Case No. 79424

In the Supreme Court of the State of Nevada

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

Appellants,

v.

BABYLYN TATE

Respondent.

APPELLANTS' REPLY BRIEF

Appeal from the Eighth Judicial District Court
Clark County, Nevada
The Honorable Mary Kay Holthus, District Judge
Case No. A-16-736457-C

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I. INTRODUCTION

A series of erroneous evidentiary rulings during trial emboldened Respondent Babylyn Tate's ("Tate") counsel to make numerous improper arguments to jurors. These prejudicial arguments, which pervaded trial, were devised to portray Appellant Desire Evans-Waiau ("Evans-Waiau") as an opportunistic, claims-minded fraud seeking financial gain at the expense of Tate. As a result, Evans-Waiau and Appellant Guadalupe Parra-Mendez ("Parra-Mendez") were deprived of a fair trial on the merits.

Tate's counsel hatched his plan to paint Evans-Waiau as a liar from day one. During opening statements, Tate's counsel incessantly told jurors the police did not want to respond to the collision scene, but that Evans-Waiau insisted they come for some untoward purpose. 3A.App.716-17, 3A.App.720. Although Evans-Waiau wanted police to come because she was scared and the law required the collision be reported, the trial court allowed Tate's counsel to present a false narrative that Evans-Waiau was somehow not trustworthy. Tate's counsel doubled down on this theme by introducing, over Appellants' objection, a hearsay recording of Evans-Waiau's fiancé, Jorge Parra-

Meza ("Parra-Meza"), angrily scream multiple obscenities about his vehicle's damage. Evans-Waiau and their children were nearby, which magnified its prejudice. Tate's counsel abusively used this evidence to portray Evans-Waiau and Parra-Meza as low-income minorities who were angry their "low rider" was damaged, which somehow motivated Evans-Waiau to seek financial gain by fabricating a bodily injury. 3A.App.714.

The trial court improperly permitted Tate's counsel to use various lawyer-driven arguments to present his contrived narrative that Appellants' injury claims were phony and built up medically. Tate's counsel emphasized lawyer referrals, lawyers requesting cost letters, and litigation liens solely to leave jurors with the impression that Appellants' medical care was untrustworthy without any evidentiary basis. 10A.App.2340-41, 10A.App.2344, 10A.App.2347-48, 10A.App.2350, 10A.App.2352, 10A.App.2357, 10A.App.2362.

Allowing these arguments was clearly an error because it contradicted the evidence. Tate retained two medical experts, Jeffrey Wang, M.D. and Joseph Schifini, M.D. Dr. Wang opined Evans-Waiau was injured from the collision. 7A.App.1531-32. Dr. Wang causally

related a portion of Evans-Waiau's treatment, which was administered on a lien, to the collision. *Id.* Dr. Wang causally related Evans-Waiau's "lawyer-referred" chiropractic care to the collision. *Id.* Dr. Schifini provided no medical causation opinions because he "assumed" both Appellants were injured. 8A.App.1960-61, 9A.App.2107. Tate retained no expert to refute the causal relationship between Parra-Mendez's soft tissue injuries and the collision. The cumulative effect of Tate's prejudicial lawyer-driven and medical buildup arguments rendered the trial fundamentally unfair.

To further ensure jurors ignored the evidence establishing Tate's liability, her lawyer made an emotional plea to spare Tate because she did not have the ability to pay a substantial damage award. 10A.App.2363-64, 10A.App.2368-69. Tate's counsel used improper ability to pay arguments as a tool to further magnify Appellants' injury claims as bogus, while simultaneously presenting Tate as a sympathetic victim who could never pay a multi-million-dollar judgment.

The jury returned a verdict so inconsistent with the evidence that the adverse influence of Tate's counsel's misconduct cannot reasonably be questioned. The cumulative effect of the improper arguments made

by Tate's counsel and the associated trial court errors, culminated in a verdict that reflected jury nullification. 10A.App.2392. A new trial is warranted.

II. TATE NEGLIGENTLY CAUSED THE COLLISION

Nevada law requires drivers to anticipate sudden stops or hazards. *Posas v. Horton*, 126 Nev. 112, 117 (2010). The underlying collision occurred on the Friday night of a holiday weekend in an intersection near the Las Vegas resort corridor. RplyApp.0001-0011. Both vehicle and pedestrian traffic were heavy. 6A.App.1317, 7A.App.1619. Tate should have been more aware of her surroundings and expected sudden stops given these circumstances. Instead, she crashed into the back of Evans-Waiau's vehicle because she failed to observe Evans-Waiau stopped for a pedestrian at a busy intersection. 6A.App.1321-23.

Shortly after the collision, Tate admitted the accident happened so fast she did not know why Evans-Waiau applied her brakes. 7A.App.1617, 7A.App.1624. Tate simply failed to pay attention, which was why she did not have enough time and space to avoid the crash even

while traveling the 35-mph speed limit.[1] 7A.App.1601, 1603. Tate told the jury Evans-Waiau did **nothing** to cause or contribute to the collision. 7A.App. 1617. She never blamed Evans-Waiau for causing the collision. 7A.App.1629-30.

"The fact that the plaintiff came to a stop sooner than the defendant expected is the type of hazard that should be anticipated under the circumstances of ordinary driving." *Posas*, 126 Nev. at 117. Tate failed to anticipate Evans-Waiau's stop even though her view of Evans-Waiau's car was unobstructed. 7A.App.1624. Tate accepted responsibility for the crash because she "could have" stopped in time if she paid closer attention to the road ahead. 7A.App.1629, 7A.App.1631.

Tate never blamed the collision on the vehicle in front of her swerving into the left lane. 7A.App.1617. Tate never even testified the vehicle in front of her swerved, and her representation to the contrary is demonstrably false as she testified **twice** that it was a normal lane change. 7A.App.1616-17, 7A.App.1679.

[1] Tate changed her testimony to say she traveled less than 35 mph when the crash happened even though she unequivocally testified at deposition she traveled 35 mph when the collision occurred. 7A.App.1603.

Tate claimed she never saw Evans-Waiau's turn signal before the crash. 7A.App.1623. However, Tate **never** blamed her inability to see the turn signal on the darkened taillight covers. 7A.App.1644-45, 7A.App.1649, 7A.App. 1656. Tate falsifies the record on this point. AB, at p. 4.

The verdict determining Tate was not negligent contradicted all the evidence and reflected an unfair trial resulting from the trial court's admission of improper arguments from Tate's counsel.

III. IMPERMISSIBLE ABILITY TO PAY ARGUMENTS WERE MADE SOLELY TO ENSURE JURORS SYMPATHIZED WITH TATE

Tate's counsel did not remind jurors about the value of a dollar during closing argument. He garnered sympathy for Tate by telling jurors it would take hundreds of years to save the precise amount of money Appellants requested them to award. 10A.App.2363-64, 2368-69. The clear purpose was to suggest an average person, like Tate and the jurors, could never pay such a large verdict. These arguments went directly to one's ability to pay, which, by any standard, were improper.

A. Appellants' Challenge to the Improper Ability to Pay Arguments was Not Waived

Tate contends a party aggrieved by attorney misconduct **must** file a motion for new trial before seeking appellate review. None of the decisions from this Court remotely stand for this proposition. Tate has chosen to read into this Court's decisions a prerequisite that must be satisfied before asserting an appellate challenge to attorney misconduct that does not exist.

In *Lioce v. Cohen*, 124 Nev. 1, 20 (2008), this Court re-assessed the "standards that district courts are to apply when deciding a motion for new trial based on attorney misconduct." The *Lioce* Court "[clarified] the proper appellate standards for reviewing the district court's order" addressing the new trial motion. *Id.* There is not a singular statement in *Lioce* remotely indicating a party aggrieved by attorney misconduct waives his right to challenge that misconduct on appeal, absent a motion for new trial.

The only requirement controlling this Court's ability to review attorney misconduct on appeal is whether a timely objection to the trial court was made: "[A] party must object to the purportedly improper

argument to **preserve this issue for appeal**. We **reapprove this requirement** . . . ." *Lioce*, 124 Nev. at 7 (emphasis added).

Two distinct scenarios are available for appellate review of attorney misconduct: (1) direct appeal or (2) filing a motion for new trial before an appeal is filed. This Court reaffirmed that basic legal principle in a subsequent decision. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 365 (2009).

Other jurisdictions acknowledge a motion for a new trial is not required to preserve issues for appellate review. *See, e.g.*, *Garcia v. ConMed Corp.*, 138 Cal. Rptr. 3d 665, 668 (Cal. Ct. App. 2012) ("[A] party is not required to move for a new trial before raising attorney misconduct as an issue on appeal"); *Janczyk v. Davis*, 337 N.W.2d 272, 274 (Mich. Ct. App. 1983); *Howe v. City of Akron*, 801 F.3d 718, 750 (6th Cir. 2015). The plain language of NRAP 3A(a) expressly acknowledges appellate issues arising from a judgment can be preserved for appeal even in the absence of a motion for new trial.

Tate's argument is premised on the falsehood that there is no factual basis upon which this Court can conduct its appellate review. In response to the objection of Appellants' counsel, which was extensively

argued (10A.App.2364-67), the trial court substantively overruled the objection:

> THE COURT: I'm going to let you do very limited that if for example a family made 50,000, it would take them this long to save this much money.
> . . .
>
> THE COURT: To put it in perspective on some level how much money it is, it's a lot of money.

10 A.App.2368.

Appellants properly preserved this issue for appeal by articulating their timely objection. 10A.App.2364. The Court subsequently allowed Tate's counsel free reign to argue various scenarios inviting jurors to conclude Tate was unable to, under any circumstances, save enough money to pay the specific damages requested by Appellants. 10A.App.2368-69. Therefore, any substantial verdict was pointless because Tate could never pay anyways. The trial court's erroneous decision to substantively overrule the objection and allow extensive argument from Tate's counsel provides an ample record for appellate review.

B. Tate Fails to Acknowledge the Adverse Effect of Her Counsel's Ability to Pay Arguments

Tate believes her counsel's arguments were not improper because he never specifically stated she lacked the ability to pay a judgment. Tate's counsel did not merely remind jurors that millions of dollars is a lot of money. The jurors, as working adults, already understood millions of dollars was a lot of money. They did not need Tate's counsel to remind them of this, nor did he because his argument solely addressed **how** to satisfy a judgment.

Tate's counsel persistently argued it would take an inordinate amount of time to save the millions of dollars requested by Appellants, which no average person, like Tate, could ever satisfy. 10A.App.2363-64, 10A.App.2368-69. There was no justification for this prejudicial argument at trial and Tate fails to provide any legitimate excuse for it now.

Determining whether counsel's argument is improper requires an appellate court to "consider the evidence, the argument itself, the prejudicial effect of that argument and the corrective actions of the Court." *Otis Elevator Co. v. Stallworth*, 474 So.2d 82, 83 (Ala. 1985). "Cases should be decided on their merits, not on the basis of the amount

of improper prejudice that can be injected into a trial." *Anderson v. BNSF Ry.*, 354 P.3d 1248, 1269 (Mont. 2015).

Tate suggests she needed to testify about her financial situation to overcome the impression left by Appellants' counsel that she was wealthy. This argument is nonsensical. Appellants' counsel elicited testimony from Tate that she was traveling to a concert on the night of the collision to establish traffic was heavy surrounding Las Vegas Boulevard because it was a Friday night. 7A.App.1615. Appellants' counsel left no impression Tate was a careless driver because she was an "affluent party-goer." AB, at p. 13. The same is true regarding Tate driving an Acura SUV. An Acura SUV, while a fine automobile, is certainly not a luxury vehicle signaling affluence. The type of vehicle Tate drove was relevant because there was a car collision. Tate cannot provide any instance where Appellants' counsel emphasized the make of Tate's vehicle to suggest she was wealthy. Even Tate's counsel referred to her "Acura SUV" during trial. 7A.App.1656.

No impression was left that Tate was a reckless, wealthy partygoer necessitating testimony regarding her financial situation. Tate did not have to specifically provide her household income for jurors to appreciate

her financial situation was tenuous at best. Tate was the sole breadwinner who was financially responsible for not just her husband, who no longer worked and recently suffered a heart attack, but also her three daughters, two of whom were teenagers. 7A.App.1640, 7A.App.1658. The jury knew Tate worked as a registered nurse, which allowed them to infer she was by no means wealthy, but simply a person of average means. *Id.* Appellants could not reasonably anticipate Tate's counsel elicited testimony about her financial condition to support his eventual argument that no average person could ever satisfy Appellants' requested damages.

C. Argument Addressing the Significant Amount of Time it Takes to Save Money has No Bearing on the Value of a Dollar

The closing argument from Tate's counsel did not reference the average person's labor to establish the value of the dollar amount Appellants requested. 10A.App.2363-64, 10A.App.2368-69. Tate's counsel did not refer to the value of money and how it diminishes over time or as a person acquires more of it. *Id.* He made a direct appeal for jurors to consider how long it would take them to save a substantial amount of money to sympathize with Tate should she be financially

responsible for that amount and essentially be in in debtor's prison for life. *Id.* This argument was improper, violated the golden rule, and encouraged jury nullification.[2] *Chin v. Caiaffa*, 42 So. 3d 300, 308 (Fla. Dist. Ct. App. 2010) ("Interjection of wealth or poverty of any party has been consistently held by the courts to be irrelevant to the issue of compensatory damages in a personal injury case").

Tate's attempt to analogize her counsel's argument with the argument in *A.C. v. Bellingham Sch. Dist.*, 105 P.3d 400 (Wash. Ct. App. 2004) is unavailing. In *A.C.*, the argument by defense counsel was deemed appropriate because it related to the amount of money jurors might choose to award, and what that amount meant to them when they possessed it. 105 P.3d at 407. By contrast, Tate's counsel incessantly stated the millions of dollars Appellants requested was "real money" to drive home the point that no person could ever save enough over his lifetime to pay it. 10A.App.2363-64, 10A.App.2368-69. The argument

[2] Appellants' counsel objected and moved to strike the arguments because their intended effect was to ask jurors "who could ever pay for this and how long it would saddle . . . the Defendant in some way." 10A.App.2364. Jurors understood if they were in Tate's position, they could not save enough to pay a substantial damage award, either. The golden rule objection was properly preserved.

was specifically devised to direct jurors to render a verdict on sympathy, not evidence.

The arguments made by Tate's counsel are more analogous to those addressed recently by the Washington Court of Appeals in *Dickerson v. Mora*, No. 72059-7-1, 2015 Wash. App. LEXIS 2835 (Wash. Ct. App. Sep. 16, 2015).[3] *Dickerson* involved claims of negligent medical care against defendants who later settled, and PeaceHealth. 2015 Wash. App. LEXIS 2835, at *4-5. During closing argument, counsel for PeaceHealth made comments to the jury similar to those made by Tate's counsel: "The first thing is we are talking **real dollars**. Big numbers are thrown around, um, thinking in your own life **how long it takes to save money**." *Id.* at *14 (emphasis added). After the jury returned a verdict for PeaceHealth, the trial court ordered a new trial based on its determination the argument from PeaceHealth's counsel violated the golden rule. *Id.* at *15. On appeal, the Washington Court of Appeals affirmed the trial court's order granting a new trial by distinguishing the arguments from those made in *A.C.*:

[3] Unpublished opinions of the Court of Appeals issued on or after March 1, 2013, may be cited as nonbinding authorities. Wash. GR 14.1.

> [U]nlike counsel in *A.C.*, PeaceHealth's counsel suggested that the large dollar amount the Dickersons asked for was a lot of money – **"big numbers"** – that the members of the jury would not want to pay if they had been asked to, "thinking . . . how long it takes to save money." **This comment did not focus on the jury finding no negligence and therefore awarding a zero dollar amount**. Rather, it asked the jury to find PeaceHealth not liable or not award the amount the Dickersons requested because **members of the jury would not want to pay that amount, taking into consideration "how long it takes to save money."**

Id. at *18 (emphasis added).

The arguments presented by Tate's counsel were even more extreme than those in *Dickerson*. Tate's counsel implored jurors to consider how they would feel if they were saddled with personal responsibility for a financially ruinous judgment knowing they could never save enough money to pay it. 10A.App.2368-69. By incessantly stating most people could never save even $5,000.00 a year, Tate's counsel encouraged jurors to view Tate as an average person like them who lacked the means to pay millions of dollars in damages. *Id.* Presenting testimony from Tate, who solely bore the financial responsibility to support a family of five, exacerbated the harm she would

suffer if a financially ruinous judgment were entered to garner sympathy from jurors. By personalizing his argument as one that any average person could relate to, Tate's counsel ensured jurors would "consider how much this [real money] would impact [them] if they were in [Tate's position] and required to pay it out of their own pockets . . . ." *Dickerson*, 2015 Wash. App. LEXIS 2835, at *17.

If Tate's counsel intended to point out three million dollars was a lot of money, he could have explained that by providing examples of its purchasing power. Instead, he urged jurors to consider how difficult it would be for them to pay a financially ruinous judgment and allow that feeling to cloud their objectivity. Appellants were unable to neutralize this prejudicial argument in the most effective way possible because evidence of Tate's liability insurance was inadmissible. Nev. Rev. Stat. 48.135.

Appellants do not misunderstand golden rule arguments as referring to "us" even once, in this context, violated the golden rule. *Capanna v. Orth*, 134 Nev. ___, 432 P.3d 726, 731 (2018). The jurors collectively understood from the arguments that, like Tate, they could never save enough money to pay millions of dollars in damages. They

placed themselves in the position of Tate solely because of the prejudicial ability to pay arguments. The adverse impact of these improper golden rule arguments was reflected by the extreme verdict rendered.

Tate suggests merely referencing a jury instruction somehow eliminates the potential for jury nullification. This view is extremely shortsighted. An attorney encourages jury nullification by "alluding to a matter that is irrelevant given the law or unsupported by admissible evidence given the facts . . . ." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 78 (2014). Tate's counsel did exactly this by referring to irrelevant information about the difficulties of saving enough money to pay the damages requested by Appellants. The inevitable financial difficulties Tate faced if a substantial judgment was entered was not reflected in any of the jury instructions. 9A.App.2196-2248. In fact, the jury was specifically instructed to "decide upon a sum of money sufficient to reasonably and fairly compensate plaintiff . . . ." 9A.App.2237. Tate's counsel discouraged jurors from following this instruction by asking them to consider the financial impact a substantial judgment would have on Tate. The prejudice resulting from this nullification argument was magnified by the jury's knowledge Tate was in a financially perilous

position. The jury's reliance on this improper argument rendered the trial fundamentally unfair as reflected by the verdict.

D. The Complete Defense Verdict Demonstrates the Jury Ignored the Evidence, Irrespective of the Instructions Given

Rather than substantively explain why Tate's counsel did not make improper ability to pay arguments, Tate inexplicably tries to blame Appellants for failing to make certain objections or take other actions at trial. Assuredly, Appellants were under no obligation to move for judgment as a matter of law regarding Tate's breach of the standard of care. Their failure to do so does not undermine the jurors' blatant disregard of the evidence establishing Tate's liability because they felt sorry for her due to the financial burden she faced. Tate admitted Evans-Waiau did nothing to cause the collision. 7A.App.1617-18. Tate admitted she could have stopped in time to avoid the collision if she paid closer attention. 7A.App.1629, 7A.App.1631. There was no legal basis for Appellants to even object to the instruction asking the jury to evaluate Tate's conduct under something other than the ordinary-prudent person

standard. Tate's suggestion to the contrary is not worthy of consideration.[4]

Tate even asserts the verdict demonstrates jurors were not influenced by the prejudicial ability to pay arguments because they rendered a defense verdict rather than a small award. This argument is myopic because Tate ignores that, in the context of the ability to pay arguments, Evans-Waiau was not the only plaintiff seeking substantial damages. Parra-Mendez requested jurors award her over $50,000.00. 10A.App.2310, 10A.App.2316. After the harmful ability to pay arguments, jurors were left with the indelible impression it would take Tate at least 10 years to save enough money to pay those damages. 10A.App.2363-64, 10A.App.2368-69. This directly influenced them to ignore the evidence establishing Tate's fault and conclude even Parra-Mendez, a fault-free passenger, was entitled to no damages. 10A.App.2392. The jury's failure to find Tate negligent for the collision

[4] Tate inaccurately characterizes Appellants' objection to the jury instruction pursuant to *Gunlock v. New Frontier Hotel Corp.*, 78 Nev. 182, 185 (1962). Appellants vehemently objected to the instruction because it suggested a "presumption" of no liability, which was inconsistent with the instruction describing Appellants' burden of proof. 10A.App.2029.

demonstrates the ability to pay arguments were successful. The jurors' overriding concern was to protect Tate from bearing **any** financial responsibility for the collision, which explained why they awarded no damages.

IV. TATE DOES NOT ARTICULATE ANY LEGITIMATE BASIS ESTABLISHING THE RELEVANCE AND ADMISSIBILITY OF PARRA-MEZA'S PROFANITY-LACED RECORDING

Although a trial court enjoys discretion to determine the admissibility of evidence, the evidence must be relevant to be admissible. *Rodriguez v. State*, 128 Nev. 155, 160 (2012). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Nev. Rev. Stat. 48.015. "Trial judges do not have discretion to admit irrelevant evidence." *State v. Sims*, 25 A.3d 144, 155 (Md. Ct. App. 2011); *see also, People v. Gurule*, 51 P.3d 224, 263 (Cal. 2002). Hearsay is only admissible if it falls into one of the recognized exceptions. *Carroll v. State*, 132 Nev. 269, 276 (2016).

A. The Recording was Inadmissible Hearsay Because it was Irrelevant to Demonstrate Bias

"[U]tterances of a witness indicating bias are admissible for impeachment purposes [and] do not constitute hearsay when offered for

such a purpose." *Fields v. State*, 608 So.2d 899, 903 (Fla. Dist. Ct. App. 1992). Tate failed to meet this standard at trial because Parra-Meza's recording was not introduced to establish bias. Tate's counsel never even attempted to lay a foundation establishing how the recording reflected Parra-Mendez's bias against Tate. 8A.App.1876-77, 8A.App.1880. The only motivation to present this evidence was to leave the jurors with a negative impression of Evans-Waiau.

Tate's overly broad interpretation of bias in the context of admitting hearsay statements is far too generous. "Bias is a term used in the common law of evidence to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469 (1984). The pertinent inquiry is whether the evidence is relevant to the alleged bias in the particular case. *Devincentz v. State*, 191 A.3d 373, 396 (Md. Ct. App. 2018). "[W]hen evaluating the relevance of evidence proffered to show the bias of a witness, reasonable inferences are permissible but speculation is not." *State v. Prange*, 268 P.3d 749, 753 (Or. Ct. App. 2011).

Tate somehow thinks Parra-Meza's recording about the vehicle damage evidenced a bias influencing Evans-Waiau to blame Tate and seek bodily injury damages. Parra-Meza's commentary was limited to holding someone financially responsible for the vehicle damage only. 10A.App.2340. Tate conveniently ignores the trial involved no issue of property damage because Evans-Waiau's vehicle was repaired. 8A.App.1841. Parra-Meza was understandably upset that his car sustained extensive damages, which was later confirmed to be approximately $4,000.00 worth of damage. 3A.App.617. Parra-Meza made no comment that even remotely suggested his anger influenced Evans-Waiau to fake a bodily injury claim. 10A.App.2340. Evidentiary inferences must be logical, and suggesting the recording evidenced bias was not. The trial court erred not only by allowing inadmissible hearsay, but also overlooking its prejudicial effect.

B. The Hearsay Recording Lacked any Probative Value

The use of profanity in a recorded conversation does not create a risk of unfair prejudice when the content of the conversation is relevant. *United States v. Pirani*, 406 F.3d 543, 555 (8th Cir. 2005).

The utter lack of probative value of Parra-Meza's recording magnified its prejudicial effect. Tate presumes jurors were not offended by Parra-Meza's profanities even though the trial court never made such an inquiry. Unlike the cases Tate relies upon, Parra-Meza's frequent use of profanities was more prejudicial because jurors were left with the impression that he used this abusive, foul language in front of his young children. 8 A.App.1876. It was reasonable for jurors to infer Evans-Waiau was a bad parent for allowing this. Moreover, Parra-Meza's anger, if probative, easily could have been conveyed to the jury without the vulgarities. Therefore, the district court erred because it underestimated the prejudicial effect of the expletives by overstating the recording's probative value.

C. Parra-Meza was Not a Party to the Case

Parra-Meza's status as party was solely limited to a guardian on behalf of his injured minor children. 1A.App.00002-00005. Once the minors' claims resolved, Parra-Meza was no longer a party this this case. Tate fails to explain how Parra-Meza remained a party to this action under these facts. The recording was inadmissible as a statement by party opponent. Nev. Rev. Stat. 51.035(3).

D. Admitting the Audio Compounded the Trial Court's Errors and Contributed to the Unfair Outcome

Errors committed by the trial court warrant a new trial when the appellant shows "that, but for the error, a different result might reasonably have been expected." *Hallmark v. Eldridge*, 124 Nev. 492, 505 (2008). "Any trial can be made unfair by a series of errors that, individually, might not justify granting a new trial, but that cumulatively did wrongly affect the verdict." *Rookstool v. Eaton*, 457 P.3d 1144, 1148 (Wash. Ct. App. 2020). Tate narrowly focuses on the admission of the audio recording to argue its exclusion would not have caused a different outcome. Tate disregards Appellants have provided numerous errors the trial court committed by not just allowing irrelevant evidence, but also improper arguments and jury instructions. These errors, when considered together, swayed the jury to render a verdict based on sympathy for Tate and animosity towards Appellants.

V. THERE WAS NO EVIDENTIARY BASIS TO INSTRUCT THE JURY THAT EVANS-WAIAU'S TAILLIGHTS WERE NOT SAFELY ILLUMINATED

A trial court abuses its discretion giving a jury instruction when the decision is "arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co., LLC*, 122 Nev.

1430, 1435 (2006). "There is no error in refusing to give a jury instruction where there is no basis in the evidence to support the giving of the instruction." *Anderson v. State*, 108 S.W.3d 592, 607 (Ark. 2003).

"The Plaintiff had no visible brake lights." 10A.App.2338. This was a blatant lie Tate's counsel told jurors. Tate provided no testimony stating or even implying she crashed into Evans-Waiau's car because the darkened cosmetic taillight covers prevented her from seeing the taillights. 7A.App.1644-45, 7A.App.1649, 7A.App. 1656. Tate did not even blame Evans-Waiau for causing the collision, let alone blame the collision on her supposed dimmed taillights. 7A.App.1617, 7A.App.1629-30.

The evidence proved Evans-Waiau's taillights functioned properly when the collision occurred. 6A.App.1318, 6A.App.1887. Evans-Waiau and Parra-Meza confirmed the cosmetic darkened covers did not impair the illumination of the taillights. *Id.* This was undisputed. If Tate blamed the crash on the taillights, she would have affirmatively testified she could not avoid the collision because the taillights were dim or difficult to see. Alternatively, she would have blamed her failure to see the turn signal on the darkened taillight covers. There was nothing

blocking Tate's view of Evans-Waiau's vehicle before the crash occurred. 7A.App.1624.

Tate misleads this Court regarding the significance of Evans-Waiau's involvement in a subsequent rear-end accident as evidence that her taillights were not safely illuminated. Tate's counsel never asked Evans-Waiau a single question regarding the facts of the subsequent accident to establish whether the other driver claimed the taillights were not visible. 6A.App.1398-99. Jurors had no idea whether the subsequent accident happened during the evening hours thereby implicating the illumination of the taillights. *Id.* This further underscores the lack of evidence required to give jury instructions regarding operational taillights. *Rocky Mountain Produce Trucking Co. v. Johnson*, 78 Nev. 44, 52 (1962) ("A court should not instruct a jury on a theory of the case which is not supported by any evidence").

There was no evidentiary basis to justify two separate jury instructions addressing the law requiring cars to have functional, visible taillights. By giving these instructions, the trial court erroneously endorsed Tate's speculative comparative negligence theory of liability. *State v. Greer*, 588 S.W.3d 623, 627 (Mo. Ct. App. 2019) ("jury instructions

cannot be based on speculative or forced inferences not supported by the evidence").

A. Tate's Reliance on the Erroneous Instructions Led to Additional Improper Arguments

The prejudice resulting from the trial court's erroneous jury instructions culminated in a closing argument that deliberately misled the jury. On multiple occasions, Tate's counsel questioned jurors about the necessity of taillights to imply Evans-Waiau's' negligence caused the collision because her taillights were not safely illuminated. 10A.App.2330, 10A.App.2333. He lied to jurors by arguing Evans-Waiau's taillights were not visible when the collision occurred. 10A.App.2327. Tate's counsel even suggested Evans-Waiau should be punished for the cosmetic taillight covers because she and Parra-Meza did not care about safety:

> Mr. Parra said he had those taillights after-market smoked and adjusted, at an audio shop. Was he concerned for safety or concerned about whether it looked cool?
>
> . . .
>
> Again, were **they** worried about safety, or were **they** worried about how cool the car looked, buying those lights from a non-dealer shop? It was involved in two rear end accidents.

10A.App.2329, 10A.App.2339 (emphasis added).

The taillights had nothing to do with causing the collision. No reliable evidence was presented to suggest such an inference to the jury. Giving the erroneous jury instructions emboldened Tate's counsel to make these blatant misrepresentations to the jury. The prejudice suffered by Appellants was substantial.

B. Tate's Reliance on the General Verdict Rule and "Negative Evidence" is Wrong

"The general verdict rule provides that, if a jury renders a general verdict for one party, and no party requests interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party." *FGA, Inc. v. Giglio*, 128 Nev. 271, 279 (2012). The general verdict rule "is inapplicable in cases where overlapping factual theories support a single theory of recovery." *Id.* at 280. This Court expressly adopted this exception to the general verdict rule because substantial overlap often exists between factual theories supporting a single theory of recovery for negligence. *Id.* In turn, this complicates the ability to formulate interrogatories to account for intertwined factual theories giving rise to a singular claim. *Id.*

Tate conveniently ignores that her factual theories of comparative negligence overlapped based on her faulty claim Evans-Waiau was negligent because her taillights were not visible. The trial court's comparative negligence instructions related to Evans-Waiau's alleged failure to activate her turn signal and unsafe taillights. 9A.App.2230-33. These instructions stemmed directly from what Tate allegedly observed in the moments before the collision. Moreover, Tate only testified she never **saw** the turn signal before the collision occurred. 7A.App.1623, 7A.App.1644-45. In this context, the only factual theory available to assert a comparative negligence defense was that Evans-Waiau's taillights were not visible because of the darkened covers even though there was no evidence to prove it. Tate never raised other, distinct factual theories to support her comparative negligence defense. Therefore, the general verdict rule is inapplicable as a matter of Nevada law.

Appellants' decision not to move for judgment as a matter of law on comparative negligence is irrelevant to this Court's inquiry.[5] The issue

[5] While Appellants did not move for judgment as a matter of law on comparative negligence, they repeatedly objected to giving comparative negligence instructions. 9A.App.2030-33, 9A.App.2036-37.

presented is whether there was sufficient evidence to instruct jurors that vehicles must have illuminated taillights. Conversely, a party's failure to move for a directed verdict is only implicated when the party claims the evidence was insufficient to sustain the verdict. *Price v. Sinnott*, 85 Nev. 600, 607 (1969). Here, Appellants claim the district court abused its discretion by giving jury instructions that were not justified by the evidence, which unfairly influenced the jury to find Tate was not liable. In this discrete context, Appellants were not required to move for judgment as a matter of law to preserve this issue on appeal.

Tate's reliance on cases acknowledging the evidentiary value of "negative evidence" is misplaced because they are distinguishable. Negative evidence is probative if "additional testimony or circumstances to show that the witness' position and attitude of attention was such that he would probably have heard or seen the occurrence or event had it happened" exists. *Doubek v. Greco*, 436 P.2d 494, 496 (Ariz. Ct. App. 1968). Tate never testified she would have seen the taillights if they were not darkened or dimmed by the cosmetic covers. 7A.App.1600-95. No "negative evidence" was presented to justify the instructions.

VI. ENCOURAGING JURORS TO VIEW EVANS-WAIAU AS A FRAUD WITHOUT ANY RELIABLE FACTUAL BASIS WAS IMPROPER TO EXPLORE BIAS OR IMPEACH CREDIBILITY

"It is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Jackson v. State*, 117 Nev. 116, 123 (2001). It is improper for counsel to make statements about facts not proven or "to put his or her personal knowledge and belief . . . on the scales." *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 705 (2009); *see also, People v. Williams*, 736 N.E.2d 1001, 1021 (Ill. 2000) (counsel may not express personal opinions on the evidence). Counsel "may not make improper or inflammatory arguments that appeal solely to the emotions of the jury." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364 (2009).

Appellants request this Court to disregard Tate's reference to various evidentiary rulings that seemingly benefited Appellants. They are not properly before this Court because no cross-appeal was filed. They did not somehow ameliorate the harm Appellants suffered from the underlying erroneous rulings, especially those allowing Tate's counsel to advocate Evans-Waiau's injuries and medical treatment were fraudulent. Tate's counsel made a concerted effort to influence jurors to question the

nature and extent of Evans-Waiau's neck injury and treatment by referring to illogical evidentiary inferences with no factual basis. The trial court erred by allowing it.

A. Evans-Waiau Suffered a Significant Discogenic Injury to Her Cervical Spine

The impact from the collision was not minor. Tate traveled approximately 35 mph in her Acura SUV when she struck the back of Evans-Waiau's Honda Accord. 7A.App.1601, 1603. Tate's SUV sustained more than $5,000.00 worth of damages as a result of the collision. 7A.App.1636, RplyApp.0012-0014. Evans-Waiau's Honda suffered substantial damage to its rear-end. RplyApp.0015-0018. Nevertheless, "[l]ow impact collisions can cause serious, as well as minor, injuries." *Rish v. Simao*, 132 Nev. 189, 197 (2016).

Jason Garber, M.D., Evans-Waiau's treating neurosurgeon, opined she suffered a traumatic disc protrusion at the C6-7 level of her cervical spine as a result of the collision. 4A.App.989. This injury caused Evans-Waiau's ongoing and persistent radicular pain she felt down her left arm. *Id.* Evans-Waiau **regularly** suffered neck pain radiating into her left arm, which she first reported to her chiropractor RplyApp.0019-0021.

This prompted the chiropractor to refer Evans-Waiau to her pain management physician, Hans Rosler, M.D. RplyApp.0022-0023.

Dr. Rosler examined Evans-Waiau and reviewed her cervical spine MRI. 4A.App.766-67. The MRI showed a disc bulge at C5-6 and a disc protrusion at C6-7 effacing the C7 nerve roots. 4A.App.773. Based on the MRI findings, her physical complaints, restricted range of motion and spasms, Dr. Rosler recommended Evans-Waiau undergo a selective nerve root block injection at C7.[6] 4A.App.786-87.

Evans-Waiau underwent the C7 nerve root block on January 7, 2016. 4A.App.790. The injection completely reduced her pain rating from an eight to a zero 4A.App.795 One week later, Evans-Waiau reported very minimal neck to Dr. Rosler. 4A.App.797. Dr. Rosler clarified a patient who undergoes a selective nerve root block could experience pain relief for hours, weeks, or even months. 4A.App.789. The therapeutic pain relief Evans-Waiau felt explained why she reported nearly complete pain relief to her chiropractor on February 3, 2016. R.App.120. Evans-Waiau reported continued pain relief to Dr. Rosler on

[6] Although Evans-Waiau reported some pain relief from chiropractic care, it was only temporary due to the structural injury to her cervical spine. 4A.App.832-33.

February 18, 2016, nearly a month and a half after her injection. 4A.App.799-800. Evans-Waiau's neck pain and radiating pain returned on March 29, 2016. 4A.App.802. Unfortunately, this outcome was expected. 4A.App.802-03.

1. Evans-Waiau was recommended to undergo neck surgery before the subsequent car accident

Tate overstates the significance of Evans-Waiau's involvement in a subsequent car accident on July 10, 2016. On May 17, 2016, nearly two months before, Evans-Waiau treated with Yevgeniy Khavkin, M.D., a spine surgeon, at the referral of Dr. Rosler. 5A.App.1173, 5A.App.1176. On that same date, Dr. Khavkin recommended Evans-Waiau undergo a cervical fusion surgery at C5-6, C6-7 given her consistent pain complaints, the failure of conservative care, and the disc protrusion at C6-7. 5A.App.1186-90. Evans-Waiau's C6-7 disc was already compromised and required surgery **before** the subsequent accident.

On July 12, 2016, Evans-Waiau presented to Dr. Garber for a second opinion. 4A.App.993. Despite the subsequent accident, Dr. Garber concluded there was no clinical change in the character and quality of Evans-Waiau's ongoing radiating neck pain. 5A.App.1014. As

a result, Dr. Garber recommended Evans-Waiau undergo a cervical fusion surgery at C6-7.[7] 5A.App.1020-21.

2. Evans-Waiau's prior neck pain was asymptomatic for over five years before the collision

Tate believes the jury questioned Evans-Waiau's credibility because of her so-called unreliable reported medical history. There was nothing clinically relevant about Evans-Waiau's medical history before the subject collision. Tate's primary medical expert, Dr. Wang, confirmed that:

> Q. All right. Now, in the -- you agree that my client had no documented neck pain or arm pain for more than five years before the October 30, 2015 crash; correct?
>
> A. **Yes**.
>
> . . .
>
> Q. So for more than five years, there was no medical evidence of any -- of any -- during that time period of any pain in the neck or her arms; correct?
>
> A. **That's correct. I did not see any documentation.**

[7] Although Dr. Garber did not recommend a two-level fusion, Dr. Garber did not fault Dr. Khavkin for his recommendation. 4A.App.999-1000, 5A.App.1082. Dr. Khavkin knew the C6-7 level contributed more significantly to Evans-Waiau's neck pain. 5A.App.1188.

7A.App.1546 (emphasis added).

Tate overstates the significance of Evans-Waiau's omission of her prior neck pain and conservative treatment to two doctors. Evans-Waiau was involved in a prior car accident in May of 2010. 6A.App.1311. During her initial visit to the chiropractor's office on May 26, 2010, Evans-Waiau documented no symptoms down her arms on her pain diagram. 4A.App.836. Although one doctor indicated Evans-Waiau had a possible cervical radiculopathy, that diagnosis was never confirmed. 4A.App.840. Evans-Waiau underwent a prior MRI of her cervical spine, which Dr. Rosler described as "pristine" and Dr. Garber described as "stone cold normal" based on reviewing the report.[8] 4A.App.838, 5A.App.1004. The extent of Evans-Waiau's prior treatment for her neck was 14 chiropractic visits between May 26, 2010 and July 13, 2010 until her neck pain fully resolved. 4A.App.841, 6A.App.1313. Dr. Wang unequivocally confirmed the medical and clinical insignificance of the prior 2010 car crash and attendant care:

> Q. And so you -- there's nothing -- the 2010 does not -- motor vehicle collision does not explain her

[8] Tate falsely implicates Appellants lost the prior MRI film without furnishing any proof presented during trial. AB, at p. 6.

> symptoms that she reported after October 30, 2015; correct?
>
> A. **That's correct**.
>
> Q. That's your opinion to a reasonable degree of medical probability.
>
> A. **Yes.**
>
> Q. That's medically not significant to this case is it, in your opinion?
>
> A. **I don't think it's the cause. I don't think that's the cause of her symptoms after the 2015 incident.**

7A.App.1547 (emphasis added).

Evans-Waiau's 2010 car accident and her limited neck treatment related thereto was irrelevant because there was no "causal connection between the prior injury and the injury at issue." *FGA, Inc. v. Giglio*, 128 Nev. 271, 283 (2012). Dr. Rosler, Dr. Garber, and Dr. Khavkin **all** agreed the prior 2010 car accident was clinically irrelevant and causally unrelated to the neck injury Evans-Waiau suffered as a result of the collision. 4A.App.836-43, 5A.App.1001-04, 5A.App.1008-13, 5A.App.1132, 5A.App.1174-75, 5A.App.1249. The nature of Evans-Waiau's prior neck pain and limited treatment belies Tate's contention that Evans-Waiau deliberately tried to hide it from her treating

physicians. It was medically irrelevant, which was why her omission of prior minor neck pain had no effect on Dr. Rosler and Dr. Khavkin's medical causation opinions. 4A.App.867, 5A.App.1125, 5A.App.1237, 5A.App.1249.

3. Evans-Waiau's job history was a red herring

Prior to the subject collision, Evans-Waiau performed jobs in which she was required to lift boxes weighing anywhere from five to fifty pounds. 6A.App.1308-09. She did not suffer any workplace injuries and no evidence was presented to establish she suffered any injuries or ongoing care before the collision. 5A.App.1117, 5A.App. 1133-34.

B. Medical Liens are Irrelevant to Establish Lawyer-Driven or Medical Buildup Arguments

To pursue a line of cross-examination suggesting a witness is biased, a proper factual foundation must be established. *McCraney v United States*, 983 A.2d 1041, 1052 (D.C. Cir. 2009). This prevents "harassment of the witness, prejudice to the opposing party, [and] confusion of the issues . . . ." *Id.* This Court acknowledged medical liens are marginally relevant only to establish a treating physician's bias, not to support lawyer-driven or medical buildup arguments. *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 270 (2017).

Tate argues the trial court correctly admitted Appellants' treatment on medical liens to establish their respective treating physicians' bias without any factual justification. The premise of this argument is flawed because Tate's counsel did not reference medical liens to argue bias. Instead, he characterized medical liens as "litigation liens" to imply Appellants' medical treatment was driven by their attorney. 10A.App.2340-41, 10A.App.2344, 10A.App.2348, 10A.App.2357. Tate's counsel had no factual basis to even argue the relevance of liens for any purpose. Her retained medical expert, Dr. Schifini, expressed no issue regarding Evans-Waiau's treatment on a lien. 10A.App.2109-10. Her other retained medical expert, Dr. Wang, gave no testimony addressing liens. 6A.App.1422-7A.App.1568. Dr. Wang causally related some of Evans-Waiau's medical care, all of which was administered on a medical lien, to the collision. 7A.App.1531-33. Therefore, Dr. Wang had no issue with Evans-Waiau's treatment on a lien.

Dr. Wang and Dr. Schifini **never** questioned the reasonableness of Evans-Waiau's medical treatment simply because she treated on a lien. 7A.App.1559-60, 9A.App.2109-10. The largest medical expense incurred by Evans-Waiau, namely her cervical spine surgery, was not even

administered on a medical lien. 5A.App.1039, RplyApp.0024. Tate's counsel exceeded the bounds of arguing reasonable inferences, and injected his baseless opinion that Evans-Waiau's care was not trustworthy because she treated on "litigation liens." 10A.App.2340-41, 10A.App.2344, 10A.App.2348, 10A.App.2357. This argument was part of Tate's counsel's theme to improperly persuade jurors that Evans-Waiau's injury claim was fabricated by her lawyer.

C. Tate Provides No Evidence to Justify her Lawyer's Use of Lawyer Referrals and Future Cost Letters to make Lawyer-Driven, Medical Buildup Arguments

Attorney referrals to physicians are not always relevant to credibility and bias. *Stephens v. Castano-Castano*, 814 S.E.2d 434, 441 (Ga. Ct. App. 2018). Tate's argument centering on the relevance of attorney referrals is confounding. She refers to the liability of a defendant for further bodily harm caused by the medical negligence of the injured plaintiff's physicians. Appellants never claimed any of their treating physicians provided negligent medical treatment and that Tate was responsible for such negligent treatment. On the contrary, Evans-Waiau underwent a successful cervical fusion surgery that provided her with substantial pain relief. 6A.App.1359. Tate never presented

evidence even remotely suggesting Evans-Waiau did not select her medical doctors with reasonable care.

Tate inaccurately states Appellants' attorney selected their first medical provider. In actuality, Appellants' attorney provided a list of chiropractors and Evans-Waiau chose the chiropractor closest to her home. 6A.App.1333. Tate also argues about some sort of frequent referral relationship between Evans-Waiau's medical doctors, without citing to the record.

Evans-Waiau's attorney never requested she see Dr. Khavkin. Evans-Waiau was referred to Dr. Khavkin by Dr. Rosler. 4A.App.843, 5A.App.1175. Dr. Khavkin recommended Evans-Waiau undergo a cervical fusion surgery before he authored his future cost letter. R.App.124-126. This did not stop Tate's attorney from repetitively injecting his opinion that Evans-Waiau's lawyer referred her to Dr. Khavkin solely to secure a future cost letter. 10A.App.2348. This argument inaccurately portrayed a financial arrangement between Dr. Khavkin and Evans-Waiau's lawyer designed to influence and buildup Evans-Waiau's care. Tate's counsel magnified the prejudice by questioning Evans-Waiau's "motivations" based on the fallacy that she

lied about the effectiveness of her injections with Dr. Rosler. *Id.* The records proved they gave her only temporary relief. The jury should not have been allowed to consider such prejudicial argument, particularly without any supporting evidentiary basis.

Tate even suggested Dr. Garber's care was fraudulent because Evans-Waiau's lawyer allegedly referred her and requested a cost letter:

> I've had all these symptoms since October 30, 2015. . . . Why would she say that to [Dr. Garber]? So that he could write a letter saying she needed surgery and blame it on [Tate]. Blame it on [Tate]. **That's why Paul Powell made the referral.**
>
> . . .
>
> And she went to a series of other doctors including a surgeon **her lawyer made her go see** who told him chiropractic failed. **Give me a surgical cost letter**.

10A.App.2350, 10A.App.2352 (emphasis added).

Dr. Garber refuted Evans-Waiau was referred to him by her attorney. 5A.App.1094. More importantly, Dr. Garber had no financial stake in the outcome of the case because none of his treatment, including the spine surgery, was administered on a lien. 5A.App.1039. Any alleged lawyer referral to him was inconsequential. Yet, Tate's counsel misled

the jury to believe Dr. Garber conspired with Evans-Waiau's lawyer to build up her medical care, and the trial court allowed it.

Tate misrepresents the record regarding Evans-Waiau's treatment with Dr. Garber. Evans-Waiau did not treat with Dr. Garber solely to discuss her need for additional surgery after the initial fusion. Dr. Garber simply informed her she will likely require a second cervical fusion surgery due to adjacent segment breakdown. 6A.App.1351-52. Tate's retained spine surgeon, Dr. Wang, disagreed with this opinion. 6A.App.1498. Argument addressing the speculative nature of Evans-Waiau's future surgery should have been based on the medical evidence, not that Dr. Garber or Dr. Khavkin authored future cost letters to build up her care at the request of her lawyer.[9] These arguments exceeded all relevant and ethical boundaries.

Tate again overlooks her retained doctors never determined Evans-Waiau underwent unnecessary medical care to build up her case. 6A.App.1422-7A.App.1568, 8A.App.1902-9A.App.2143. Notably, Dr.

[9] Like expert reports, future cost letters are required to provide defendants a computation of future damages under NRCP 16.1.

Wang was not critical of Evans-Waiau's decision to undergo surgery, nor Dr. Garber's recommendation for it. 7A.App.1560.

Allowing baseless lawyer-driven and medical buildup arguments was prejudicial error that deprived Evans-Waiau of a fair trial. Tate's counsel incited anger with jurors by incessantly arguing Evans-Waiau underwent expensive treatment solely because her lawyer influenced her doctors to provide unnecessary care. This false narrative was presented to jurors to fall squarely within Tate's counsel's ill-conceived opinion that Evans-Waiau intended to falsify an injury claim from the beginning.

D. Tate Provides the Same Specious Arguments Regarding Evans-Waiau's Request for Police to Respond

"The purpose of an opening statement is to give the broad outlines of the case to enable the jury to comprehend it." *Bost v. United States*, 178 A.3d 1156, 1190 (D.C. Cir. 2018). "[A]n opening statement should not be argumentative, nor should it appeal to the passions and sympathies of the jury." *Id.* Similarly, "[i]t is beyond debate that counsel must restrict closing argument to the evidence and the **fair inferences** that might be drawn therefrom." *Commonwealth v. Arroyo*, 810 N.E.2d 1201, 1212 (Mass. 2004) (emphasis added). The appellate court relies on the trial court to "rein in improper closing argument, including argument

that is more speculative conjecture than reasonable inference." *Clayborne v. United States*, 751 A.2d 956, 970 (D.C. Cir. 2000).

Tate's counsel insisted numerous times in his opening statement that Evans-Waiau formed an intent to fabricate an injury claim because she wanted to wait for police to respond to the scene. 3A.App.716-19. Evans-Waiau was scared, had three kids in the back of her car, and believed waiting for police was the right thing to do. 6A.App.1326-27. This was mandated by law, irrespective of the Las Vegas Metropolitan Police Department's short-lived policy to not respond to all car accidents. Nev. Rev. Stat. 484E.030(2).

Yet, Tate's counsel implored the jury to believe Evans-Waiau demanded police respond to the scene so that she could obtain a report if she needed it later to pursue an injury claim. 10A.App2337. A police report was never even issued, which directly contradicted the argument Evans-Waiau wanted police to respond to help her later falsify a personal injury claim.

Tate's counsel simply voiced his own opinion regarding Evans-Waiau's supposed ulterior motive to wait for police to respond without a legitimate factual basis. Tate's counsel used this argument as further

support for his other arguments to portray Evans-Waiau's personal injury claim as fake and fraudulent from the moment the collision happened all the way through her care and treatment. By making this improper argument, Tate's counsel ensured jurors would view Evans-Waiau's injury claim with baseless skepticism and punish her. The collective adverse impact from these improper arguments warrants a new trial.

VII. TATE FAILS TO ACCEPT DR. SCHIFINI'S OPINIONS WERE UNRELIABLE

The trial court erroneously allowed Dr. Schifini to criticize Appellants' care and treatment without even offering an admissible opinion on injury causation. This decision further exacerbated the negative impact caused by Tate's counsel repetitively questioning the legitimacy of Appellants' respective injuries and their treatment.

The record establishes Dr. Schifini did not offer opinions regarding injury causation or the reasonableness of treatment received with any degree of certainty. 8A.App.1930, 8A.App.1960-61, 9A.App.2107. He merely assumed Appellants were injured and, conveniently, assumed they required limited medical treatment. *Id.* Dr. Schifini was unable to offer any reliable medical causation opinions despite his substantive

review of all the relevant documents related to Appellants' alleged injuries and treatment.[10] Dr. Schifini's medical causation opinions rendered no assistance to the jury under Nevada law because they were admittedly based on "assumption and conjecture." *Hallmark v. Eldridge*, 124 Nev. 492, 500-01 (2008). Instead, the opinions misled jurors about the sufficiency of the medical evidence related to the contested issue of medical causation.

Similarly, Dr. Schifini's supposed medical causation opinions were insufficient to contradict Appellants' respective causation theories provided by their doctors. *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 530 (2011). Dr. Schifini could not competently furnish alternative causes for the injuries Appellants suffered because he was unable to determine whether they were even injured in the first place. Contrary to Tate's assertion, Dr. Schifini never testified the data or information was insufficient to support an opinion that Appellants suffered injuries. 8A.App.1901-72, 9A.App.2068-9A.App.2143.

[10] Tate's other medical expert, Dr. Wang, relied on the same information and was able to render a medical causation opinion. 7A.App.1531.

Otherwise, he would have qualified his testimony addressing injury causation for this reason.

By "assuming" Appellants were injured, Dr. Schifini did not accept Appellants' medical causation theories as true. Dr. Schifini provided no analysis detailing why Appellants' claimed injuries were not as extensive as their doctors claimed, nor could he because he was unable to decipher whether they were, in fact, injured. Moreover, Dr. Schifini's acknowledgment he reviewed the reports from Appellants' treating physicians was not enough to prove he accepted their causation opinions as true. If this were true, Dr. Schifini would have been able to affirmatively state Appellants did not suffer injuries from the collision by directly contradicting the medical causation opinions from their treating physicians. He never offered that testimony at trial.

A plaintiff's burden of proof to show medical care was reasonably necessary certainly encompasses the burden to show the liability event caused the injury. *Wood v. Elzoheary*, 462 N.E.2d 1243, 1245 (Ohio Ct. App. 1983). It is inconceivable Dr. Schifini was unable to reliably determine whether Appellants suffered any injury as a result of the collision, but was able to somehow identify what treatment was

reasonable. Allowing a medical expert to opine on the medical necessity of care when he cannot conclude whether the plaintiff even sustained an injury subverts the standard for defense expert testimony regarding medical causation outlined in *Williams*, 127 Nev. at 530-31.

Dr. Schifini was unable to offer medical causation opinions within the degree of specificity required under *Williams*. It follows that his opinions did not assist the jury in accordance with *Hallmark*. Tate's generic arguments to the contrary do not excuse the trial court's error allowing jurors to rely upon Dr. Schifini's speculative medical causation opinions.

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VIII. CONCLUSION

Appellants respectfully request this court to reverse the district court's judgment and remand this matter for a new trial.

DATED this 5th day of February, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 Business, in 14-point, double-spaced Century Schoolbook font.

2. I further certify that this brief exceeds the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,966 words.

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

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

DATED this 5th day of February, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Supreme Court of Nevada on the 5th day of February, 2021. Electronic service of the foregoing document entitled **APPELLANTS' REPLY BRIEF** shall be made in accordance with the Master Service List as follows:

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