle accident should be deemed to have caused nothing more than a minor, temporary worsening of Ms. Evans-Waiau's condition. The July 10, 2016 accident remains a plausible causal alternative to the October 30, 2015 accident.

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14. Ms. Evans-Waiau's work history must be at least considered as a possible cause of her complaints for the following reasons:

a. She admitted to regularly lifting up to 50 pounds.

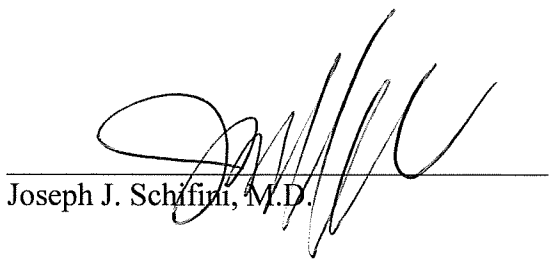
b. Dr. Garber admitted in his deposition that this type of repetitive manual labor would cause wear and tear on the spine and would cause pain.

c. Dr. Garber testified in his deposition that it was not his medical opinion that Ms. Evans-Waiau's cervical spine condition, including the minor disc protrusion, was caused by her work activities. He attributed the spine condition to the subject motor vehicle accident. He did not explain why he eliminated her work activities as a possible cause of her condition.

d. It is plausible that repetitive lifting could cause neck pain and could have contributed to the findings on the November 2015 MRI images, which I consider to be essentially normal for Ms. Evans-Waiau's age and occupation.

I make this declaration under the penalty of perjury pursuant to the laws of the State of Nevada.

DATED this 15th day of March, 2019.



Joseph J. Schifini, M.D.

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EXHIBIT B

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EXHIBIT B

DECLARATION OF JEFFREY WANG, M.D.

I, JEFFREY WANG, declare as follows:

1. I, JEFFREY WANG, M.D., am a licensed medical doctor, practicing in Los Angeles, California, I am currently affiliated with the University of Southern California Medical Center as a faculty member and Professor of Orthopaedic Surgery and Professor of Neurosurgery. I am the co-director of the USC Spine Center and the Chief of the USC Orthopaedic Spine Service. I attended the University of Pittsburgh School of Medicine from 1987 – 1991, graduating in 1991 as a Doctor of Medicine. I performed a residency in Orthopaedic Surgery at University of California, Los Angeles, from 1991 – 1996. I then completed a Fellowship in Spine Surgery with Henry H. Bohlman, M.D., at Case Western Reserve University – Department of Orthopaedic Surgery in Cleveland, Ohio. I hold active licenses to practice medicine in California, Ohio, and Nevada, and am certified by the American Board of Orthopaedic Surgery. My additional qualifications and training are set forth in my Curriculum Vitae, which is attached hereto and incorporated herein by reference.

2. I am knowledgeable as to all matters stated in this declaration, and know them to be true, except for those matters stated upon information and belief. As to those I believe them to be true.

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3. I believe the statements I make in this Declaration are already implicit in the reports I have completed in this case, especially my commentary following review of the reports of plaintiff's experts. However, I submit this Declaration as an offer of proof to provide extra detail and make express the implied premises and logical connections of my rebuttal criticism of Plaintiff's causation theory, and of the medical relevance of other motor vehicle accidents that Ms. Evans-Waiau has been involved in. Thus, while this Declaration largely is redundant of my previous reports, I express a few connections and premises that I previously implied.

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4. As part of my review of Desire Evans-Waiau's treatment, I reviewed all of the available medical records documenting her treatment before and after the motor vehicle accident of October 30, 2015. I also personally examined Ms. Evans-Waiau and obtained a medical history from her. The multiple reports I have authored in my capacity as a forensic expert in this case contain summaries my examination and of all the treatment provided to Ms. Evans-Waiau by her various medical providers and experts.

5. I have considered the opinions of Ms. Evans-Waiau's medical treatment providers and experts. For example, Dr. Jason Garber opines that she suffered a traumatic disc disruption at C6-C7 as a result of this accident. Dr. Hans-Jorg Rosler opines that the accident caused discogenic pain in her cervical spine. Dr. Yevgeniy Khavkin opines that the accident caused a compromise of the discs at C5-C6 and C6-C7.

6. If the opinions of Ms. Evans-Waiau's medical treatment providers and experts are to be considered, including those of Dr. Garber, Dr. Rosler, and Dr. Khavkin, then plausible

alternative explanations for her symptoms must also be considered. Ms. Evans-Waiau was involved in one known prior motor vehicle accident and one known subsequent motor vehicle accident. It would be necessary to rule those out as potential causes her claimed injuries and conditions, or as or aggravating factors, to properly conclude that this subject accident caused her claimed injuries and symptoms. Ms. Evans-Waiau's medical treatment providers and experts failed to follow proper methodology to rule out other plausible causes.

7. Plausible alternative explanations of Ms. Evans-Waiau's claimed injuries and conditions include:

    a. A motor vehicle accident on May 10, 2010. Ms. Evans-Waiau was the front-seat passenger of a vehicle involved in a rear-end collision. She is documented to have experienced post-traumatic headaches, neck pain, mid back pain, lumbar pain, spasm and stiffness, bilateral radiating shoulder pain, and tenderness throughout the cervical, thoracic and lumbar spine. Symptoms described as possible cervical spinal radiculopathy were documented in June and July 2010. She appears to have ceased treatment after her symptoms had slightly lessened, before being medically discharged. Her documented prognosis was unknown due to her failure to continue treating.

    Ms. Evans-Waiau's deposition testimony was not consistent with the medical records. She said she suffered a lumbar injury only. Records indicate she also suffered a cervical spine injury with radiating pain and possible cervical radiculopathy. Records indicate the cervical spine was of greater concern that the lumbar spine in 2010. Advanced imaging was performed on the cervical spine (an MRI), but not the lumbar spine.

    The only record we have of the cervical spine pain with radiating pain or possible radiculopathy resolving after the 2010 accident is Ms. Evans-Waiau's self-reported medical history. There is no objective documented resolution of those symptoms. My initial report acknowledges this where it states, "This is provided, of course, that she was fully recovered from her prior spinal injuries from the MVA in 2010."

    Ms. Evans-Waiau's medical treatment providers and experts failed to account for the symptoms that originated in 2010, including a cervical spine injury with documented radiating pain, when they diagnosed and causally related a traumatic disc disruption at C6-C7 to the accident of October 30, 2015. In fact, there is no medical record indicating that Dr. Garber, Dr. Rosler, or Dr. Khavkin knew about the 2010 cervical radiculopathy before forming their causation opinions.

    b. A motor vehicle accident on July 10, 2016. Ms. Evans-Waiau was the driver of a vehicle involved in a rear-end collision. She was transported by ambulance to the Sunrise Hospital Emergency Room where cervical spinal x-rays were taken. She complained of increased neck and low back pain.

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Ms. Evans-Waiau presented to Dr. Garber for the first time on July 12, 2016. She informed Dr. Garber that she was seeing him for injuries related to a motor vehicle accident occurring October 30, 2015. She also informed him she was involved in another accident two days earlier.

The July 10, 2016 accident objectively appears to have been a more forceful and damaging impact than the October 30, 2015 accident. Ms. Evans-Waiau reported no pain at the scene of the October 2015 accident; she complained of immediate pain and was transported to a hospital by ambulance immediate after the July 2016 accident. The October 2015 accident caused some minor to moderate vehicle damage; the July 2016 accident caused a total loss of her vehicle.

Despite this, Dr. Garber did not order an updated cervical spine MRI after the July 10, 2016 motor vehicle accident. He failed to use an available, objective imaging procedure to eliminate the July 2016 accident as a cause or exacerbation of the traumatic cervical disc injury for which he operated.

8. The 2010 motor vehicle accident and the 2016 motor vehicle accident are plausible alternative explanations of Ms. Evans-Waiau's conditions and symptoms. *It is not my opinion that either of those did, or did not, cause her conditions and symptoms*. It is my opinion that they are plausible alternative explanations and that the Plaintiff's medical treatment providers and experts failed to properly rule them out as such when forming their causation opinions.

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9. It is possible that Ms. Evans-Waiau sustained only soft tissue strain injuries in the 2010 accident. Nevertheless, she complained of symptoms that could be interpreted as cervical spinal radiculopathy in June and July 2010. It is not unusual for patients who suffer soft-tissue strains to report radiating pain in the shoulders and arms. This type of pain is a symptom of a soft tissue strain and is not proof of radiculopathy, or of a structural spinal injury compressing a nerve. Radiating pain resulting from a soft tissue injury typically resolves along with the soft tissue injury.

   If that is the type of injury that Ms. Evans-Waiau suffered in 2010, then the accident is medically relevant to show that this patient is susceptible to radiating pain related to soft tissue injuries. This is consistent with my opinion that the October 30, 2015 accident caused nothing more than soft tissue strains. The left shoulder and arm pain she reported in November 2015 is consistent with radiating pain related to a soft tissue injury. There is no objective evidence of a spinal disk injury

10. I am aware that Dr. Garber opines that the July 2016 accident is not relevant, reasoning that her neck pain and cervical radiculopathy were constant following the subject 2015 accident regardless of the 2016 accident, and that the apparent resolution of symptoms by the Spring of 2016 was illusory because the symptoms were merely deadened by the selective nerve root block injections administered by Dr. Rosler on January 7, 2016. In my opinion, Dr. Garber misinterprets the significance of that that injection. Had she suffered a traumatic disc disruption in the October 2015 accident, it is not plausible that the analgesic

and steroidal components of that injection could have masked her symptoms for the period of time in which she reported full or significant pain relief. The injection would grant temporary relief for a nerve injury but not for a disc injury. Ms. Evans-Waiau's response to the injection is more consistent with the resolution of a soft-tissue strain injury than with a cervical spinal disc injury.

I make this declaration under the penalties of perjury of the State of Nevada.

Dated this __13_ day of April, 2019.

JEFFREY WANG, MD

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EXHIBIT C

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EXHIBIT C

DISTRICT COURT

CLARK COUNTY, NEVADA

DESIRE EVANS-WAIAU, individually; GUADALUPE PARRA-MENDEZ, individually; JORGE PARRA-MEZA, as guardian for MAYRA PARRA, a minor; JORGE PARRA-MEZA, as guardian for AALIYAH PARRA, a minor; and JORGE PARRA-MEZA, as guardian for SIENNA PARRA, a minor, Plaintiffs, vs. BABYLYN TATE, individually; DOES I-X, and ROE CORPORATIONS I-X, inclusive, Defendants.	CASE NO. A-16-736457-C DEPT. NO. 17

VIDEOTAPED DEPOSITION

OF DESIRE EVANS-WAIAU

THURSDAY, AUGUST 17, 2017

9:17 A.M.

AT 1117 SOUTH RANCHO DRIVE

LAS VEGAS, NEVADA

REPORTED BY: MICHELLE R. FERREYRA, CCR No. 876
JOB NO. 520049

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Q. All right. Did this accident impair your ability to take care of your children?
A. Yes.
Q. How so?
A. It has hindered me from being able to play with my children, pick my children up, and just do every day things with my kids.
Q. All right. Can you think of some specific things that you do with your children before the accident that you could not do afterwards?
A. Yes. I would take them to the park. We would play in the grass, we would run, skip, play ball, swing, we would go swimming. That's all I can think of right now.
Q. Have you been able to do any of those things with your children since the October 2015 accident?
A. No.
Q. So you haven't gone swimming with them?
A. I've sat in the pool with them.
Q. Okay. But you haven't done the same things in the pool that you did before?
A. Correct.
Q. Have you taken them to the park since October 2015?
A. Yes.

BY MR. SMITH:
Q. I understand that you were involved in a motor vehicle accident in 2010; correct?
A. Correct.
Q. Did you file a lawsuit over that accident?
A. Yes.
Q. So we're talking not just a claim to an insurance company, but actually a complaint filed with a court? Sorry, go ahead.
A. I'm sorry. I -- I believe it was just with the insurance company.
Q. Did you have an attorney for the purpose of that claim?
A. Yes.
Q. Who was your attorney?
A. I don't remember.
Q. Do you recall which insurance company the claim was made to?
A. No, I do not.
Q. I understand that you were involved in a motor vehicle -- excuse me, accident in 2016 as well, July 2016?
A. Correct.
Q. And I understand you've made a claim to an insurance company over that?

Q. Have you been able to do anything with them at the park?
A. Not like I used to.
Q. So you can still go to the park, you can still do some things, but not the same range of activities you did before?
A. Correct.
Q. Have you had to incur any out-of-pocket expenses for childcare as a result of this accident?
A. No.
Q. Have you ever had to hire someone to help you with housekeeping after October 2015?
A. No.
Q. Have you ever been involved in a -- well, let me strike that. Let me rephrase.
You understand that when you file a complaint with the court asking for money damages, that's a form of a civil lawsuit. Have you -- and this case that we're here today is a civil lawsuit. Other than this case, have you ever been involved in any other civil lawsuit?
MR. KRISTOF: You just answer to the best of your knowledge. It's okay.
THE WITNESS: I don't know how to answer that.

A. Correct.
Q. Have you filed a civil lawsuit over the 2016 accident? Or have you asked your attorneys to file a civil lawsuit for you?
MR. KRISTOF: Object to the extent asking the attorneys to file the lawsuit may be attorney-client privilege.
Answer the best that you can. And then if you need the information, I can certainly provide it to you. If you -- if you really need it, I'm happy to do that.
THE WITNESS: Yes.
BY MR. SMITH:
Q. Okay. Maybe I can make this a bit easier.
Does Mr. Kristof's firm represent you with regard to the 2016 accident as well?
A. Yes.
Q. The 2016 motor vehicle accident, to the best of your knowledge, is that claim still open or has it been paid and closed?
A. It is open.
Q. Regarding the 2016 accident, do you have an understanding what parts of your body were injured in that accident?
MR. KRISTOF: Object to the extent it may

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call for medical opinion or conclusion.
Go ahead and answer.
THE WITNESS: Can you repeat the question, please?
BY MR. SMITH:
Q. Sure. Now, we're thinking solely about the 2016 accident. What parts of your body were injured in that accident?
MR. KRISTOF: Same objection.
You can answer.
THE WITNESS: I was feeling sore. My lower back and my neck.
BY MR. SMITH:
Q. So at this point, I understand you've been -- or I'm aware of three car accidents you've been involved in: One in 2010, this one in 2015, and then the one in July of 2016. Have you ever been involved in any other motor vehicle accidents, either as a driver or as a passenger?
A. No.
Q. Can you tell me, briefly, what happened in the 2010 motor vehicle accident?
A. I was a passenger. My husband was the driver. We had -- at that time, we had both of our older children in the car. We were hit from the rear with another vehicle, and it was also a hit and run. So the car -- another vehicle hit the car behind us and it hit our car.
Q. So it was a three-car collision?
A. I believe so.
Q. Did they ever -- or I'm sorry, did you ever find the hit and run driver?
A. Yes, they did.
Q. Police found the hit and run driver?
A. Yes.
Q. Were you injured in that accident?
A. Can you define injured?
Q. Did you feel any pain after the accident?
A. Yes.
Q. What parts of your body felt pain after the 2010 accident?
A. I -- I believe it was my -- my back.
Q. All right. I -- I saw you moving your hand to your left or right shoulder. I'm not very good at looking at people in mirrors and knowing left from right?
A. Well, I'm -- I'm like --
Q. Oh, okay.
A. -- like right back here (indicating). That -- I'm sorry.
Q. Were either of your shoulders -- did -- did you feel pain in either of your shoulders after the 2010 accident?
A. No.
Q. When you say that your back hurt in -- in 2010, after that -- after being rear-ended, was it your -- your neck or like the middle of your back or your lower back?
A. I can't remember.
Q. Do you remember if it was the top half or the bottom half or both?
A. I believe it was my lower.
Q. Did you get medical treatment for that?
A. Yes.
Q. Do you remember which doctor or clinic you went to for medical treatment?
A. I do not remember.
Q. Did you go to a chiropractor?
A. Yes.
Q. Do you recall going to a medical doctor in 2010 for that?
A. I believe so.
Q. Did you get any x-rays?
A. Yes.
Q. Did you ever get -- now, do you understand the difference between an x-ray and an MRI?
A. Yes.
Q. Okay. Did you get an MRI in 2010?
A. Yes.
Q. But you don't recall where those would have been done?
A. No.
Q. Where would I go to find out where you received treatment in 2010?
A. I do not know.
Q. Did the pain in your -- well, sorry. Let me strike that.
Other than your back, did any other parts of your body hurt after being rear-ended in 2010?
A. No.
Q. Did the pain in your back ever go away?
A. Yes.
Q. Completely?
A. Yes.
Q. How long did it take for the pain in your back to go away?
A. A few months.
Q. So after the pain in your back went away, were there ever times or -- or did things ever happen to sort of cause the pain to come back?

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A. Can you define that?
Q. Sure. You indicated that in 2010, you were rear-ended. As a result of that collision, you had the pain in your back that lasted for a few months, and you said it completely resolved. Did it ever come back?
A. No.
Q. Okay. So you never had an incident at work that aggravated the pain in your back?
A. No.
Q. Never had an incident lifting your children where it aggravated the pain in your back?
A. No.
Q. Did you ever have to take over-the-counter pain relievers for your back --
A. No.
Q. -- after 2010?
A. I'm sorry. No.
MR. KRISTOF: After 2010 and before our crash?
MR. SMITH: Correct.
MR. KRISTOF: Okay.
BY MR. SMITH:
Q. Yes. And -- and I'm thinking specifically from the time her back pain initially resolved in 2010, until October 2015. Did you ever have to take over-the-counter medication for neck pain or back pain?
A. No.
Q. Do you -- before the 2015 accident, did you ever get headaches?
A. No.
Q. So you're not prone to migraines?
A. No.
Q. Prior to October 2015, when this accident occurred, did you ever have a surgical procedure?
A. I gave birth to my daughter.
Q. Okay. Was it a natural birth or C-section?
A. It was a natural birth. I don't know if that counts or not as being surgical.
Q. I -- I appreciate your honesty.
A. Okay.
Q. But -- or -- or your -- your forthrightness. I -- I don't know that I would count that as a surgical procedure.
A. Okay.
Q. Natural birth for all three children?
A. No. Just Mayra.
Q. Oh, Mayra? Okay. All right.
A. Can -- can I -- the older two daughter -- the older two -- my older two daughters, they are my stepchildren.
Q. Oh, okay.
A. I just want to clarify that.
Q. So Aaliyah and Sienna are your stepchildren, and you gave birth to Mayra?
A. Yes, correct.
Q. Okay. Thank you. All right.
What I would like to do now is turn to the day that this accident occurred.
A. (Witness nods.)
Q. Where were you in the hour before the accident happened?
A. At my house.
Q. Okay. So this started -- an hour before the accident happened, you were at your house on -- I'm trying to be all smooth and get the address here, and I can't find it. 3500 Broadway?
A. Correct.
Q. All right. Who was there with you?
A. Myself, my three children, my husband, Jorge -- Jorge, my mother-in-law and my father-in-law.
Q. Okay. Do they all live with you?
A. Yes.
Q. When did you -- do you remember about what time you left the house that evening?
A. I don't recall.
Q. Okay. From the time you left your house, where did you go next?
A. We were driving toward -- to the lake.
Q. Okay. Did you go directly from your house on Broadway to the Linq, or did you stop some part on the way?
A. No. We -- we went directly there.
Q. Okay. Who was in the car when you left your house?
A. Myself, my sister-in-law, Guadalupe, and my three children.
Q. You were driving?
A. Yes.
Q. And Guadalupe was in the front passenger seat?
A. Yes.
Q. If you are -- think from like the driver's side working towards the passenger side, do you remember how children were arranged in the car?
A. Yes. Sienna was sitting behind me, Mayra was sitting in the middle, Aaliyah was sitting behind Guadalupe.
Q. Now, how old was Sienna in October 2015?
A. Eight years old.
Q. Okay. And how old was Mayra?

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CERTIFICATE OF DEPONENT

PAGE LINE CHANGE REASON

* * * * *

I, DESIRE EVANS-WAIAU, deponent herein, do hereby certify and declare under the penalty of perjury the within and foregoing transcription to be my deposition in said action; that I have read, corrected and do hereby affix my signature to said deposition.

DESIRE EVANS-WAIAU, Deponent

CERTIFICATE OF REPORTER

STATE OF NEVADA)
COUNTY OF CLARK)

I, Michelle R. Ferreyra, a Certified Court Reporter licensed by the State of Nevada, do hereby certify: That I reported the videotaped deposition of DESIRE EVANS-WAIAU, commencing on THURSDAY, AUGUST 17, 2017, at 9:17 a.m.

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said stenographic notes into written form, and that the typewritten transcript is a complete, true and accurate transcription of my said stenographic notes, and that a request has not been made to review the transcript.

I further certify that I am not a relative, employee or independent contractor of counsel or of any of the parties involved in the proceeding, nor a person financially interested in the proceeding, nor do I have any other relationship that may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 5th day of September, 2017.

Michelle R. Ferreyra-Mann

MICHELLE R. FERREYRA, CCR No. 876

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Desire Evans-Waiau and Guadalupe Parra-Mendez

DISTRICT COURT

CLARK COUNTY, NEVADA

DESIRE EVANS-WAIAU, individually, GUADALUPE PARRA-MENDEZ, individually; JORGE PARRA-MEZA as guardian for MAYRA PARRA, a minor; JORGE PARRA-MEZA, as guardian for AALIYAH PARRA, a minor; and JORGE PARRA-MEZA, as guardian for SIENNA PARRA, a minor,

Plaintiffs,

vs.

BABYLYN TATE, individually, DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO. A-16-736457-C
DEPT. NO. XVIII

PLAINTIFFS' TRIAL BRIEF IN OPPOSITION TO TRIAL BRIEF REGARDING DEFENDANT'S RIGHT TO CONTEST PLAINTIFFS' *PRIMA FACIE* SHOWING OF CAUSATION AND DAMAGES

AND

OFFER OF PROOF

Plaintiffs DESIRE EVANS-WAIAU and GUADALUPE PARRA-MENDEZ, by and through their attorneys of record, DENNIS M. PRINCE, ESQ., TRACY A. EGLET, ESQ., and

KEVIN T. STRONG, ESQ, of EGLET PRINCE, hereby submit *Plaintiffs' Trial Brief in Opposition to Trial Brief Regarding Defendant's Right to Contest Plaintiffs' Prima Facie Showing of Causation and Damages*.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendant Babylyn Tate's ("Tate") Trial Brief seeks reconsideration of the district court's orders regarding the admissibility of: (1) Plaintiff Desire Evans-Waiau's ("Evans-Waiau") prior 2010 motor vehicle accident; (2) Evans-Waiau's subsequent July 10, 2016 motor vehicle accident (potentially); (3) Evans-Waiau's representations made during other lawsuits; and (4) Evans-Waiau and Plaintiff Guadalupe Parra-Mendez's respective employment histories.

Tate artfully employs misdirection by suggesting that the district court's ruling to exclude Evans-Waiau's prior 2010 accident somehow circumvents Plaintiffs' burden of proof at trial. This argument, however, disregards Tate's failure to secure the necessary medical expert testimony to establish the relevancy and/or causal relationship between Evans-Waiau's claimed injuries and the prior 2010 accident. Tate also disregards Nevada law that requires the relevancy of pre-existing injuries, accidents or conditions to be established by competent medical evidence and expert testimony. *Williams v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 518, 530 (2011); *FGA, Inc. v. Giglio*, 128 Nev. 271, 284 (2012). Tate's criticisms of Evans-Waiau's treating physicians/retained medical experts' opinions does not absolve Tate's retained medical experts of their failures to adequately articulate opinions necessary to establish the relevancy of the prior 2010 accident. Tate understands this to be true, which is precisely why she provides untimely supplementary affidavits from her retained medical experts to rectify the deficiencies in the reports they produced during discovery. These experts easily could have provided such opinions in their reports produced during discovery, but failed to do so. They should not now be able to offer such new opinions now because such a ruling would contravene the express provisions of NRCP 16.1(a)(2)(B).

II.

LEGAL ARGUMENT

A. The Relevancy of Evans-Waiau's Prior 2010 Motor Vehicle Accident is Tied to Medical Expert Opinions and Testimony that Tate Does Not Possess

Tate begins her argument by reminding this Court to consider Plaintiffs' burden of proof regarding medical causation. Tate relies on *Mathews v. State of Nevada*, 134 Nev. ___, 424 P.3d 634, 638 (2018) to imply that the district court's ruling to exclude Evans-Waiau's prior 2010 accident is somehow an endorsement of Plaintiffs' treating physicians/medical experts' causation opinions. This argument is flawed because the district court did not presume that Evans-Waiau's medical causation opinions are correct as part of its ruling. Rather, the district court focused on the factual evidence regarding Evans-Waiau's prior treatment and the lack of reliable medical evidence and medical expert testimony to establish the relevancy of the 2010 motor vehicle accident. *See* 4/22/19 Order regarding Plaintiffs' Motions in Limine, at pp. 6-8. The district court's analysis of the evidence regarding Evans-Waiau's prior 2010 accident and Defendant's medical experts' opinions was triggered by Evans-Waiau's treating physicians/retained medical experts' opinions that the subject collision caused her injuries. When a plaintiff has met her burden to establish medical causation to a reasonable degree of medical probability, the defendant is afforded the opportunity to challenge the plaintiff's case. *Williams*, 127 Nev. at 530. Thus, the district court properly analyzed whether Tate established the relevancy of the 2010 motor vehicle accident without making any evaluation as to the reliability or credibility of Plaintiffs' treating physicians' opinions. Such an inquiry is not germane to the district court's analysis pursuant to *Williams* and *Giglio*. Tate merely suggests otherwise to distract this Court from the deficient reports prepared by her retained medical experts. Ironically, Tate implies that Evans-Waiau's treating physicians/retained medical experts fabricate their causation opinions without acknowledging the inherent bias of her retained medical experts, Jeffrey C. Wang, M.D. and Joseph J. Schifini, M.D.

Suffice to say, the district court did not err in its analysis regarding the admissibility of the 2010 motor vehicle accident because there is no burden shifting or endorsement of Evans-Waiau's medical causation opinions in its analysis. Tate's arguments are presumptuous, at best,

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and overlook the district court's specific analysis outlined in its Order. The district court did not cite to *Kleitz v. Raskin*, 103 Nev. 325, 326 (1987) to support its Order granting Plaintiffs' motions regarding the prior 2010 car accident or the subsequent 2016 car accident. Thus, the district court did not incorrectly rely on *Kleitz*, as Tate suggests, to shift the burden in this case. Tate is simply trying to manufacture error based on her speculative interpretation of the court's rationale regarding its ruling. Simply put, the district court properly relied on *Williams* and *FGA, Inc.* to justify its rulings because the district court analyzed Dr. Wang and Dr. Schifini's opinions consistently with those decisions.

1. The reliability of the medical causation opinions from Evans-Waiau's treating physicians are irrelevant to the district court's inquiry and should have been Addressed by Tate's retained medical experts

Rather than address the blatant deficiencies in her retained medical experts' reports, Tate presents to this Court arguments that are critical of the opinions from Evans-Waiau's treating physicians. Tate contends that Evans-Waiau's treating physicians failed to account for the 2010 motor vehicle accident to reach their ultimate opinions, which is inaccurate. The propriety of Tate's arguments in this context is highly questionable for a number of reasons. Tate's criticisms of Evans-Waiau's treating physicians'' opinions are based on reliability because they alleged failed to account for the prior motor vehicle accident. This criticism addresses the weight that should be placed on Evans-Waiau's treating physicians' opinions, not their admissibility. "It is a function of the jury, not the court, to determine the weight and credibility to give such [expert] testimony." *Mulder v. State*, 116 Nev. 1, 13 (2000). Tate also overlooks that her experts' failure to address the alleged deficiencies of Evans-Waiau's treating physicians' opinions in their reports precisely underscore why the prior 2010 accident and subsequent 2016 accident were excluded from this matter.

Notably, Tate disregards that Evans-Waiau's treating physician expressly considers the prior 2010 accident and outlines in his report ***why*** the accident and limited treatment thereafter are clinically insignificant as to medical causation. Specifically, Evans-Waiau's treating neurosurgeon, Jason E. Garber, M.D., authored several reports regarding his medical causation opinions. One of his reports specifically outlined his review of Evans-Waiau's treatment records

following the prior 2010 accident and why his opinion that the subject collision caused Evans-Waiau's cervical spine injury did not change:

> It would appear that the patient was involved in a motor vehicle accident on 05/10/2010. The patient was apparently the restrained front seat passenger of an automobile that was struck by another vehicle. The patient was seen at Cameron Medical Center by Dr. Kathleen Smith on 06/16/2010. She had complaints of headaches, neck pain, and shoulder pain bilaterally. The patient apparently underwent from 05/26/10 until 07/13/10 visits of chiropractic treatment at the Bonanza Back Center. ***The patient had reduced pain and overall improvement in her range of motion in areas of the neck, mid back, lower back, and shoulders bilaterally. There was an MRI of the cervical spine performed 07/12/10, which apparently was unremarkable. The information provided to me serves to note that the patient sustained what appears to be a soft tissue strain or sprain which did not require additional intervention, other than the conservative chiropractic treatment.***

. . .

> I understand that the patient does have a prior history of motor vehicle accident of 05/10/2010, it was only limited chiropractic treatment for which the patient's symptomatology resolved thereafter. An MRI in 2010 ***clearly revealed no evidence of acute cervical spine disc pathology noted***.

See 7/20/18 Garber report, at p. 6, attached as **Exhibit "1"** (emphasis added).

As Dr. Garber clearly articulated in his initial December 21, 2017 report, "I reserve the right to alter or modify my opinions based upon any additional information that me be presented to me." *See* 12/21/17 Garber report, at p. 13, attached as **Exhibit "2."** Dr. Garber then considered the particularized facts regarding Evans-Waiau's medical treatment she underwent after the prior 2010 motor vehicle accident. *Hallmark v. Eldridge*, 124 Nev. 492, 501 (2008). Ultimately, Dr. Garber determined that Evans-Waiau sustained a sprain/strain injury to her cervical spine as a result of the prior 2010 car accident because: (1) she experienced improvement in her range of motion in her neck and bilateral shoulders from chiropractic care; and (2) the July 12, 2010 MRI was normal. *See* 7/12/10 MRI report, attached as **Exhibit "3."** Notably, the July 12, 2010 MRI was taken ***after*** Dr. Kathleen Smith examined Evans-Waiau and noted her belief that Evans-Waiau "[had] ***possible cervical radiculopathy*** . . . ." *See* 6/16/10 Cameron Medical Center record, attached as **Exhibit "4."** In fact, Dr. Smith was the physician who referred Evans-Waiau to undergo the cervical spine MRI, which is noted on the report. *See* **Exhibit "3."** It is reasonable to presume that Dr. Smith referred Evans-Waiau to undergo the

cervical spine MRI to "rule out" the suspicion of cervical radiculopathy. The cervical spine MRI certainly confirmed this "rule out" given that the MRI returned normal findings and that Evans-Waiau's treatment ceased from July 13, 2010 to October 30, 2015, the date of the subject collision. Notably, However, after the subject motor vehicle collision, Evans-Waiau's cervical spine MRI taken on December 16, 2015 revealed a disc protrusion at C5-6 and C6-7. *See* **Exhibit "2,"** at p. 3. Therefore, Dr. Garber provided a sufficiently reliable explanation for why he ruled out the 2010 motor vehicle accident as a potential cause of Evans-Waiau's cervical spine injury.

2. Tate overstates the potential relevancy of Evans-Waiau's prior 2010 accident to her credibility

Tate's argument that Evans-Waiau deliberately lied to her treating physicians regarding the prior 2010 motor vehicle accident and her treatment related thereto is based on the flawed premise that her treating physicians heavily relied on her subjective reporting to support their opinions. This is not accurate. Dr. Garber also relied on the findings of the cervical spine MRI after the subject collision in comparison to the cervical spine MRI taken after the prior 2010 motor vehicle accident, which revealed no structural changes or injuries of any kind. *See* **Exhibit "3."** This fact significantly limits the probative value, if any, of the prior 2010 motor vehicle accident because Dr. Garber did not provide a medical causation opinion based solely on Evans-Waiau's self-reporting. This distinction is critical because it undermines Tate's reliance on *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008 (7th Cir. 2000) to support its argument. In *Cooper*, the Seventh Circuit determined that the accuracy and truthfulness of the injured plaintiff's medical history was subject to cross-examination. Unlike this matter, the truthfulness of the injured plaintiff's reporting of his medical history was directly relevant because his treating physician, Dr. Richardson, relied only on the injured plaintiff's self-reporting that he was pain free before the underlying incident. *Id.* at 1019.

Tate also speculates that Evans-Waiau lied about not experiencing any neck or low back pain related to her work history of lifting heavy weight and that she never took Tylenol or Advil for muscle pain in her neck or low back. Tate's disbelief of this testimony does not somehow transform the testimony into a lie. Tate seems to forget that reference to prior injuries or medical

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conditions requires medical expert testimony that is supported by relevant evidence and research. *FGA, Inc.*, 128 Nev. at 284. There is no evidence that Evans-Waiau treated for neck or low back pain prior to the subject collision as a result of lifting heavy items at work. Jurors are not permitted to speculate about Evans-Waiau's credibility because this will unduly prejudice Plaintiffs at trial, particularly because it could impact the outcome of the verdict. *Gramanz v. T-Shirts & Souvenirs*, 111 Nev. 478, 485 (1995); Nev. Rev. Stat. 48.035. The probative value of Evans-Waiau alleged credibility issues regarding the prior 2010 car accident is also limited by Dr. Wang and Dr. Schifini's failure to provide the opinions necessary to establish the relevancy of the prior accident and treatment. Therefore, the district court's order precluding reference to the 2010 motor vehicle accident should remain.

3. Evans-Waiau's past symptoms do not inform her interpretation of her current symptoms because of the distinct differences in medical findings and symptomatology

Plaintiffs already establish above that there is sufficient distinction between the injury to Evans-Waiau's cervical spine after the prior 2010 car accident in relation to her cervical spine injury following the subject collision. Specifically, the distinction in findings on the 2010 MRI versus the 2015 MRI. However, Plaintiffs also note that during Evans-Waiau's June 16, 2010 initial exam with Dr. Smith, Evans-Waiau complained of neck pain that she described as achy and burning. *See* **Exhibit "4."** The character of these pain complaints is completely different from Evans-Waiau's complaints of left-sided neck pain shooting down into her left arm and numbness in her left hand. *See* 12/16/15 Rosler record, at p. 1, attached as **Exhibit "5."** Once again, these are the particularized facts of Evans-Waiau's prior medical treatment that Tate simply cannot ignore. There is no relevance to the 2010 motor vehicle accident

B. <u>Tate Does Not Possess Sufficient Foundation to Reference the 2010 Accident in Light of Her Retained Medical Experts' Opinions</u>

Tate's secondary argument is that the district court erroneously interpreted *Williams* in relation to the admissibility of the prior 2010 motor vehicle accident. However, Tate disregards that *FGA, Inc.* further clarifies the standard set forth in *Williams* regarding the relevance and admissibility of prior injuries or medical conditions. Tate overlooks that prior injuries are not automatically relevant simply because they happened to the same area of the body at issue in this

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litigation. Rather, such prior injuries must be supported by competent medical expert testimony and research. *FGA, Inc.*, 128 Nev. at 284. Tate's medical experts do not address Evans-Waiau's medical causation theory because they do not offer any opinions regarding the relevance of the prior accident in relation to their ultimate causation opinions. This is precisely why Tate has provided detailed supplemental reports to this Court that are disguised as "affidavits" to clarify their opinions. Defendant even admitted during her prior briefing that her experts intend to discuss how the prior medical treatment factored into [Evans-Waiau's] current complaints. Tate now is trying to sneak in supplemental reports before this Court in clear violation of the Nevada Rules of Civil Procedure.

1. Defense counsel may not ask Plaintiffs' experts and treating physicians about her prior 2010 accident because medical expert testimony is required to establish its relevancy

Tate believes that the mere existence of a prior injury automatically means that Evans-Waiau's treating physicians/retained medical experts should be questioned about it. This argument disregards Nevada law that governs the admissibility of prior injuries. "A prior injury or preexisting condition ***may*** be relevant to the issues of causation and damages in a personal injury action." *FGA, Inc.*, 128 Nev. at 283. "In order for evidence of a prior injury or preexisting conditions to be admissible, ***a defendant must present by competent evidence a causal connection between the prior injury and the injury at issue***." *Id.* "Moreover, unless it is readily apparent to a layperson, a defendant seeking to introduce evidence of a prior injury generally must produce expert testimony demonstrating the relationship between the prior injury and the injury complained of and why it is relevant to a fact of consequence." *Id.* "Expert testimony . . . must have a sufficient foundation before it may be admitted into evidence." *Rish v. Simao*, 132 Nev. ___, 368 P.3d 1203, 1208 (2016) (citing *Hallmark v. Eldridge*, 124 Nev. 492, 503-04 (2008)). Without expert support, any argument or reference to these prior injuries or medical conditions is speculative and inadmissible. *Morsicato v. Sav-On Drug Stores, Inc.*,121 Nev. 153, 157 (Nev. 2005).

The complexities associated with Evans-Waiau's cervical spine injuries both before and after the subject collision are not readily apparent to a layperson. Therefore, Tate is required to

present expert testimony to establish the relevancy and causal connection between the prior injury from the 2010 accident and the subject collision. Tate's retained medical experts failed to do so as articulated by the district court in its order. Therefore, the relevancy of the 2010 accident and Evans-Waiau's cervical spine injury and treatment are not relevant.

2. Defendant's retained medical experts do not address Plaintiffs' medical causation theory in their reports at all

A defendant has three distinct courses of action to take once a plaintiff has met his burden of medical causation: (1) cross-examine the plaintiff's expert; (2) contradict the plaintiff's medical expert's testimony with his own expert and/or (3) propose an independent alternative causation theory. *Williams*, 127 Nev. at 530; *Giglio*, 128 Nev. at 284. A medical expert who opines that a prior injury or medical condition is ***the*** cause of the plaintiff's claimed injury or pain complaint must state this opinion to a reasonable degree of medical probability. *FGA, Inc.*, 128 Nev. at 283-84 (citing *Williams*, 127 Nev. at 529). If expert testimony is offered to contradict the plaintiff's expert's opinion, the testimony must be supported by competent medical research and relevant evidence. *Id.* "However, for defense expert testimony to constitute a contradiction of the party opponent's expert testimony, the defense expert ***must*** include the plaintiff's causation theory in his analysis." *Giglio*, 128 Nev. at 284. This is necessary because proposing an alternative theory of causation creates a burden shift to the defendant regarding medical causation:

> If the defense expert does not consider the plaintiff's theory of causation at all, then the defense expert must state any independent alternative causes to a reasonable degree of medical probability because he or she then bears the burden of establishing the causative fact for the trier of fact. 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 evidence of [plaintiff].

FGA, Inc., 128 Nev. at 284 (internal quotations omitted).

Notably, Tate generally argues that Dr. Wang and Dr. Schifini review and offer criticisms of Evans-Waiau's treating physicians' opinions without specificity. This is because Dr. Wang and Dr. Schifini already established their medical causation opinions before they even considered the existence of Evans-Waiau's prior 2010 accident. In Dr. Wang's initial report, he opined that Evans-Waiau only sustained a sprain/strain to her cervical spine as a result of the

subject collision. *See* 11/9/17 Wang report, at pp. 5-6, attached as **Exhibit "6."** Dr. Wang did not specifically refer to the opinions of Evans-Waiau's treating physicians/retained medical experts when he offered this opinion. *Id.* In Dr. Wang's supplemental report in which he addressed the prior 2010 accident, his opinions did not change regarding medical causation. *See* Plaintiffs' Motion in Limine No. 13, at Exhibit "5," p. 2. The same is true for Dr. Schifini, who opined in his initial report that Evans-Waiau sustained soft tissue injuries as a result of the subject collision. *See* 1/7/18 Schifini report, at p. 8, attached as **Exhibit "7."** In his supplemental report in which he addressed the prior 2010 accident, Dr. Schifini's medical causation opinion did not change. *See* Plaintiffs' Motion in Limine No. 13, at Exhibit "6," p. 6. Dr. Wang and Dr. Schifini's medical causation opinions remained the same even after considering the existence of Plaintiff's prior 2010 accident. Thus, there was no basis for them to even consider Evans-Waiau's treating physicians/retained medical experts' medical causation opinions in relation to the prior 2010 accident. Plaintiffs do not contend that Tate's experts' reports need to provide every detail as to why the prior accident is relevant. However, they have to do more than just explain that they reviewed the prior records and that their original opinions remain the same. This establishes the clinical insignificance of the prior accident.

3. Defendant's retained medical experts' declarations should be struck by this court as untimely supplemental reports

NRCP 16.1(a)(2)(B) states that retained experts are required to provide reports that must contain "a complete statement of all opinions the witness will express, and the basis and reasons for them." NRCP 26(e)(2) requires parties to provide additions or change to their retained experts' reports by the time the parties' pre-trial disclosures are due, which is thirty days before trial. *See also,* Nev. R. Civ. P. 16.1(a)(3)(B)(i).

Tate's suggestion that the declarations from her retained medical experts merely provide additional details regarding opinions that they already provided in their reports is laughable. Both Dr. Wang and Dr. Schifini author new opinions that the prior 2010 accident and subsequent 2016 accident are plausible alternative explanations of Evans-Waiau's alleged injuries from the subject collision. *See generally* Tate's Trial Brief, Exhibit "A" and Exhibit "B." There is no excuse as to why they failed to provide these opinions in their respective expert reports. There is

no excuse why they simply maintained their same opinions that Evans-Waiau only suffered a sprain/strain injury as a result of the subject collision given that they reviewed the medical treatment related to the prior and subsequent accidents. Tate understands the deficiencies of her retained medical experts' reports and opinions, which is why she attempts to introduce new opinions well past the initial expert disclosure deadline and on the eve of trial. The district court should view these declarations as nothing more than failed attempts to establish the relevancy of the prior 2010 accident and subsequent 2016 accident, which they failed to do. Tate's attempt to somehow justify these declarations by arguing that Evans-Waiau's treating physicians are not required to prepare reports is flawed not only because her treating physicians prepared reports, but also because Plaintiffs' provided a detailed explanation of the scope of their testimony and opinions. The same cannot be said for Dr. Wang and Dr. Schifini. Accordingly, Plaintiffs respectfully requests this Court maintain its rulings and strike any reference to the declarations of Dr. Wang and Dr. Schifini from this matter.

C. Evans-Waiau's Prior Lawsuit and Subsequent Lawsuit was Properly Excluded from this Action

Tate misinterprets the underlying bases supporting the district court's decision to exclude reference to Evans-Waiau's prior claims and/or lawsuits related to the prior 2010 accident and the subsequent 2016 accident. The district court specifically reasoned that the claims and/or lawsuits should be excluded because the underlying injuries alleged are irrelevant to the remaining issues in this case. *See* 4/22/19 Order regarding Plaintiffs' Motions in Limine, at p. 9. The irrelevance of these injuries stem from Tate's retained experts' failure to offer opinions regarding the clinical significance of the injuries from the prior 2010 accident and subsequent 2016 accident. *Id.*

Tate's primary argument is that the allegations contained in Evans-Waiau's lawsuit related to her subsequent 2016 accident are evidentiary admissions that should not be excluded.[1] Tate relies on *Trans W. Leasing Corp. v. Corrao Constr. Co.*, 98 Nev. 445 (1982) to support her argument. However, *Trans W. Leasing* is not applicable in this case because the Nevada

[1] There is no evidence that Evans-Waiau filed a lawsuit regarding the 2010 accident and Tate has not produced any evidence to prove otherwise.

Supreme Court's specific determination was that the district court erred in excluding factual allegations from ***superseded pleadings*** that were filed in the same case, ***not*** a different case. 98 Nev. at 448. Tate cannot reasonably interpret *Trans W. Leasing* to stand for the proposition that the factual allegations in a complaint from a separate lawsuit are admissible in any concurrent lawsuit involving the same plaintiff. Therefore, Tate's arguments do not justify the admission of her prior and/or subsequent claims or lawsuits.

D. Plaintiffs' Employment History Should Remained Excluded Because They are No Longer Pursuing a Wage Loss or Loss of Earning Capacity Claim

Tate's arguments to reconsider the district court's ruling regarding Plaintiffs' respective employment histories are void because Plaintiffs are no longer pursing wage loss or loss of earning capacity claims. Therefore, the district court's Order precluding reference to the same should remain in effect.

IV.

CONCLUSION

Based on the foregoing facts, law, and analysis, Plaintiffs respectfully request this Court to deny Defendant the requested relief outlined in her Trial Brief.

DATED this 23rd day of April, 2019.

EGLET PRINCE

/s/ Kevin T. Strong
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
TRACY A. EGLET, ESQ.
Nevada Bar No. 6419
KEVIN T. STRONG, ESQ.
Nevada Bar No. 12107
Attorneys for Plaintiffs
Desire Evans-Waiau and Guadalupe Parra-Mendez

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on April 23, 2019, I caused a true and correct copy of the foregoing document entitled **PLAINTIFFS' TRIAL BRIEF IN OPPOSITION TO TRIAL BRIEF REGARDING DEFENDANT'S RIGHT TO CONTEST PLAINTIFFS' *PRIMA FACIE* SHOWING OF CAUSATION AND DAMAGES AND OFFER OF PROOF** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

Thomas E. Winner, Esq.
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Las Vegas, Nevada 89102
Attorneys for Defendant
Bablyn Tate

/s/ Lizbeth Flores
An Employee of Eglet Prince

EXHIBIT 1

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EXHIBIT 1

LVNI
CENTER FOR SPINE AND BRAIN SURGERY™
LAS VEGAS NEUROSURGICAL INSTITUTE

Jason E. Garber, MD, FAANS, FACS
Stuart S. Kaplan, MD, FAANS, FACS
Gregory Logan Douds, MD, FAANS, FACS
Scott Glickman, DO, FACOS
Aury Nagy, MD, FAANS, FACS
Patrick McNulty, MD, FABOS, FABBS

July 20, 2018

Eglet Prince
Attn: Tracy Eglet, Esq
4th Floor, 400 South 7th Street
Las Vegas, NV. 89101
(702) 853-5861

Regarding: Desire Evans-Waiau

Date of Loss: 10/30/2015
Date of Birth: 04/17/1991

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Dear Ms. Eglet,

Enclosed is a complete review of all additional medical records in regards to Ms. Desire Evans-Waiau. After reviewing the records provided to me, enclosed is my expert opinion.

Below is a list of the items that I have reviewed in preparation for this rebuttal report:

1. Sunrise Hospital Medical Center
2. Steinberg Diagnostic Medical Imaging Centers
3. Cameron Medical Center
4. Southwest Medical Associates
5. Bonanza Back Center
6. Centennial Upright MRI
7. Clark Medic West
8. Radiology Specialists
9. Fremont Emergency Services
10. American Medical Response
11. Videotaped deposition transcript of Desire Evans-Waiau
12. Neuromonitoring Associates
13. Addendum Report #4 by Dr. Jeffrey Wang at Keck Medical Center of USC
14. Deposition transcript of Jason Garber, M.D.
15. Addendum Report #7 by Dr. Jeffrey Wang at Keck Medical Center of USC
16. Additional medical records review by Joseph J. Schifini, M.D.
17. Addendum Report #8 by Dr. Jeffrey Wang at Keck Medical Center of USC

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I. PHYSICIAN CONSULTATIONS / OFFICE VISITS:

Ms. Evans-Waiau was seen at Sunrise Hospital Medical Center on the following dates:

07/10/2016 Emergency Department - Dr. Aaron Lovinger: Patient arrived by EMS. She was involved in a motor vehicle accident. She complained of neck and back pain. Patient was the restrained driver who was rear ended by another vehicle. She had a history of chronic neck and back pain. She was in a c-collar. X-ray of the cervical spine showed no evidence of acute bony abnormality. Patient was to follow up with her primary care physician. Medication was prescribed. Patient's condition was stable and she was discharged.

II. DIAGNOSTIC AND TESTING REVIEW:

07/10/2016 Ms. Evans-Waiau underwent an x-ray of the cervical spine performed at Sunrise Hospital Medical Center. X-ray showed no evidence of acute bony abnormality.

09/21/2016 Ms. Evans-Waiau underwent an MRI of the cervical spine performed at Steinberg Diagnostic Medical Imaging Centers. MRI revealed status post anterior interbody fusion at C6-C7.

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III. PAST MEDICAL HISTORY:

a. PAST PHYSICIAN CONSULTATIONS / OFFICE VISITS:

Ms. Evans-Waiau was seen by Dr. Kathleen Smith at Cameron Medical Center on the following dates:

06/16/2010 Patient was involved in a motor vehicle accident on 05/10/2010. She was the restrained front seat passenger who was struck by another vehicle. X-rays of the cervical, thoracic, and lumbar spine dated 05/26/2010 were negative. Patient complained of headaches, neck pain, and shoulder pain bilaterally. She was in chiropractic treatment and was to continue. Patient was recommended an MRI of the cervical spine. She was referred to a neurologist for her headaches and upper extremity pain.

Ms. Evans-Waiau was seen at Southwest Medical Associates on the following dates:

02/19/2013 Caprice Hutchison, APN: Patient was new to SMA. She had a small burn on her chest after splashing scalding water on herself. Patient was ordered blood work and a urinalysis. Medication was prescribed. Patient was to follow up in 11 months.

b. PAST SUMMARY OF TREATMENT & PROCEDURES:

Treatment:	05/26/2010 to 07/13/2010 - Chiropractic treatment for approximately 14 visits including, manipulation, adjustments, mechanical traction, electrical muscle stimulation, cryotherapy, and massage
Performed by:	Bonanza Back Center
Results:	Patient had reduced pain and overall improvement in her range of motion in the areas of the neck, mid back, low back, and shoulders bilaterally.

c. PAST DIAGNOSTIC AND TESTING REVIEW:

07/12/2010 Ms. Evans-Waiau underwent an MRI of the cervical spine without contrast performed at Centennial Upright MRI. MRI was normal.

IV. MISCELLANEOUS:

07/10/2016 Clark Medic West patient care report:

Patient was a 25-year-old female ambulatory on the scene who complained of neck pain. She was in the front passenger seat of the vehicle wearing her seatbelt. She was at a complete stop at a stop sign when she was rear-ended by another vehicle. Patient reported prior chronic neck and back pain from a motor vehicle accident months ago but her neck was significantly worse after this accident. Patient reported her neck pain was 8/10. She was placed in a c-collar. IV was started on the right-hand. Patient was transported to Sunrise Hospital Medical Center.

07/27/2016 Radiology Specialists account history for date of service 07/10/2016 totaling $45.00

08/26/2016 Fremont Emergency Services patient statement for date of service 07/10/2016 totaling $841.00

09/29/2016 American Medical Response invoice for date of service 07/10/2016 totaling $1236.45

08/17/2017 Videotaped deposition transcript of Desire Evans-Waiau

11/08/2017 Neuromonitoring Associates health insurance claim form for date of service 09/01/2016

02/12/2018 Addendum Report #4 by Dr. Jeffrey Wang at Keck Medical Center of USC:

Medical records reviewed from 05/10/2010 through 02/07/2018

"After reviewing the new records, my opinions had not changed. The new records document in greater detail a prior MVA in 2010, where she sustained injuries to her neck and low back. In particular, the new records document a prior cervical injury that required advanced imaging with an MRI, prior medical treatment, and the diagnosis of cervical radiculopathy and neck pain, all prior to the incident of 2015. This is not consistent with her reports of only having prior low back injuries in the past..."

04/04/2018 Deposition transcript of Jason Garber, M.D.

04/21/2018 Addendum Report #7 by Dr. Jeffrey Wang at Keck Medical Center of USC:

Reviewed Dr. Khavkin's deposition dated 03/20/2018 and Dr. Rosler's deposition dated 04/05/2018.

"After reviewing the new records, my opinions had not changed..."

04/30/2018 Additional medical records review by Joseph J. Schifini, M.D.:

Records reviewed from 05/26/2010 through 03/23/2018

"After having the opportunity to review these updated medical records, billing records, deposition testimonies and other data regarding Ms. Evans-Waiau in addition to my previously authored report in this matter, I have not arrived at any significant changes to my previously expressed opinions. Instead, I have formulated some new and/or rebuttal opinions while strengthening my previously helped opinions in this matter."

05/13/2018 Addendum Report #8 by Dr. Jeffrey Wang at Keck Medical Center of USC:

Reviewed new records from Dr. Schifini dated 04/30/2018 and Dr. John Janzen dated 05/10/2018.

Reviewed Babylyn Tate's deposition dated 04/03/2018 and Dr. Garber's deposition dated 04/14/2018

"After reviewing the new records, my opinions had not changed. The risk of adjacent segment arthritis and the need for future surgery is consistent with the natural progression of arthritis with age, and not definitely associated with a prior fusion..."

V. CONCLUSION:

I have reviewed additional medical records provided to me on patient Desire Evans-Waiau. It would appear that the patient was involved in a motor vehicle accident on 05/10/2010. The patient was apparently the restrained front seat passenger of an automobile that was struck by another vehicle. The patient was seen at Cameron Medical Center by Dr. Kathleen Smith on 06/16/2010. She had complaints of headaches, neck pain, and shoulder pain bilaterally. The patient apparently underwent from 05/26/2010 until 07/13/2010 visits of chiropractic treatment at the Bonanza Back Center. The patient had reduced pain and overall improvement in her range of motion in areas of the neck, mid back, lower back and shoulders bilaterally. There was an MRI of the cervical spine performed 07/12/2010, which apparently was unremarkable. This information provided to me serves to note that the patient sustained what appears to be a soft tissue strain or sprain which did not require additional intervention, other than the conservative chiropractic treatment.

I was provided other miscellaneous information for which the patient was seen at Sunrise Hospital on 07/10/2016 for a motor vehicle accident. The patient was seen by Dr. Aaron Lovinger and the patient was found to have on plain film x-rays no acute bony structural abnormalities. Patient was discharged home.

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The patient continued to have ongoing symptomatology following this accident of 7/10/2016. Following the secondary accident, the patient had continued symptomatology stemming from the disc herniation at C6-C7. The identification of this disc herniation however was first noted following the 10/30/2015 accident. It was only after this second accident of 07/10/2016 that the patient had worsening and persistent symptomatology.

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Based upon the additional information provided to me, the identification of the traumatically disrupted disc at C6-C7 was first identified after the 10/30/2015 accident. It is also my expert opinion within a reasonable degree of medical probability that the motor vehicle accident of 07/10/2016 has no clinical relevance as it relates to the nature of the injuries. The patient sustained in her cervical spine which initially stem from the 10/30/2015 accident.

I understand that the patient does have a prior history of motor vehicle accident 05/10/2010, it was only limited chiropractic treatment for which the patient's symptomatology resolved thereafter. An MRI in 2010 clearly revealed no evidence of acute cervical spine disc pathology noted.

In conclusion, the additional medical records provided to me only served to reinforce in my expert opinion the nature of the injuries sustained by the patient as a result of the 10/30/2015 accident and the subsequent need for treatment thereafter. 07/10/2016 accident only served to aggravate her pre-existing condition set forth in motion by the 10/30/2015 accident. The motor vehicle accident of 05/10/2010 appears to have only caused the patient to suffer from a transient cervical strain which was self-limited, and conservative chiropractic treatment.

Nothing in the additional medical records provided to me alters the nature of the injuries in my expert opinion sustained by the patient or the subsequent need for ACDF following the accident of 10/30/2015.

All my opinions are within a reasonable degree of medical probability, and I reserve the right to alter or modify my opinions based upon any additional information that may be presented to me.

Should you have any additional questions or concerns, please do not hesitate to contact me. Thank you very much for your time and consideration.

Sincerely,

JASON E. GARBER, M.D., F.A.C.S.
Diplomat, American Board of Neurological Surgeons
Spine Fellowship Trained Neurosurgeon
JEG:crh
Dictated but not edited

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EXHIBIT 2

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EXHIBIT 2

Western Regional Center for Brain & Spine Surgery
Comprehensive Neurosurgical Care

Jason E. Garber, MD, FACS

Stuart S. Kaplan, MD, FACS

Gregory Logan Douds, MD

Scott Glickman, MD

December 21, 2017

Eglet Prince
Attn: Tracy Eglet, Esq
4th Floor, 400 South 7th Street
Las Vegas, NV. 89101
(702) 853-5861

Regarding: Desire Evans-Waiau

Date of Loss: 10/30/2015
Date of Birth: 04/17/1991

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I am preparing this report following my record review, and expert opinion of an individual named Desire Evans-Waiau. In providing this information and report, it is necessary that I inform the reader that I am Board Certified in Neurological Surgery. In addition, I completed a minimally invasive and complex reconstructive spinal fellowship at the Medical College of Wisconsin prior to starting my practice in Las Vegas in 2002. Throughout my experience as a Neurosurgeon, I have treated many individuals such as Ms. Desire Evans-Waiau, following traumatic injuries on many occasions. Any information concerning my education and experience is more fully set forth in my attached curriculum vitae. I have also testified concerning the treatment of several of my patients, the list of which is attached to this information.

Dear Ms. Eglet,

Enclosed is a complete review of all medical records in regards to Ms. Desire Evans-Waiau. After reviewing the records provided to me, enclosed is my expert opinion.

Below is a list of the items that I have reviewed in preparation for this expert opinion:

1. Photographs of vehicles
2. Pain Management and Urgent Care
3. Interventional Pain and Spine Institute
4. Khavkin Clinic
5. Align Med
6. Surgical Arts Center
7. Alignment MRI Center
8. Western Regional Center for Brain and Spine Surgery
9. Valley Hospital Medical Center
10. Geico
11. District Court Clark County Nevada complaint case no.: A-16-736457-C
12. Monitoring Associates
13. Amerigroup
14. District Court Clark County Nevada plaintiff Desire Evans-Waiau's answers to defendant's interrogatories to plaintiff
15. District Court Clark Tammy Nevada plaintiff Desire Evans-Waiau's responses to defendant's request for production documents to plaintiff
16. District Court Clark County Nevada amended orders setting civil jury trial and calendar call case no: A-16-736457-C
17. CVS Pharmacy

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CAUSATION:

The patient is a 26-year-old female who was involved in a motor vehicle accident on October 30, 2015. The patient since the time of the accident complained of headaches, axial mechanical neck pain, and low back pain with upper and lower extremity radiculopathies.

PHYSICIAN CONSULTATIONS / OFFICE VISITS:

Ms. Evans-Waiau was seen by Dr. Douglas Ross at Pain Management and Urgent Care on the following dates:

11/10/2015 Patient was seen by Dr. Douglas Ross. Patient was a 24-year-old female who was involved in a motor vehicle accident on 10/30/2015. She complained of neck pain and left upper extremity pain. She also complained of low back pain. She rated her pain at a 7/10. She underwent chiropractic care and reported that it was helping significantly. X-ray of the cervical, thoracic, and lumbar spine performed on 11/04/2015 which revealed no significant abnormalities. She was recommended an MRI of the cervical sprain and left shoulder. She was to continue chiropractic care. Patient was to follow up in 2 weeks.
Dr. Ross noted: Patient reported having a previous injury in 2010 which she had low back pain and received conservative treatment including chiropractic care. She had 100% recovery with no residual problems. She also reported being involved in motor vehicle accident in 1998 and 2014.

11/27/2015 Patient returned for a follow up with Jairo Rodriguez, PA-C. She reported continued neck pain radiating into the left upper extremity. She also reported being able to rotate her head without been in severe pain. She was recommended to continue chiropractic care. She was prescribed medication. Patient was to follow up in 2-4 weeks.

12/16/2015 Patient was seen by Jairo Rodriguez, PA-C. She complained of continued neck pain radiating into the left upper extremity. She reported mild improvement from chiropractic treatment. MRI of the cervical spine performed at Align Med showed disc protrusion at C5-C6 and C6-C7. She was referred for pain management. She was recommended to continue with chiropractic treatment until discharge. She was given a refill on medication. Patient was to follow up as needed.

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Ms. Evans-Waiau was seen by Dr. Jorg Rosler at Interventional Pain and Spine Institute on the following dates:

12/16/2015 Initial visit, patient was a 24-year-old female who was involved in a motor vehicle accident on 10/30/2015. She was the restrained driver at a complete stop who was rear-ended by another vehicle. She complained of headaches, neck pain, and upper extremity pain bilaterally. She underwent conservative treatment. Patient reported in 2010 a previous motor vehicle accident where she experienced low back pain. She completed conservative treatment which helped relieve her pain symptoms. MRI of the cervical spine dated 11/24/2015 showed a disc bulge at C5-C6. Bilateral disc protrusion effacing bilateral C7 nerve roots at C6-C7 was noted. MRI of the left shoulder dated 11/24/2015 showed a bone contusion lesser tuberosity of the humerus without fracture. Mild subcoracoid bursitis was noted. She was to continue conservative treatment. She was recommended a left C7 selective nerve root block. Patient was to follow up after injection.

01/14/2016 Patient followed up after undergoing a left C7 selective nerve root block on 01/07/2015. She reported having cervical discomfort, rated at 1-2/10. She was to continue her conservative treatment modalities. Patient was to follow up in four weeks.

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02/18/2016 Patient returned for a follow up. She reported symptom-free within her cervical spine. Patient was to follow up as needed.

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03/29/2016 Patient followed up with complaints of neck pain radiating into the left upper Chamblee. She was recommended a repeat left C7 selective nerve root block for therapeutic purposes. Patient was to follow up after injection.

04/26/2016 Patient followed up after completing a left C7 selective nerve root block on 04/11/2016. She rated her pain at 5/10 including arm pain. She reported one day of relief post procedure. She was prescribed medication. She was recommended a neurosurgical consultation for discogenic neck pain. Patient was to follow up in four weeks.

05/24/2016 Patient returned for a follow up. She complained of continued neck pain and left upper extremity pain. She was evaluated by Dr. Khavkin which he recommended neck surgery. She wished to proceed with the surgery. She was prescribed medication. She was to follow up with Dr. Khavkin. Patient was to follow up in four weeks.

06/21/2016 Patient followed up with continued neck pain and low back pain. She was awaiting surgery with Dr. Khavkin for an anterior cervical decompression fusion. She was prescribed medication. Patient was to follow up in four weeks.

Ms. Evans-Waiau was seen by Dr. Yevgeniy Khavkin at Khavkin Clinic on the following dates:

05/17/2016 Initial visit, patient was a 24-year-old female who was referred by Dr. Rosler. Her chief complaint was not pain. Patient was involved in a motor vehicle accident on 10/30/2015. She was the restrained driver attempting to make a right-hand turn and stopped for pedestrian crossing when she was rear-ended. Patient reported neck pain that increased with stiffness and pain at the base of the skull radiating into the posterior shoulders bilaterally and into the upper extremities, left greater than right. She also reported intermittent numbness, left greater than right. She underwent conservative treatment with injections by Dr. Rosler on two separate occasions without any significant improvement to her symptoms. On 04/11/2016 and 01/07/2015 she underwent left C7 selective nerve root block. Pre-procedure pain score was 8 and post procedure pain score was 0. Patient was recommended an anterior cervical decompression fusion with corpectomy and C5-C6 and C6-C7. *Dr. Khavkin noted: Patient had a motor vehicle accident in 2009 which resulted in low back pain and was treated and discharged with conservative treatment.*

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SUMMARY OF TREATMENT & PROCEDURES:

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Treatment:	11/02/2015 to 02/03/2016 - Chiropractic treatment for approximately 30 visits including, therapeutic activity, electrical muscle stimulation as well as hot and cold packs
Performed by:	Align Med
Results:	Patient continued to have minimal pain in the neck, mid back, and low back.

Procedure:	01/07/2016 - Left C7 selective nerve root block
Performed by:	Jorg Rosler, M.D. at Surgical Arts Center
Results:	Pre-procedure pain score was 8/10 and post procedure pain score was 0/10.

Procedure:	04/11/2016 - Repeat left C7 selective nerve root block
Performed by:	Jorg Rosler, M.D. at Surgical Arts Center
Results:	Pre-procedure pain score was 8/10 and post procedure pain score was 0/10.

DIAGNOSTIC AND TESTING REVIEW:

11/04/2015 Ms. Evans-Waiau underwent an x-ray of the cervical spine performed at Alignment MRI Center. X-ray revealed no abnormalities.

11/04/2015 Ms. Evans-Waiau underwent an x-ray of the thoracic spine performed at Alignment MRI Center. X-ray revealed no significant abnormality.

11/04/2015 Ms. Evans-Waiau underwent an x-ray of the lumbar spine performed at Alignment MRI Center. X-ray revealed no significant abnormality.

11/24/2015 Ms. Evans-Waiau underwent an MRI of the cervical spine performed at Alignment MRI Center. MRI revealed bilateral posterolateral disc protrusion at C6-C7. There was evidence of cervical strain.

11/24/2015 Ms. Evans-Waiau underwent an MRI of the left shoulder performed at Alignment MRI Center. MRI revealed bone contusion lesser tuberosity of the humerus without fracture. Mild subcoracoid bursitis was noted.

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MEDICAL HISTORY - SUBSEQUENT TO 10/30/2015:

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Ms. Evans-Waiau was involved in a motor vehicle accident on July 10, 2016

Ms. Evans-Waiau was seen by Dr. Jorg Rosler at Interventional Pain and Spine Institute on the following dates:

07/26/2016 Patient followed up with continued neck and low back pain. She reported a new motor vehicle accident on 07/10/2016. She was the front seat passenger at a complete stop when she was rear-ended by another vehicle. She was taken by paramedics to Sunrise Hospital where an updated x-ray of the cervical spine was completed. She reported new symptoms of right upper extremity pain. She saw Dr. Garber for second opinion and decided to move forward with cervical surgery with Dr. Garber. She reported new onset low back pain radiating down the left lower extremity following a motor vehicle accident on 07/10/2016. She was prescribed medication. She was recommended a new MRI of the cervical spine. Patient was to follow up in four weeks.

08/23/2016 Patient returned for a follow up. She complained of neck and low back pain. She had neck surgery in September with Dr. Garber. She reported bilateral leg pain. Her most recent motor vehicle accident brought on her lumbar symptoms with leg pain. She was to continue with medication management. MRI of the lumbar spine was recommended. She was awaiting ACDF with Dr. Garber. Patient was to follow up in four weeks.
Dr. Rosler noted: "There was mention of low back pain on visit dated 06/21 however the patient states that her lumbar symptoms started with the second MVA and this must have been a typo since no physical exam was conducted toward the lumbar spine."

09/09/2016 Patient followed up after undergoing an ACDF with Dr. Garber on 09/01/2016. She reported improvement with her neck discomfort and parascapular pain rating was 4/10. Her left arm pain subsided. She reported low back discomfort rating at 3/10. MRI of the lumbar spine dated 08/31/2016 showed disc protrusion at L5-S1. She was to continue medication management. Patient was to follow up in four weeks.

10/07/2016 Patient returned for a follow up. She reported improvement in her neck discomfort with a rating of 1/10. Her low back discomfort was 1/10. Patient was status post ACDF, nearly resolved. Her lower back pain following the recent motor vehicle accident of 07/10/2016 was nearly resolved. Patient was to follow up if lumbar symptoms worsened.

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04/20/2017 Patient followed up with complaints of return neck pain and intermittent right arm pain and numbness. She was recommended a new MRI of the cervical spine. She was prescribed medication. Patient was to follow up in 2-3 weeks.

05/11/2017 Patient returned for a follow up. She complained of neck pain rating at 3/10 with episodes of 5-6/10. She also experienced pain and numbness intermittently in the right upper extremity. Patient reported her pain increased when looking down. MRI of the cervical spine dated 04/24/2017 showed no evidence for cervical spine instability. Successful anterior fusion at C6-C7 was noted. There was evidence for cervical strain. Posterior disc bulges at C5-C6 was also noted. She was to follow up with Dr. Garber. Continue medication management. Patient was to follow up in four weeks.

06/16/2017 Patient followed up with residual neck discomfort rated at 2-3/10. She reported improvement over the last month. She was prescribed medication. Patient was to follow up in six weeks.

07/28/2017 Patient followed up with residual neck discomfort, rated at 1-2/10. She felt significantly improved. Patient was to follow up as needed.

Ms. Evans-Waiau was seen by Dr. Jason Garber at Western Regional Center for Brain and Spine Surgery on the following dates:

07/12/2016 Initial visit, patient was involved in a motor vehicle accident on 10/30/2015. She was the restrained driver attempting to make a right hand turn, stopped for a pedestrian crossing when a vehicle rear-ended her. She complained of constant neck and intermittent low back pain, neck was worse radiating into the left upper and lower extremity. She had stiffness in the neck. She complained of numbness and tingling in the hands bilaterally as well as in the left upper extremity. Patient reported recently involved in another motor vehicle accident. She was the restrained front seat passenger when she was rear-ended by another vehicle. She was seen at Sunrise Hospital. She complained of continued constant neck and low back pain. She had conservative management including chiropractic treatment as well as injections by Dr. Rosler. Injections lasted for approximately 2-4 weeks. She underwent a left C7 selective nerve root block by Dr. Rosler on 01/07/2016. Preoperative pain score was 8/10 and postoperative pain score was 0/10. She underwent a second left C7 selective nerve root blocks by Dr. Rosler on 04/11/2016. Her preoperative pain score was 8/10 and postoperative pain score was 0/10. No films on initial visit. Patient was to obtain her films from Align Med. Patient was to follow up after.

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07/19/2016 Patient returned for a follow up. She continued to have ongoing axial mechanical neck pain, with left intermittent medial scapular radiation, with extension down her left upper extremity in a C7 distribution. Selective nerve root blocks of C7 on the left successfully alleviated the patient's pain temporarily. Clinically the patient had a C7 radiculopathy of the left. MRI of the cervical spine revealed a left paracentral disc protrusion at C6-C7 with nerve root impingement. Given the fact the patient failed conservative management, she was recommended an anterior cervical discectomy and fusion at C6-C7.
Note: "It is my expert opinion within a reasonable degree of medical probability that the need for surgery is the direct consequence of the accident in question."

09/15/2016 Patient returned for a postoperative visit. She was status post anterior cervical discectomy and fusion at C6-C7. Surgery was performed on 09/01/2016 at Valley Hospital. She was recommended x-rays of the cervical spine. Patient was to return for a follow up.

09/23/2016 Patient returned for a follow up. She was status post anterior cervical discectomy and fusion at C6-C7. Plain film x-rays of the cervical spine showed anterior cervical discectomy and fusion at C6-C7 in stable position without evidence of hardware failure. She was recommended a new set of x-rays. Patient was to follow up in three months.

11/22/2016 Patient returned for a postoperative visit. She was status post anterior cervical discectomy and fusion at C6-C7. Incision was dry, intact and edges were well approximated, no drainage present, no redness, and no warmth to the touch. Patient was to follow up as needed.

SUMMARY OF TREATMENT AND PROCEDURES – SUBSEQUENT TO 10/30/2015:

Procedure:	09/01/2016 - Anterior cervical discectomy and fusion C6-C7
Performed by:	Jason Garber, M.D.
Results:	Valley Hospital Medical Center

Procedure:	09/01/2016 - Intraoperative neurophysiology
Performed by:	Morton Hyson, M.D. at Valley Hospital Medical Center
Results:	Study was unremarkable.

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DIAGNOSTIC AND TESTING REVIEW – SUBSEQUENT TO 10/30/2015:

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08/30/2016 Ms. Evans-Waiau underwent a chest x-ray performed at Valley Hospital Medical Center. X-ray revealed no acute cardiopulmonary process.

08/31/2016 Ms. Evans-Waiau underwent an MRI of the lumbar spine performed at Alignment MRI Center. MRI revealed central/left posterolateral disc protrusion at L5-S1. There was evidence of lumbar strain.

MISCELLANEOUS:

11/03/2015 Photographs of 2014 Acura RDX and 1998 Honda Accord

11/03/2015 Geico repair estimate for 1998 Honda Accord totaling $3838.49

11/04/2015 Geico repair estimate for 2014 Acura RDX 4x2 totaling $4359.87

11/19/2015 Geico supplemental repair estimate for 2014 Acura RDX 4x2 totaling $4606.50

11/25/2015 Align Med MRI Center health insurance claim form for date of service 11/24/2015

01/18/2016 Surgical Arts Center health insurance claim form for date of service 01/07/2016

02/04/2016 Align Med health insurance claim form for date of service 01/18/2016 through 02/01/2016

04/05/2016 Interventional Pain and Spine Institute cost estimate for left selective nerve root block at C7 totaling $2750.00, not including surgery center fee

04/21/2016 Surgical Arts Center health insurance claim form for date of service 04/11/2016

05/08/2016 NLV Pain Management and Urgent Care account activity report for date of service 11/10/2015 through 01/11/2016 totaling $960.00

05/10/2016 District Court Clark County Nevada complaint case no.: A-16-736457-C

05/17/2016 Cost estimate by Dr. Yevgeniy Khavkin at Khavkin Clinic

Anterior cervical decompression fusion at C5-C6, C6-C7

Surgeons fee	$59,236.00
Assistant surgeon fee (M.D. and PA)	$74,157.00
Anesthesia fees	$8302.00
Hospitalization, AST, equipment fees	$123,000.00
Preoperative physical therapy rehabilitation	$9000.00

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05/25/2016 Khavkin Clinic health insurance claim form for date of service 05/17/2016

09/01/2016 Align Med MRI health insurance claim form for date of service 08/31/2016

09/14/2016 Monitoring Associates health insurance claim form for date of service 09/01/2016

09/17/2016 Amerigroup Nevada explanation of payment for date of service 08/31/2016 2 09/01/2016 totaling $1504.13

10/27/2016 Monitoring Associates health insurance claim form for date of service 09/01/2016

02/16/2017 Valley Hospital Medical Center account history for date of service 08/30/2016 through 19 2016

06/05/2017 District Court Clark County Nevada plaintiff Desire Evans-Waiau's answers to defendant's interrogatories to plaintiff

06/05/2017 District Court Clark Tammy Nevada plaintiff Desire Evans-Waiau's responses to defendant's request for production documents to plaintiff

07/31/2017 Interventional Pain and Spine Institute account history for date of service 12/16/2015 through 07/28/2017 totaling $11,660.00

10/05/2017 District Court Clark County Nevada amended orders setting civil jury trial and calendar call case no: A-16-736457-C

10/13/2017 Surgical Anesthesia Services invoice for date of service 09/01/2016 totaling $2700.00

10/20/2017 CVS Pharmacy patient prescription record for date of service 11/10/2015 through 09/29/2017

10/31/2017 Khavkin Clinic account information and report for date of service 05/24/2016 totaling $930.00

No date Align patient statement for date of service 11/02/2015 through 02/01/2016 totaling $5850.00

No date NLV Pain Management and Urgent Care account financial ledger for date of service 11/10/2015 through 06/16/2016

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Valley Hospital Medical Center

Allergies
Facesheets
Assessments
Cardiology
Patient education notes
History and physical reports
Operative record
Progress
Physician orders
Consents
Orders
Medication orders
Medication administration record
Admit/discharge/transfer forms
Assessment forms
Case management forms
ED nursing documentation
Nursing Notes
Occupational therapy forms
Patient history forms
Physical therapy forms
Treatment/procedure forms
Procedures
Intake and output
Hematology
Coagulation
Chemistry
Blood bank
Imaging
Measurements
Vital signs
Comfort measures
Assessment and treatments
Advanced directive information
Infection control
Perioperative documentation
Procedures
Anesthesia and sedation
Rehabilitation services
Patient and family education

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PAST MEDICAL BILLS:

I have also reviewed within the medical records provided to me, a number of charges incurred in the treatment of Ms. Desire Evans-Waiau following the motor vehicle accident of 10/30/2015. It appears that the charges for her treatment as the result of the injuries sustained are usual and customary within the Las Vegas community. Furthermore, they are also reasonable as they pertain to the care of the patient following the accident of 10/30/2015.

CONCLUSION:

I have reviewed the medical records provided to me on Desire Evans-Waiau. Since her accident of 10/30/2015, she complained of axial mechanical neck pain with intermittent medial scapular radiation with extension down her left upper extremity with what appears to be C7 distribution. The patient underwent conservative management including chiropractic treatment for 30 visits as well as interventional pain management. Ultimately the patient had C7 selective nerve root blocks which adequately alleviated her pain on a temporary basis.

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The patient was also involved in a secondary accident 07/10/2016. It appears that this second accident of 07/10/2016 only aggravated her cervical spine condition set forth in motion by the accident of 10/30/2015. The reason for this, is a clear evidence of C7 radiculopathy on the left prior to this second accident in question. It is also my understanding the patient does not have a prior history of cervical spine pathology necessitating any treatment prior to the original accident 10/30/2015.

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Based upon the medical records that I have reviewed, it is my expert opinion patient sustained a traumatic disc protrusion at C6-C7 that now necessitates anterior cervical discectomy and fusion at C6-C7. It is also my expert opinion within a reasonable degree of medical probability that the second accident of 07/10/2016 has no clinical relevance to the traumatic disc protrusion at C6-C7. This second accident caused the patient to have low back pain with intermittent lower extremity radiculopathy.

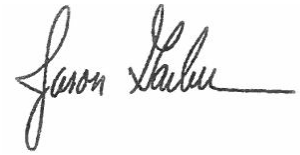
I have also reviewed the charges involved with taking care Desire Evans-Waiau as a result of the accident dated 10/30/2015. It is my expert opinion also within a reasonable degree of medical probability that the patient's expenses for treatment following the accident of 10/30/2015 appears to be reasonable, usual, and customary, with the exception of Dr. Khavkin's charges. I find it completely excessive his assistant surgeon fee which includes a secondary M.D. and PA charges for this procedure which totals $74,157.00. In addition, his surgeon fee is excessive. Specifically my surgeon fee for this procedure is $40,100.00 and the physician assistant fee would be $8,020.00. The total for my fees for this procedure would be $48,120.00. Interestingly enough Dr. Khavkin's fees would be $133,393.00. This appears to be almost three times the normal cost in my expert opinion.

Nevertheless, aside from Dr. Khavkin's charges, it remains my expert opinion the patient sustained a traumatic disc protrusion as a result of the 10/30/2015 accident which required anterior cervical discectomy and fusion C6-C7.

All my opinions are within a reasonable degree of medical probability, and I reserve the right to alter or modify my opinions based upon any additional information that may be presented to me.

Should you have any additional questions or concerns, please do not hesitate to contact me. Thank you very much for your time and consideration.

Sincerely,



JASON E. GARBER, M.D., F.A.C.S.
Diplomat, American Board of Neurological Surgeons
Spine Fellowship Trained Neurosurgeon
JEG:crh
Dictated but not edited

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EXHIBIT 3

EXHIBIT 3

Centennial Pain Relief

4640 W. Craig Rd

Las Vegas, NV 89032

Phone 702.839.1203 Fax: 702.507.0992

Name: Evans Desire
Patient ID: EVANS895
History: Neck/pain
Date of Birth: 04/17/1991
Study: MR - Cervical Spine, MRI Cervical Spine Without
Facility: CENTENNIAL UPRIGHT MRI
Physician: Smith, Kathleen, MD
Date of Service: 07/12/2010 00:15:19

CLINICAL:
19-year-old female neck pain.

MRI CERVICAL SPINE WITHOUT CONTRAST

TECHNIQUE
Standardized fat and water weighted pulse sequences were obtained in the sagittal and axial planes.

COMPARISON:
None.

FINDINGS:
Normal craniovertebral junction. Normal anterior atlantoaxial articulation. Normal odontoid process.

Normal cervical lordosis. Normal alignment of the cervical vertebrae.

Normal visualized cervical vertebral bodies.

Normal visualized posterior osseous elements and spinous processes.

C2-3: Normal endplates. Normal disc height, hydration and morphology. Normal bilateral uncovertebral and facet joints. Normal bilateral intervertebral neuroforamina. Normal central canal.

C3-4: Normal endplates. Normal disc height, hydration and morphology. Normal bilateral uncovertebral and facet joints. Normal bilateral intervertebral neuroforamina. Normal central canal.

C4-5: Normal endplates. Normal disc height, hydration and morphology. Normal bilateral uncovertebral and facet joints. Normal bilateral intervertebral neuroforamina. Normal central canal.

C5-6: Normal endplates. Normal disc height, hydration and morphology. Normal bilateral uncovertebral and facet joints. Normal bilateral intervertebral neuroforamina. Normal central canal.

C6-7: Normal endplates. Normal disc height, hydration and morphology. Normal bilateral uncovertebral and facet joints. Normal bilateral intervertebral neuroforamina. Normal central canal.

C7-T1: Normal endplates. Normal disc height, hydration and morphology. Normal bilateral uncovertebral and facet joints. Normal bilateral intervertebral neuroforamina. Normal central canal.

Normal cervical cord

Normal visualized soft tissue structures.

IMPRESSION:
Normal unenhanced MR examination of the cervical spine.

Signed:

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Alvand Hassankhani, M.D.
July 12th, 2010 at 10:14:31 PM EDT
Electronically Signed

AH/AH

As part of our Quality Assurance Program, we request that surgical or pathologic correlation, or any additional supportive or discordant medical history, laboratory or imaging studies be forwarded to Radisphere National Radiology Group, attention: Peer Review Coordinator. Phone 216.255.5796, Fax 866-788-0204, 23625 Commerce Park, Suite 204 Beachwood, OH 44122.

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EXHIBIT 4

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EXHIBIT 4

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EXHIBIT 4

Cameron Medical Center

4567 W. Flamingo
Las Vegas, NV 89103

Phone: (702) 307-8600
Fax: (702) 368-0027

INITIAL EXAM

June 16, 2010

Re: Desire Kuu Leo Nahinahi Evans-Waiau
DOB: 4/17/91
Age: 19
Date of Accident: 5/10/10

The patient presented for initial examination after she was involved in a motor vehicle accident on 5/10/10 where she was a passenger sitting in the front seat of the car. She was wearing a seat belt the moment of accident. Her air bag did not go off. She denies hitting her head or being unconscious. The patient went home after the accident. Denies work related injury. Denies being pregnant. She completed cervical, thoracic, lumbar x-rays on 5/26/10 at Fine Chiropractic Center that showed negative results for recent fracture. Presently, denies any shortness of breath, chest pain, dizziness, dyspnea, abdominal pain, nausea or vomiting. She complained of pain in her neck area and both shoulders that she rates 8/10; described as achy and burning. Pain increasing with standing and relieved with rest. Overall, condition is staying the same. The patient is not on any pain medication. She denies any bowel or bladder problems. Denies numbness, tingling, weakness, temperature changes, and increased skin sensitivity. No recent weight changes. Able to sleep six hours at night. The patient complained of headaches in her occipital and top of her head area that she rates 8/10 and described as constant. The patient occasionally becomes dizzy with positional changes. Pain decreases with Tylenol and then usually comes back. The patient also feels hot during headaches. The past couple of days, headaches increased with exertion and relieved with rest. No blurred or double vision.

Family History: Mother and father alive and healthy. Age not available.

Allergies: None.

Medical and Surgical Condition: None.

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Social History: Presently employed. Resides with her family. Does not drink alcohol. Smokes ten cigarettes a day.

Physical Examination: The patient is pleasant, slightly anxious not in distress. His blood pressure is 116/87 mmHg, heart rate 78 beats per minute, weight 135 pounds, and height 5 feet 5 inches. She is awake, alert, and oriented x3. Skin: Warm and dry. Lungs: Clear to auscultation. Breath sounds equal with vesicular respiration. Cardiovascular: Regular rate. Normal S1, S2. No murmurs, rubs or gallops. GI: Was not examined. Extremities: Has no edema.

Neurological and Musculoskeletal Examination: Cranial nerves II through XII are grossly intact. The patient is able to shrug her shoulders but complained of tightness and pain in trapezius muscles area. Motor strength of biceps and triceps is 3/5. Lower extremity strength is 5/5. Good bulk and tone. Coordination is intact. Gait is steady. Romberg is intact. No pronation. No drift. No extrapyramidal symptoms. Sensory: She has intact sensation throughout upper and lower extremities. Sense of vibration intact to both hands and feet. She has diminished biceps reflexes, +2 knee reflexes. No joint deformities. She has difficulty to perform range of motion with her neck due to severe stiffness throughout entire neck area. Flexion pain at C5. Pain with palpation over C5, C6, down to C7. The patient also experiences pain between her shoulder blades and rhomboideus major muscles area bilaterally with abduction and adduction of her arm. Straight leg test was not performed. She is able to bend her body over completely. Complained of pain in her cervical area. Extremities are symmetrical. No muscle atrophy, crepitus, swelling, or warmth noted.

Impression: The patient has possible cervical radiculopathy and post-traumatic headaches which I believe was sustained as a result of the motor vehicle accident on 5/10/10.

Plan of Care: She will continue chiropractic treatment. Patient is recommended to have a cervical MRI. If her condition persists or worsens we will consider nerve conduction studies of upper extremities. If headaches persist or worsen we will consider an MRI of the head area. Patient will be referred to see a neurologist regarding these issues. The patient will take

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Motrin 600 mg every eight hours with food for pain, Tylenol #3 one pill every six hours as needed for moderate-to-severe pain, and Zanaflex 2 mg before she goes to sleep for muscle tightness. The patient was instructed to go to the ER with increasing headaches, dizziness, any visual changes, or neurological deficits. She will continue chiropractic treatment. She was informed of the possible side effects of newly prescribed medication. She understood the instructions.

Marina Gorbachinsky, APRN

Kathleen D. Smith, MD

KS: ww
World Wide Dictation
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R# 002-08-005784

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EXHIBIT 5

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EXHIBIT 5

Interventional Pain & Spine Institute
Jorg Rosler, MD Annemarie Gallagher, MD
851 S. Rampart Blvd. Suite 100
Las Vegas, NV 89145
702-357-8004

Date	PATIENT	ACCOUNT #
12/16/2015	DESIRE EVANS 3500 BROADWAY AVE NORTH LAS VEGAS, NV 89030	EVA26235 04/17/1991

Note

Initial Report

CHIEF COMPLAINTS:
headaches, left sided neck pain, left shoulder pain, left para-scapular pain, shooting pains down left arm, and numbness into left hand

HISTORY OF PRESENT ILLNESS:
The patient is a pleasant 24 Years Female who was involved in a motor vehicle accident on 10/30/2015. She was the restrained driver of a vehicle that came to a complete stop prior to make a right hand turn when she was suddenly rear ended by another driver. The patient reports being jolted within the vehicle upon impact. No reported head trauma or loss of consciousness. Emergency care was not required. The patient noted the immediate onset of her above pain symptomatology, which continued over the ensuing days, prompting a visit to Dr.Tim Mccauley, chiropractic physician, where conservative treatment was implemented. The patient complains of ongoing headaches, left sided neck pain, left shoulder pain, shooting pain down the left arm and numbness into the left hand. The pain is described as numbness and sharp. Pain aggravated with prolonged sitting and standing. Intensity rated at 6-7/10 dependent upon activities. She has difficulty sleeping at night due to the pain symptoms. The patient denies history of similar symptomatology or previous spinal injury. In 2010 patient was involved in a previous MVA where she experienced lower back pain and completed conservative treatment which helped to relieve her pain symptoms.

PAST MEDICAL HISTORY:
denies any medical history

SOCIAL HISTORY:
Social History:
Live Alone Single

PAST SURGICAL HISTORY:
denies any major surgeries

MEDICATIONS:

EXHIBIT 6

EXHIBIT 6

Keck Medical Center of USC

DEPARTMENT OF ORTHOPAEDIC SURGERY

Keck Hospital of USC
USC Norris Cancer Hospital

Independent Medical Evaluation (IME)

Patient: Desire Evans-Waiau
Date of Service: November 9, 2017
Date of Birth: April 17, 1991
Date of Incident: October 30, 2015

I was asked to perform an IME and review the medical records of Desire Evans-Waiau as they relate to the incident of 10/30/15.

This is a 26 year-old female who was involved in a rear-end MVA on 10/30/15. She was a restrained driver, denies any loss of consciousness, and the airbags did not deploy. She did not require any medical treatment at the scene and was not transported to the hospital that day. She first noted pain in her neck and left shoulder the following day. The patient has been treated with physical therapy, epidural injections, TENS, heat, ice, medications, chiropractic care, and surgery. On 9/1/16 she underwent a cervical fusion which helped her pain. Her left arm symptoms went away. Prior to surgery, her pain was 10/10, and following surgery, he pain is now 3/10 and tolerable. She admits to a prior MVA in 2010 where she injured her neck and her back, but feels these injuries resolved prior to the MVA of 2015. She was in a subsequent MVA around July 2016 where she was also involved in a rear-end MVA.

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Past surgical history: cervical fusion 9/1/16

Past Medical History: negative

Allergies: NKDA

Current Medications: ibuprofen

Social history: she delivers newspapers and was unemployed at the time of the accident, she smokes 1 pack every other day

Family history: negative

Review of systems: glasses/contacts

Medical Time Line:

Pre-Incident Medical Records:

8/18/11	Sunrise Hospital – labor and delivery, bleeding
9/3/11	Sunrise Hospital – delivery of baby
2/19/13	Southwest Medical Associates – small burn on chest after splashing water, smokes

Incident

10/30/15 Incident - MVA

Post-Incident Medical Records:

11/2/15	chiro – severe back and neck pain, anxiety
11/3/15	interview with Babylyn Tate – she was not injured in this accident, 10/30/15, driving Honda sedan, car in front slammed on her brakes, they were in the right lane, her car hit more on the front passenger side, other person said she was okay and would go to the ER tomorrow if in pain
11/3/15	Geico – estimate Honda Accord, $3,838.49
11/4/15	Geico – estimate Acura RDX, $4,359.87
11/4/15	xrays thoracic spine – no significant abnormality xrays cervical spine – no abnormalities xrays lumbar spine – no abnormalities
11/4/15	chiro
11/6/15	chiro
11/9/15	chiro
11/10/15	Dr. Ross – neck pain, left shoulder and arm pain, s/p MVA 10/30/15, prior injury 2010 with LBP with recovery, unemployed, smokes 1.5 ppd
11/11/15	chiro
11/13/15	chiro
11/16/15	chiro
11/18/15	chiro
11/20/15	chiro
11/23/15	chiro
11/24/15	chiro
11/24/15	MRI cervical spine – mild desiccation of all cervical discs C2-3 no abnormality C3-4 no abnormality C4-5 no abnormality C5-6 1-2mm bulge into right LR C6-7 2-3mm bulge, no significant stenosis C7-T1 no abnormality
11/24/15	MRI left shoulder – mild subchondral edema at the lesser tuberosity compatible with bone contusion, mild subcoracoid bursitis
11/17/15	Dr. Ross – neck pain, left UE weakness
11/30/15	chiro
12/2/15	chiro
12/3/15	chiro
12/7/15	chiro
12/9/15	chiro
12/11/15	chiro
12/14/15	chiro
12/16/15	chiro
12/16/15	Dr. Rosler – initial report, HA, left neck pain, left shoulder pain, left scapular pain, shooting pain down left arm into hand
12/16/15	NLV pain management – PA Rodriguez – neck pain, midback pain, weakness in left UE, refill meds
12/18/15	chiro
12/21/15	chiro
12/23/15	chiro

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12/28/15	chiro
12/30/15	chiro
1/4/16	chiro
1/7/16	Dr. Rosler – left C7 SNRB, post op pain 0/10
1/14/16	Dr. Rosler – cervical discomfort 1-2/10
1/18/16	chiro
1/25/16	chiro
2/1/16	chiro
2/3/16	chiro – cervical pain 1/10 dull, thoracic 1/10, lumbar 1/10
2/18/16	Dr. Rosler – symptom-free in cervical spine
3/29/16	Dr. Rosler – return in discogenic cervical symptoms radiating into left forearm and had with numbness
4/11/16	Dr. Rosler –left C7 SNRB
4/26/16	Dr. Rosler – f/u, neck pain 5/10 with left arm pain
5/17/16	Dr. Khavkin – cervical pain with tingling bilateral arms, 24 yo female, neck pain following MVA 10/30/15, denies prior neck pain in the past, had prior MVA in 2009 with LBP that was treated, discussed C5-6 and C6-7 ACDF
5/24/16	Dr. Rosler – neck pain 8/10, saw Dr. Khavkin who recommended neck surgery, wants to proceed
6/21/16	Dr. Rosler – neck pain 9/10, LBP 4-5/10
7/10/16	Sunrise Hospital – ER – arrived by EMS, back pain, neck pain, MVA today, driver in MVA rear-ended while at stop sign, neck and LBP, prior history of chronic neck and LBP, xrays cervical spine no abnormalities
7/12/16	Dr. Garber – 25 yo female with neck pain, s/p MVA 10/30/15, constant neck and intermittent LBP, had 2nd MVA 7/10/16
7/19/16	Dr. Garber – mechanical neck pain with left C7 distribution, SNRB temporary relief, recommend ACDF C6-7
7/26/16	Dr. Rosler – neck pain 8-9/10 and LBP 10/10, had new MVA on 7/10/16 when she was front seat passenger, rear-ended at a complete stop, paramedics brought her to Sunrise Hospital where cervical xrays were taken, new right UE symptoms, saw Dr. Garber for 2nd opinion and wants surgery with Dr. Garber, new onset LBP down left leg following MVA 7/10/16
8/23/16	Dr. Rosler – neck surgery scheduled, now with bilateral leg pain, lumbar symptoms started with MVA 7/10/16, mention of LBP 6/21/16 was typo
8/31/16	MRI lumbar spine – mild desiccation L5-S1 T12-L1 no abnormality L1-2 no abnormality L2-3 no abnormality L3-4 no abnormality L4-5 3mm bulge L5-S1 2-3mm protrusion into left LR, no stenosis
9/1/16	Dr. Garber – C6-7 ACDF surgery
9/9/16	Dr. Rosler – had surgery 9/1/16 and is improving, LBP 3/10, left arm pain subsided
9/15/16	Dr. Garber – f/u, post op
9/21/16	xrays cervical spine – s/p C6-7 ACDF
9/23/16	Dr. Garber – f/u
10/7/16	Dr. Rosler – neck 1/10, LBP 1/10
11/22/16	Dr. Garber – s/p ACDF 9/1/16
4/20/17	Dr. Rosler – return of neck pain with intermittent right arm pain and numbness

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4/24/17	MRI cervical spine – s/p C6-7 fusion
	C2-3 no abnormality
	C3-4 no abnormality
	C4-5 no abnormality
	C5-6 2mm bulge
	C6-7 no abnormality
	C7-T1 no abnormality
5/11/17	Dr. Rosler – reviewed cervical MRI, neck apin 3/10, right UE symptoms
6/16/17	Dr. Rosler – residual neck discomfort 2-3/10, no arm symptoms, improving over last month

Imaging Studies:

11/24/15	MRI left shoulder
11/24/15	MRI cervical spine – unremarkable
7/10/16	xrays cervical spine - unremarkable
8/30/16	CXR
8/31/16	MRI lumbar spine – early mild desiccation L5-S1
9/1/16	cervical fluoroscopy - intraoperative
4/24/17	MRI cervical spine – C6-7 fusion

Photos:

Red Acura RDX – front passenger damage to the bumper and front passenger corner
Honda sedan – rear end drivers side damage

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Depositions:

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8/17/17 Desire Evans-Waiau

Jorge Parra is her husband, first deposition, she is not legally married, common marriage, been together for over 8 years, finished high school online in 2015, she currently delivers newspapers to houses for the past year, delivers 200 papers each day, before this she worked in warehouse for bed bath and beyond, started in march 2015 and ended in june 2015, husband works at AT&T, sales associate, prior MVA 2010 had an attorney and lawsuit, also with 2016 MVA with same legal representation, from MVA 2016 she injured neck and low back, in 2010 she was a passenger hit from rear, another car hit the car behind them and they hit her, injured her back, had medical treatment, received MRI after 2010 MVA, her LBP went away, a pedestrian was in front of her so she had to slam on her brakes, felt the impact instantly, she was driving a Honda Accord, no immediate pain after the accident, the other driver was driving a SUV, they went trick or treating afterwards, no one complained of injuries, first noted pain the next morning, left neck and shoulder, did have LBP, MVA in 2016 she was a passenger and was rear-ended, she was transported by ambulance, was already in pain, her neck and LBP was intensified by this MVA, today her neck feels good, shoulder has been pain-free since the surgery, LBP does not hurt anymore, resolved after the surgery

Physical Examination:

General: The patient is awake, alert, oriented. The patient has intact recent and remote memory and is oriented to time, place and person. The patient has normal mood and affect. The patient is without any distress and has reasonably normal stature.

Cervical spine: The patient has mild tenderness to light touch in the posterior neck/and shoulder areas. Her range of motion is not limited.

Lumbar spine: The patient reports no pain to palpation and has a full range of motion

Neurovascular examination: Lower extremities demonstrates 5/5 motor strength in the lower extremities. Sensation is intact to light touch throughout the bilateral lower extremities. Deep tendon reflexes are 1 plus and symmetrical in the lower extremities. There is a negative Babinski test in the lower extremities. Toes are down going. There is no evidence of clonus. She has a negative straight leg raise bilaterally.

Upper extremities demonstrate 5/5 motor strength in the bilateral upper extremities. Sensation is intact to light touch throughout the bilateral upper extremities. Deep tendon reflexes are 1 plus and symmetrical in the upper extremities with negative bilateral Hoffmann's reflexes.

Assessment / Opinions / Future Care:

All of my opinions below are based on my training, clinical teaching practice and the medical literature. I am currently a Professor of Orthopaedic Surgery and Neurosurgery at the USC Spine Center. My opinions are also based on a reasonable medical probability however, are preliminary and subject to change based on future records/documents supplemented and reviewed. I am reviewing these records and performing an IME for evaluation purposes only. There is no doctor-patient relationship.

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This is a 26 year-old female who was involved in an MVA on 10/30/15. She was a restrained driver in a rear-end MVA. She denies any loss of consciousness and the airbags did not deploy. She did not require any medical treatment at the scene, and did not require transportation to the hospital. She did not have any pain or symptoms at the scene, but first developed neck and left shoulder pain the following morning. She also reports that she did develop some low back pain. She first sought treatment a few days later with a chiropractor, where she complained of neck pain and back pain. She started regular chiropractic treatments which lasted about 3 months. On 11/4/15, she had radiographs of her cervical, thoracic, and lumbar spine. These radiographs did not show any injuries. On 11/24/15, she had an MRI of the cervical spine, which did not show any acute traumatic structural injuries. She also had an MRI of the left shoulder. On 1/7/16 she had a cervical injection. On 2/3/16, she was discharged from her chiropractic care with minimal occasional pain, and marked improvement in her symptoms. On 4/11/16, she had another cervical injection. On 7/10/16, she had another rear-end MVA, while a passenger in her car. She sustained an increase in her neck and low back pain. On 8/31/16, she had an MRI of the lumbar spine, which did not show any acute injuries. On 9/1/16, she had a cervical fusion. On 4/24/17, she had another MRI of her cervical spine that was unremarkable.

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She reports a prior MVA in 2010, where she was involved in a rear-end MVA and sustained injuries to her back. She did require medical treatments, but stated that this resolved prior to the MVA in 2015. She also had a subsequent MVA on 7/10/16, which exacerbated her symptoms. It appears that her low back pain and leg and arm symptoms have resolved, and she has occasional neck pain.

It appears we have a 26 year-old female involved in an MVA on 10/30/15. She did not have any symptoms until the following day. All her spinal imaging, did not demonstrate any acute structural injuries, and were essentially normal for her age. Although there are no objective radiological signs of any spinal injuries, if she did have neck and low back pain following the incident of 10/30/15, she may have sustained a soft tissue strain to her cervical and lumbar spine. The delayed onset of symptoms and the significant improvement with conservative care in the first 3-4 months, are all

consistent with a soft tissue strain, and not consistent with any structural spinal injury. These soft tissue strains are typically self-limited and resolve with time. I could attribute the initial evaluation, the imaging studies, and the conservative care, immediately following the incident, to be causally related to the accident. This is provided, that she was fully recovered from her prior spinal injuries from the MVA in 2010. After a reasonable amount of time, I could no longer attribute any spinal symptoms or ongoing treatments, to be related to the MVA. It appears that around February 2016, she was pain-free and was doing well. I cannot relate any of the spinal symptoms, nor the treatments, or the cervical fusion, following this time point, to be causally linked to the incident of 10/30/15. I do not relate the need for the cervical fusion to be causally linked to the MVA of 10/30/15. It does appear that she had an increase in her symptoms following the MVA of 7/10/16, which is likely related to that accident. I do not relate any ongoing spinal symptoms or any future medical care for the spine, to be causally linked to the MVA of 10/30/15.

I would like to see more recent medical records, and the imaging studies and the prior medical records regarding her prior spinal injuries from the MVA in 2010. In addition, the outcomes of spinal treatments and conditions can be negatively impacted by the presence of litigation, and the potential for secondary gain, which always needs to be considered in these types of cases. I reserve the right to alter my opinions if more information is provided to me.

Sincerely,

Jeffrey C. Wang, MD
Chief, Orthopaedic Spine Service
Co-Director USC Spine Center
Professor of Orthopaedic Surgery and Neurosurgery
USC Spine Center
1520 San Pablo St., Suite 2000
Los Angeles, CA 90033
Office: (323) 442-5303

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EXHIBIT 7

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EXHIBIT 7

www.controlpain.com
JOSEPH J. SCHIFINI, M.D., LTD
Diplomate of the American Board of Anesthesiology
Practice of Anesthesiology and Pain Medicine

January 7, 2018

Thomas E. Winner, Esq.
Atkin, Winner & Sherrod
Attorneys at Law
1117 S. Rancho Drive
Las Vegas, NV 89102-2216
PH: 702-243-7000
FAX: 702-243-7059

Claimant: Desire Kuu Evans-Waiau
RE: Evans-Waiau V. Tate
Case No.: A-16-736457-C
DOL: October 30, 2015

Dear Mr. Winner:

000104

This letter will serve to summarize my opinions/conclusions following my review of approximately 1,700 pages of medical records. These medical records were produced in five different batches with accompanying letters dated September 19, 2017, October 2, 2017, October 6, 2017, November 15, 2017 and November 29, 2017. You have asked me to review these records as a medical expert and provide opinions/conclusions following my review. As a courtesy, at the end of this document, I will provide a formal record review. Below, you will find a listing of the categories of records reviewed in preparation of this document.

1. Complaint.
2. Recorded Statement of Babylyn Tate from November 3, 2015.
3. Property Damage for Babylyn Tate vehicle.
4. Color Photographs of Babylyn Tate's vehicle.
5. Property Damage Documentation for Desire Evans-Waiau's vehicle.
6. Desire Evans-Waiau Answers to Interrogatories.
7. Desire Evans-Waiau Deposition Transcript dated August 17, 2017.
8. Align Med MRI Records.
9. Interventional Pain & Spine records.

600 S. Tonopah Drive, Suite #240, Las Vegas, NV 89106 • (702) 870-0011 • Fax (702) 870-1144

10. Surgical Arts Center records.
11. Khavkin Clinic records.
12. CVS Pharmacy records.
13. Western Regional Center for Brain & Spine Surgery records.
14. Valley Hospital Records.
15. Sunrise Hospital Records.
16. Radiology Specialists billing statements.
17. Surgical Anesthesia Services billing statements.
18. Align Med MRI films (see attached CD).
19. Plaintiff Desire Evans-Waiau Initial ECC Production.
20. Valley Hospital films (see attached CD).
21. Sunrise Hospital films (attached CD).
22. Plaintiffs First Supplemental Early Case Conference Production.
23. Plaintiff's Second Supplemental Early Case Conference Production.
24. NLV Pain Management and Urgent Care records.
25. Sunrise Hospital billing records.
26. Southwest Medical Associates medical and billing records.
27. Plaintiffs First Supplement to Early Case Conference List of Witnesses (with attachments).
28. Dr. Jeffrey Wang Report dated 11/09/17.

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Ms. Evans-Waiau produced records began in 2011. She did, however, describe a prior motor vehicle accident which occurred in approximately 2010, which reportedly resulted in injury to her lumbar spine. These lumbar injuries reportedly resolved with conservative care. The produced records in 2011 reference obstetrical or gynecological issues. Ms. Evans-Waiau's records resumed in 2013 when she was seen at Southwest Medical Associates for a burn on her chest after splashing scalding water on herself. On March 14, 2013, there was evidence that Ms. Evans-Waiau underwent a pap smear at Southwest Medical Associates. There were no other medical records produced for review, nor were there any other admissions or documentation of prior accidents, injury or chronic pain complaints, which predated the events of October 30, 2015.

On October 30, 2015, Ms. Evans-Waiau was the restrained driver of her vehicle. She was traveling with four passengers, one adult and three children. She had intended to make a right-hand turn. The vehicle in front of her had cleared the intersection, and as she approached the intersection to turn right, reportedly, several pedestrians walked in front of her car, causing her to "slam on her brakes". The vehicle she was traveling in was unexpectedly struck from behind on the driver's rear of her vehicle by the passenger front of another vehicle. At the scene of the accident, there were no reported injuries by any occupant of either vehicle. The drivers exchanged information, and no police report was generated, nor was either driver cited. After a three day gap in medical care and/or medical records, Ms. Evans-Waiau was referred to Align Chiropractic Rhodes Ranch where she was evaluated by Dr. Ryan Kissling. This first chiropractic visit occurred as a result of an attorney driven referral, as Ms. Evans-Waiau had retained an attorney prior to seeking any medical care for her complaints of left neck, left arm and hand, left thoracic and left lumbar spine symptoms, which she rated as an eight out of ten on a Visual Analog Pain Scale. Ms. Evans-Waiau was treated on 30 different occasions through this chiropractic clinic from November 2, 2015 through February 3, 2016. On November 4, 2015, x-rays of the cervical, thoracic and lumbar spines were taken, which all were reportedly normal. On November 10, 2015, Ms. Evans-Waiau was evaluated at North Las Vegas Pain Management and Urgent care by Dr. Douglas Ross, where she complained of neck, left shoulder and left arm pain. She described her mechanism of injury to Dr. Ross. She was provided with medications, and recommendations were made to obtain cervical and left shoulder MRIs. These MRI studies were performed on November 24, 2015 at Align Med MRI Center. The MRI of the cervical spine reportedly demonstrated straightening and a disc protrusion at C6-7. An MRI of the left shoulder reportedly revealed evidence of a bone contusion and bursitis.

On November 27, 2015, Ms. Evans-Waiau followed up at North Las Vegas Pain Management and Urgent Care where she continued to complain of neck and left arm pain. She was recommended to

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undergo continued chiropractic care and medication management. Similar recommendations were made through this North Las Vegas Pain Management and Urgent Care Clinic on December 16, 2015 in addition to recommendation for a referral to a pain management physician.

On December 16, 2015, Ms. Evans-Waiau was referred to a pain management physician, Dr. Jorg Rosler, where she complained of neck and left arm pain. As a result of this evaluation, Dr. Rosler recommended performance of a left C7 selective nerve root block. This initial procedure was performed on January 7, 2016 and reportedly resulted in complete immediate relief of Ms. Evans-Waiau's pain. This procedure was performed under Propofol sedation. Although a second anesthesiologist was discussed in the procedure note, there was no evidence of the presence of a second anesthesiologist. This sedative hypnotic, general anesthetic medication was administered by a registered nurse assigned to the procedure room. Ms. Evans-Waiau followed up with Dr. Rosler on January 14, 2016 where she reported Visual Analog Pain Scale scores of one to two out of ten. She was advised to return to clinic in approximately four weeks. On February 3, 2016, Ms. Evans-Waiau underwent her final chiropractic visit where she reported her Visual Analog Pain Scale scores in reference to her cervical, thoracic and lumbar spines as a one out of ten. On February 18, 2016, Dr. Rosler noted that Ms. Evans-Waiau was "symptom free in her cervical spine". She advised to return to clinic if symptoms return.

On March 29, 2016, Ms. Evans-Waiau returned to Dr. Rosler's office due to reported return of her neck and left arm symptoms. Dr. Rosler recommended repeat left C7 selective nerve root blocks. This repeat left C7 selective nerve root block was performed on April 11, 2016 and reportedly resulted in complete immediate relief of Ms. Evans-Waiau's pain. This procedure was also performed under Propofol sedation as administered by the registered nurse already assigned to the procedure room, despite notation of the presence of a separate, dedicated anesthesia provider in the procedure note.

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On this occasion, however, Ms. Evans-Waiau was noted to be "sedated" upon arrival to the postanesthesia care unit. On April 26, 2016, Ms. Evans-Waiau followed up with Dr. Rosler where she continued to report a Visual Analog Pain Scale score of five out of ten. Dr. Rosler recommended a neurosurgery evaluation and ongoing medication management.

On May 17, 2016, Ms. Evans-Waiau was evaluated by a neurosurgeon, Dr. Yevgeniy Khavkin. Based on Dr. Khavkin's evaluation of Ms. Evans-Waiau, he recommended an anterior cervical decompression fusion with corpectomy at C5-6 and C6-7. Dr. Khavkin provided a cost estimate for the performance of this surgery, estimated to be $273,695. Ms. Evans-Waiau followed up through Dr. Rosler's office on May 24, 2016 where she was provided refills of her medications. Medications were also provided on June 21, 2016 through Dr. Rosler's office.

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On July 10, 2016, Ms. Evans-Waiau was involved in a subsequent rear-end motor vehicle accident while stopped at a stop sign. As a result of this accident, she was taken by ambulance to Sunrise Hospital emergency room where she reported neck and back pain. She also disclosed her history of "chronic neck and back pain". She was provided with medications and discharged after her cervical x-ray was normal. Ms. Evans-Waiau underwent a neurosurgical second opinion. Dr. Jason Garber was made aware of Ms. Evans-Waiau's recent motor vehicle accident. He did not, however, recommend updated imaging studies, nor did he offer any potential opinions on apportionment. Instead, Dr. Garber wished to review Ms. Evans-Waiau's previous cervical spine MRI films. Ms. Evans-Waiau returned to Dr. Garber's office on July 19, 2016, at which point he recommended performance of an anterior cervical discectomy and fusion at C6-7. One week later, on July 26, 2016, Ms. Evans-Waiau returned to Dr. Rosler's office where Dr. Rosler noted that Ms. Evans-Waiau "reports new onset low back pain with associated pain radiating down left leg following MVA on July 10, 2016". Dr. Rosler recommended the performance of a lumbar MRI if the lumbar symptoms persisted. Ms. Evans-Waiau followed up with Dr. Rosler on August 23, 2016, at which point

Dr. Rosler solely attributed her low back and left leg symptoms to the more recent motor vehicle accident of July 10, 2016.

On August 30, 2016, Ms. Evans-Waiau underwent a chest x-ray as part of a preoperative workup. On this same day, Ms. Evans-Waiau was evaluated by Dr. Garber who continued to recommend anterior cervical discectomy and fusion at C6-7. The next day, Ms. Evans-Waiau underwent an MRI of the lumbar spine, which reportedly demonstrated an L4-5 disc bulge measuring 2 mm and a left-sided disc protrusion at L5-S1 measuring 2-3 mm. On September 1, 2016, Ms. Evans-Waiau underwent an anterior cervical discectomy and fusion at Valley Hospital, as performed by Dr. Garber. Intraoperative neuromonitoring was provided by Dr. Morton Hyson. Ms. Evans-Waiau was admitted to the hospital overnight and discharged on September 2, 2016. On September 9, 2016, Ms. Evans-Waiau followed up with Dr. Rosler, where she reported that her left arm pain had subsided. Postoperatively, Ms. Evans-Waiau continued to see Dr. Garber and Dr. Rosler throughout the remainder of 2016.

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After a five month gap in medical care and/or medical records between November 22, 2016 and April 20, 2017, Ms. Evans-Waiau returned to Dr. Rosler's office where she was now complaining of intermittent right arm pain. Dr. Rosler recommended updating her cervical MRI. An updated cervical MRI was performed on April 24, 2017, which reportedly demonstrated postoperative changes at C6-7, a disc bulge measuring 1-2 mm at C5-6 and a 2-3 mm disc bulge at C6-7. Ms. Evans-Waiau followed up with Dr. Rosler on May 11, 2017 where she continued to report symptoms in her right upper extremity with increased neck pain with forward flexion. Approximately one month later, on June 16, 2017, Ms. Evans-Waiau followed up with Dr. Rosler for ongoing medication management. During this visit, however, her Visual Analog Pain Scale score was noted to be a two to three out of ten. She denied any significant arm symptoms. By July 28, 2017, Ms. Evans-Waiau's symptoms were noted to be "significantly improved". Her Visual Analog Pain Scale score was noted to be a one to two

out of ten. On November 9, 2017, Ms. Evans-Waiau underwent an Independent Medical Evaluation as performed by Dr. Jeffrey Wang, who noted that "the delayed onset of symptoms and the significant improvement with conservative care in the first three to four months are all consistent with a soft tissue strain and not consistent with any structural spinal injury". There were no medical records produced for review beyond November 9, 2017.

After having the opportunity to review all produced medical records, billing records, a deposition testimony, accident related data, imaging studies and other data regarding Ms. Evans-Waiau and her involvement in a motor vehicle accident of October 30, 2015, I have been able to formulate several opinions/conclusions regarding the care, appropriateness of care, necessity of care and relatedness of care provided to Ms. Evans-Waiau following the events of October 30, 2015. There were no admissions or documentation of prior accidents, injuries or chronic pain complaints other than a vague reference to a prior motor vehicle accident which occurred in approximately 2010, resulting in lumbar pain, which has, reportedly, since resolved prior to the events of October 30, 2015. There were some sparse medical records which were produced for review. Of note, Ms. Evans-Waiau was involved in a subsequent rear-end motor vehicle accident on July 10, 2016 which caused neck and back pain and prompted emergency care at Sunrise Hospital where Ms. Evans-Waiau was taken via ambulance. One must understand that absence of prior, documented complaints, symptoms, diagnostic testing and/or treatment does not necessarily correlate with the lack of previous complaints, symptoms, diagnostic testing and/or treatment. If injury was assumed to be related to the events of October 30, 2015, based on my review of the totality of the medical records, the lack of evidence of acute, traumatic injury on any imaging study, the lack of acute, severe pain complaints following the events of October 30, 2015, Ms. Evans-Waiau's significant improvement following conservative care, my knowledge, my training, my experience in treating similar patients, and my familiarity with applicable, multi-

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disciplinary medical literature, it is my opinion, on a more likely than not basis, that Ms. Evans-Waiau's presumed injuries were limited to soft tissue or musculoligamentous injuries commonly discussed as sprain/strain type injuries. These types of presumed injuries predictably resolve, reach a state of maximal medical improvement or return to their baseline levels within days or weeks of the inciting event, often without pursuit of formal treatment. It is my opinion that any treatment which may have assisted Ms. Evans-Waiau in reaching a state of maximal medical improvement ceased on or before February 18, 2016. Treatment beyond February 18, 2016 was unrelated to the events of October 30, 2015.

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There was evidence of attorney retention prior to seeking any medical care. There was also evidence of attorney driven referrals. Ms. Evans-Waiau seemed to have compartmentalized her symptoms in her neck and low back, attributing her neck symptoms to the events of October 30, 2015 and her low back symptoms to the subsequent motor vehicle accident of July 10, 2016. Although Ms. Evans-Waiau and/or treating physicians prefer to attribute all of her lumbar symptoms, rather than any of her cervical symptoms, to the events of July 10, 2016, it should be noted that the only x-rays which were obtained in the emergency room on July 10, 2016, were that of the cervical spine. On May 17, 2016, there was evidence of a nonanatomic pain diagram which shows evidence of symptoms in a nondermatomal distribution. In Ms. Evans-Waiau's deposition testimony, she discussed the mechanism of injury of October 30, 2015. Although, eventually, Ms. Evans-Waiau mentioned pedestrians as the cause for her to have stopped abruptly, this was not initially disclosed in her deposition testimony. Although Ms. Evans-Waiau claims that the motor vehicle accident of October 30, 2015 was associated with a more significant impact causing more damage to her vehicle, as compared to the July 10, 2016 motor vehicle accident, emergent care was obtained following the events of July 10, 2016, whereas Ms. Evans-Waiau delayed seeking any treatment following the events of October 30, 2016 until after retaining an attorney, who referred her to a chiropractor.

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It is my opinion that any treatment which may have assisted Ms. Evans-Waiau in reaching a state of maximal medical improvement ceased on or before February 18, 2016. At that point, Ms. Evans-Waiau reported to her chiropractor that she had a Visual Analog Pain Scale score of one out of ten in reference to the cervical, thoracic and lumbar spines. On that same day, Ms. Evans-Waiau was noted to be "symptom free in her cervical spine" by Dr. Rosler. Treatment beyond this date, February 18, 2016, was unrelated to the events of October 30, 2015. This unrelated treatment included ongoing pain management evaluations, subsequent cervical spine injections, medication management, neurosurgical consultations, future cost estimates, neurosurgical second opinions, hospital evaluations for a subsequent motor vehicle accident, cervical fusion surgery at C6-7, intraoperative neuromonitoring, overnight hospital stay at Valley Hospital, primary care evaluations, postoperative neurosurgical evaluations, and updated advanced imaging studies. It remains my opinion that Ms. Evans-Waiau's pain generator, if anatomic, remains unknown. Based on the manner in which Ms. Evans-Waiau was provided sedation during the two procedures performed by Dr. Jorg Rosler, which both utilized Propofol, the post-procedure diagnostic assessments of Ms. Evans-Waiau was made difficult due to choices of sedation. Ms. Evans-Waiau recalled being "groggy" following the procedure in which she was "put to sleep" with Propofol. Propofol is a sedative hypnotic, general anesthetic agent which has no role in the performance of conscious sedation for spinal injection procedures due to its narrow margin of safety related to its irreversibility and ability to induce unconsciousness at any dose. Ms. Evans-Waiau, on one occasion, was noted to be "sedated" in the postanesthesia care unit. The use of this medication, as recommended by all reputable organizations which govern its use, as well as the package insert of Propofol (see Exhibits 1 and 2), necessitates the presence of a separate, dedicated anesthesia provider to administer the Propofol rather than having the pain interventionalist supervise the administration of the Propofol by a registered nurse already assigned to the procedure room, as was the sit-

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uation on two occasions in this case. I know of no reputable medical literature or medical organizations which support or promote the use of Propofol or "deep sedation" for the performance of these spinal injections, nor am I aware of any reputable medical literature or medical organizations which promote supervision of non-anesthesia personnel to administer Propofol during the performance of spinal injection procedures. The choice to use this medication, when other, more suitable medications were readily available, served only to increase the risks to Ms. Evans-Waiau, which included positioning concerns, airway concerns, and/or decreased ability or inability to respond to noxious stimuli. Although I am unaware of any reputable medical literature or medical organizations which support or promote the use of Propofol or "deep sedation" in the context of spinal injection procedures, I am aware of medical literature and medical organizations which support the avoidance of such. In the Fall 2012 Anesthesia Patient Safety Foundation Newsletter, there was an article entitled "Hazards of Sedation for Interventional Pain Procedures", authored by Steven E. Abram, M.D. and Michael C. Francis, M.D. (http://www.apsf.org/newsletters/html/2012/fall/01 hazards.htm)

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As a practicing pain management interventionalist, Dr. Rosler should be familiar with the SIS (Spine Intervention Society) Practice Guidelines of Spinal Diagnostic & Treatment Procedures, which contains the following opinions on the use of General anesthetic agents during the performance of delicate spinal procedures: "Routine use of sedation is not indicated for any of the procedures described in these Guidelines. Notwithstanding practices and instructions to which practitioners in the USA may have been accustomed, elsewhere in the world these procedures have been conducted, and continue to be conducted, without sedation. There are no features of any of the procedures covered by these Guidelines that warrant preemptive or routine sedation." If and whenever sedation is used, the patient must always be sufficiently alert so as to be able to recognize and warn of any impending misadventure by reporting any unexpected, unfamiliar, or undesired sensations. Deep sedation may be required in certain

extreme cases. Patients with dystonias or other movement disorders or patients who cannot lie still for the period required, may require deep sedation when definitive therapeutic procedures are being conducted. Barring such extreme cases, procedures should not be performed under deep sedation. For diagnostic procedures, using deep sedation defeats the very purpose of the investigation. For procedures that rely on provocation, the patient must be awake in order to report the production of pain and be able to describe its intensity, quality and distribution. For diagnostic blocks, the patient must be awake and mobile immediately after the procedure in order to assess the response. For ablative procedures, the patient must be awake in order to report any impending misadventure. Although not reported in the literature, cases have arisen in the Medicolegal arena of neurological injuries that should not have occurred during lumbar and cervical radiofrequency neurotomies, and which would have been avoided had deep sedation not been used. (SIS Practice Guidelines for Spinal Diagnostic and Treatment Procedures, 2nd Edition (2013))

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Comments are necessary regarding the reviewed medical billing. My comments are not meant to justify or relate any of the reviewed medical billing to any specific event or events. I will focus on medical billing which occurred on October 30, 2015 and beyond. The billing through Align Med Chiropractic was within the usual and customary rates commonly seen in the Southern Nevada medical community, as was the billing through Align Med MRI. The billing through North Las Vegas Pain Management and Urgent Care was not produced for review. The billing through Dr. Jorg Rosler's office exhibited consultation fees which were approximately 25% higher than usual and customary. Dr. Rosler's office visit fees were approximately two times usual and customary. Dr. Rosler had high billed charges for his procedurally based services. Dr. Rosler, as an anesthesiologist, bills utilizing the guidelines of the American Society of Anesthesiologists (ASA). Each procedure performed by Dr. Rosler is assigned a certain number of ASA units. Each ASA unit is assigned a monetary value by

the physician. Multiplying the monetary value of each ASA unit by the number of units assigned to a procedure will help to generate the total cost of the procedure. Dr. Rosler's office billed $185 per ASA unit. The average billed charges for anesthesiologists in the Southern Nevada Medical Community ranges between $90 and $120 per ASA unit. Dr. Rosler performed all of his procedures at Surgical Arts Center, where he is a partial owner. Although the facility fees through Surgical Arts Center were within the usual and customary rates commonly seen in the Southern Nevada medical community, there was evidence that this facility sold its interest in the personal injury liens to Canyon Medical Billing prior to the conclusion of this claim. Typically, interest in personal injury liens is sold for anywhere from 24 to 38 cents on the dollar. I will present evidence (see Exhibit 3), where this facility has previously sold its interest in personal injury liens prior to the conclusion of the claim for approximately 35 cents on the dollar, which would indicate that this facility significantly overvalued its billed charges by approximately three times. The billed charges through Dr. Yevgeniy Khavkin's office exhibited consultation services which were billed at approximately 20% higher than usual and customary for the performance of similar services in the Southern Nevada medical community. The billing through Sunrise Hospital and Medical Center for the July 10, 2016 date of service was unrelated to the events of October 30, 2015. The billed charges through Dr. Jason Garber's office exhibited consultation fees which were approximately 25% higher than usual and customary. Dr. Garber's office visit charges were approximately two times usual and customary. Dr. Garber's procedure fees were on the high end of usual and customary for the performance of similar services in the Southern Nevada medical community. The billed charges through Valley Hospital were not produced for review. The billing for Monitoring Associates was approximately two times usual and customary for the performance of similar services in the Southern Nevada medical community. The billing through CVS Pharmacy was within the usual and customary rates commonly seen in the Southern Nevada medical community. If the above billing abnormalities are addressed,

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the resultant medical billed charges will fit better within the usual and customary rates commonly seen in the Southern Nevada medical community.

I have had the opportunity to review multiple imaging studies provided to me on several DVDs from Align Med MRI, Valley Hospital and Medical Center, and Sunrise Hospital. It is my opinion that none of these films demonstrated any evidence of acute, traumatic injury to any areas of the spine. My opinions in this regard were consistent with those expressed by another medical expert, Dr. Jeffrey Wang, in his November 9, 2017 report, where he concluded that "the delayed onset of symptoms and the significant improvement with conservative care in the first three to four months are all consistent with a soft tissue strain and not consistent with any structural spinal injury". Based on my review of the traffic accident related data, including multiple descriptions of the mechanism of injury, review of vehicular damage photos and vehicular damage estimates, it is my opinion that it was unlikely that Ms. Evans-Waiau suffered any significant spinal, neurologic or orthopaedic injuries as a result of the events of October 30, 2015. There appeared to have been some preexisting damage to Ms. Evans-Waiau vehicle. If Ms. Evans-Waiau would have suffered any significant spinal injuries, more likely than not, she would have experienced severe, acute, immediate pain complaints in her neck and/or upper extremities. Instead, Ms. Evans-Waiau had no documented pain complaints for three days following the events of October 30, 2015.

It is my opinion that any treatment which may have assisted Ms. Evans-Waiau in reaching a state of maximal medical improvement, resolving her conditions, or returning to her baseline levels of pain, ceased on or before February 18, 2016. Treatment beyond February 18, 2016 was unrelated to the events of October 30, 2015, including any future care estimates in reference to surgical intervention for adjacent segment breakdown or any other treatment modalities. It is my opinion that treatment beyond February 18, 2016 was unrelated to the events of October 30, 2015 and that any future care

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estimates would represent pure speculation. Ms. Evans-Waiau works approximately four hours per day delivering newspapers to residential homes. She delivers these by car. It is my opinion that she will suffer no decreased work life capacity nor will she require any permanent work restrictions or functional limitations as a direct or indirect result of the events of October 30, 2015.

I, Joseph J. Schifini, M.D., do hereby affirm that I am a physician licensed to practice the full scope of medicine and surgery in Nevada and California; that I have an unrestricted license to prescribe every class of medication issued by the FDA; that I am Board Certified by the American Board of Anesthesiology, certified by the American Board of Pain Medicine, and that I am a Diplomate of the Academy of Integrative Pain Management.

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I do further affirm that my opinions are derived from a review of the records provided and based on multiple factors including my experience in addition to my knowledge and familiarity with current evidence based medicine. The opinions/conclusions presented above are based on the records reviewed and/or performance of a history and physical examination, and may or may not be supplemented or changed upon presentation of additional materials not presently available for review. The opinions above were derived only after reviewing the entirety of the records submitted and/or examining the patient. No assumptions of validity or invalidity were made prior to an actual review of the materials provided. Unless noted otherwise, all presented opinions are rendered to a reasonable degree of medical probability and/or certainty. The derived opinions expressed herein are the author's alone and have not been modified or skewed on the basis of any prejudice, financial consideration, or secondary influence other than an analysis of the available data, including provided medical records, photographs, radiographs, video surveillance, history and physical examination, etc. The opinions stated above would remain the

same based upon the evidence provided regardless of the parties involved or the agent or agency requesting this review and/or examination.

If further clarification of these opinions is necessary, please do not hesitate to contact me.

Sincerely,

Joseph J. Schifini, M.D.

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DISTRICT COURT

CLARK COUNTY, NEVADA

DESIRE EVANS-WAIAU, INDIVIDUALLY; GUADALUPE PARRA-MENDEZ, INDIVIDUALLY; JORGE PARRA-MEZA, AS GUARDIAN FOR MYRA PARRA, A MINOR; JORGE PARRA-MEZA, AS GUARDIAN FOR AALIYAH PARRA, A MINOR; AND JORGE PARRA-MEZA, AS GUARDIAN FOR SIENNA PARRA, A MINOR, Plaintiffs, *vs.* BABYLYN TATE, INDIVIDUALLY, DOES I-X, AND ROE CORPORATIONS I-X, INCLUSIVE, Defendants.	Case No. A-16-736457-C Dept. No. XVII **OPPOSITION TO "MOTION FOR ATTORNEYS FEES AND COSTS BASED ON COUNSEL'S [PURPORTED] PROFESSIONAL MISCONDUCT ON ORDER SHORTENING TIME"**

During opening statements in trial over disputed injuries resulting from slow-speed rear-end collision just off the Vegas Strip, Defense counsel informed the jury that the Plaintiffs insisted upon waiting for the police to arrive at the scene, and that, when the police arrived, they issued no traffic citations. For this, Plaintiffs sought and obtained a mistrial and now ask the Court to award nearly $700,000 in fees and costs. But no sanctions are justified.

First and foremost, the Defense did not "purposely cause[] a mistrial to occur." Thus, under NRS 18.070, the Court cannot impose costs and fees.

Moreover, the Defense did not commit misconduct. Plaintiffs assert it was misconduct to inform the jury that police wrote no tickets for this accident. But no Nevada statute, rule, case (or order in this case) states that information regarding the *nonissuance* of a citation is inadmissible. Even if the Nevada Supreme Court ultimately rules this evidence to be inadmissible, the Defense still acted in good faith at the trial. Thus, the conduct was not "so egregious" as to justify sanctions, as the standard requires.

Plaintiffs also claim it was misconduct to question their motives in waiting for the police where a statute requires them to call the police when an accident occurs. But contrary to Plaintiffs' repeated representations, the Nevada statute does not require drivers to call police to the scene of an accident (only that they later report to the "office" of a police authority). Plaintiffs' entire argument fails on this basis. Either way, there is no prohibition against questioning the motives behind an act that also complies with a legal obligation. It is for the jury to decide the motive of a witness. These remarks similarly were not egregious.

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Even if misconduct occurred, it was not "so extreme" that a curative instruction could not remedy the misconduct's effect. As many courts have concluded, a simple instruction to the jury would have solved the problem (for example, the jury could have been informed that the nonissuance of a citation was not to be considered in determining whether the Defendant was negligent). In short, any purported misconduct did not prejudice the Plaintiffs.

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The Defense did not purposely cause a mistrial and there was no misconduct. If the Court disagrees, it should carefully scrutinize the outrageous amount Plaintiffs seek. It is not proportionate to the purported misconduct and applies grossly inflated hourly rates and a "contingency multiplier" that Nevada does not recognize. Most disturbingly, many (even most) of the charges are for fees and costs that were not incurred as a result of the mistrial. Plaintiffs are not entitled to a windfall.

The Motion should be denied.

ARGUMENT

I. SANCTIONS CANNOT BE AWARDED, BECAUSE DEFENSE COUNSEL DID NOT PURPOSELY CAUSE THE MISTRIAL

The Nevada statute is clear: "A court may impose costs and reasonable attorney's fees against a party or an attorney who, in the judgment of the court, ***purposely caused a mistrial to occur***." NRS 18.070(2). Plaintiffs neglect to inform the Court of this on-point statute.

In light of the fact that Plaintiffs did not confess this mandatory authority, it is not surprising that they also provide no evidence that the Defense purposely caused a mistrial, as the statute requires. Indeed, the only mention of the possibility is the single statement that the "Defense may have caused this mistrial because they have now seen and know Plaintiffs' voir dire strategies, Plaintiffs' opening statement, and Plaintiffs' arguments for trial." (Mot. at 13:20–21). But Plaintiffs' speculation cannot constitute evidence of purposeful conduct. *See Richter v. Mut. of Omaha Ins. Co.*, No. CV 05-498 ABC, 2007 WL 6723708, at *9 (C.D. Cal. Feb. 1, 2007), *aff'd*, 286 Fed. Appx. 427 (9th Cir. 2008) ("However, a hypothetical is not evidence."); *Lam v. City of Cleveland*, 338 F. Supp. 3d 662, 672 (N.D. Ohio 2018) (holding that a "hypothetical is not evidence").

Even if Plaintiffs' wild, unfounded accusations were sufficient to show Defense counsel's intent, these particular accusations are absurd. Frankly, it would be incredibly inefficient, ineffective, and downright idiotic to seek to gain the slightest possible advantage by empaneling a jury, hearing the opposition's opening statement, and then causing a mistrial. This scenario, with no basis in the record, is simply too absurd to be considered.

The Defense did not purposely cause a mistrial. In fact, as Defense counsel informed the Court, the Defense discussed the possibility that raising the lack of a traffic citation might draw an objection, but concluded that such objection would be overruled:

> [F]or whatever it is worth, there were some brief communication in my office and with co-counsel, and with our other counsel about this saying, well, if neither side got a ticket and the cops didn't think it was a big deal, I'm not pointing out that somebody was written a ticket; is there anything wrong with me saying this?
>
> I mean, somebody might -- might object, but I would think the objection would be overruled; does anybody see anything wrong with

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> saying this? It's not like I did it willy nilly. And the -- the consensus unanimously was, no, there's nothing wrong with that.

(Transcript of Hearing at 149:1–12, Apr. 26, 2019, Ex. 1 to Mot. [hereinafter Transcript]). In other words, because the Defense assumed that any objection to these remarks would be overruled, the Defense believed its conduct was appropriate.[1] Hence, the Defense could not have been acting with intent to cause a mistrial.

Furthermore, when Plaintiffs' counsel moved orally for a mistrial, the Defense vehemently opposed the motion:

- Arguing that no order or established rule prohibited this conduct:
  - "He didn't file a motion about this. And I disagree, I don't think the law is clear on this at all." (*Id.* at 132:9–10).
  - "Frias v. Valle does not say that if somebody doesn't get a ticket, that's excluded. It doesn't say that." (*Id.* at 131:16–18).
  - "[T]here is no case on point saying that the inverse [i.e., lack of a citation] is necessarily inadmissible" (*Id.* at 144:22–23).
  - "So I think the law is not clear. (*Id.* at 145:9–10).
  - "I think that the way that it was handled was not any clear violation of any clear law, and so I -- no, I don't think that there is misconduct here even if the Court finds that a mistrial is necessary." (*Id.* at 148:20–23).
- Arguing that the caselaw does not support granting a mistrial:
  - "Frias/Valle doesn't say that if a party doesn't get a ticket he gets a mistrial." (*Id.* at 125:22–23).
- Offering to cure any purported misuse of the remarks:

[1] Plaintiffs even concede that "[e]very step of the opening statements were thought-out [sic] methodically." (Mot. at 4:14–15). That the Defense "methodically" considered the issues and concluded the remarks were appropriate indicates a difference of legal opinion—not an intentional act to cause a mistrial.

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- "[I]f you'd like me to say what a police officer said as to fault or whether a ticket was issued is not something for you to consider[, I will]." (*Id.* at 134:24–135:1).

- Arguing that a curative instruction would be adequate:

  - I think all that needs to be told to the jury is that they should disregard it, that it's irrelevant because on the scene traffic scene officers may elect not to issue citations for any number of reasons.

    And it doesn't necessarily mean that there is negligence or fault on the part of either party. It's inadmissible and they should disregard it.

    (*Id.* at 145:3–9).

  - "I think there really is no prejudice if it is cured with as simple a statement as that and not only is it possible to do that technically and legally, but I think even as a matter of common sense for people on the jury." (*Id.* at 145:11–12).

- Expressing disagreement with the Court's decision to order a mistrial:

  - "I respect your ruling. . . . But respectfully, I disagree with the ruling." (*Id.* at 152:10–13).

Defense counsel attempted to avoid a mistrial by (1) arguing that no established rule or order had been violated, (2) arguing that the caselaw did not support granting a mistrial for this conduct, (3) offering to personally cure the statements to the jury, (4) arguing for a curative instruction, and (5) expressly disagreeing with the Court's intention to declare a mistrial. The only "purposeful" conduct here was the concerted effort of the Defense to avoid a mistrial.

NRS 18.070(2) allows a sanction of fees and costs, only where the attorney "purposely caused a mistrial to occur." Because the Defense did not purposely cause the mistrial, a sanction of fees and costs is not appropriate. The Court can deny the Motion on this basis alone.

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II. DEFENSE COUNSEL DID NOT COMMIT MISCONDUCT, OR AT THE VERY LEAST, THE MISCONDUCT WAS NOT "SO EXTREME" AS TO JUSTIFY SANCTIONS

The Court's initial instinct was correct. When Defense counsel stated, "I don't think there is misconduct that warrants fees or costs or anything," the Court responded, "***I don't either.***" (*Id.* at 148:10–12 (emphasis added)). And Plaintiffs' motion offers nothing to suggest otherwise. This is because Plaintiffs fail to establish that the Defense's actions amount to misconduct under the law. Indeed, the Motion gives scant treatment to the law. (*See, e.g.*, *supra* Part I (discussing that Plaintiffs do not even provide the Court with the controlling statute on the issue; *infra* this section)). Instead, Plaintiffs rely on wild accusations that are unfounded in the law and unsupported by the record. But an objective application of the law, shows that no misconduct occurred.[2]

Misconduct warranting a new trial occurs when (1) an attorney engages in conduct that he knew was prohibited, *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 135, 252 P.3d 649, 658 (2011); and (2) "the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect," *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). Here, the Defense was not aware that he was engaged in prohibited conduct. Indeed, it is not even clear that the conduct *is* prohibited.[3] And in any event, the Defense's conduct was not "so extreme" that a curative instruction could not have repaired any harm. Accordingly, the Defense's actions do not rise to the level of misconduct justifying sanctions.

A. Defense Counsel Did Not Commit Misconduct, Because He Did Not Know that His Conduct Was Prohibited

1. Nevada Law Requires that the Attorney Be Aware of the Prohibited Conduct

"[S]anctions for attorney misconduct requires that the offending attorney know what conduct the district court is prohibiting in order to avoid a sanction." *Boyack v. Eighth Judicial*

[2] As Aristotle astutely stated (and as the *Legally Blonde* movie made famous to non-lawyers), "The law is reason free from passion." Plaintiffs hope this Court ignores reason and succumbs to Plaintiffs' passionate, albeit wrong, description of the events and interpretation of the Defense's intent. (*See, e.g.*, Mot. at 11:10–12 (declaring that the Defense intended to act "deceitfully")). The Court should view such rhetoric with healthy skepticism.

[3] *See infra* Part. II.A.3.

Dist. Court, 2019 WL 1877402, 439 P.3d 956 (Nev. 2019) (citing *Bayerische*, 127 Nev. at 135, 252 at 658); *see also* EDCR 7.6(b) (allowing for sanctions, "including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause . . . [f]ails or refuses to comply with any order of a judge of the court"). In fact, Plaintiffs base their misconduct argument on a purported violation of Nevada Rule of Professional Conduct 3.4, which states that a lawyer cannot raise facts unless he "***reasonably believe[s]"*** they are relevant and admissible. (*See, e.g.*, Mot. at 7:8–13 (emphasis added) (quoting Nev. RPC 3.4(e))). Inherent in this Rule is the protection afforded by a "reasonable belie[f]." Where an attorney reasonably believes his statements allude to relevant and admissible facts, he clearly does not know that his conduct is prohibited, if indeed it is.

For example, in *Bayerische*, the court ordered a new trial after determining that defense counsel's opening and closing statements constituted attorney misconduct. The plaintiff was ejected from her vehicle after a rollover accident and claimed that a faulty seatbelt was the cause of her ejection. 127 Nev. at 122, 252 P.3d at 653. The court ordered that the defense could present evidence of seatbelt nonuse, but only for the limited purpose of evaluating if the vehicle's seatbelt was defective (and not for the general proposition that the plaintiff was negligent). *Id.* at 129, 252 P.3d at 654. In opening and closing statements, defense counsel repeatedly stated that the plaintiff was not wearing a seatbelt. *Id.* at 134–35, 252 P.3d at 657–58. After the court ordered a new trial based upon attorney misconduct, the defense appealed. The Nevada Supreme Court concluded that the order "was neither definitive nor specific . . . as to the limitations being imposed on use of the seatbelt evidence." *Id.* at 135, 252 P.3d at 658. Accordingly, it found that defense counsel's violation was not "clear for purposes of establishing attorney misconduct." *Id.* The Court reversed the district court's award of fees and costs. *Id.* at 142, 252 P.3d at 662.

2. The Nevada Supreme Court Just Considered This Issue, and Ruled that Sanctions Are Not Appropriate Where the District Court Was Not Specific as to the Conduct that Was Prohibited

In April of this year, the Nevada Supreme Court considered sanctions ordered by this Court for fees and costs in the amount of $91,000, resulting from a mistrial purportedly caused by attorney misconduct. *Boyack*, 2019 WL 1877402, at *2. There, this court granted a mistrial after finding that defense counsel committed attorney misconduct by subtly disparaging the plaintiff's trial

strategy. *Id.* Specifically during voir dire, after a juror commented on the reptile trial strategy, defense counsel asked the Court in a side bar for permission to ask follow-up questions on the issue. *Id* at *1. The Court responded, "No, we're not going down that road." *Id.* Later, in apparent defiance of the Court's directive, defense counsel asked the potential jurors if any knew what "reptile brain theory" was. *Id.* This initiated a conversation where defense counsel told the jurors he was not permitted to explain it to them, but that he would "love to." *Id.* Moments later the jury was excused and the plaintiff requested a mistrial, which this Court granted. *Id.* at *1–2. This Court sanctioned the defense counsel for $91,000, compensating the plaintiff for the fees and costs it incurred as a result of the mistrial. *Id.* at *2.

The Nevada Supreme Court granted defense counsel's writ petition and instructed the District Court to vacate the order for sanctions. It first recognized that Nevada law permits sanctions for attorney misconduct only where "the offending attorney kn[e]w what conduct the district court [wa]s prohibiting." *Id.* (citing *Bayerische*, 127 Nev. at 135, 252 P.3d at 658. And it observed that the conduct must be so clearly prohibited "so as to 'obviate the need for a contemporaneous objection,' and 'to make a subsequent violation clear for purposes of establishing attorney misconduct.'" *Id.* (quoting *Bayerische*, 127 Nev. at 135, 252 P.3d at 658). After the Court found that the defense counsel's comments did not constitute a knowing and clear violation, it "conclude[d] that the district court acted arbitrarily and capriciously in sanctioning [the defense counsel]."

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3. The Defense Had No Notice that Its Conduct Was Prohibited, if It Even Was

To the extent the conduct at issue violates Nevada's rules, the Defense did not know that at the time of trial. First, no Nevada case has held that the *nonissuance* of a traffic citation is inadmissible evidence. And Plaintiffs did not seek an order prohibiting such evidence. Thus, the Defense was not on notice that the district court would prohibit any statements related to this issue. Second, Defense counsel's remarks questioning Plaintiffs' motive for calling police to the accident

scene, were not improper, and Plaintiffs cite no authority stating otherwise.[4] Accordingly, the Defense's lack of notice (and lack of knowledge) that its conduct was prohibited preclude a finding of misconduct.

a. DEFENSE COUNSEL HAD NO NOTICE THAT EVIDENCE OF NONISSUANCE OF A CITATION WAS INADMISSIBLE

i. It is not clear in Nevada if evidence regarding the nonissuance of a citation is inadmissible

This Court did not issue an order prohibiting the parties from introducing evidence that the police wrote no traffic citations. Indeed, Plaintiffs never even filed a motion in limine on the issue. Thus, the only source for the required notice of prohibited conduct must derive from Nevada law itself. But no statute, rule, or case answers the question. At most, Defense counsel's conduct stepped into a "grey area" of Nevada law. But venturing into undecided areas of law cannot constitute a "violation clear for purposes of establishing attorney misconduct." *Bayerische*, 127 Nev. at 135, 252 P.3d at 658.

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Plaintiffs rely almost exclusively on *Frias v. Valle*, 101 Nev. 219, 221, 698 P.2d 875, 876 (1985), but *Frias* says nothing about the nonissuance of a traffic citation. As Plaintiffs admit, *Frias* only dealt with error caused by "admitting the patrol officer's traffic accident report and traffic citation into evidence." (Mot. at 10:5–7 (citing *Frias*, 101 Nev. at 219)). From there, Plaintiffs misrepresent the holding to the Court. The following block quote contains Plaintiffs' original emphasis and citation:

> The Court reasoned that **the officer's conclusions are not admissible because they are based upon statements of third parties and a cursory inspection of the scene.** *Id.*, (emphasis added).

(Mot. at 10:7–9 (every character, citation, and parenthetical as in the original)). Though Plaintiffs use no quotation marks, they add an "emphasis added" parenthetical. But this parenthetical only

[4] Though Plaintiffs raise this issue in their motion, and raised it briefly in oral argument on the oral motion for mistrial, the bulk of the oral argument and this Court's focus concerned the Defense's remarks related to the nonissuance of a traffic citation. So it is not clear that Defense counsel's statements about Plaintiffs' insistence on waiting for the police formed any basis for the Court's decision to grant a mistrial. However, in an abundance of caution, Defendant addresses the issue in this Opposition.

applies to direct quotations. THE BLUEBOOK R. 5.2(d)(i) (20th ed. 2015). Thus, Plaintiffs imply that this is a direct quote. It is not.

In fact, not only is this not a direct quote, the Court never stated that an officer's conclusions were inadmissible. *Frias*, a very short opinion, only twice mentions "conclusions":

1. "The report contained statements of third parties, Sowder's conclusions as to the cause of the accident and reference to the citation issued to the cab driver. We conclude the trial court erred by admitting the traffic accident report into evidence." *Frias*, 101 Nev. at 221, 698 P.2d at 876. Though this statement reflects that the traffic report contains conclusions, it does not go far as to say that the conclusions, themselves, are inadmissible.
2. "The conclusions of Officer Sowder, based upon statements of third parties and a cursory inspection of the scene, did not qualify him to testify as to who was at fault. Evidence of the traffic citation was also inadmissible." *Id.* This statement only holds that an officer's conclusions do not qualify him to testify as to who is at fault.

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While one may guess that—based on *Frias*—the Nevada Supreme Court would hold that an officer's conclusions are inadmissible, *Frias* does not go that far. But the ultimate admissibility of an officer's conclusions is not the issue here. First, *Frias* only states that traffic accident reports and traffic citations cannot be entered into evidence. *Id.* Thus, it cannot provide notice that Defense counsel's conduct was "so clearly prohibited 'so as to . . . to make a subsequent violation clear for purposes of establishing attorney misconduct.'" *Boyack*, 2019 WL 1877402, at *2 (quoting *Bayerische*, 127 Nev. at 135, 252 P.3d at 658). Second, even if the holding in *Frias* were as Plaintiffs misrepresent, *Frias* must be viewed in light of its underlying factual context. The Court's decision was predicated upon facts where the officer did write a traffic citation, unlike here. *See Georgia Interlocal Risk Mgmt. Agency v. city of Sandy Springs*, 788 S.E.2d 74, 75 n.1 (Ga. Ct. App. 2016) ("It is, of course, axiomatic that a decision's holding is limited to the factual context of the case being decided and the issues that context necessarily raises. Language that sounds like a holding—but actually exceeds the scope of the case's factual context—is not a holding no matter

how much it sounds like one."). It is entirely possible that the Nevada Supreme Court would hold otherwise with facts like those here.

The bottom line, no Nevada case establishes that evidence of the nonissuance of a traffic citation is inadmissible.

ii. Defense counsel's motions filed in other cases are irrelevant

Plaintiffs make a big deal out of the fact that Defense counsel has filed motions, in other cases, seeking to exclude evidence that officers issued traffic citations. But those motions, like *Frias*, all dealt with situations where a citation was issued. None sought to exclude evidence of the nonissuance of a traffic citation. Defendant readily concedes (as its counsel did at oral argument) that evidence showing that an officer wrote a traffic citation is inadmissible. That is not the issue here. In any event, an attorney's arguments made in a separate, unrelated case, with an unrelated client, cannot be imputed to this case and this client. *Excel Const., Inc. v. Town of Lovell,* 268 P.3d 238, 243, n.1 (Wyo. 2011) ("Counsel for the Town of Lovell suggests that Excel's itemization arguments are undermined by the fact that counsel for Excel argued the opposite side of the issue in a separate and unrelated case, representing a different party. This argument is misplaced. We do not require attorneys to reconcile the positions they argue in unrelated cases with unrelated parties. We decide a case based on the application of the controlling law to the facts of that particular case."); *People v. Harrell*, 975 N.E.2d 624, 632 (Ill. App. Ct. 2012) (providing that a party "is not bound by different arguments advanced in the separate cases").

iii. Some jurisdictions admit evidence of the nonissuance of a traffic citation

Further supporting Defense counsel's "reasonable belief" that his conduct was proper, some jurisdictions—which do not allow evidence of the *issuance* of a citation—do allow evidence of the *nonissuance* of a citation. *See, e.g.*, *McQuiston v. Helms*, No. 1:06-cv-1668-LJM-DML, 2009 WL 554101 (S.D. Ind. Mar. 4, 2009) (holding that the "nonissuance of a citation to [the defendant] is merely a fact, and not an opinion, about which [the officer] is entitled to testify"); *LeClair v. Sickler*, 146 N.W.2d 853, 856 (Minn. 1966) (holding that Minnesota's rule "precludes

merely the introduction of the fact of a conviction of a traffic violation and does not prohibit the introduction of evidence showing that no tickets were issued"). While several jurisdictions have ruled that evidence of the nonissuance of a traffic citations is not admissible, Nevada has not ruled either way. And the split of state authority further demonstrates that Defense counsel's belief that his actions were proper was, in fact, reasonable.

If Defense counsel's statement regarding the nonissuance of a citation were improper, he did not know that. Nor did any statute, rule, case, or order from this Court put him on notice. Accordingly, the error, if existing, cannot rise to the level of misconduct required to justify sanctions.

iv. Plaintiffs' Counsel Agrees that Evidence of Nonissuance of a Citation Is Admissible—When It Suits Their Needs

In the second trial, Plaintiffs' counsel seems to have experienced a change of heart on the admissibility of evidence showing that the police failed to issue a citation. Mr. Prince elicited testimony from his client attempting to show that her vehicle's tail lights were not unlawfully altered, because no police had given her any "problems":

> Q Okay. Mr. Winner had talked about that there was some like aftermarket like smoked out light -- things around your taillights. Do you recall that?
>
> A Yes.
>
> Q Now, have you ever had any problems, any law enforcement ever stop you saying that was a problem or that your lights were weren't functioning properly?
>
> A No.
>
> Q Okay. How long had you been driving that car, Desire?
>
> A Two years, maybe.
>
> Q Okay. Did you always have that -- the smoked out lenses on the back of the car?
>
> A For the most part, yeah.

(Trial Transcript at 41:18–42:6, May 28, 2019, Ex. A). Likely aware of the hypocrisy of this inquiry, Plaintiffs' counsel was very careful to avoid using the words "ticket" or "citation." But his point was clear. In the two years that Plaintiffs' vehicle had the darkened tail lights, she never had a "problem" with the police. Whether this "problem" was a traffic citation, or merely a police officer

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warning Plaintiffs that the modification was unlawful, it elicits the same evidence—that is, evidence of law enforcement's decision to not write a citation. And Plaintiffs' counsel introduced this evidence for the very purpose that their Motion declares to constitute professional misconduct: They sought to inform the jury that Plaintiffs were not violating the law, because no police officer cited them for the violation. You cannot have it both ways, especially when accusing opposing counsel of sanctionable conduct.

b. DEFENSE COUNSEL HAD NO NOTICE THAT STATEMENTS REGARDING PLAINTIFFS' MOTIVES TO WAIT FOR THE POLICE WERE IMPROPER[5]

Plaintiffs contend that the Defense committed jury nullification by implying that Plaintiffs motives for waiting for police to arrive at the scene are shielded from any inquire because "the driver is required to report the collision" to the police. (Mot. at 5:1–2, 8:21–10:2). But once again, Plaintiffs never moved to exclude evidence that they insisted on waiting for the police to arrive at the scene. Consequently, this Court did not issue an order prohibiting such evidence. Indeed, Defendant could not have notice (required to find misconduct) of the impropriety of these statements, because these statements were not improper. And even if they were, a party is always free to question the motives of a witness and determination of those motives is a question for the jury.

i. The statute does not require drivers to call police to the scene of an accident

Nevada has no law requiring parties to a motor vehicle accident to call the police while at the scene of the accident (contrary to Plaintiffs' repeated representations to the Court). Not surprisingly, Plaintiffs not only quote, but insert an entire image from the DMV's "Nevada Driver's Handbook." (Mot. at 9)—but when referencing the controlling statute, they fail to quote the operative language. Defendant provides it to the Court now:

> ***If no police officer is present***, the driver of any vehicle involved in such crash after fulfilling all other requirements of subsection 1 and

[5] To reiterate, Defendant does not believe the Court based its mistrial order on this issue. *See supra* n.4. Defendant only addresses this issue in response to the arguments raised in Plaintiff's motion. To the extent that the Court's mistrial arguments were not based in part on this issue, it can ignore the related sections in this brief (and in Plaintiffs' brief).

> 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.

NRS 484E.030(2) (emphasis added). In other words, if an officer is not already on the scene, the statute requires the parties only to report to "the nearest office" of either a "police authority" or "the Nevada Highway Patrol." *Id*. (emphasis added). There is no requirement that the parties call officers to the scene of the accident and wait for their arrival. Hence, Plaintiffs had no legal obligation to wait for officers at the scene, and it was entirely proper for the Defense to question their motives. Plaintiffs' entire argument fails on this basis alone.

It is difficult to overlook the irony of Plaintiffs' accusation that Defense counsel failed in "his duty to research the law," (Mot. at 9:28), while Plaintiffs misrepresent the requirements of the statute that forms the basis of their argument. And to make matters worse, Plaintiffs cite to no authority for the proposition that it constitutes jury nullification to question the motives of someone who performs a legally mandated act. However, it no longer matters. Plaintiffs' proposition is moot, as it is based on an incorrect reading of the statute.

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ii. It is not improper to question the motives of a witness, even if acting in accordance with a legal obligation

Though this question is now moot, as an aside, a party is free to question the motives of a witness, even if the underlying action was lawful. For example, in the context of employment law, although an employer may assert that an employee's termination was lawful, courts routinely examine whether the termination was motivated by the employee's engagement in protected activity. *See, e.g.*, *Good Samaritan Med. Ctr. v. Nat'l Labor Relations Board*, 858 F.3d 617, 629, 642 (1st Cir. 2017) (providing that, although employer asserted that termination of employee was for "lawful reason," a primary consideration for trier of fact is whether employer's "motivation" for terminating employee was based on employee's "protected activity"); *Schlichtig v. Inacom Corp.*, 271 F. Supp. 2d 597, 608, 611 (D.N.J. 2003) ("A reasonable jury could conclude, based on this testimony, that Schlichtig's protected conduct was 'more likely than not' a substantial or motivating factor in Ross's decision to fire him.").

Many otherwise lawful acts are committed for nefarious reasons. Deciding the motives of a witness—whether they be purely to comply with a legal obligation, or some other reason—is entirely the province of the jury. *Monteiro v. City of Elizabeth*, 436 F.3d 397, 405 (3d Cir. 2006) ("Motive is a question of fact that must be decided by the jury, which has the opportunity to hear the explanations of both parties in the courtroom and observe their demeanor."); *Fizz v. Allen*, No. 3:17-CV-1518, 2018 WL 2709376, at *10 (M.D. Pa. May 10, 2018) (same), *adopted by*, 3:17-CV-01518, 2018 WL 2709430 (M.D. Pa. June 5, 2018); *Nationwide Mut. Ins. Co. v. Gentry*, 117 S.E.2d 76, 80 (Va. 1960) (providing that a person's "purposes and motives" are "questions for the jury to decide"); *Kohlhoff v. State*, 270 N.W.2d 63, 66 (Wis. 1978) (providing that "the relative credibility of the witnesses is a decision for the jury," and "[t]he jury may consider a witness' motives in this weighing process").

Though Plaintiffs had no legal obligation to wait for police to arrive to the scene of the accident, even if such legal obligation existed, the Defense acted properly when it questioned Plaintiffs' motives in doing so. It is axiomatic that the Defense could not have been on notice that its conduct was improper, when its conduct was not improper. This was not misconduct.

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4. Plaintiffs' Reliance on Lioce *Is Misplaced*

Finally, Plaintiffs' comparison of this trial to *Lioce v. Cohen* is like comparing apples to oranges. (*See, e.g.*, Mot. at 7:14–20, 10:2). As Plaintiffs concede, in *Lioce*, the defense was sanctioned for "stating the golden rule, giving his personal opinion regarding the justness of plaintiffs' causes, and causing jury nullification during his closing arguments." (*Id.* at 7:15–16 (citing *Lioce* 124 Nev. 20–23)). But it is common knowledge amongst trial attorneys (or at the very least, it is well-established) that these acts are not permitted. So, the *Lioce* attorney had notice that his conduct was prohibited, justifying sanctions for misconduct.

In this case on the other hand, as discussed at length above, it is far from well-established that the Defense's actions amounted to misconduct. The Defense did not have notice that its conduct was impermissible. No sanctions are warranted.

B. Sanctions Are Not Warranted Because the Conduct Was Not "So Extreme" that a Curative Instruction Could Not Remedy the Issue

Mistrial, or at least as a sanction, may only be granted upon a showing of unfair prejudice arising from the alleged violation. *See, e.g.*, *Bayerische*, 127 Nev. at 132–33, 252 P.3d at 656. This requires a showing that "the misconduct is ***so extreme*** that the objection and admonishment could not remove the misconduct's effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008) (emphasis added).[6] Or, as Plaintiffs quoted in their Motion, the Court may "award attorney fees as sanctions when the ***egregious misconduct*** of a party or an attorney causes a mistrial." (Mot. at 6:14–16 (emphasis added) (quoting *Persichini v. William Beaumont Hosp.*, 238 Mich. App. 626, 641, 607 N.W.2d 100, 109 (1999))).

Moreover, the District Court must make specific findings on the record and its order on "[t]he relevant inquiry [of] what impact the misconduct had on the trial, not whether the attorney intended the misconduct." *Lioce*, 124 Nev. at 125, 174 P.3d at 985. "[T]he district court is required to find that a violation is so extreme that it cannot be eliminated through an objection and admonition." *Rish v. Simao*, 132 Nev. Adv. Op. 17, 368 P.3d 1203, 1212 (2016) (citing *Lioce*, 124 Nev. at 17, 174 P.3d at 981. Here, the Court made only one statement regarding a curative instruction: "I can't come up with a curative instruction that takes away that argument, because at the end of the day no report was taken and no citation was issued." (Transcript at 144:12–15). But this does not explain how the lack of a curative instruction would have prejudiced the Plaintiff. Nevertheless, as discussed below, courts have held that a curative instruction is sufficient to cure the possible harm caused by this type of error. In short, Defense counsel's conduct was neither extreme nor egregious.

[6] Obviously, it is too late to undo the Court's mistrial order. However, it is important to consider the factors that the Nevada Supreme Court weighs when determining if the mistrial was warranted. Because, if it was not warranted, sanctions are similarly not justified.

1. Discussing the Nonissuance of a Citation, When the Issue Has Not Been Decided in Nevada, Is Not Egregious Misconduct

As discussed at length above,[7] (1) *Frias* did not hold that a police officer's conclusions are inadmissible, only that traffic accident reports and evidence that citations were issued cannot be admitted; (2) no Nevada case has considered the admissibility of the *nonissuance* of citations; and (3) Defense counsel's motions in unrelated cases are similarly premised on the *issuance* of a citation and are nevertheless irrelevant to the facts and the law related to this case. The Defense's remarks, even if they constituted misconduct (they do not), were not "so extreme that the objection and admonishment could not remove the misconduct's effect" for several additional reasons. *See Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008).

First, it cannot be extreme misconduct to take action that no statute, rule, case, or order has expressly prohibited. In a nearly identical situation, one court concluded that sanctions were improper where counsel violated no existing rule:

> We conclude that because the statute does not expressly disallow evidence of issuance (or nonissuance) of a ticket and because case authority has not addressed the question presented here, there is no basis for a finding that defendant acted in bad faith or in a display of obdurate behavior. Thus, the award of attorney's fees on this ground was improper.

Jackson v. Moore, 883 P.2d 622, 625 (Colo. App. 1994).

Second, several courts have faced this same issue and determined that a curative instruction could have eliminated the effect of the conduct, and thus, the conduct was not prejudicial. *Link v. McCoy*, 197 N.W.2d 278, 280 (Mich. Ct. App. 1972) (holding that testimony regarding nonissuance of a traffic ticket was not prejudicial where the court instructed that such evidence was not to be considered in determining whether defendant was negligent); *Breitenberg v. Parker*, 372 S.W.2d 828, 830 (Ark. 1963) (holding that testimony regarding the nonissuance of a traffic citation was "not prejudicial where trial court admonished jury to disregard question and answer"). Juries understand that police officers do not always write a ticket for every infraction. In fact, most

[7] *See supra* Part II.A.3.a.i. To avoid burdening the Court with a repetition of many issues already addressed, Defendant provides only a summary of those issues in this section.

people, at some time in their lives, have been pulled over for violating a traffic law and have been "let off" with a warning. Perhaps in a situation where a citation *was* issued, it may be difficult for the jury to ignore that information. But where a citation was *not* issued, a jury could easily conclude that the officer (1) "let them off" with a warning, (2) decided the accident was punishment enough, (3) or just did not feel like writing a ticket—especially where a curative instruction was issued.

In this case, Plaintiffs do not explain how the Defense's conduct was extreme, or why a curative instruction would not have been sufficient to remedy the misconduct.[8] Instead, Plaintiffs resort to strawman arguments, i.e., Plaintiffs refute arguments that Defendant does not raise. For example, Plaintiffs declare that the "Defense will argue that they violated ethical rules because Plaintiffs' counsel somehow violated the rules." (Mot. at 12:22–23). But Defendant does not make this rather silly argument. That Plaintiffs' counsel violated an order of this Court in its own opening statement has no bearing on whether Defendant's own actions were so egregious that sanctions are warranted. As shown here, the conduct was not extreme or egregious, and a curative instruction would have cured any possible error. Plaintiffs have failed to show otherwise. The Motion should be denied.

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2. It Is Not Egregious Misconduct to Question Plaintiffs' Motives for Calling the Police, Especially when They Were Under No Legal Obligation to Do So

Again, Plaintiffs' Motion is predicated on the premise that NRS 484E.030 legally obligated them to call the police from the scene of the accident and wait for the police to arrive. But the statute only required Plaintiffs to report the accident "to the nearest office of a police authority." NRS 484E.030(2). So Plaintiffs' argument that the Defense was arguing contrary to Nevada law is moot. Accordingly, the related remarks cannot constitute misconduct at all, let alone egregious misconduct.

[8] And should Plaintiffs add new arguments addressing these issues in their reply brief, that would deprive the Defense of its opportunity to respond to the specific facts and law that Plaintiffs might believe support their position. This is why a movant is not permitted to raise new factual or legal issues in a reply brief. *See Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 523, 286 P.3d 249, 261 (2012) ("[H]e does not make this argument in his opening brief thus, we do not consider it.").

But even if the Plaintiffs did have a legal obligation to report the accident, it is still not improper to question Plaintiffs' *motives* in doing so, as it is within the sole province of the jury to determine a witness's motives. (*See* text and cases cited *supra* Part II.A.3.b.ii). Nevertheless, assuming for the sake of argument that this did constitute misconduct, at worst it would fall within NRS 48.035(1), which states that "evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice."[9] But this evidence is hardly prejudicial. In any event, that would be a discretionary decision of the Court. It is not "extreme" misconduct to conclude that discussing a witness's motives is not so prejudicial as to substantial outweigh the probative value of that information.

Once again, instead of showing how the Defense's remarks were "extreme," Plaintiffs construct a strawman and then tear it down. Plaintiffs brazenly predict that Defense counsel "will argue that he did not know it was the law for drivers to contact the police after a collision." (Mot. at 11:19–20). But this is not Defendant's argument. Defendant argues that there is no such law and even if there were, it is not misconduct to question *why* Plaintiffs acted as they did.

There was no misconduct, and no sanctions are warranted.

III. PLAINTIFFS' COUNSEL COMMITTED PROFESSIONAL MISCONDUCT IN THE SECOND TRIAL

If the Court determines that some sanctions are warranted, any sanctions should be offset in consideration of the professional misconduct of Plaintiff's counsel in the subsequent trial.[10] After Plaintiffs' counsel engaged in "ambush litigation" by surprising the Defense and the Court with the potential for a third surgery (i.e., a second future surgery), the Court ruled that Plaintiffs could not put forward any evidence related to a third surgery: "All right. Here's my decision. The doctor will

[9] Plaintiffs cite to no authority showing any basis for concluding that a party cannot inquire into the motives of a witness's actions that otherwise comply with a legal obligation. Defendant is aware of no such authority. The only possible basis for its exclusion would be based on its prejudicial value.

[10] This is not the situation Plaintiffs predicted: "Defense will argue that they violated ethical rules because Plaintiffs' counsel somehow violated the rules." (Mot. at 12:22–23). Plaintiffs' misconduct occurred after the actions giving rise to this Motion. And *Lioce* only says that "asserting that engaging in misconduct because another lawyer is also engaging in misconduct is in and of itself misconduct. *Lioce*, 124 Nev. at 26, 174 P.3d at 986. Of course, the Defense's acts could not have been because of Plaintiffs' counsel's later misconduct. And, the Defense does not seek to excuse any of its purported misconduct. Defendant only asks that the Court weigh the prejudice caused by Plaintiffs' counsel's misconduct if it decides some sanctions are necessary.

not be able to opine that there's going to be a third surgery necessary." (Trial Transcript at 154:7–9, May 22, 2019 Ex. B).

Yet, Plaintiff's counsel continued to push his witnesses close to the line, drawing multiple, sustained objections. Ultimately two different Plaintiffs' witnesses informed the jury of the potential for a third surgery. For example, Dr. Khavkin testified, "The only difference is that now essentially it's going to be two, potentially three surgeries, versus one and potentially two surgeries." (Trial Transcript at 217:15–17, May 23, 2019, Ex. C). Whether the witnesses were responding to Plaintiffs' counsel's coaxing, or Plaintiffs' counsel failed to properly inform them of the Court's order, Plaintiffs' counsel is responsible. Plaintiffs violated the Court's order.

During oral argument on a curative instruction to attempt to "unring the bell," the Court responded to Plaintiffs' counsel's continued defiance:

> THE COURT: I'm not going to relitigate this. I said no more surgeries.
> MR. PRINCE: Well --
> THE COURT: We rule that at the very beginning and it's been --
> MR. PRINCE: No. But only the cost.
> THE COURT: No.
> MR. PRINCE: She's going to have an adjacent segment breakdown even after the second surgery.
> THE COURT: That was not the ruling. The ruling was no. It was the one surgery. That was it and nobody was supposed to talk about it or opine or throw out or blurt. I assume you told all your witnesses and yet they've all blurted.

(Trial Transcript at 69:23–70:10, May 31, 2019, Ex. D).

Violating an order of the Court constitutes misconduct for which the sanction of fees and costs is justified. EDCR 7.6(b) (allowing for sanctions "including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause . . . [f]ails or refuses to comply with any order of a judge of the court"). Unlike the purported misconduct of the Defense, where there was no order prohibiting Defense's counsel's remarks, here, Plaintiffs' counsel violated an express order of the Court. This is misconduct.

Plaintiffs' counsels' actions are very likely to harm Defendant. The jury knows that a third surgery is possible. Though they will not expressly be asked to provide damages related to a third

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surgery, the jury is likely to inflate other damages areas (e.g., pain and suffering), to compensate. Thus, Plaintiffs' counsel's misconduct is prejudicial to Defendant.

Accordingly, to the extent the Court deems the Defense's acts to be sanctionable, it should weigh those acts against Plaintiffs' misconduct in determining any potential award.

IV. EVEN IF SANCTIONS WERE JUSTIFIED, PLAINTIFFS ARE NOT ENTITLED TO THE OUTRAGEOUS AMOUNT THEY REQUEST

For a trial that did not even go through opening statements, Plaintiffs claim to be entitled to an astonishing $685,717.59! (Mot. at 18:14). But even this amount is not enough, they claim, stating that "[a]ttorney's fees and costs should be a ***minimum sanction*** for Defense's professional misconduct." (*Id.* at 14:6–7). Perhaps they are implying that Defense counsel should be sent straight to the guillotine? While it is unclear what else they could be entitled to, in addition to the nearly $700,000 they requested, it is clear that Plaintiffs' demand is outrageous.

Plaintiffs appear to be employing a tactic known as "extreme anchoring." Anchoring is the negotiation tactic of leading with a very high (or very low) offer to establish a reference point for the negotiations.[11] "Extreme anchoring" extends this tactic to outlandish levels:

> Experienced negotiators often lead with a ridiculous offer, an extreme anchor. And if you're not prepared to handle it, you'll lose your moorings and immediately go to your maximum. It's human nature.

Chris Voss, *Never Split the Difference: Negotiate as if Your Life Depended on It* 199 (2017). This strategy may be acceptable in a negotiation, but it is not appropriate to play such games with the Court.

The requested award is grossly excessive for several reasons. First, it does not adhere to the *Brunzell* factors. Second, the amount is not proportionate to the purported misconduct. Third, the asserted hourly rates are not realistic in the Nevada market. Fourth, for mid-litigation sanctions, a contingency "boost" is not appropriate. And fifth, Plaintiffs are not permitted to seek compensation for certain (a) work performed and (b) costs expended for goods or services—that will still provide value in the second trial.

[11] *Negotiation Anchoring*, NEGOTIATION EXPERTS (Dec. 7, 2017), https://www.negotiations.com/definition/anchoring/.

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A. The Requested Fee Award Does Not Comport with the *Brunzell* Factors

"In Nevada, 'the method upon which a reasonable fee is determined is subject to the discretion of the court,' which 'is tempered only by reason and fairness.'" *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548–49 (2005) (quoting *University of Nev. v. Tarkanian*, 110 Nev. 581, 594, 591, 879 P.2d 1180, 1188, 1186 (1994)). "[W]hichever method is chosen as a starting point, however, the court must continue its analysis by considering the requested amount in light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank . . . .*" *Id.* at 865, 124 P.3d at 549. Under the *Brunzell* factors, courts consider:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill;
>
> (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;
>
> (3) the work actually performed by the lawyer: the skill, time and attention given to the work; [and]
>
> (4) the result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). In applying these factors, "no one element should predominate or be given undue weight." *Id.* at 350, 455 P.2d at 33.

Here, it is not disputed the Mr. Prince is a quality advocate. This, however, is the only factor weighing in favor of Plaintiffs. And as good as Mr. Prince may be, his skills cannot justify fees of nearly $700,000 for work incurred on a mistrial occurring during opening statements, especially when the other three factors weigh in favor of the Defendant. Applying the second factor, prosecution of this typical car accident personal injury case is not a matter of extreme complexity that requires a high level of attorney expertise.

Under the third factor, despite Plaintiffs' exaggerations, relatively little time and work was lost as a result of the mistrial.[12] Much of the claimed fees are for work that will not need to be

[12] Defendant addresses this issue in greater detail, *infra* Part IV.E.

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duplicated for the second trial. In other words, Plaintiffs will still realize the value of that work in the second trial and would receive a windfall if they were compensated for those fees.

Finally, the fourth factor considers whether the attorney was successful. Of course, this case is still proceeding. Plaintiffs' counsel's entitlement to a contingent fee will ultimately be determined by whether Plaintiffs prevail in this matter.[13] Thus far, they have won nothing. Combined, these factors weigh in favor of a substantially reduced award (and one not influenced by the subconscious effects of Plaintiffs' extreme anchoring tactic).

B. The Requested Fee Award Is Not Proportionate to the Purported Misconduct

"[A] district court may only impose sanctions that are reasonably proportionate to the litigant's misconduct." *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 681, 263 P.3d 224, 230 (2011) (quoting *Heinle v. Heinle*, 777 N.W.2d 590, 602 (N.D. 2010)). "Proportionate sanctions are those which are 'roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability.'" *Id.* (quoting *In re Disciplinary Proceeding Against Hicks*, 214 P.3d 897, 905 (Wash. 2009)).

Though the Defense contends it did not commit misconduct, to the extent the Court disagrees, at most, the misconduct was minor. Because no Nevada authority has determined that evidence of the nonissuance of a traffic citation is inadmissible, Defense counsel acted in good faith when he discussed this with the jury. And because (1) there is no statute requiring a driver to call police to the scene of an accident, (2) it is not improper to question the motives behind an act that complies with a legal obligation, and (3) determining the motivation of a witness is a question for the jury, Defense counsel reasonably believed it was appropriate to question the Plaintiffs' motives for doing so. An award of nearly $700,000 is grossly disproportionate to Defense counsel's conduct.

C. The Requested Fee Award Is Based on an Unreasonably High Hourly Rate

"The Supreme Court has held that reasonable attorney fees must 'be calculated according to the prevailing market rates in the relevant community.'" *CLM Partners LLC v. Fiesta Palms, LLC*,

[13] Defendant addresses the appropriateness of a contingent fee multiplier, *infra* Part IV.D.

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No. 2:11-CV-01387-PMP, 2013 WL 6388760, at *5 (D. Nev. Dec. 5, 2013) (quoting *Blum v. Stenson*, 465 U.S. 886, 895–96 n. 11 (1984); *accord Shuette*, 121 Nev. at 865 n.99, 124 P.3d at 549 n.99 (recognizing that the court should "ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation.").

Plaintiffs represent that Mr. Prince's "reasonable hourly rate is $1,000." (Mot. at 15:18). That is anything but "reasonable." This rate far exceeds the market rate for southern Nevada. *See, e.g., CLM Partners LLC v. Fiesta Palms, LLC,* 2013 WL 6388760, *5 (D. Nev. Dec. 5, 2013) (refusing to calculate hourly rates between $650 and $400 for attorneys working "for a law firm with an excellent reputation," and instead calculating lodestar at hourly rate of $450 for partner and $250 for experienced associates); *Home Gambling Network, Inc. v. Piche,* 2015 WL 1734928, 10-11 (D. Nev. Apr. 16, 2015) (awarding rates as low as $268 for partners and $95 for associates); *John Hancock Life Ins. Co. v. Jacobs,* 2014 U.S. Dist. Lexis 19283, *8 (D. Nev. Feb. 13, 2014) (calculating lodestar in interpleader case based on hourly rate of $300 for partner and $250 for associate). Mr. Prince's fees alone account for $427,000 dollars of the requested award.[14] This amount is unconscionable. Should the Court determine that an award of fees is appropriate, this hourly rate must be adjusted downward to reflect the prevailing market rate.[15]

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D. Plaintiffs Are Not Entitled to a Contingent Fee Multiplier for Mid-Litigation Sanctions

Nevada does not recognize the rule, existing in some jurisdictions, requiring that a lodestar calculation of attorney fees be augmented by a contingent fee "multiplier." Instead, Nevada requires only that courts consider the *Brunzell* factors when determining the reasonableness of the award. *Shuette*, 121 Nev. at 865 n.99, 124 P.3d at 549 n.99 (recognizing that while some "jurisdictions also permit the court to adjust the amount in consideration of contingency-fee-related factors . . . in Nevada, the district court is already required to consider certain factors when

[14] $1,000 per hour * 170.8 hours * 2.5 contingent fee multiplier. (Mot. at 15:17–18, 18:2–3).

[15] Indeed it appears Plaintiffs may be attempting to "double-dip." They may argue that a $1,000 per hour fee incorporates Mr. Prince's value in the market with the contingent-risk factored in. Yet they try to apply a separate 2.5x contingent fee multiplier on top of this rate.

determining reasonableness"). Thus, application of a *per se* multiplier is not required in Nevada. All of Plaintiffs' cited authority discussing multipliers is from foreign jurisdictions. (*See* Mot. at 14–18).

Moreover, in each case Plaintiffs cite where reasonable fees were adjusted upward because of the contingent nature of the representation, the fees were awarded at the *termination* of litigation. *See, e.g.*, *Ketchum v. Moses*, 24 Cal. 4th 1122, 1127, 17 P.3d 735, 738 (2001) (awarding fees after the defendant won an Anti-SLAPP motion, dismissing the claims); *State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836, 837 (Fla. 1990) (awarding fees after judgment for the plaintiff);[16] *Barker v. Utah Pub. Serv. Comm'n*, 970 P.2d 702, 704 (Utah 1998) (reviewing "a final agency action"); *PLCM Grp. v. Drexler*, 997 P.2d 511, 514 (Cal . 2000), *as modified* (June 2, 2000) (discussing an award of fees after a jury verdict). In each of the cases, the court was awarding fees that the contingent fee attorney could reasonably expect to receive *at the termination of a successful litigation*. None of Plaintiffs' cases address fees awarded as a sanction before judgment is entered.

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Here, these fees are not in lieu of a contingent fee payment to which an attorney may be entitled at the conclusion of a successful personal injury trial. This matter is ongoing. If Plaintiffs' counsel is entitled to a contingent fee payment, it can only be if they prevail in this action. And if they do prevail, applying a multiplier here will amount to a double recovery. The sole purpose of this sanction is to compensate Plaintiffs' counsel for the time lost as a result of purported misconduct. Applying a multiplier, or any kind of contingent fee adjustment, is inappropriate. The Court must adhere to the *Brunzell* factors recognized in the Nevada Courts—and not the inapposite rules of other jurisdictions—and base the award on what is reasonable.

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E. Plaintiffs Are Not Entitled to Compensation for Fees and Costs for Preparation that Carries Over to the Second Trial

"[M]onetary sanctions . . . [a]re compensatory in nature because they [a]re designed to compensate [the non-offending party] for unnecessary costs and attorney's fees . . . incurred as a result of the mistrial." *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1111 (9th Cir. 2005).

[16] Plaintiffs incorrectly cite this case as 550 So.2d 836. (Mot. at 17:22).

Accordingly, where the fees or costs relate to preparation that will not need to be repeated for the second trial, it is not compensable. *See Slaughter v. Uponor, Inc.*, No. 2:08-CV-01223-RCJ, 2010 WL 4940013, at *4 (D. Nev. Nov. 29, 2010), *rev'd on other grounds*, 475 F. App'x 150 (9th Cir. 2012) (awarding fees where the innocent party would "incur duplicative attorneys' fees in defending identical issues in future proceedings"); *Allstate Ins. Co. v. Nassiri*, No. 2:08-CV-00369-JCM, 2011 WL 3794252, at *2 (D. Nev. Aug. 25, 2011) (allowing an award only for expenses that were rendered "unnecessary or duplicative" as a result of the violation); *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993) (holding that parties may recover "attorneys fees or costs for work which is not useful in continuing litigation between the parties").

In fact, because nearly all work done preparing for a trial will carry over to the next trial (especially where, like here, the second trial commenced after the mistrial without substantial delay), the Nevada Supreme Court has recognized that excluding all preparation costs is appropriate:

> While the district court's order expressed the court's intention to award attorney fees and costs incurred by Wilson in preparing for and attending the first trial, the ultimate amount awarded was limited to attorney fees and costs incurred during the trial. . . . Accordingly, because Emerson's misconduct caused a new trial to be granted, and the district court limited the sanctions to the fees and costs that Lioce incurred ***in the original trial***, we conclude that the sanctions are not disproportionate to the misconduct.

Emerson v. Eighth Judicial Dist. Court, 127 Nev. 672, 682, 263 P.3d 224, 230 (2011) (emphasis added).

Here, Plaintiffs make no effort to select only those fees and costs that they incurred "as a result of the mistrial," i.e., that will need to be repeated for the second trial. *See Lasar*, 399 F.3d at 1111. Instead, they arbitrarily select a date 25 days prior to opening arguments. (*See* Mot. at 17:25–26 (stating that the affidavit reflects all "time and tasks performed from April 1, 2019 until the Court ordered the mistrial)). Including everything that occurred for more than three weeks before opening statements almost certainly sweeps in countless tasks that carry over to the second trial. It is improper to award fees and costs for such expenses, and it is even more improper for Plaintiffs to request them. Plaintiffs are not entitled to a windfall.

A cursory review of Plaintiffs' itemized lists of fees and costs shows numerous items that will carry over to the second trial and, therefore, for which compensation is improper. Below is only a sample:

Costs (Mot. at Ex. 4).

- Legal Copy Cats & Printing ($556.95) – Whatever was printed, there is likely no need to reprint it for the second trial.
  - Same ($621.36)
  - Same ($1,254.02)
  - Same ($136.72)
  - Same ($296.50)
  - Same ($220.83)
  - Same ($1096.36)
  - Same ($255.52)
  - Same ($2199.21)
  - Same ($181.86)
  - Same ($308.24)
- Oasis Reporting Services, LLC ($1,361.00) – This is a court reporter service for deposition. Certainly Plaintiffs did not need to retake a deposition because of the mistrial.
- Radar Graphics ($10,800.00) – Any graphics from the first trial can be used in the second trial.

Fees (Mot. at Ex. 5A).

- Compile trail notebook ($3,400) – The trial notebook can be used in the second trial.
- Analyze and review proposed exhibits ($9,500) – This prep work would not need to be repeated for a second trial that so closely followed the first.
- Analyze and review depositions and related exhibits ($5,400) – This prep work would not need to be repeated for a second trial that so closely followed the first.

- Same ($9,300)
- Same ($8,200)

- Analyze and review all motions in limine . . . . ($9,100) – This appears to be prep work for the hearing on the motions in limine that occurred four days later. If so, this is blatantly unrelated to the mistrial. If not, it is not work that would not need to be repeated for the subsequent trial.
- Draft and revise cross examination (Dr. Wang) ($7,600) – There would be no need to redraft this examination.
- Analyze and review motions in limine and Defendant's opposition for tomorrow's hearing ($5,300) – The motions in limine did not need to be reheard for the second trial. This is clearly not a cost incurred because of the mistrial.
- Prepare and attend hearing for Plaintiffs [sic] motions in limine ($4,500) – Plaintiffs did not need to attend another hearing on the already decided motions in limine.
- Research and assemble demonstrative exhibits for trial ($6,400) – The demonstrative exhibits did not need to be created from scratch again.
- Draft and revise cross examination (Dr. Khavkin) ($7,500) – There would be no need to redraft this examination.
- Draft and revise direct examination (Evans Waiau) ($8,700) – There would be no need to redraft this examination.
- Draft and revise direct examination (Dr. Garber) ($8,100) – There would be no need to redraft this examination.
- Draft and revise cross examination (Babylyn Tate) ($7,200) – There would be no need to redraft this examination.
- Draft and revise voir dire outline ($4,300) – The voir dire outline can be used at the second trial.

This are only a few of the obviously improper line items. Because Plaintiffs made no effort to differentiate the costs that will be duplicated from those that will not, and because many of the

entries are too vague to ascertain this information, it is impossible to know how many of these charges are proper. Indeed, it is possible that none of the preparation costs require compensation. *See Emerson*, 127 Nev. at 682, 263 P.3d at 230. In any event, because Plaintiff arbitrarily selected a date range and did not distinguish those charges for which compensation is appropriate, the Court should award none of the charges occurring before the start of the trial. *See Hershey v. ExxonMobil Oil Corp.*, 550 F. App'x 566, 574 (10th Cir. 2013) ("The party seeking fees has the burden of submitting sufficient information to justify the requested fees and taxable costs.").

Accordingly, because the requested amount of sanctions (1) does not pass the *Brunzell* test; (2) is not proportionate to the purported misconduct; (3) uses grossly inflated hourly rates; (4) applies a contingency multiplier that Nevada does not recognize; and (5) contains numerous charges that would not need to be duplicated for the second trial, compensation should be substantially reduced. Plaintiffs are not entitled to a windfall.

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CONCLUSION

NRS 18.070 allows a court to impose fees and costs where a party purposely causes a mistrial. There is no showing that occurred here (because it did not). The court should deny the motion on that basis alone. In any event, the Defense did not commit misconduct. He reasonably believed that he was complying with Nevada law. Indeed, he likely was. The statements were neither extreme nor prejudicial. The motion should be denied.

Alternatively, if the Court determines that some sanctions are appropriate, it must greatly reduce the amount. $700,000 is not proportionate to the purported misconduct. And numerous charges were not incurred as a result of the mistrial.

Dated this 3rd day of June, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2019, I served the foregoing **OPPOSITION TO "MOTION FOR ATTORNEYS FEES AND COSTS BASED ON DEFENSE COUNSEL'S PROFESSIONAL MISCONDUCT ON ORDER SHORTENING TIME**" on counsel by the Court's electronic filing system to the persons listed below:

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EXHIBIT A

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EXHIBIT A

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

DESIRE EVANS-WAIAU, et al.,	)	
Plaintiffs,	)	CASE NO. A-16-736457-C
vs.	)	DEPT. NO. XVIII
BABYLYN TATE,	)	
Defendant.	)	

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BEFORE THE HONORABLE MARY KAY HOLTHUS, DISTRICT COURT JUDGE

TUESDAY, MAY 28, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 9

APPEARANCES:

FOR THE PLAINTIFFS: DENNIS M. PRINCE, ESQ.
JACK F. DEGREE, ESQ.

FOR THE DEFENDANT: THOMAS E. WINNER, ESQ.
JOEL D. HENRIOD, ESQ.
CAITLIN J. LORELLI, ESQ.

RECORDED BY: YVETTE SISON, COURT RECORDER
TRANSCRIBED BY: VERBATIM DIGITAL REPORTING, LLC

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Q Okay. How many cars were in front of you?
A There was one.
Q Okay.
MR. PRINCE: So if you can, Brendon, pull up Demonstrative 14.
BY MR. PRINCE:
Q Okay. And I kind of just -- I've created a diagram here, and I have your car as the second car in line behind the -- the first car; do you see that?
A Yes.
Q Okay. And you were -- did you come to a complete stop behind that car?
A Yes.
Q Did you have your turn signal on?
A Yes.
Q Are you certain that you had your turn signal on?
A Yes.
Q Okay. Mr. Winner had talked about that there was some like aftermarket like smoked out light -- things around your taillights. Do you recall that?
A Yes.
Q Now, have you ever had any problems, any law enforcement ever stop you saying that was a problem or that your lights were weren't functioning properly?
A No.

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Q Okay. How long had you been driving that car, Desire?
A Two years, maybe.
Q Okay. Did you always have that -- the smoked out lenses on the back of the car?
A For the most part, yeah.
Q Okay. And so you're there, your -- you recall pedestrians being on the sidewalk at that -- that location?
A Yes.
Q Okay. It's obviously, a Friday night, so you said traffic was pretty busy?
A Yes.
Q And how -- approximately how long were you at a stop behind the car in front of you, would you estimate?
A Not long.
Q Okay. And at some point did the car in front of you move -- start to go?
A Yes.
Q What did the car in front of you do?
A Made a right-hand turn.
Q Okay.
MR. PRINCE: So Brendon, let's go to No. 15.
BY MR. PRINCE:
Q And when the car in front of you made a right turn, did it make a right turn while the traffic signal was still

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* * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

Julie Lord

VERBATIM DIGITAL REPORTING, LLC

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EXHIBIT B

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EXHIBIT B

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

DESIRE EVANS-WAIAU, et al.,	)	
Plaintiffs,	)	CASE NO. A-16-736457-C
vs.	)	DEPT. NO. XVIII
BABYLYN TATE,	)	
Defendant.	)	

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BEFORE THE HONORABLE MARY KAY HOLTHUS, DISTRICT COURT JUDGE

WEDNESDAY, MAY 22, 2019

RECORDER'S ROUGH DRAFT TRANSCRIPT OF:
JURY TRIAL - DAY 7

APPEARANCES:

FOR THE PLAINTIFFS:	DENNIS M. PRINCE, ESQ. JACK F. DEGREE, ESQ.
FOR THE DEFENDANT:	THOMAS E. WINNER, ESQ. JOEL D. HENRIOD, ESQ. CAITLIN J. LORELLI, ESQ.

RECORDED BY: YVETTE SISON, COURT RECORDER
TRANSCRIBED BY: VERBATIM DIGITAL REPORTING, LLC

please.

THE MARSHAL: You got it.

THE COURT: Thank you.

THE MARSHAL: No problem.

(Court recessed at 3:13 P.M., until 3:39 P.M.)

(Outside the presence of the jury)

THE COURT: All right. Here's my decision. The doctor will not be able to opine that there's going to be a third surgery necessary. He can opine generally speaking, fusion leads to fusion. I mean, that's kind of out there. But in terms of I don't see this as treating physician stuff, I think it is disclosure.

I've already said that I don't think the computation comes in, I think, to let the third surgery in. I don't see how the defense can undue the fact that there was a price tag for the third surgery. I don't think it's as definitive as everyone else. I think the doctors really would be testifying if he were to do that more as an expert than a treating physician based upon all of the information and, therefore, it should have been disclosed and it was not disclosed.

So you can get in generally speaking years down the road, this whole process could start over again, fusion leads to fusion, but not beyond a medical degree of certainty or whatever she's going to get a third surgery.

MR. PRINCE: Right. Just so I'm clear, we can talk

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* * * * *

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected or certified to be an accurate transcript.

Julie Lord

VERBATIM DIGITAL REPORTING, LLC

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EXHIBIT C

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EXHIBIT C

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

DESIRE EVANS-WAIAU, et al.,	)	
Plaintiffs,	)	CASE NO. A-16-736457-C
vs.	)	DEPT. NO. XVIII
BABYLYN TATE,	)	
Defendant.	)	

BEFORE THE HONORABLE MARY KAY HOLTHUS, DISTRICT COURT JUDGE

THURSDAY, MAY 23, 2019

RECORDER'S ROUGH DRAFT TRANSCRIPT OF:
JURY TRIAL - DAY 8

APPEARANCES:

FOR THE PLAINTIFFS:	DENNIS M. PRINCE, ESQ. JACK F. DEGREE, ESQ.
FOR THE DEFENDANT:	THOMAS E. WINNER, ESQ. JOEL D. HENRIOD, ESQ. CAITLIN J. LORELLI, ESQ.

RECORDED BY: YVETTE SISON, COURT RECORDER
TRANSCRIBED BY: VERBATIM DIGITAL REPORTING, LLC

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as I -- as I put this on the piece of paper on the drawing, if you fuse 5-6 and 6-7, they would address all the existing pathology, but down the line you still have a 4-5 problem as an adjacent level pathology.

Now, in her case, she has 6-7 addressed, and clearly got significant relief, but 5-6 is definitely going to become symptomatic just because it's already bad and it's only going to be just a matter of time before it needs to be done. Once that gets done and once the 5-6 is addressed, then she's still at risk of 4-5 being a problem for the same reason because now she's going to have two segments fused, and then she's going to have adjacent level pathology for the C4-C5.

So that's -- you know, that would be my approach. I think what Dr. Garber did is reasonable. He addressed the one that's worse. The only difference is that now essentially it's going to be two, potentially three surgeries, versus one and potentially two surgeries. So if that makes sense.

THE COURT: Are we done?

MR. PRINCE: Yes.

THE COURT: Both sides? Everybody is done?

BY MR. WINNER:

Q Doctor, do you agree that two radiologists can look at two MRIs and interpret them different; correct?

A Hopefully not, but it can happen, sure.

Q You've seen it happen; correct?

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* * * * *

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected or certified to be an accurate transcript.

Julie Lord

VERBATIM DIGITAL REPORTING, LLC

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EXHIBIT D

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DISTRICT COURT

CLARK COUNTY, NEVADA

DESIRE EVANS-WAIAU, Plaintiff, vs. BABYLYN TATE, Defendant.	CASE#: A-16-736457-C DEPT. XVIII

BEFORE THE HONORABLE MARY KAY HOLTHUS
DISTRICT COURT JUDGE
FRIDAY, MAY 31, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 12

APPEARANCES:

For the Plaintiff: DENNIS M. PRINCE, ESQ.

For the Defendant: JOEL D. HENRIOD, ESQ.
THOMAS E. WINNER, ESQ.

RECORDED BY: YVETTE SISON, COURT RECORDER

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THE COURT: Withdrawn.
MR. WINNER: Okay.
THE COURT: Perfect.
MR. PRINCE: Now, we're going to use their 21.
THE COURT: Yes. Their 21 now, because I've ruled the comparative comes in. And now we're down to four more. Adam, have we apologized to the jury? There's baby doughnuts, if they want some. Okay, now we have --
MR. WINNER: Are we at page 1?
THE COURT: Yeah.
MR. WINNER: This is the curative --
THE COURT: This is the curative for --
MR. WINNER: -- instruction.
THE COURT: -- the couple of --
MR. PRINCE: Well, I want to talk about that --
THE COURT: We can.
MR. PRINCE: -- because Dr. Khavkin clearly was talking to Desire and went into her decision making what surgery to have. His adjacent segment was C4-5 -- he -- because he was offering her a two level surgery at 5-6 and 6-7. So his discussion with her related to --
THE COURT: Okay.
MR. PRINCE: -- the 4-5 surgery.
THE COURT: I'm not going to relitigate this. I said no more surgeries.
MR. PRINCE: Well --

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THE COURT: We rule that at the very beginning and it's been --

MR. PRINCE: No. But only the cost.

THE COURT: No.

MR. PRINCE: She's going to have an adjacent segment breakdown even after the second surgery.

THE COURT: That was not the ruling. The ruling was no. It was the one surgery. That was it and nobody was supposed to talk about it or opine or throw out or blurt. I assume you told all your witnesses and yet they've all blurted.

MR. PRINCE: But Judge, after the --

THE COURT: I get it.

MR. PRINCE: -- after she has the first adjacent segment surgery, the process starts over again.

THE COURT: I'm not reargue -- and that's what I told you you could say.

MR. PRINCE: You're saying I can't even talk about that?

THE COURT: I said you can say --

MR. PRINCE: For pain and suffering purposes.

THE COURT: -- there's another process.

MR. PRINCE: Yeah. Yeah. I'm going to talk about that.

MR. HENRIOD: And this argument --

THE COURT: The word multiple surgeries is not --

MR. HENRIOD: -- is why I'm afraid the whole thing was intentional.

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MR. WINNER: -- and I'd agree to it. That's all.

THE COURT: Okay. Just somebody remind me.

MR. PRINCE: All right.

THE COURT: And is that it?

THE CLERK: Not yet.

THE COURT: Oh, we're doing the verdict form things.

THE CLERK: Just waiting for it.

[Pause]

MR. PRINCE: Judge, are we good?

THE COURT: Do you all need to see the verdict form to agree to it?

MR. PRINCE: No, we already did.

THE COURT: Okay. Just -- let's just run over it on Monday, you know, before it goes back to them, okay?

MR. PRINCE: We're fine. Yeah, we agree on that.

MR. WINNER: All right.

THE COURT: Okay. All right. Thank you. You all have a great weekend.

MR. WINNER: Thanks, Judge.

THE COURT: Uh-huh.

[Proceedings concluded at 2:33 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

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A-16-736457-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	COURT MINUTES	August 21, 2019

A-16-736457-C Desire Evans-Waiau, Plaintiff(s)
vs.
Babylyn Tate, Defendant(s)

August 21, 2019 **09:00 AM** **Motion for Attorney Fees and Costs**

HEARD BY: Holthus, Mary Kay **COURTROOM:** RJC Courtroom 03F

COURT CLERK: Yorke, Dara

RECORDER: Sison, Yvette G.

REPORTER:

PARTIES PRESENT:

Dennis M Prince	**Attorney for Plaintiff, Subject Minor**
Joel D. Henriod	**Attorney for Defendant**
Thomas E. Winner	**Attorney for Defendant**

JOURNAL ENTRIES

Statements by Mr. Prince in support of the instant Motion indicating Mr. Winner intentionally caused a mistrial. Mr. Prince indicated they were going to be requesting $4,000,000.00 to $5,000,000.00 from the Jury in the previous trial. Mr. Prince noted the hours put in to the first trial preparation were as follows: 170 hours to prepare for trial and four days of trial, 135 hours for preparation by associates, 165 hours of preparation by the Law Clerk. Court noted the reason the re-trial was set right after was so the preparation wasn't wasted. Mr. Prince indicated he had to prepare twice, and Mr. Winner saw his strategy which gave opposing counsel an advantage; additionally, over $35,000.00 in cost alone was spent. Further, Mr. Prince was requesting that the Court grant him $35,000.00 in costs, and $649,921.00 in attorney's fees which was accrued from preparation of trial and the four to five days in trial. Mr. Henriod indicated he still disagreed with the mistrial ruling. Further arguments by Mr. Henriod in opposition of the Motion. Colloquy between parties regarding mistrial. Court noted it didn't feel Mr. Winner made the comment of the citation intentionally or to cause a mistrial. Following colloquy, Court noted it would need to read a few more cases and requested that Mr. Prince be more specific than what the Court currently had. Further Court noted the most it was inclined to award would be cost and trial time for three weeks. Statements by Mr. Prince. Court advised Mr. Prince to prepare a supplemental breakdown. Additionally, Court indicated breakdown would need to include increased costs and fees specifically related to the trial itself that would have been incurred by mistrial. CONFERENCE AT BENCH. COURT ORDERED the following Briefing Schedule: Mr. Prince to file Supplemental Brief by September 4, 2019, Mr. Winner's Response filed by September 18, 2019, and matter CONTINUED for Argument.

9/25/19 9:00 AM ARGUMENT

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

DESIRE EVANS-WAIAU, INDIVIDUALLY; GUADALUPE PARRA-MENDEZ, INDIVIDUALLY; JORGE PARRA-MEZA, AS GUARDIAN FOR MYRA PARRA, A MINOR; JORGE PARRA-MEZA, AS GUARDIAN FOR AALIYAH PARRA, A MINOR; AND JORGE PARRA-MEZA, AS GUARDIAN FOR SIENNA PARRA, A MINOR, Plaintiffs, *vs.* BABYLYN TATE, INDIVIDUALLY, DOES I-X, AND ROE CORPORATIONS I-X, INCLUSIVE, Defendants.	Case No. A-16-736457-C Dept. No. XVII **DEFENDANT'S RESPONSE TO PLAINTIFFS' SECOND SUPPLEMENTAL BRIEF REGARDING MOTION FOR ATTORNEY FEES AND COSTS**

The Court requested a second round of supplemental briefing on two issues. First, the Court asked whether any caselaw supports awarding a non-prevailing party its fees and costs resulting from a prior mistrial. Plaintiffs concede that "[t]here is no [such] case law in Nevada," and provided no such caselaw from *any* jurisdiction. (Pl.'s Second Supp. Br. Re Mot. for Attorney Fees and Costs at 6:2, filed Feb. 21, 2020 [hereinafter Second Supp.].) In fact, caselaw shows that courts will not award fees and costs from a mistrial to a party that did not ultimately prevail.

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Second, the Court asked, again, that plaintiffs detail fees and costs incurred in preparing for the first trial that did not provide value to the second trial, i.e., only those fees and costs that would necessarily be duplicated in the second trial. Though given a *third* opportunity to reduce opportunistic requests and to eliminate costs not necessitated by the mistrial, Plaintiffs flatly declined to do so, saying they "cannot give a more specific detail of their attorney fees breakdown than what was [already] presented." (*Id.* at 4:1.)[1] They should not be given a fourth chance. And the Court should not be required to guess. Just as Plaintiffs denied the Court's repeated requests for clarification, the Court should similarly deny Plaintiffs' Motion.[2]

I. SANCTIONS CANNOT BE AWARDED; DEFENDANT DID NOT INTEND TO CAUSE A MISTRIAL[3]

Plaintiffs' continue to avoid Nevada's on-point statute: "A court may impose costs and reasonable attorney's fees against a party or an attorney who, in the judgment of the court, ***purposely caused a mistrial to occur***." NRS 18.070(2) (emphasis added). Contrary to Plaintiffs' unfounded accusations,[4] Defense counsel did not intend to cause an mistrial. Indeed, Defense counsel vehemently opposed Plaintiffs' oral motion for a mistrial.[5] And the Court has spoken on this issue, stating that it "noted it didn't feel Mr. Winner made the comment of the citation intentionally or to cause a mistrial." (Minutes, Aug. 21, 2019.)

Moreover, it appears that it was Plaintiffs' counsel who had independent reasons to hope for a mistrial. Just minutes before requesting the mistrial, Plaintiffs' counsel objected and strongly argued against the Court's decision (1) to allow Defense counsel to address a driver's obligation to avoid stopping suddenly and (2) to refuse to remove a juror who worked at the same hospital as Defendant. (Transcript at 97–115.) It was Plaintiffs who admittedly revised their strategy after the

[1] Plaintiffs filed an errata, withdrawing fee requests for Mr. Prince (likely because he is no longer at the law firm). Nevertheless, this does not remedy the remaining substantial flaws in the request.

[2] Because several months have passed since the original briefing on these issues, Defendant will briefly summarize her prior arguments, providing citations to the prior briefs.

[3] *See* Opp'n to Mot. for Attorneys Fees and Costs at 3–5 [hereinafter Opp'n].

[4] *See* Pl.'s Mot. for Attorney Fees and Costs, served May 14, 2019 at 13:20–21 [hereinafter Motion].

[5] Transcript 125:22-23, 131:16-18, 132:9-10, 134:24-135:1, 144:22-23, 145:9-10, 148:20-23, 152:10-13.

mistrial, as demonstrated by the description of the time entries.[6]

II. DEFENSE COUNSEL DID NOT COMMIT MISCONDUCT, OR AT THE VERY LEAST, THE MISCONDUCT WAS NOT "SO EXTREME" AS TO JUSTIFY SANCTIONS

The Court's initial instinct was correct. When Defense counsel stated, "I don't think there is misconduct that warrants fees or costs or anything," the Court responded, "I don't either." (Transcript at 148:10–12.) Misconduct warranting a new trial occurs when (1) an attorney engages in conduct that he knew was prohibited, *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 135, 252 P.3d 649, 658 (2011); and (2) "the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect," *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). Here, the Defense was not aware that he was engaged in prohibited conduct. Indeed, it is not even clear that the conduct *is* prohibited. And in any event, the Defense's conduct was not "so extreme" that a curative instruction could not have repaired any harm.

A. Defense Counsel Did Not Commit Misconduct, Because He Did Not Know that His Conduct Was Prohibited, if it Even Was

First, no Nevada statute, rule, or case answers the question of whether the *nonissuance* of a citation is inadmissible. Plaintiffs relied almost exclusively on *Frias v. Valle*, 101 Nev. 219, 221, 698 P.2d 875, 876 (1985), but *Frias* says nothing about the nonissuance of a traffic citation. As Plaintiffs admit, *Frias* only dealt with error caused by "admitting the patrol officer's traffic accident report and traffic citation into evidence." (Mot. at 10:5–7 (citing *Frias*, 101 Nev. at 219)). The Court never stated that an officer's conclusions were inadmissible. *See Frias*, 101 Nev. at 221, 698 P.2d at 876. And even if it had, the decision was predicated upon facts where the officer did write a traffic citation, unlike here. While one may guess at how the Supreme Court would rule in the contrary situation at issue here, such guess cannot provide notice that Defense counsel's conduct was "so clearly prohibited 'so as to . . . to make a subsequent violation clear for purposes of

[6] This conclusion is bolstered by the fact that Plaintiffs now seek fees, not for simply refreshing their counsels' recollection, but for improving their case. For example, after the mistrial Plaintiff's counsel "spent this time deciding whether to change his trial strategy and opening statement PowerPoint," (Second Supp. at 4:11), "edit[ing] and revis[ing] certain parts of his opening statement," (Pl.'s Supp. Br. at 3:6, filed Sept. 4, 2019 [hereinafter Supp.]), and "revis[ing] his voir dire outline," (id. at 3:2). Thus, it appears it was Plaintiffs, and not Defendant, who took advantage of the mistrial to alter and refine their litigation strategy.

establishing attorney misconduct.'" *Boyack v. Eighth Judicial Dist. Court*, 439 P.3d 956, 2019 WL 1877402, at *2 (Nev. 2019) (unpublished decision) (citation omitted). Indeed, some jurisdictions do admit evidence of the nonissuance of a traffic citation.[7]

Second, Plaintiffs also contended that the Defense committed jury nullification by implying that Plaintiffs' motives for waiting for police to arrive at the scene are shielded from any inquiry because "the driver is required to report the collision" to the police. (Mot. at 5:1–2, 8:21–10:2.) But Nevada has no law requiring parties to a motor vehicle accident to call the police while at the scene of the accident. The law requires only that the driver report the accident to the nearest police office. NRS 484E.030(2).[8] What is more, Plaintiff agreed that even the police informed her (on the phone while she was at the scene) that "they didn't need to come and there was no requirement that they come."[9] Hence, Plaintiffs had no legal obligation to wait for officers at the scene, and it was entirely proper for the Defense to question their motives to do so.[10]

B. Sanctions Are Not Warranted Because the Conduct Was Not "So Extreme" that a Curative Instruction Could Not Remedy the Issue[11]

Mistrial, or at least as a sanction, may only be granted upon a showing of unfair prejudice arising from the alleged violation. *See, e.g.*, *Bayerische*, 127 Nev. at 132–33, 252 P.3d at 656. This

[7] *See, e.g.*, *McQuiston v. Helms*, No. 1:06-cv-1668-LJM-DML, 2009 WL 554101 (S.D. Ind. Mar. 4, 2009) (holding that the "nonissuance of a citation to [the defendant] is merely a fact, and not an opinion, about which [the officer] is entitled to testify"); *LeClair v. Sickler*, 146 N.W.2d 853, 856 (Minn. 1966) (holding that Minnesota's rule "precludes merely the introduction of the fact of a conviction of a traffic violation and does not prohibit the introduction of evidence showing that no tickets were issued").

[8] In fact, even the Court recognized that "she certainly wasn't required to hang around for an hour [to wait for the police]." (Transcript at 100:20–21), May 21, 2019.)

[9] Transcript at 117:2–3, May 28, 2019.

[10] Even if the law were as Plaintiffs misstated it, a party is free to question the motives of a witness, even if the underlying action was lawful. *See, e.g.*, *Good Samaritan Med. Ctr. v. Nat'l Labor Relations Board*, 858 F.3d 617, 629, 642 (1st Cir. 2017) (providing that, although employer asserted that termination of employee was for "lawful reason," a primary consideration for trier of fact is whether employer's "motivation" for terminating employee was based on employee's "protected activity"). Deciding the motives of a witness—whether they be purely to comply with a legal obligation, or some other reason—is entirely the province of the jury. *Monteiro v. City of Elizabeth*, 436 F.3d 397, 405 (3d Cir. 2006) ("Motive is a question of fact that must be decided by the jury, which has the opportunity to hear the explanations of both parties in the courtroom and observe their demeanor.").

[11] *See* Opp'n at 16–19.

requires a showing that "the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008).

Regarding discussing the nonissuance of a citation, it cannot be extreme misconduct to take action that no statute, rule, case, or order has expressly prohibited. *See, e.g.*, *Jackson v. Moore*, 883 P.2d 622, 625 (Colo. App. 1994). And even in jurisdictions where this may constitute misconduct, courts have determined that a curative instruction could have eliminated the effect of the conduct, and thus, the conduct was not prejudicial. *Link v. McCoy*, 197 N.W.2d 278, 280 (Mich. Ct. App. 1972); *Breitenberg v. Parker*, 372 S.W.2d 828, 830 (Ark. 1963). Regarding discussing Plaintiffs' insistence that the parties wait at the scene for police, no law requires such action. Thus, it is not improper—and certainly not egregious misconduct—to point out this fact to a jury.

Importantly, the Court is not committed to a course of misconduct and sanctions merely because it erred on the side of caution and declared a mistrial. *Boyack,* 439 P.3d 956. (reversing an award of sanctions against an attorney whose conduct led to a mistrial). Even if the Court continues to believe that declaring the mistrial was prudent, that does not mean a sanction should follow. *Id.*

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III. PLAINTIFFS' COUNSEL CONCEDES NO AUTHORITY SUPPORTS AWARDING FEES AND COSTS RESULTING FROM A MISTRIAL TO A PARTY THAT DID NOT ULTIMATELY PREVAIL

Plaintiffs concede that "[t]here is no case law in Nevada," or anywhere else, allowing a non-prevailing party to be awarded fees and costs in these circumstances. (*See* Second Supp. at 6:2.) Plaintiffs cite an inapposite case from the Seventh Circuit stating that the prevailing party cannot recover fees and costs it incurred in a prior mistrial caused by the prevailing party. (*Id.* at 6 (citing *Shott v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 338 F.3d 736, 742 (7th Cir. 2003)). But here, Defendant (who prevailed), is not seeking fees and costs solely related to the first trial. It is telling, though, that the Seventh Circuit still recognized that the prevailing party who caused the mistrial could be "award[ed] fees for the work done in preparation for that [first] trial because it is likely that this work benefitted the second trial as well." *Id.* This implicitly rejects the idea that the non-prevailing party should get any award arising from the mistrial.

And while there is no authority supporting Plaintiffs' proposition, there *is* authority suggesting that the innocent party in a mistrial cannot recover costs arising from that mistrial unless

that party ultimately prevails. *See Chiaradio v. Falck*, 794 A.2d 494, 496–97 (R.I. 2002) (recognizing that, in medical malpractice action in which the trial court declared a mistrial, an award of costs was inappropriate since patient did not prevail in the action against physician); *see also Robinson v. Howard Univ.*, 455 A.2d 1363, 1368 (D.C. 1983) (recognizing that defendants were entitled to costs resulting from plaintiff-induced mistrial because defendants were the prevailing parties).

IV. PLAINTIFFS NOW REFUSE A *THIRD* OPPORTUNITY TO OFFER A REASONABLE PROPOSAL[12]

Once again, Plaintiffs refuse to substantiate a reasonable amount of fees and costs in their third opportunity to do so. As discussed above and in prior briefing, Plaintiffs are not entitled to any award. Nevertheless, Plaintiffs' refusal to offer a *reasonable* proposal of fees—when given this third chance—is disqualifying. Even where a prevailing party is effectively entitled to recover attorney fees and costs under a fee-shifting statute, courts may deny fees altogether if the fee request "appears unreasonably inflated when considered in light of the amount of time an attorney might reasonably expect to spend in litigating such a claim." *Chavez v. City of Los Angeles*, 224 P.3d 41, 54–55 (Cal. 2010); *Serrano v. Unruh*, 652 P.2d 985, 993 (Cal. 1982).

A. Plaintiffs' Fees Are Inflated

Some of the entries are inherently incredible. Others provide enough detail to demonstrate that they are definitely not awardable.

1. *The matching 12-hour entries for each day of trial*

Plaintiffs claim that everyone on their trial team spent exactly 12 hours during the first four days. (*Compare* Exs. 2 and 3 to Errata to Pl.'s Second Supp., filed Feb. 24, 2020 [hereinafter Errata].) It is simply not credible that each person logged *matching* time entries for those days of trial, in massive 12-hour blocks,[13] especially when (1) four of the five days were *half days*, (2) virtually *no preparation time was needed* for the first four days of trial, as they consisted only of

[12] *See* Opp'n at 21–29; *see generally* Def's Response to Supp. Br. Re Mot. for Attorney Fees and Costs, filed Sept. 20, 2019 [hereinafter Response to Supp..

[13] Prior to the Errata filed Feb. 24, Mr. Prince's timesheet also showed 12 hours for each day, and 8.5 on the final half-day, further demonstrating that Plaintiffs appear to have arbitrarily selected 12-hours as their default entry.

jury *voir dire*, (3) any preparation time spent out of court would inure to the second trial, and (4) much of those five (half) days of trial were spent resolving evidentiary issues, which was necessary to establish the parameters of trial—be it the first or second.

2. Plaintiffs Seek Fees for Trial Preparation that Inures to the Second Trial

Plaintiffs want fees for trial preparation that Mr. DeGree and Ms. Kabins did in the three weeks before the first trial (from 3/29/19 to 4/22/19)—their time "compiling," "analyzing" and preparing "trial exhibits;" "analyzing and reviewing" depositions in order to "draft and revise direct examinations," and draft line depositions for trial; drafting jury instructions; and "meet[ing]with clients re trial testimony," (Errata Exs. 2, 3.) Of course, none of that time occurred because of the mistrial, as it was just as useful in the second trial.

To get around this impropriety, Mr. Degree and Ms. Kabins claim that they had to *redo all of that work* during the two weeks before the second trial, although it was a little "quicker and easier the second time," but they provide no supporting documentation. (Supp. at 3.) Plaintiffs also claim they "divided their hours in half to represent work for that was duplicated for the second trial." (Second Supp. At 4:12–16.) But this appears to be a concession that the work benefitted the second trial, just as it did the first. Because this work would have been required, with or without the mistrial, Plaintiffs cannot tax half of those fees to Defendant.

A. <u>Plaintiffs' Costs Are Inflated</u>[14]

If the Court is inclined to award any costs, they must be significantly reduced. For example, even if Plaintiffs prevailed on the case, they would only be entitled to $1,500 for each expert witness pursuant to NRS 18.005(5). Moreover, Radar Graphic's fees are not taxable costs. While these services may be desirable, they were not necessary for the presentation of Plaintiffs' case and, therefore, are not recoverable. Additionally, Plaintiffs appear to have spent over $3,000 for a transcript used solely to draft this motion. The transcript was not the result of the mistrial and there was certainly no justifiable reason to expedite the transcript in such a manner to incur over $3,000.

[14] *See* Response to Supp. at 7–8.

V. PLAINTIFFS' ERRATA DOES NOT CURE THE NUMEROUS DEFICIENCIES

In Plaintiffs' February 24, 2020 Errata, they abandon two of their more egregious requests. First, Plaintiffs now decline to pursue over $120,000 in attorney's fees they claim were solely attributable to Mr. Prince: "Plaintiffs withdraw their request for Dennis M. Prince, Esq.'s attorneys' fees." (Errata at 2:1.) Second, Plaintiffs are no longer pursuing the "contingency fee multiplier," now seeking a "total" of $73,159.07.[15] (*Id.* at 2:6–7.)

These concessions are likely in recognition of the fact that the Court would not award such outrageous amounts for a mistrial that occurred during opening statements. Nevertheless, the Court should not allow the substantial reduction in the amount requested to, itself, be evidence that the new amount is reasonable. It is not. If anything, the inclination to think this way is a reflection of the power of the extreme anchoring technique Plaintiffs employed (i.e., first offering an absurdly high number to make a lesser (but still absurd) number appear to be a reasonable concession). Plaintiffs are not entitled to any sanctions. But if they are, they still cannot seek fees and costs for multiple items that carried over to the second trial, as they have done here.

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VI. ANY SANCTION BEYOND A $10,000 OFFSET OF THE COST AWARD WOULD BE EXCESSIVE

For the reasons set out herein and in prior briefing, no sanction is appropriate in this case. Nevertheless, at the most, the circumstances cannot justify anything more than a $10,000 award. Even in those circumstances where a sanction of fees is warranted following a mistrial, they properly are limited to those incurred "during" or "in" the original trial. *Emerson v. Eighth Judicial District Court*, 127 Nev. 672, 682, 263 P.3d 224, 230 (2011). By Defendant's calculation, the five days of trial—four of which were half days—totaled approximately 24 hours. Reasonable rates for competent personal injury counsel in a case such as this would be $450 for partners, $260 for associates, and $120 for paralegal time. At those reasonable market rates, the fees for time incurred during trial would be ***$9,120*** (plus 24 x $260, plus 24 x $120).[16] That award would be offset

[15] The Errata contains a clear typo in the total amount requested: "The total amount Plaintiffs request as a result of the mistrial is $73,1159.07." (Errata at 2:6–7.) Adding together the amounts in the same paragraph shows the number to contain an extra "1" (i.e., 34,230 + 18,154.50 + 20,774.57 = 73,159.07).

[16] Recall, in the errata, Plaintiffs have withdrawn their request for Mr. Prince's fees, so the only fees at issue now are those for the associate and the law clerk. And any cost award could not exceed $3,190. *See above*.

against the costs that plaintiffs owe defendant.[17]

CONCLUSION

Because Defense counsel did not intentionally cause a mistrial (or commit any egregious misconduct), the motion for fees and costs should be denied. Alternatively, if the Court would have been inclined to award sanctions, Plaintiffs have waived any right to those sanctions by refusing to provide—after three opportunities—any itemization that comports with the law or the repeated requests of the Court. No fees or costs should be awarded.

Dated this 27th day of February, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel D. Henriod*
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Attorneys for Defendant Babylyn B. Tate

[17] *See* Response to Supp. at 9.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February 2020, I served the foregoing **"DEFENDANT'S RESPONSE TO PLAINTIFFS' SECOND SUPPLEMENTAL BRIEF REGARDING MOTION FOR ATTORNEY FEES AND COSTS"** on counsel by the Court's electronic filing system to the persons listed below:

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/s/ Lisa M. Noltie
An Employee of Lewis Roca Rothgerber Christie LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

DESIRE EVANS-WAIAU, INDIVIDUALLY; GUADALUPE PARRA-MENDEZ, INDIVIDUALLY; JORGE PARRA-MEZA, AS GUARDIAN FOR MYRA PARRA, A MINOR; JORGE PARRA-MEZA, AS GUARDIAN FOR AALIYAH PARRA, A MINOR; AND JORGE PARRA-MEZA, AS GUARDIAN FOR SIENNA PARRA, A MINOR, Plaintiffs, *vs.* BABYLYN TATE, INDIVIDUALLY, DOES I-X, AND ROE CORPORATIONS I-X, INCLUSIVE, Defendants.	Case No. A-16-736457-C Dept. No. XVII **ORDER GRANTING PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS ARISING FROM MISTRIAL**

"Plaintiffs' Motion for Attorney Fees and Costs Based On Defense Counsel's Professional Misconduct" came before this Honorable Court on the 4th day of March 2020. Appearances were made by attorneys James A. Trummell, Esq. and Ashley E. Kabins, Esq. of EGLET ADAMS and Dennis M. Prince, Esq.

Case Number: A-16-736457-C

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of PRINCE LAW GROUP on behalf of Plaintiffs DESIRE EVANS WAIAU and GUADALUPE PARRA-MENDEZ; and by Thomas E. Winner, Esq. and Caitlin J. Lorelli, Esq. of WINNER & SHERROD and Joel D. Henriod, Esq. of LEWIS ROCA ROTHGERBER CHRISTIE LLP on behalf of Defendant BABYLYN TATE.

Having read and considered the pleadings and papers on file herein and having heard oral argument for good cause shown, the Court hereby orders:

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' motion for attorneys' fees and costs arising from the mistrial is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the order of attorneys' fees and costs granted to Plaintiffs is a compensation for Plaintiffs' counsels' time during trial from April 23, 2019 to April 26, 2019.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the total amount awarded to Plaintiffs is $43,241.00, which shall be an offset against the $202,477.69 in costs that Plaintiffs owe to Defendant as the prevailing party, set out in the "Memorandum of Costs and Disbursements" filed on July 16, 2019. This amount includes $11,126.00 for Plaintiffs' costs, $21,000.00 for Jack F. DeGree, Esq.'s fees, and $11,115.00 for Ashley E. Kabins, Esq.'s fees.

IT IS SO ORDERED.

DATED this 8th day of May 2020.

Mary Kay Holthus

DISTRICT COURT JUDGE

Respectfully submitted by:

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By: */s/ Joel D. Henriod*
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