IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants/Cross-Respondents, vs. TITINA FARRIS and PATRICK FARRIS, Respondents/Cross-Appellants.	No.: 80271 Appeal from the Eighth Judicial District Court, the Honorable Joanna S. Kishner Presiding
BARRY JAMES RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants, vs. TITINA FARRIS and PATRICK FARRIS, Respondents.	No.: 81052 Appeal from the Eighth Judicial District Court, the Honorable Joanna S. Kishner Presiding

RESPONDENTS/CROSS-APPELLANTS' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NRAP 26.1 DISCLOSURE

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

1. Titina Farris and Patrick Farris are individuals.

2. Titina Farris and Patrick Farris are or have been represented in the District Court and this Court by Bighorn Law; Hand & Sullivan, LLC; and Claggett & Sykes Law Firm.

Dated this 3rd day of March 2021.

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I. JURISDICTIONAL STATEMENT

Appellants/Cross-Respondents, Barry James Rives, M.D. ("Dr. Rives") and Laparoscopic Surgery of Nevada, LLC ("Laparoscopic Surgery") (collectively "Defendants") appealed from the judgment on the jury verdict. 30 Appellants/Cross-Respondents' Appendix ("AA") 6665–6666. Defendants' appeal from the final judgment is authorized by NRAP 3A(b)(1). *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

Defendants also filed a notice of appeal from the order granting attorney fees and costs to Respondents/Cross-Appellants, Titina Farris ("Titina") and Patrick Farris ("Patrick") (collectively "Plaintiffs"). 31 AA 6835–6836. Defendants' appeal from the award of attorney fees and costs is authorized by NRAP 3A(b)(8) as a special order. *See Lee*, 116 Nev. at 426, 996 P.2d at 417.

Finally, Plaintiffs filed a cross-appeal from the judgment on jury verdict. 30 AA 6673–6675. Plaintiffs' cross-appeal is authorized by NRAP 3A(b)(1) and NRAP 4(a)(2). Thus, the Court has appellate jurisdiction over Defendants' appeals from the judgment on the jury verdict and the award of attorney fees and costs, as well as Plaintiffs' cross-appeal from the judgment on the jury verdict. However, Defendants raise a variety of issues that are not embodied in any written order. As a matter of Nevada law, this Court lacks jurisdiction over such arguments. *See Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) ("An

oral pronouncement of judgment is not valid for any purpose, NRCP 58(c); therefore, only a written judgment has any effect, and only a written judgment may be appealed. The district court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose and cannot be appealed.") (citations omitted).

II. ROUTING STATEMENT

Plaintiffs concur with Defendants' assessment that this appeal should be retained by the Supreme Court according to NRAP 17(b)(5), given that the judgment on the jury verdict, sounding in tort, amounts to $6,076,479.94, without including attorney fees, costs, and interest. 12 AA 2479–2482. Additionally, the District Court also reduced Plaintiffs' non-economic damages to $350,000 according to NRS 41A.035, which Plaintiffs challenge in their cross-appeal. Distinct from the constitutional challenges to NRS 41A.035 decided by this Court in *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 358 P.3d 234 (2015), Plaintiffs ask this Court to determine that NRS 41A.035 is preempted by the ERISA plan in this case. 5 AA 1005–1046.

This preemption argument is similar to the Court's preemption of NRS 42.021 in *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 937, 408 P.3d 149, 155 (2017), where a Medicaid program with both federal and state funding was involved. Essentially, the Court ruled that NRS 42.021 was not intended to operate

as a "*double* reduction" of a plaintiff's recovery. *Id.* (emphasis in original). The same is also true of NRS 41A.035, which cannot be interpreted to operate as a double reduction of Plaintiffs' non-economic damages. Therefore, the Supreme Court should retain this appeal due to the issues of first impression that are also of statewide importance. *See* NRAP 17(a)(11) & (12).

III. ISSUES ON APPEAL/CROSS-APPEAL

A. WHETHER DEFENDANTS HAVE FORFEITED THE RIGHT TO ASK FOR A NEW TRIAL SINCE THEIR REQUESTED RELIEF IS RAISED FOR THE FIRST TIME ON APPEAL.

B. WHETHER DEFENDANTS' EVIDENTIARY CHALLENGES ARE COMPLETELY WITHOUT MERIT, OR ALTERNATIVELY, AMOUNT TO NOTHING MORE THAN HARMLESS ERROR.

C. WHETHER THE DISTRICT COURT PROPERLY AWARDED PLAINTIFFS THEIR REQUESTED ATTORNEY FEES BASED UPON THE REJECTED OFFER OF JUDGMENT, OR ALTERNATIVELY, NRS 18.020(2)(b).

D. WHETHER THE DISTRICT COURT ERRED BY REDUCING PLAINTIFFS' NON-ECONOMIC DAMAGES ACCORDING TO NRS 41A.035, DESPITE THE STATUTE BEING PREEMPTED BY THE ERISA PLAN IN THIS CASE.

IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This is a medical malpractice case in which Titina Farris suffered life-altering injuries as Defendants' patient. While performing surgery on Titina, Dr. Rives negligently cut, burned, or tore her colon. 30 AA 6531–6532. Thereafter, Dr. Rives then failed to adequately repair the colon or sanitize the abdominal cavity. *Id.* Unfortunately, Dr. Rives then failed to recommend any surgery to repair the punctured colon or contaminated abdomen for twelve days, during which time Titina was on the verge of death due to the predictable sepsis that ensued as a result of Dr. Rives' initial negligence. *Id.* As a further result of Dr. Rives' negligence, Titina developed permanent bilateral "dropped feet" and now cannot walk without assistance. 30 AA 6539–6540. Titina's husband Patrick testified that her life has been turned upside down, due to Dr. Rives' medical negligence. 26 AA 5545.

After a 14-day trial, the jury awarded Plaintiffs (1) past medical expenses as $1,063,006.94; (2) present value of value of life care plan as $4,663,473; (3) Titina's past non-economic damages as $1,571,000; (4) Titina's future non-economic damages as $4,786,000; (5) Patrick's past non-economic damages as $821,000; and (6) Patrick's future non-economic damages as $736,000. 12 AA 2475–2476. Instead of entering judgment on the jury's verdict, the District Court held a hearing in which it orally entertained the submitted competing judgments. 15 AA 3302–3363. In the hearing, the District Court reduced the non-economic damages amounts

to $350,000, while rejecting Plaintiffs' preemption argument. 15 AA 3313–3351. This reduction is reflected in the judgment on verdict. 12 AA 2479–2482. In post-trial proceedings, the District Court awarded Plaintiffs the sum of $821,468.66 in attorney fees, as well as $113,186.24 in costs. 31 AA 6802–6815.

Defendants appeal the judgment on the jury's verdict and the award of fees and costs, and Plaintiffs cross-appeal the District Court's reduction of the non-economic damages. Plaintiffs urge this Court to affirm the judgment on jury verdict, as well as the award of fees and costs, and reinstate the full amount of the jury's verdict based upon the following arguments:

Defendants have forfeited the right to ask for a new trial since their requested relief is raised for the first time on appeal. It is well established that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Defendants' evidentiary challenges are completely without merit, or alternatively, amount to nothing more than harmless error. Since Plaintiffs prevailed at trial, they are entitled to all favorable inferences in the record. *See Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (noting that appellate courts are "not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party"). The

proper focus in this appeal is to salvage the jury's verdict. *See Wyeth v. Rowatt*, 126 Nev. 446, 476, 244 P.3d 765, 785–786 (2010) ("A jury's verdict should be salvaged, when possible, to avoid a new trial.") (citation omitted). Consistent with NRCP 61, all of Defendants' presumed errors are harmless.

The District Court properly awarded Plaintiffs their requested attorney fees based upon the rejected offer of judgment, or alternatively, NRS 18.020(2)(b). The District Court properly weighed the factors in *Beattie v. Thomas*, 99 Nev. 579, 588–589, 668 P.2d 268, 274 (1983), and *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349–350, 455 P.2d 31, 33 (1969) to reach a detailed order granting attorney fees to Plaintiffs. 31 AA 6802–6815. Although the Court does not need to reach the alternative basis for awarding attorney fees to Plaintiffs under NRS 18.010(2)(b), both the order and record are sufficient to support the fees award. *See, e.g., Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001).

The District Court erred by reducing Plaintiffs' non-economic damages according to NRS 41A.035, despite the statute being preempted by the ERISA plan in this case. Distinct from the constitutional challenges to NRS 41A.035 decided by this Court in *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 358 P.3d 234 (2015), Plaintiffs ask this Court to determine that NRS 41A.035 is preempted by the ERISA plan in this case. 5 AA 1005–1046. This preemption argument is similar to the Court's preemption of NRS 42.021 in *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*,

133 Nev. 930, 937, 408 P.3d 149, 155 (2017), where a Medicaid program with both federal and state funding was involved. Essentially, the Court ruled that NRS 42.021 was not intended to operate as a "*double* reduction" of a plaintiff's recovery. *Id.* (emphasis in original). The same is also true of NRS 41A.035, which cannot be interpreted to operate as a double reduction of Plaintiffs' non-economic damages.

In summary, Plaintiffs urge this Court to affirm the judgment on jury verdict, as well as the award of fees and costs, and reinstate the full amount of the jury's verdict.

V. STANDARDS OF REVIEW

A. STANDARDS FOR REVIEWING JURY VERDICTS.

It is a basic principle of appellate review that when substantial evidence supports a jury's verdict, this Court will not disturb the result "despite suspicions and doubts based upon conflicting evidence." *Allen v. Webb*, 87 Nev. 261, 266, 485 P.2d 677, 679 (1971). The role of determining witness credibility belongs to the fact finder, and this Court will not direct that certain witnesses should or should not be believed. *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 487, 117 P.3d 219, 223 (2005); *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004).

B. STANDARDS FOR REVIEWING FACTUAL ISSUES.

This Court will not disturb a district court's findings of fact unless they are clearly erroneous and not supported by substantial evidence. *See Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005). Waiver is generally a question of fact. *See Merrill v. DeMott*, 113 Nev. 1390, 1399, 951 P.2d 1040, 1045 (1997).

C. STANDARDS FOR REVIEWING QUESTIONS OF LAW.

This Court reviews questions of law de novo. *See Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002). Statutory interpretation is a question of law that this Court reviews de novo. *Id.*

D. STANDARDS FOR REVIEWING JURY INSTRUCTIONS.

A district court has broad discretion to settle jury instructions. *See Skender v. Brunsonbuilt Constr. and Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006). Accordingly, this Court will review a district court's decision to give a particular instruction for an abuse of discretion or judicial error. *Id.* Nevertheless, a litigant is entitled to have the jury instructed on all theories of its case which are supported by the evidence. *See Beattie v. Thomas*, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983).

E. STANDARDS FOR REVIEWING ALLEGATIONS OF ATTORNEY MISCONDUCT.

Whether an attorney's comments are misconduct is a question of law, which this Court reviews de novo. *See Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). But, this Court will give deference to the district court's factual findings and application of the standards to the facts. *Id.* In order to facilitate this Court's review of district court orders resolving motions for new trial with attorney misconduct issues, "the district court must make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards described above to the facts of the cases before it." *Id.*, 124 Nev. at 19–20, 174 P.3d at 982.

F. STANDARDS FOR REVIEWING THE ADMISSION OR REFUSAL TO ADMIT EVIDENCE AT TRIAL.

This Court reviews a district court's decision to allow testimony for an abuse of discretion. *See Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). This Court also reviews a district court's decision to exclude or allow evidence for an abuse of discretion. *See M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008).

G. STANDARDS FOR REVIEWING CONSTITUTIONAL ISSUES, INCLUDING FEDERAL PREEMPTION.

This Court reviews constitutional issues de novo. *See Jackson v. State*, 128 Nev. 598, 602, 291 P.3d 1274, 1277 (2012); *Callie v. Bowling*, 123 Nev. 181, 183,

160 P.3d 878, 879 (2007) (reviewing constitutional challenges de novo, including a violation of due process rights challenge). An error is of constitutional dimension if it impairs a party's constitutional rights. *See Dickson v. State*, 108 Nev. 1, 3, 822 P.2d 1122, 1123 (1992). Issues of whether a federal statute preempts state law are questions of law subject to de novo review. *See Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007).

H. STANDARDS FOR REVIEWING AN AWARD OF ATTORNEY FEES.

This Court reviews decisions awarding or denying attorney fees with an abuse of discretion standard. *See Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000).

VI. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. PLAINTIFFS' COMPLAINT AND THE UNDERLYING MEDICAL MALPRACTICE.

Plaintiffs filed their complaint against Defendants in 2016. 1 AA 1–8. Titina alleged medical malpractice for the first cause of action. 1 AA 3–6. On July 3, 2015, Dr. Rives of Laparoscopic Surgery performed a laparoscopic reduction and repair of an incarcerated incisional hernia on Titina at St. Rose Dominican Hospital-San Martin Campus. 1 AA 4. Post-operatively, Titina became septic as a result of a perforated colon. *Id.* Dr. Vincent E. Pesiri, M.D. ("Dr. Pesiri"), whose affidavit

supported the complaint, opined that Dr. Rives deviated from the accepted standard of care in his treatment of Titina. 1 AA 4, 10–12.

After the July 3, 2015 surgery, Titina was noted to have an extremely high white blood cell count. 1 AA 5. Titina was transferred to the ICU on July 4, 2015. *Id.* She continued to deteriorate. *Id.* She was noted to have respiratory failure, atrial fibrillation, fever, leukocytosis, and ileus. *Id.* There was evidence of sepsis. *Id.* Dr. Rives did not determine the cause of the infection post-operatively, and Titina did not improve. *Id.* Titina was placed on a ventilator and received a tracheostomy. *Id.*

Dr. Pesiri opined that Dr. Rives fell beneath the accepted standard of care as follows: (a) Intraoperative technique; (b) Failure to adequately repair bowel perforations at the time of July 3, 2015 surgery; and (c) Poor post-operative management of perforated bowel and resultant sepsis. 1 AA 5. These failures caused Titina to have bilateral foot drop, as well as a colostomy. *Id.*

For the second cause of action, Titina alleged corporate negligence and vicarious liability. 1 AA 6–7. For their third cause of action, Plaintiffs alleged loss

of consortium.[1] In their answer, Defendants generally denied the allegations. 1 AA 18–25.

B. PLAINTIFFS' DISCOVERY AND SANCTIONS FILINGS.

1. Defendants' Intentional Concealment of Dr. Rives' History of Negligence and Litigation, Including the *Center* Case.

Plaintiffs filed their motion for sanctions pursuant to NRCP 37 against Defendants for intentional concealment of Dr. Rives' history of negligence and litigation. 1 AA 87–187. The point of the motion was to draw the Court's attention to Defendants' concealment of a prior litigation case in Clark County (*Vickie Center v. Rives*, A-16-731390) with very similar medical malpractice by Dr. Rives. *Id.* Ultimately, Plaintiffs requested NRCP 37(c) sanctions in the form of striking Defendants' answer, or alternatively, a finding of liability against Defendants. 1 AA 98–101. In their motion, Plaintiffs also requested the ability to assert punitive damages against Defendants. 1 AA 102–103.

Defendants' opposition claimed that their failure to disclose the *Center* case was "inadvertent." 2 AA 358–380, 381–429. In essence, Defendants asserted that because the omission was not intentional, there could be no NRCP 37 sanctions. *Id.*

[1] Since Patrick's claims sound in loss of consortium, they are derivative of Titina's claims. *See, e.g., Gunlock v. New Frontier Hotel*, 78 Nev. 182, 185 n.1, 370 P.2d 682, 684 n.1 (1962).

In order to determine whether the concealment was intentional, the District Court set an evidentiary hearing and required Dr. Rives to personally appear. 2 AA 434. The District Court's later comment was that the defense's concealment was "willful." 19 AA 4229–4230.

2. Plaintiffs' Motion to Strike Defendants' Rebuttal Witnesses Sarah Larsen, R.N., Bruce Adornato, M.D. and Scott Kush, M.D., and to Limit the Testimony of Lance Stone, D.O. and Kim Erlich, M.D. for Giving Improper "Rebuttal Opinions."

In this motion, Plaintiffs argued that several defense experts had given rebuttal opinions that were actually opinions of an initial expert. 1 AA 199–2 AA 346. As outlined in Plaintiffs' motion, Sarah Larsen, R.N., Bruce Adornato, M.D., and Scott Kush, M.D. did not actually attempt to rebut a report from Plaintiffs' initial experts. 1 AA 204–205. So, Plaintiffs asked that these three defense experts be stricken. Plaintiffs also requested that defense experts Lance Stone, D.O. ("Dr. Stone")[2] and Kim Erlich, M.D. have their opinions limited to topics that do not involve standard of care and causation, which should have been in initial reports. 1 AA 217–218.

[2] It is noteworthy that Dr. Stone never made a proper expert disclosure under NRCP 16.1(a)(2)(B)(v) because he did not disclose his list of prior testimony. Defendants acknowledge this in their opening brief, given that Dr. Stone was an expert in the *Center* case. AOB 44 n.10.

The District Court vacated the hearing on this motion to strike, which was later addressed in an evidentiary hearing. 2 AA 347. The District Court's written order allowed the defense experts to testify on a limited basis. 7 AA 1410–1412.

3. Plaintiffs' Motion to Strike Defendants' Fourth and Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents.

Discovery in this matter closed on July 24, 2019, yet Defendants disclosed 18 new witnesses on September 12, 2019, which was approximately 45 days after the close of discovery. 2 AA 450, 456–470; 3 AA 471–495. On this basis, Plaintiffs moved the District Court to strike these untimely-disclosed witnesses. 2 AA 446–455.

Near the same time that Plaintiffs moved the District Court to exclude Defendants' 18 new witnesses, Defendants presented a motion to extend discovery to be heard on shortened time. 3 AA 553–601. However, the District Court properly refused to sign Defendants' request for shortened time and issued an order. 3 AA 549–552. The District Court's order recited, "The Court cannot sign its name to the Order Shortening Time due to its per se noncompliance with the rules including that the declaration(s) include purported 'facts/statements' that are contrary to the record at Court hearing(s)." 3 AA 550 (footnote omitted). The District Court further cautioned defense counsel of other previous rule violations and set a hearing to discuss potential sanctions against counsel. *Id.*

After the District Court's order was entered, Defendants later filed an opposition, arguing that the admittedly untimely disclosure of 18 new witnesses after the close of discovery was substantially justified or harmless. 3 AA 595–599. Plaintiffs filed a reply. 4 AA 759–766.

On the outstanding discovery issues, the District Court held an evidentiary hearing and entertained the argument of counsel. 7 Respondents/Cross-Appellants' Appendix ("RA") 991–992. The District Court first struck the supplemental filings filed by Defendants, without leave. 7 RA 991; 14 AA 3043–3124. The District Court also heard testimony from Dr. Rives on his intention regarding the non-disclosure of the *Center* case. *Id.* The District Court chose not to strike Defendants' answer or allow punitive damages to be added to the lawsuit. *Id.*; 14 AA 3117–3124. On the remaining issues, the Court took them under advisement. *Id.*

The District Court held a subsequent hearing and heard additional argument of counsel. 15 AA 3163–3301. Ultimately, the District Court granted Plaintiffs' motion to strike these 18 new witnesses disclosed by the defense after the discovery cutoff. 15 AA 3199–3201.

On the issue of Dr. Rives' concealment of the *Center* case, the District Court allowed Plaintiffs to prepare a jury instruction on this issue. 15 AA 3223–3224. Ultimately, the District Court imposed the sanction of attorney fees but reserved an amount of fees for a later filing. 15 AA 3231–3232.

4. Plaintiffs' Renewed Motion to Strike Defendants' Answer for Rule 37 Violations.

During trial, Plaintiffs' counsel questioned Dr. Rives while he was on the stand. Dr. Rives testified that he was not completely aware that his interrogatories had been verified and signed under the penalty of perjury, thus giving rise to Plaintiffs' renewed motion to strike. 4 AA 892–5 AA 994. In fact, Dr. Rives confirmed in trial that he had not told the truth in answering interrogatories. 4 AA 898–900. He suggested that he had used an assistant who answered the interrogatories for him. *Id.* Based upon Defendants' prior discovery abuses, and the egregiousness of this admission, Plaintiffs asked the District Court to strike Defendants' answer.

Defendants opposed Plaintiffs' renewed motion to strike. 5 AA 1081–6 AA 1337. They argued in their opposition that Dr. Rives' assistant, Amy Hanegan ("Hanegan"), did not prepare his testimony. 5 AA 1083. Defendants further argued that Dr. Rives did not actually perjure himself. 5 AA 1084–1085. Plaintiffs replied. 7 AA 1338–1409.

Since the case was in the midst of a jury trial, the District Court ordered a hearing, which was held after the jury's verdict. 16 AA 3364–3432. The District Court heard the argument of counsel over the course of two days and eventually wanted to review additional case law before determining the sanction to be imposed

upon Defendants. 16 AA 3433–3569; 17 AA 3570–3660. Yet, since the jury had already rendered its verdict, the striking of Defendants' answer would have been meaningless. 12 AA 2475–2476.

C. THE JURY TRIAL.

The jury trial took place over the course of 14 days. 7 RA 993–999; 8 RA 1099–1102, 1104–1105; 9 RA 1159–1168.

1. Jury Selection, Further Discussion of the *Center* Case, and Opening Statements.

The first two days of trial were dedicated to selecting the jury. 17 AA 3661–3819; 18 AA 3820–4068. Jury selection continued into the third day of the jury trial. 19 AA 4071–4208. Before opening statements, the District Court discussed extensively how much Plaintiffs' counsel could reference Defendants' prior discovery abuses, and specifically the *Center* case. 19 AA 4209–4247. For the remainder of the third day of trial, the jury heard opening statements from both Plaintiffs (19 AA 4247–4265) and Defendants. 19 AA 4265–4281.

2. Aaron Willer, M.D.'s Testimony.

For the fourth day of trial, the jury heard testimony from Justin Aaron Willer, M.D. ("Dr. Willer"), which was previously transcribed and made a part of the record. 20 AA 4298; 30 AA 6514–6618. Dr. Willer testified that Titina developed bilateral foot drop, on both the right and left feet, which was caused by the sepsis which she

experienced from the incident in this case. 30 AA 6531–6532. Dr. Willer also dispelled the opinions of Dr. Chaney, who incorrectly opined that Titina's foot drop was a pre-existing neuropathy condition related to diabetes. 30 AA 6531–6533. Notably, Dr. Chaney never did any neurological testing before reaching his erroneous conclusion. 30 AA 6534. Dr. Willer also explained that Titina's foot drop is permanent. 30 AA 6539–6540.

3. Dr. Rives' Testimony.

Still on the fourth day of trial, Dr. Rives testified in Plaintiffs' case in chief. 20 AA 4298–4527. Although Dr. Rives was uncooperative for most of his testimony, he agreed that when performing a surgery, use of a wrong tool or device can put the patient in unnecessary danger. 20 AA 4305. For example, Dr. Rives explained that he preferred not to use the harmonic scalpel because it can actually "poke into the small bowel" or "it could burn the bowel." 20 AA 4306–4307. Dr. Rives also agreed that it was important to limit the time that a patient is septic because a patient could die or suffer permanent injury. 20 AA 4308. In this testimony, Dr. Rives also agreed that it was Titina's expectation that she would have surgery and go home either the same day or the next day, but unexpectedly ended up staying in the hospital for a long time. 20 AA 4311. Dr. Rives further agreed that the "transverse colon was perforated" during his surgery on Titina. 20 AA 4312.

He also acknowledged that Titina did not have trouble walking prior to the surgery when he had seen her for office visits in the prior years. 20 AA 4312–4313.

Dr. Rives continued his testimony on the fifth day of trial. 20 AA 4377. He agreed with counsel that providing false information is a serious crime. 20 AA 4380. Dr. Rives reviewed his answers to interrogatories and confirmed that he signed the answers under the penalty of perjury. 20 AA 4385–4386.

On the sixth day of trial, Dr. Rives once again testified to the jury. 21 AA 4631. Dr. Rives agreed at trial that his deposition testimony was not true when he previously testified in his deposition that he had not used the harmonic scalpel in five to seven years. 21 AA 4635. In fact, Dr. Rives had used the harmonic scalpel in the *Center* case. 21 AA 4636. Dr. Rives also explained that Vickie Center had also received sepsis post-operatively, and required bilateral amputations. 21 AA 4647.

4. <u>Dr. Michael Hurwitz's Testimony.</u>

Dr. Michael Hurwitz ("Dr. Hurwitz") testified on the fifth day of trial. 20 AA 4438. Dr. Hurwitz is familiar with the standard of care and recognizing and treating infections, including sepsis. 20 AA 4441. Dr. Hurwitz testified that Dr. Rives fell below the standard of care in using a thermal energy source to take the colon off of the mesh because there is such a high risk of injury. 20 AA 4450. He also explained that sepsis is a rare event in similar types of surgeries. 20 AA 4488.

5. Alex Barchuk, M.D.'s Testimony.

On the sixth day of trial, the jury heard from Alex Barchuk, M.D. ("Dr. Barchuk"). 21 AA 4545. Dr. Barchuk specializes in physical medicine and rehabilitation. *Id.* He is also a certified life care planner. 21 AA 4547. Dr. Barchuk has prepared over a thousand life care plans in his career. 21 AA 4549. Dr. Barchuk explained that prior to the incident, Titina was able to groom herself and take care of herself. 21 AA 4551–4552. But, after the incident, she now requires assistance to do ordinary things like putting on her socks and shoes. *Id.* Dr. Barchuk performed both a physical examination, as well as a functional examination of Titina. 21 AA 4554–4555. Titina lost sensation and function due to severe nerve damage. 21 AA 4556. Titina now requires a walker or a cane. 21 AA 4567. Dr. Barchuk also confirmed that none of the categories of Titina's life care plan include any of her pre-existing medical conditions. 21 AA 4612.

6. Michael Mavromatis' Testimony.

On the seventh day of trial, Michael Mavromatis ("Mavromatis") testified. 22 AA 4785. Mavromatis is the administrator of CareMeridian, which is a nursing home facility. 22 AA 4786. During his testimony, the District Court admitted the CareMeridian medical records and billing into evidence. 22 AA 4792; 7 RA 819–845.

7. Titina's Testimony.

Still on the seventh day of trial, Titina testified. 22 AA 4794. She has three kids and two grandkids. 22 AA 4797. Titina explained that a couple of weeks after leaving the hospital, she was at CareMeridian for several weeks. 22 AA 4801. She had to learn how to use a walker. 22 AA 4802–4803. She now has to use a catheter. 22 AA 4803. She can no longer walk her dogs. 22 AA 4805. And, she discovered, after waking up at CareMeridian, that she had a colostomy bag. *Id.* Even today, her husband, Patrick, has to pick her up when going places. 22 AA 4806.

8. Dawn Cook's Testimony.

On the seventh day of the jury trial, Dawn Cook ("Cook") testified to the jury. 22 AA 4848. Cook is both a registered nurse and a life care planner. 22 AA 4849. In the last seven years, Cook has done about 400 reports in life care planning and 200 in past medical bill reviews. 22 AA 4851. Her role was to research all the costs of the future medical care for Titina that had been recommended by Dr. Barchuk. 22 AA 4854. Cook testified that Titina had 29 years left in her life based upon the government life expectancy tables. 22 AA 4857. Cook testified that the total value of Titina's future medical care is $4,211,816.63. 22 AA 4891.

9. Terence Clauretie, Ph.D.'s Testimony.

On the eighth day of the jury trial, Terence Clauretie, Ph.D. ("Dr. Clauretie"), an economist, testified at trial. 23 AA 4944. Dr. Clauretie's role as an economist

was to provide an economic analysis of the life care plan. 23 AA 4946. Dr. Clauretie testified that the present value of Titina's future life care plan is $4,663,473. 23 AA 4954.

10. Amy Nelson's Testimony.

On the ninth day of the jury trial, Amy Nelson ("Nelson") testified to the jury. 24 AA 5131. Nelson was a personal friend to Titina since 1998. 24 AA 5132. Nelson explained that Titina was perfectly mobile. 24 AA 5133–5134. Nelson explained that they danced all night at Titina's wedding in 2007. 24 AA 5134.

11. Christine Garcia's Testimony.

Still on the ninth day of trial, Christine Garcia ("Garcia") testified. 24 AA 5143. At the time of trial, Garcia had been friends with Titina for 17 years. 24 AA 5144. Garcia visited Titina while she was still in the hospital. 24 AA 5146–5147. Garcia explained that after the incident, Titina has been restricted in what she can do, which has caused her to be depressed. 24 AA 5151–5153.

12. Sky Prince's Testimony.

During the tenth day of trial, Sky Prince ("Prince") testified to the jury. 25 AA 5504. Titina is Prince's mother. 25 AA 5505. Prince testified that Titina was playful and used to dance prior to the incident. 25 AA 5507. After the incident Titina was bound by either a wheelchair or a walker. 25 AA 5508. Prince now helps Titina with hair or makeup, as well as getting in and out of the shower. 25 AA 5509.

13. Lowell Pender's Testimony.

Lowell Pender ("Pender") also testified at the jury trial. 25 AA 5517. Titina is also Pender's mother. 25 AA 5518. Prior to July 2015, Pender explained that Titina had no issues with walking or balance. 25 AA 5519. Pender also saw Titina in the hospital and observed her condition. 25 AA 5521. Pender took a video of Titina on April 13, 2015, which was just prior to the surgery and the incident. 25 AA 5524. This video was played to the jury and admitted as evidence. 25 AA 5531–5532; Supreme Court Order dated 11/10/2020 allowing Trial Exhibit 10 to be transmitted to this Court.

14. Patrick's Testimony.

Patrick testified to the jury on the tenth day of trial. 25 AA 5533. He met Titina in 2004. 25 AA 5534. They had enjoyed walking their dogs and going on vacations prior to the surgery. *Id.* Patrick understood that Titina's surgery would keep her in the hospital for no more than two days. 25 AA 5535. He was with Titina throughout her hospital stay and described the events from his perspective, including conversations with Dr. Rives about what was taking so long. 25 AA 5537. Patrick wanted Dr. Rives removed as his wife's doctor because he was not doing anything to help her situation. 25 AA 5542. Dr. Hamilton was eventually assigned to Titina. *Id.* Patrick explained to the jury that Titina's life has turned upside down. 26 AA 5545.

15. Addison Durham's Testimony.

Addison Durham ("Durham") is Titina's younger brother. 26 AA 5655. Durham recalls going on family vacations together. 26 AA 5656. Some of the events he recalled were Halloween parties, including a live DJ. 26 AA 5657. When Durham saw his sister in the hospital, he recalls that she was unconscious, swollen, and had a tube in her mouth. 26 AA 5658. After the surgery, Durham observed that Patrick now has to do everything for Titina, including getting everything she needs. 26 AA 5663.

16. The Jury's Verdict.

Following the parties' closing arguments, the jury deliberated and rendered its verdict. 12 AA 2475–2476; 29 AA 6483–6484. After the District Court polled the jury, one out of the eight jurors did not agree with the verdict. 29 AA 6485. The amounts in the jury's verdict include: (1) past medical expenses as $1,063,006.94; (2) present value of value of life care plan as $4,663,473; (3) Titina's past non-economic damages as $1,571,000; (4) Titina's future non-economic damages as $4,786,000; (5) Patrick's past non-economic damages as $821,000; and (6) Patrick's future non-economic damages as $736,000. 12 AA 2475–2476.

D. THE ENTRY OF JUDGMENT AND THE DISTRICT COURT'S ORDER TO SHOW CAUSE TO DEFENSE COUNSEL.

Instead of entering judgment on the jury's verdict, the District Court held a hearing in which it orally entertained the submitted competing judgments. 15 AA 3302–3363. The District Court had also issued an order to show cause to defense counsel Thomas J. Doyle, Esq. 12 AA 2477–2478. The purpose of the order to show cause was to determine why Defendants filed a series of seven documents during closing argument, after the parties had rested and confirmed with the Court that no further issues were outstanding. 12 AA 2477–2478.

In the hearing, the District Court reduced the non-economic damages amounts to $350,000, while rejecting Plaintiffs' preemption argument. 15 AA 3313–3351. This reduction is reflected in the judgment on verdict. 12 AA 2479–2482.

On the sanctions issues, the District Court continued those to a later hearing. 15 AA 3358–3359. Defendants appealed from the judgment, and Plaintiffs also filed a cross-appeal to challenge the reduction of their non-economic damages. 30 AA 6665–6672, 6673–6682.

E. PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS.

Following the entry of the judgment, Plaintiffs filed a motion for attorney fees and costs. 12 AA 2489–2550. In this motion, Plaintiffs asked for attorney fees of $2,547,122.21. 12 AA 2501. The basis for the motion was the rejected offer of

judgment for $1,000,000, as well as NRS 18.010(2)(b). 12 AA 2498–2505. Plaintiffs also requested costs in the amount of $153,118.26. Defendants opposed Plaintiffs' motion. 12 AA 2551–13 AA 2877. And, Plaintiffs filed a reply. 13 AA 2878–2907.

Following a hearing on Plaintiffs' motion, the District Court awarded Plaintiffs the sum of $821,468.66 in attorney fees, as well as $113,186.24 in costs. 31 AA 6802–6815. Defendants also appealed this order. 31 AA 6835–6857.

VII. LEGAL ARGUMENT

A. DEFENDANTS HAVE FORFEITED THE RIGHT TO ASK FOR A NEW TRIAL SINCE THEIR REQUESTED RELIEF IS RAISED FOR THE FIRST TIME ON APPEAL.

1. The Prohibition Against Raising Issues for the First Time on Appeal Extends to the Types of Relief Requested.

It is well established that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). In *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437–438, 245 P.3d 542, 545 (2010), this Court reaffirmed *Old Aztec* and concluded, "We decline to reverse summary judgment to allow Schuck to reinvent his case on new grounds." In reaching this conclusion, the Court explained, "This rule is not meant to be harsh, overly formalistic, or to punish careless litigators.

Rather, the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties." *Id.*, 126 Nev. at 437, 245 P.3d at 544.

The prohibition against raising new issues on appeal has been stated by this Court repeatedly both before and after *Old Aztec*. For example, in 1925, this Court held that the "statute of frauds cannot be raised for the first time on appeal. The objection must first be taken in some appropriate way in the court below; otherwise it will be deemed to have been waived." *Cornell v. Gobin*, 49 Nev. 101, 105, 238 P. 344, 345 (1925). As early as 1937, this Court held that the "point of excessive damages cannot be raised for the first time on appeal, no motion for a new trial being made in the trial court on that ground." *Hilton v. Hymers*, 57 Nev. 391, 394, 65 P.2d 679, 680 (1937). The Court's citations to *Old Aztec* since 1981 are legion. *See, e.g., In re Estate of Scheide*, 478 P.3d 851 n.5 (Nev. 2020) ("We need not address the effect of NRS 136.240(5), which the parties did not raise below and the district court did not address.") (citing *Old Aztec*).

Other courts looking at this precise issue have concluded that the failure to file a motion for new trial, in addition to preserving objections at trial, waives the issue for appellate review. *See, e.g., Spotts v. Spotts*, 55 S.W.2d 977, 980 (Mo. 1932) ("[B]efore an appellant or plaintiff in error can have a review of any matter of exception on the trial, he must not only make his objections and save his exceptions

at the time they occur, but he must also bring them again to the court's attention by a motion for new trial.") (citations omitted). The Missouri Supreme Court explained that the "purpose of this requirement is to afford the trial court an opportunity to correct its own errors." *Id.* at 980–981. Additionally, "[b]y requiring a complaining party to state to the trial court what his grounds of complaint are, error may be remedied without the delay or expense incident to appellate review." *Id.* at 981.

In a patent infringement case, the Federal Circuit Court of Appeals similarly concluded, "With respect to [the plaintiff's] frequent references to jury prejudice resulting from disclosure to the jury of [the plaintiff's] recent civil penalties and criminal convictions for several violations of Food and Drug Administration laws and regulations, we take note that no motion for a new trial was made on this ground, and the issue is not before us for review." *C.R. Bard, Inc. v. M3 Sys.*, 157 F.3d 1340, 1373–1374 (Fed. Cir. 1998).

The Supreme Court of Washington reached the same conclusion: "The office of the motion for a new trial is to give the trial court an opportunity to pass upon questions not before submitted for its ruling. Hence, those errors which could only have been raised on motion for new trial will not be considered on appeal, if not raised by this motion." *State v. Davis*, 250 P.2d 548, 549 (Wash. 1952). The court explained that this new trial rule is a corollary to the preservation rule that new issues cannot be raised for the first time on appeal: "This is but a corollary to the rule that

questions which are not raised in any manner before the lower court will not be considered on appeal." *Id.* (citations omitted). Therefore, the Court should first conclude that the well-established prohibition against raising issues for the first time on appeal likewise extends to requests for a new trial that are raised for the first time on appeal, as in the instant case.

2. Defendants' Request for a New Trial for the First Time in This Court Is Improper and Should Be Denied.

In their opening brief, Defendants' ultimate requested relief in this appeal is for a new trial: "The judgment should be reversed, and a new trial should be ordered." Appellants/Cross-Respondents' Opening Brief ("AOB") 80. However, the District Court docket reflects that Defendants did not file a motion for new trial. 20 RA 2605–2614. NRCP 59(a) governs the specific grounds by which district courts may grant a new trial. Importantly, a district court's findings and conclusions when faced with a motion for new trial are necessarily based upon the facts of the case presented at trial. *See, e.g., Lioce v. Cohen*, 124 Nev. 1, 19–20, 174 P.3d 970, 982 (2008) ("[W]hen deciding a motion for a new trial, the district court must make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards described above to the facts of the cases before it."). This Court's role in reviewing an order granting or denying a motion for new trial is to review the district court's order for an abuse of discretion. *See*

Gunderson v. D.R. Horton, Inc., 130 Nev. 67, 74, 319 P.3d 606, 611 (2014) ("This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion."). However, since Defendants bypassed filing a motion for new trial in the District Court, not only was the District Court deprived of the opportunity to consider Defendants' assignments of error, but this Court is unable to conduct a proper review of whether the District Court properly or improperly granted a new trial because there is no appealable order to review. *See* NRAP 3A(b)(2) (allowing an appeal from an "order granting or denying a motion for a new trial").

In essence, Defendants ask this Court to review, in the first instance, their arguments for a new trial, which contain factual issues and would convert this Court into a factfinder. However, this Court does not engage in appellate factfinding. *See Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 365, 184 P.3d 378, 385 (2008) ("[I]t is not the role of this court to reweigh the evidence."); *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.") (citations omitted). Therefore, this Court should make the threshold determination that Defendants' arguments in this appeal requesting a new trial are not preserved for appellate review.

B. DEFENDANTS' EVIDENTIARY CHALLENGES ARE COMPLETELY WITHOUT MERIT, OR ALTERNATIVELY, AMOUNT TO NOTHING MORE THAN HARMLESS ERROR.

1. Defendants Present This Court With a Completely Incorrect Presumption Regarding the Jury's Verdict.

Since Plaintiffs prevailed at trial, they are entitled to all favorable inferences in the record. *See Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (noting that appellate courts are "not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party"); *Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 739, 192 P.3d 243, 252 (2008) (same). Instead of abiding by this well-established presumption, Defendants pretend as if they are entitled to favorable inferences in the record. For example, Defendants recite for their statement of facts certain testimony from their own experts, as well as their own arguments, all while ignoring the prevailing evidence presented by Plaintiffs at trial. AOB 2–4. Defendants' skewed presentation of only the facts favoring themselves is the only way they can support their misplaced arguments. Once the Court takes into account all the facts in the record, and applies the proper presumption of the jury's verdict, the Court should reject Defendants' legal arguments that rely upon only their own misconstrued version of the facts. *See Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 702, 962 P.2d 596, 604 (1998) ("[T]his court must presume that the jury

believed evidence favorable to that prevailing party and drew inferences in that party's favor.") (citations omitted).

2. Defendants' Argument Regarding Alleged Cumulative Error Should Actually Be Reviewed as Harmless Error.

Defendants' opening brief argues that the District Court committed "cumulative error." AOB 5. For this cumulative error proposition, Defendants rely upon *Holderer v. Aetna Cas. & Sur. Co.*, 114 Nev. 845, 853, 963 P.2d 459, 465 (1998). However, *Holderer* does not even mention the word "cumulative." Rather, the Court identified two reasons for granting a new trial. There was no discussion in the opinion whether one reason was sufficient, or if the Court combined the two reasons to reach "cumulative error." Thus, *Holderer* does not extend the notion of cumulative error to civil cases. *Cf. Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854–855 (2000) (addressing a claim of cumulative error in which all three elements must be satisfied: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged). Of course, since Defendants cannot demonstrate any error, there can be no cumulative error.

The proper focus in this appeal is to salvage the jury's verdict. *See Wyeth v. Rowatt*, 126 Nev. 446, 476, 244 P.3d 765, 785–786 (2010) ("A jury's verdict should be salvaged, when possible, to avoid a new trial.") (citation omitted). Consistent with NRCP 61, all of Defendants' presumed errors are harmless: "Unless justice

requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Notably, Defendants have not attempted to demonstrate that their substantial rights have been affected. *See, e.g.,* NRCP 59(a) ("The court may, on motion, grant a new trial on all or some of the issues—and to any party—for any of the following causes or grounds materially affecting the substantial rights of the moving party. . . ."). When considering whether there was harmless error, "[t]he record must be considered as a whole." *Truckee-Carson Irrigation Dist. v. Wyatt*, 84 Nev. 662, 668, 448 P.2d 46, 50 (1968). The Court "do[es] not presume prejudice from the occurrence of error in a civil case." *Boyd v. Pernicano*, 79 Nev. 356, 359, 385 P.2d 342, 343 (1963); *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (confirming that the appealing party must establish "by providing record evidence . . . that, but for the error, a different result might have been reached"). Therefore, the Court should reject Defendants' cumulative error argument, and instead review this case for harmless error, if any.

3. There Was No Attorney Misconduct, Nor Any Defense Objection Based Upon the Reptile Theory.

Defendants characterize their reptile theory argument as attorney misconduct. AOB 6. Yet, they completely avoid the very heightened standards for proving attorney misconduct. *See Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008). Defendants do not identify which category of attorney misconduct they contend is applicable to the so-called "reptile theory." In fact, Defendants do not even identify whether there was an objection or an admonishment for the particular instances where the word "safety" was uttered in the District Court and cannot raise these issues for the first time on appeal. *See Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). In any event, Dr. Rives agreed that when performing a surgery, use of a wrong tool or device can put the patient in unnecessary danger. 20 AA 4305. For example, Dr. Rives explained that he preferred not to use the harmonic scalpel because it can actually "poke into the small bowel" or "it could burn the bowel." 20 AA 4306–4307. Dr. Rives also agreed that it was important to limit the time that a patient is septic because a patient could die or suffer permanent injury. 20 AA 4308. Thus, Defendants' entire reptile theory argument fails for several reasons. Without abandoning this waiver argument, Plaintiffs, nevertheless, address the cases that Defendants have raised, even though they have no application to the instant case.

Courts generally do not sua sponte analyze counsel's strategy prior to trial. In this case, Defendants did not move the District Court to analyze or limit Plaintiffs' trial strategy. Trial strategy includes mental impressions and legal theories of the case which are protected from review. *See Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 357, 891 P.2d 1180, 1188 (1995). In fact, it is generally improper for any party to seek information which could reveal a party's litigation strategy. *See Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 229, 276 P.3d 246, 249–250 (2012). An attorney acts as an officer of the court within the framework of our judicial process to "promote justice" and "protect their clients' interests." *Hickman v. Taylor*, 329 U.S. 495, 510–511, 67 S.Ct. 385, 393 (1947). An attorney's duty to advocate on behalf of his client requires privacy from intrusion by opposing parties so he can "prepare his legal theories and plan his strategy without undue and needless interference." *Id.* Attorneys have an ethical duty to zealously advocate for their clients. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 96, 127 P.3d 1057, 1067 (2006) ("Zealous advocacy is the cornerstone of good lawyering and the bedrock of a just legal system.").

Defendants characterize the reptile theory as "a jury influence tactic used by plaintiffs' attorneys to motivate juries to award larger verdicts." AOB 6 (citing *Perez v. Ramos*, 2018 LEXIS 825, at *25–26, 429 P.3d 254, 2018 WL 5305614 (Kan. Ct. App. 2018 (unpublished)). The unpublished Kansas case describes the

reptile theory without citing the information and never addresses whether a court can properly exclude reptile tactics from a trial. *See Perez*, 2018 LEXIS 825, at *26–27. Instead, the court looked at the issue of whether evidence was improperly excluded and rejected the appellant's argument because he failed to properly preserve the argument for appeal. *Id.*

Defendants cite another unpublished Kansas opinion for the accusation that the reptile theory encourages the jury to decide the case based on fear for its own safety. AOB 6 (citing *Randolph v. Quiktrip Corp.*, No. 16-1063-JPO, 2017 U.S. Dist. LEXIS 76103, at *12 (D. Kan. May 18, 2017)). Defendants cite the part of the case where the court was quoting the defendant's argument, not analyzing the arguments or stating its opinion. *Id.* ("Defendant asserts that the plaintiff's bar has implemented a concept commonly known as the Reptile theory. . ."). Further, that court considered the issue a question of whether evidence should be excluded. The court held that evidence of the defendant's policies and safety rules were relevant and should be admitted subject to future consideration, if and when specific objections were raised according to the rules of evidence. *Id.* at *13–14.

Defendants next cite an unpublished Michigan case for the proposition that in medical malpractice cases, plaintiff's attorneys use the reptile theory to get the jury to disregard the proper standard of care. AOB 7 (citing *Bryson v. Genesys Reg'l Med. Ctr.*, 2018 Mich. App. LEXIS 1102, *53, 2018 WL 1611438). In that case, the

hospital asserted that the plaintiff employed the reptile theory by arguing that the defendants "did not act in the 'safest' manner possible." *Id.* That court analyzed the plaintiff's closing argument and did not comment on whether he utilized the reptile theory. Instead, the court held that it was improper for an attorney to argue a standard of care that is different than the law, known in Nevada as jury nullification. *Id.* This Court precludes jury nullification arguments when an attorney alludes "to a matter that is irrelevant given the law." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 78, 319 P.3d 606, 613 (2014) (interpreting RPC 3.4(e)). Yet, Defendants have not presented a jury nullification argument.

Further, Defendants cite another unpublished Kansas case for the proposition that the discussion of safety and Defendants' policies are contrary to the standard of care in a medical malpractice case and will mislead a jury. AOB 7 (citing *Lanam v. Promise Reg'l Med. Center-Hutchinson, Inc.*, 2016 Kan. App. Unpub. LEXIS 18, *22–23, 364 P.3d 305, 2016 WL 105046). Defendants overlook the court's holding in that case that a medical defendant's policies and procedures can determine the standard of care. *See Lanam v. Promise Reg'l Med. Center-Hutchinson, Inc.*, 2016 Kan. App. Unpub. LEXIS 18, *17, 364 P.3d 305, 2016 WL 105046 ("expert testimony is required to determine whether a hospital's policies and procedures equate to the appropriate standard of care").

Instead, Defendants focus on the part of the holding referring to the standard of care in a simple negligence case. *See Lanam v. Promise Reg'l Med. Center-Hutchinson, Inc.*, 2016 Kan. App. Unpub. LEXIS 18, *22–24, 364 P.3d 305, 2016 WL 105046. The *Lanam* case was a slip and fall, pursued against a hospital based on simple negligence. *Id.* That court held that when a plaintiff introduces evidence about the safety policies of the hospital, she was actually arguing the professional standard of medical malpractice rather than the reasonable standard of simple negligence. *Id.* Defendants improperly use that case to argue that a "plaintiff's use of the terms safety requirements and safety rules, with reference to the medical defendant's policies and procedures, will prejudice the jury by conflating the standard of care with the safety rules." AOB 8.

Finally, Defendants misinterpret *Biglow v. Eidenberg*, 424 P.3d 515, 528–529 (Kan. 2018). The court did not allow the plaintiff to use the term 'safe' to argue the standard of care. *Id.* at 529. Rather, the court held that the duty of care was based on patient safety was a "broad and abstract" reference to a doctor's job. *Id.* Ultimately, the Kansas upheld the restriction because broad evidence of a doctor's job is not an appropriate phrasing of the medical malpractice duty of care. The Kansas court did not suggest that plaintiffs should not be allowed to use the word "safe" or the phrase "needlessly endanger" in medical malpractice cases. That issue was brought before the court, which it declined to review because it was not properly

preserved. *Id.* at 528. Therefore, Defendants' reptile theory argument fails both procedurally and substantively.

4. The District Court's Rulings on the *Center* Case Focus on Defendants' Intentional Concealment, Not Merely an Evidentiary Issue.

Defendants have waived the right to argue that the *Center* case was inadmissible because the defense intentionally concealed it from discovery to improperly gain an advantage, thereby preventing Plaintiffs from being able to fully flesh out its admissibility. 15 AA 3226. The District Court characterized the concealment of the *Center* case as "willful." 19 AA 4229–4230. Defendants ask for a de novo review of a supposedly legal interpretation without explaining any of the context of the District Court's decision. Defendants' evidentiary argument is improper because they intentionally concealed the evidence throughout discovery. Plaintiffs were presumed to have suffered prejudice due to Defendants' failures. *See Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010) ("[W]e conclude that appellants' continued discovery abuses and failure to comply with the district court's first sanction order evidences their willful and recalcitrant disregard of the judicial process, which presumably prejudiced Dingwall, Yang, and Chai.") (citing *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (upholding the district court's strike order where the defaulting party's "constant failure to follow [the court's] orders was unexplained and unwarranted"); *In re Phenylpropanolamine*

(PPA) Products, 460 F.3d 1217, 1236 (9th Cir. 2006) (holding that, with respect to discovery abuses, "[p]rejudice from unreasonable delay is presumed" and failure to comply with court orders mandating discovery "is sufficient prejudice")).

Defendants hid the *Center* case from Plaintiffs until after the discovery process had ended. 14 AA 413–417; 15 AA 3237 (Defendants disclosed the *Center* case in September 2019, two months after the close of discovery). This discovery abuse precluded Plaintiffs from fully exploring and developing the evidence. 14 AA 3010 (Plaintiffs found out about the case after discovery had ended). Plaintiffs moved for sanctions including case dismissal because of Defendants' intentional concealment. 1 AA 87–104. After conducting two hearings, allowing Defendants to call witnesses and testify in his defense, the District Court agreed that the concealment was intentional, and that Defendants did it to improperly gain an advantage in the litigation. 15 AA 3226. The District Court found that Defendants' discovery abuse was prejudicial to Plaintiffs and granted monetary sanctions, as well as an adverse inference instruction. 15 AA 3170; 15 AA 3223.

Defendants' challenges to the *Center* evidence at trial were limited to relevance objections. But, the arguments now presented on admissibility were not presented at the time of the sanctions. In any event, "[u]nder NRCP 37(b)(2), a district court has discretion to sanction a party for its failure to comply with a discovery order, which includes document production under NRCP 16.1." *Bahena*

v. Goodyear Tire & Rubber Co., 126 Nev. 243, 249, 235 P.3d 592, 596 (2010) (citation omitted). Defendants cannot now pretend like the sanctions do not exist and ask for a ruling on the merits of an argument that was never presented.

Appellate courts review a "district court's interpretation of the [rules of evidence] de novo . . . but [reviews] decisions to admit or exclude evidence for abuse of discretion." *United States v. LeShore*, 543 F.3d 935, 941 (7th Cir. 2008); *Stephans v. State*, 127 Nev. 712, 716, 262 P.3d 727, 730 (2011). This Court will not overturn a verdict based on erroneous admission of evidence unless, "but for the error, a different result might reasonable have been expected." *Hallmark v. Eldridge*, 124 Nev. 492, 505, 189 P.3d 646, 654 (2008). Defendants suggest that this Court should review his argument de novo but concedes that the decision to admit evidence is generally reviewed for abuse of discretion. And, sanctions are also reviewed for an abuse of discretion. *See Bahena*, 126 Nev. at 249, 235 P.3d at 596. Defendants cannot separate these two issues, as they have attempted, which would have the effect of excusing them from their intentional discovery abuses, particularly where Dr. Rives admitted at trial to providing false testimony in discovery. 21 AA 4635–4636.

Defendants now ask this Court to review the Districts Court's evidentiary rulings de novo. AOB 11–12. Defendants identify two statutes that they believe had some relevance in the District Court's determination, NRS 48.035 and

48.045(2). AOB 13–15. But, Defendants' discussion does not show where the District Court "interpreted" either of the statutes, or how the District Court's application amounted to an abuse of discretion. Therefore, this Court must presume that the District Court's ruling was accurate. *See Cuzze v. Univ. & Cmty. College Sys.*, 123 Nev. 598, 600, 172 P.3d 131, 133 (2007) ("[A]ppellant bears the responsibility of ensuring an accurate and complete record on appeal and that missing portions of the record are presumed to support the district court's decision.").

NRS 48.045(2) states that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Defendants do not identify when they preserved their improper character evidence argument to the District Court. In any event, if this argument had been properly presented, Dr. Rives' modus operandi would have fit within the stated exceptions to the statute. *See Rosky v. State*, 121 Nev. 184, 196, 111 P.3d 690, 698 (2005) ("[M]odus operandi evidence falls within the identity exception to NRS 48.045(2).").

Aside from the fact that Defendants avoid the sanctions context of the District Court's rulings on the admissibility of the *Center* case, they also sidestep that bias is

a relevant inquiry into the *Center* case. *See Robinson v. G.G.C., Inc.*, 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) ("[T]he exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. . . [T]he same reasoning regarding bias applies in a civil trial."); *Capanna v. Orth*, 432 P.3d 726, 732 (Nev. 2018) (confirming the holding of *Robinson*).

Moreover, the cases cited by Defendants in their opening brief do not approximate the facts of this case, involving the same surgery, the same negative reactions, and the same surgeon. AOB 14–15. In *Hansen v. Universal Health Servs.*, 115 Nev. 24, 974 P.2d 1158 (1999), the Court was not presented with a similar set of circumstances that the defendant had intentionally concealed. *Hansen* did not discuss a similar surgery, negative reactions, or the same surgeon. The facts of *Mischler v. McNally*, 102 Nev. 625, 730 P.2d 432 (1986) are similarly distinct from the facts of the instant case.

Interestingly, Defendants offered a series of cases from foreign jurisdictions. AOB 15–19. However, these cases largely stand for the notion that a trial court's evidentiary rulings focused on the probative value versus a prejudicial effect, which is discretionary. Questions of probative value are left to the sound discretion of the district court and will not be disturbed absent a showing of abuse. *See McCourt v. J.C. Penney Co.*, 103 Nev. 101, 103, 734 P.2d 696, 698 (1987).

Notably, *Cerniglia v. French*, 816 So.2d 319, 323 (La. App. 2002) is inapposite because the particular surgery, and the resulting issue was a "known result." In the instant case, Dr. Rives admitted that Titina's injuries are not a "known result." Rather, her injuries are the result of Dr. Rives' medical malpractice. 20 AA 4306–4312. Additionally, the "prior bad acts" in *Stottlemyer v. Ghramm*, 597 S.E.2d 191, 193 (Va. 2004) dealt with the doctor's falsification of medical records and licensing issues. Therefore, the Court should reject Defendants' arguments relevant to the District Court's discretionary rulings with respect to the concealed *Center* case.

5. The District Court's Adverse Inference Instruction Was a Very Minimal Sanction for Defendants' Intentional Concealment of the *Center* Case.

Defendants present this issue as a de novo review of a jury instruction. AOB 20. However, they also acknowledge that the District Court ruled that they had waived their challenge to the jury instruction. AOB 25–26. But, Defendants cannot simply gloss over the waiver issue, which is a factual issue that this Court does not disturb. *See Merrill v. DeMott*, 113 Nev. 1390, 1399, 951 P.2d 1040, 1045 (1997) (waiver is a question of fact); *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005) (factual issues are not disturbed if they are supported by substantial evidence). So, the Court should first treat Defendants'

challenge to the *Center* instruction as waived based upon the District Court's own determination.

Notably, this Court's review of an adverse inference instruction is based upon an abuse of discretion standard, not a de novo standard, as Defendants suggest. *See Bass-Davis v. Davis*, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006). Essentially, Defendants ask this Court to disregard the District Court's factual determinations and reweigh the evidence to make a finding in Defendants' favor. But, this Court is not a fact finding tribunal. *See Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 365, 184 P.3d 378, 385 (2008) ("[I]t is not the role of this court to reweigh the evidence."); *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.") (citations omitted).

Despite Defendants' best efforts to reargue certain facts in their opening brief, they cannot overcome Dr. Rives' own trial testimony admitting to providing false testimony in discovery. 21 AA 4635–4636. District courts have the discretion to impose discovery sanctions when a party fails to supplement a discovery response. *See APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, 473 P.3d 1021, 1027–1028 (Nev. 2020) (upholding a district court's discretion to impose sanctions based on a party's untimely supplementing of discovery responses). Courts have wide discretion in choosing an appropriate sanction. NRCP 37(c)(1). This Court does

not substitute its own judgment as to the imposition of a particular discovery sanction. *See Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Therefore, this Court should reject Defendants' request to reweigh the evidence to eliminate the very minimal sanction, particularly where Plaintiffs requested Defendants' answer to be struck. 15 AA 3223–3227.

The detriment created by failing to be diligent or honest in discovery falls on the party who made the mistake. *See Bass-Davis v. Davis*, 122 Nev. 442, 449, 134 P.3d 103, 107 (2006). Indeed, Nevada law presumes prejudice from Defendants' concealed evidence. *See Foster*, 126 Nev. at 66, 227 P.3d at 1049 ("[W]e conclude that appellants' continued discovery abuses and failure to comply with the district court's first sanction order evidences their willful and recalcitrant disregard of the judicial process, which presumably prejudiced Dingwall, Yang, and Chai.") (citing *Hamlett*, 114 Nev. at 865, 963 P.2d at 458 (upholding the district court's strike order where the defaulting party's "constant failure to follow [the court's] orders was unexplained and unwarranted"); *In re Phenylpropanolamine (PPA) Products*, 460 F.3d at 1236 (holding that, with respect to discovery abuses, "[p]rejudice from unreasonable delay is presumed" and failure to comply with court orders mandating discovery "is sufficient prejudice")). Thus, Defendants' attempt to have this Court fashion a new remedy based upon their assertion that Plaintiffs were not prejudiced is squarely contrary to Nevada law.

The District Court considered the documentary evidence, Dr. Rives' deposition transcript, and the evidentiary hearing including Dr. Rives' live testimony. 15 AA 3229. After all parties were fully heard in argument, the District Court exercised its discretion to allow the defense an additional evidentiary hearing before ruling on the sanctions. 14 AA 3050–3051. The District Court was not required to hold the evidentiary hearing but exercised its discretion, so Dr. Rives would be fully heard. 14 AA 3020, 3024; *Bahena*, 126 Nev. at 246, 235 P.3d at 594 ("We conclude that the district court did not abuse its discretion by imposing non-case concluding sanctions and by not holding a full evidentiary hearing."). Dr. Rives was fully heard through evidence, testimony and additional oral argument given to his counsel. 15 AA 3219–3220.

The Court found that both Dr. Rives and his counsel's conduct each separately merit sanctions. 15 AA 3229 ("So those are independent grounds. . . ."). Although Dr. Rives claims his failure to disclose discovery was accidental, he did the same thing in the *Center* case. 14 AA 3105. The District Court considered Dr. Rives' arguments and testimony and found that that he chose to conceal the *Center* case because he likely believed disclosure would have been more harmful to his case than lying would. 15 AA 3226 ("it appears he views it would've been more harmful to him"). Attorneys have affirmative obligations to disclose and supplement which Dr. Rives' counsel ignored in this discovery. 15 AA 3228.

The District Court tried to give every benefit of the doubt to Dr. Rives, yet it found that his concealment was not an error. 14 AA 3016–3017. The District Court explained that Dr. Rives appeared dishonest at the evidentiary hearing because he answered defense counsel's questions with specific information but failed to answer even basic questions asked by Plaintiffs' counsel. 15 AA 3220–3221. Therefore, the Court should reject Defendants' arguments to have this Court reweigh the evidence supporting the very minimal sanctions of an adverse inference.

6. The District Court Properly Concluded that the MGM ERISA Plan Preempts NRS 42.021.

Defendants present this preemption argument with the claimed purpose that they were prohibited from offering evidence showing that Titina's bills were paid by insurance, and that Dr. Rives should have been able to use the word "insurance" during trial. AOB 33. These assertions are either legally incorrect, or alternatively, amount to harmless error because the medical documents reflect that Titina's medical bills were indeed paid by MGM's self-funded plan. 7 RA 944–950. Notably, Defendants omitted these documents from their own appendix to make their hypothetical argument. But, NRS 42.021 would not give Defendants the right to the relief they request in any event.

In *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 937, 408 P.3d 149, 155 (2017), this Court explained that where a Medicaid program with both

federal and state funding was involved, preemption applied. Essentially, the Court ruled that NRS 42.021 was not intended to operate as a "*double* reduction" of a plaintiff's recovery. *Id.* (emphasis in original). So, whenever a plan is funded at least partially by federal funds, federal preemption applies according to *McCrosky*, such that NRS 42.021 does not apply. Notably, *McCrosky* does not discuss Defendants' argument that there must be proof of direct federal collateral source payments. AOB 30. Plaintiffs have satisfied their initial burden to demonstrate that the MGM plan is governed by ERISA. 5 AA 1006–1046. Specifically, the plan is established and maintained as an ERISA plan. 5 AA 1010. Defendants further claim that the ERISA plan must be self-funded to qualify for preemption. AOB 30. Plaintiffs do not dispute Defendants' citation to *FMC Corp. v. Holliday*, 498 U.S. 52, 54 (1990). However, the ERISA plan through MGM is preempted, even under these conditions.

The Federal District Court for New Mexico observed that "MGM provides a self-insured health insurance plan to its employees. As mentioned previously, the MGM Plan is a self-funded employee group health plan subject to ERISA; MGM is the Plan administrator and Defendant UMR is the claims administrator. The MGM Plan is administered in Nevada, and there is a "governing law" provision in the Plan states that: 'The Plan shall be construed in accordance with the laws of the State of Nevada, to the extent not preempted by federal law.'" *Med Flight Air Ambulance v.*

MGM Resorts Int'l, 2017 U.S. Dist. LEXIS 193428, *10–11, 2017 WL 5634116 (unpublished). The same provisions are present in the MGM ERISA plan in this case. The insurance documents that were admitted as Court's Exhibit No. 13 contain the designation "UMR" or "UMR MGM Resorts." 7 RA 944–950. And, the ERISA plan in this case contains the same governing law provision. 7 AA 1404. Therefore, Plaintiffs have adequately demonstrated that the ERISA plan in this case preempted NRS 42.021 consistent with *McCrosky*.

Even if the ERISA plan in this case does not preempt NRS 42.021, Defendants have not demonstrated what "evidence" they wanted to present at trial, which is a requirement of NRS 42.021(1): "In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, **the defendant may introduce evidence of any amount payable as a benefit to the plaintiff** as a result of the injury or death pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services. **If the defendant elects to introduce such evidence**, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any

insurance benefits **concerning which the defendant has introduced evidence**." (emphases added). However, Defendants have not identified what evidence they intended to offer into evidence, which was denied. And, Defendants' otherwise broad assertions do not satisfy NRAP 28(e)(1): "A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected." Therefore, Defendants' preemption argument fails as a matter of law based upon the facts of this case. Or, alternatively, Defendants' argument constitutes nothing more than harmless error. In either scenario, Defendants have not demonstrated that they are entitled to a new trial.

7. Defendants' New Challenges to the Limitation of Their Own Experts and Plaintiffs' Damages Calculations Were Never Raised in the District Court.

Similar to many of Defendants' arguments in this appeal, the entirety of Defendants' challenges to the limitation of their own experts and Plaintiffs' damages calculations were not properly raised in the District Court. In fact, Defendants never filed an opposition to Plaintiffs' motion to limit and strike Defendants' experts. 1 AA 199–2 AA 346; 20 AA 2605–2614. The District Court would have been within its rights to grant Plaintiffs' motion due to the absence of an opposition. *See, e.g., King v. Cartlidge*, 121 Nev. 926, 928, 124 P.3d 1161, 1162 (2005) (citing DCR 13(3) and providing district court judges with discretion to grant motions that are

unopposed). Instead of striking these experts altogether, the District Court's written order allowed the defense experts to testify on a limited basis, which was consistent with their expert reports. 7 AA 1410–1412. Certainly, there was no error in allowing the defense experts to testify within the scope of their expert reports. *See, e.g., FCH1, LLC v. Rodriguez*, 130 Nev. 425, 434, 335 P.3d 183, 190 (2014).

However, Defendants did not file a motion to strike any of Plaintiffs' experts, as reflected in the District Court's written order resolving these issues, as well as the District Court docket. 7 AA 1410–1412; 20 AA 2605–2614. Defendants also did not file any motion to strike or limit Plaintiffs' requested damages. *Id.* Thus, Defendants' entire discussion of Plaintiffs' experts and computation of damages is not properly before this Court. *See Old Aztec*, 97 Nev. at 52, 623 P.2d at 983. In fact, many of the record citations in Defendants' answering brief are to either Plaintiffs' motion or the oral argument. But, the pure argument of counsel does not carry any evidentiary weight. *See Jain v. McFarland*, 109 Nev. 465, 475–476, 851 P.2d 450, 457 (1993) ("Arguments of counsel are not evidence and do not establish the facts of the case.") (citations omitted). Even if Defendants had properly raised a challenge to Plaintiffs' computation of damages, their broad assertions of prejudice do not overcome harmless error. *See, e.g., Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 266, 396 P.3d 783, 788 (2017). Indeed, the District Court order allowed the defense experts to testify based upon their supplemental reports. 7 AA 1410–

1412. Thus, Defendants' decision to disclose their rebuttal experts without complying with *Williams v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 518, 521, 262 P.3d 360, 362 (2011) and the requirements of an initial expert is theirs alone. Moreover, without an offer of proof, or even limited testimony that the District Court did allow, Defendants cannot now ask this Court for a new trial based upon their own failures. *See Foreman v. Ver Brugghen*, 81 Nev. 86, 90, 398 P.2d 993, 995 (1965) (affirming the trial judgment "because the record does not contain the information necessary for us to rule upon the assigned error"); *Burgeon v. State*, 102 Nev. 43, 47, 714 P.2d 576, 579 (1986) ("If appellant desired to preserve for our review the testimony that he reasonably expected the jury to hear, absent the adverse ruling of the trial court, a detailed offer of proof was essential."); *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 688, 191 P.3d 1138, 1151 (2008) ("Offers of proof must be specific and definite; counsel's mere conjecture as to what the evidence might reveal does not suffice.").[3] Therefore, the Court should

[3] Notably, the several offers of proof that appear in the record were never actually raised in the District Court, which gave rise to the District Court's order to show cause. 9 AA 1840–1973; 9 AA 1974–2088; 10 AA 2089–11 AA 2261; 11 AA 2262–2314; 11 AA 2315–2346; 11 AA 2347–2436; 11 AA 2437–12 AA 2474; 12 AA 2477–2478. *See* NRS 47.040(1)(b); *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 245, 246, 579 P.2d 1251, 1252 (1978) (offer of proof must be made before the close of evidence).

reject Defendants' entire untimely argument on Defendants' expert witnesses and Plaintiffs' computation of damages.

8. Defendants Did Not Present Any Opposing Evidence to Challenge the Amounts of Titina's Past Medical Expenses or the Present Value of Her Life Care Plan.

At trial, Plaintiffs presented expert testimony from Dr. Barchuk, who specializes in physical medicine and rehabilitation. 21 AA 4545. He is also a certified life care planner. 21 AA 4547. Dr. Barchuk performed both a physical examination, as well as a functional examination of Titina. 21 AA 4554–4555. Dr. Barchuk recommended several categories for Titina's future medical care and also confirmed that none of these categories included any of her pre-existing medical conditions. 21 AA 4612.

Plaintiffs also presented Dawn Cook, who is both a registered nurse and a life care planner. 22 AA 4849. Her role was to research all the costs of the future medical care for Titina that had been recommended by Dr. Barchuk. 22 AA 4854. Cook testified that Titina had 29 years left in her life based upon the government life expectancy tables. 22 AA 4857. Cook testified that the total value of Titina's future medical care is $4,211,816.63. 22 AA 4891. Her opinions costs were made "to a reasonable degree of medical probability." 22 AA 4855.

Finally, Plaintiffs presented Dr. Clauretie whose role as an economist was to provide an economic analysis of the life care plan. 23 AA 4946. Dr. Clauretie

testified that the present value of Titina's future life care plan is $4,663,473. 23 AA 4954.

Defendants now argue that since they claimed to have challenged Dr. Barchuk's recommended future care, Plaintiffs' NRCP 50(a) motion should not have been granted, even though Defendants never challenged any amounts. In other words, Defendants had no response to Cook or Dr. Clauretie.

A district court may grant judgment on an issue as a matter of law against a party that has been fully heard when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." NRCP 50(a)(1)(a). In the District Court, the defense broadly reviewed some of the testimony from defense experts, but did not identify any specific evidence. The defense also could not point to any evidence that actually challenged the testimony from Cook and Dr. Clauretie. 29 AA 6310–6313. Although the defense claimed that Titina's life care plan included amounts for pre-existing care, they cannot point to any specific amounts that were challenged. This was the point of the District Court's questioning, not to elicit a magic word, but to identify if there was any conflicting evidence. 29 AA 6314–6315. Defendants could not identify any specific evidence that should have been reserved for the jury. *Id.*

Notably, the only person qualified from the defense who could have testified against Cook was Sarah Larsen, RN ("Larsen"). But, by the defense's own

admission, it chose not to call Larsen at trial because it believed her testimony was moot. AOB 45. Tellingly, the District Court struck Dr. Stone as an expert, upon whom Larsen relied, because Dr. Stone failed to disclose his list of prior testimony, as required by NRCP 16.1(a)(2)(B)(v). Defendants acknowledge this in their opening brief, given that Dr. Stone was an expert in the *Center* case. AOB 44 n.10. Defendants also recognize that Dr. Stone was not qualified under *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). *Id.* But, they do not assign any error to his disqualification on this basis.

Dr. Adornato testified about the cause of Titina's pain and non-economic damages, but never discussed the medical needs or life-care plan. 26 AA 5716–5719. Ultimately, Defendants' own failures and trial strategies create the implied admission that Defendants truly had no evidence to counter Cook and Dr. Clauretie. That is, the unqualified experts that Defendants identify could not offer speculation as to the life care plan. *See Williams v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 518, 532, 262 P.3d 360, 369 (2011) (experts cannot engage in speculation or conjecture). Importantly, *Quintero v. McDonald*, 116 Nev. 1181, 14 P.3d 522 (2000) does not discuss this distinction. And, more recently, this Court has rejected *Quintero* in the context of NRCP 50(a). *See Didier v. Sotolongo*, 441 P.3d 1091 (Nev. 2019) (unpublished).

It is noteworthy that the District Court left open the question of causation. 29 AA 6317. Defendants argue that the jury's decision on causation was supposedly influenced by the amounts of damages. But, Defendants offer only the argument of their counsel, which is not evidence. *See Jain*, 109 Nev. at 475–476, 851 P.2d at 457. Therefore, Defendants have not demonstrated that the District Court erred by granting Plaintiffs' NRCP 50(a) motion on a limited basis.

9. Defendants' Argument on Medical Records Is Incorrect, Not Preserved for This Court's Review, and Does Not Otherwise Rise to the Level of Harmful Error.

Defendants argue that the District Court erred by not allowing them to submit untimely medical records. AOB 52–59. However, in presenting this argument, Defendants have not specifically identified these records, what they might show, or how they would support a new trial. *See* NRAP 28(e)(1); NRS 47.040(1)(b); NRCP 59(a). So, it is unclear how Defendants expect this Court to review the issue without a presentation of the omitted exhibits.

The District Court refused to allow defense counsel to add pages into an exhibit because those documents were untimely, and there were no extenuating circumstances. Defendants argue that a new trial should be ordered because the District Court erred by enforcing a deadline that "had never actually been imposed." AOB 58. Defendants fail to inform this Court that defense counsel agreed to the deadline. 14 AA 3145, 3147, 3161, 3162. Notably, defense counsel conceded that

he was aware of the "end of day Tuesday [deadline] to get whatever pages were missing for Exhibit 1." 15 AA 3285–3286. The District Court did not allow the defense to admit any additional documents because Defendants' arguments that Plaintiffs' counsel misrepresented the exhibit could have no effect on the defense's choice to ignore the deadline. Additionally, the defense never actually had a stipulation from Plaintiffs that they now claim. *See* DCR 16 ("No agreement or stipulation between the parties in a cause or their attorneys, in respect to proceedings therein, will be regarded unless the same shall, by consent, be entered in the minutes in the form of an order, or unless the same shall be in writing subscribed by the party against whom the same shall be alleged, or by his attorney.").

This Court reviews the exclusion of evidence for an abuse of discretion. *See Hansen v. Universal Health Servs., Inc.*, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999). Untimely evidence is generally excluded from trial. *See Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 787 (Nev. 2017). District courts have wide discretion in the management of evidence at trial. *See Harte v. State*, 132 Nev. 410, 414, 373 P.3d 98, 101 (2016); *Young v. Nev. Title Co.*, 103 Nev. 436, 441, 744 P.2d 902, 904–905 (1987). Defendants do not identify a rule which would require the District Court to allow them to add to an exhibit after the deadline. Accordingly, this Court defers to the District Court's wide discretion to exclude the evidence.

See Harte, 132 Nev. at 414, 373 P.3d at 101 ("A district court has wide discretion in many facets of trial procedure in the absence of a rigid rule.").

Defendants argue that the District Court arbitrarily imposed a deadline for the submission of changes to exhibits based on its own perception which "exceeded the bounds of reason." AOB 58–59. On Tuesday, October 8, 2019, the parties met in the morning for a calendar call. 14 AA 3125–3162. At that time, some issues with Exhibit 1 and Exhibit 9 were not finalized, and the District Court allowed the parties to use the anteroom to negotiate and finalize the exhibits. 15 AA 3275, 3280–3281. After the parties met in the ante room, they came back into the courtroom and told the Court that they had settled all issues with those exhibits. Defense counsel informed the Court of his desire to add "20 to 25 pages" to Exhibit 1, and Plaintiff confirmed that the pages may be added. 14 AA 3142.

The District Court asked if all parties were willing to finalize the exhibits and stipulations to the Court by the end of that day. 14 AA 3145. Both parties agreed to that deadline. 14 AA 3145. The parties discussed other issues with exhibits, and the District Court asked if those issues could also be settled and sent to the Court by the end of that day. 14 AA 3147. Defense counsel confirmed the end of day deadline, "Yes, we can agree to it by end of the day, Your Honor." 14 AA 3147. At the end of the calendar call that morning, the parties again confirmed that they would give all exhibit stipulations as well as the completed exhibit summary to the District

Court by the end of that day. 14 AA 3161–3162. No party objected to the end-of-day deadline or asserted that the time frame would prejudice them.

Defendants' counsel then left the courthouse and did not review Exhibit 1 to see what pages should be added. 15 AA 3275. Even though Defendants had a full copy of the exhibit and all hospital records, they asked Plaintiffs to provide an electronic copy. 15 AA 3293. Plaintiffs provided the additional electronic copy that day during business hours. *Id.* Defendants' counsel then declined to review either his copy or the additional electronic copy that Plaintiffs had sent him at any point that day. 15 AA 3286. Defendants' counsel claims that he waited until after the agreed deadline to start reviewing Exhibit 1. 15 AA 3275. Defendants' counsel did not contact the District Court or opposing counsel to ask for an extension on the agreed deadline.

At that Thursday hearing, Defendants' counsel argued for the first time that some of Exhibit 1 that Plaintiffs had produced earlier was improper, and the District Court should allow Defendants to change their agreement that everything in the exhibits on Tuesday had been resolved. 15 AA 3275; 14 AA 3142. The District Court correctly told Defendants' counsel that the exhibits had been finalized two days earlier through agreement by all parties. 15 AA 3275. Defendants' counsel then argued that his decision to only review Exhibit 1 after the deadline was Plaintiffs' counsel's fault. 15 AA 3277.

During his argument blaming others for his mistake, defense counsel expressed to the Court, "I have [additional records] in a binder here that I was planning on presenting to the Court." 15 AA 3279. Although defense counsel had assured the Court and Plaintiffs' counsel on Tuesday that he would only add around 20–25 pages to Exhibit 1, he actually attempted to add 400 pages. 14 AA 3142; 15 AA 3300. The District Court informed defense counsel that the exhibits were already settled two days earlier per the agreement by all parties. 15 AA 3279. The Court asked Defense counsel, "did you hear the Court say specifically you had until end of day Tuesday to get whatever pages were missing for Exhibit 1?" 15 AA 3285–3286. Defendants' counsel replied, "Yes, Your Honor. That was my understanding of the Court order." 15 AA 3286. Under the circumstances of this issue, it is unclear exactly what this Court can possibly do. Defendants most certainly have not demonstrated any error that would rise to the level of a new trial.

10. Defendants Have Not Demonstrated Any Error With Regard to Dr. Hurwitz's Deposition.

In their opening brief, Defendants argue that they were prohibited from conducting a full cross-examination of Dr. Hurwitz. AOB 59–65. They do acknowledge that they were able to cross-examine Dr. Hurwitz, and they also agree that they were able to offer some impeachment. *Id.* However, the ultimate complaint that Defendants present is that they were not able to fully impeach Dr. Hurwitz.

Once again, however, it is unclear what Defendants expect this Court to do. Defendants have not identified what portions of the deposition they were prohibited from using in the form of an offer of proof. *See Burgeon v. State*, 102 Nev. 43, 47, 714 P.2d 576, 579 (1986) ("If appellant desired to preserve for our review the testimony that he reasonably expected the jury to hear, absent the adverse ruling of the trial court, a detailed offer of proof was essential."). Defendants also have not demonstrated what these missing portions of the deposition would have shown. *See Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 688, 191 P.3d 1138, 1151 (2008) ("Offers of proof must be specific and definite; counsel's mere conjecture as to what the evidence might reveal does not suffice."). And, Defendants have not demonstrated how these missing portions, if presented to the jury, would have changed the outcome of the trial by affecting their substantial rights. *See* NRCP 59(a); NRCP 61. In the end, Defendants have presented what amounts to a hypothetical syllogism. That is, they want the Court to assume the first point, without a proper showing, to then make additional assumptions along the logical chain to eventually grant them a new trial. However, Defendants have not satisfied the initial assumption of what was in the omitted portions of the deposition. In fact, Defendants have not even lodged a copy of Dr. Hurwitz's deposition with either the District Court or this Court. Thus, Defendants' entire argument amounts to speculation. *See Carson Ready Mix v. First Nat'l Bank*, 97 Nev. 474, 476, 635 P.2d

276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal.").

In the end, Defendants agree that the District Court was enforcing local rules. AOB 64. With this admission, the Court should refuse to disturb the District Court's trial protocols. *See Goodman vs. Goodman*, 68 Nev. 484, 487, 236 P.2d. 305, 307 (1951) (district courts have considerably broad discretion in addressing internal affairs, such as conducting a trial); *Int'l Fid. Ins. Co. v. State of Nev.*, 114 Nev. 1061, 1062, 967 P.2d 804, 805 (1998) (a district court's discretion in setting trial protocols can only be disturbed upon showing of a "manifest abuse" of discretion); *Casey v. Musgrave*, 72 Nev. 31, 40, 292 P.2d 1066, 1071–1072 (1956) (a district court has "extensive discretionary authority" on conducting an orderly trial). Therefore, the Court should reject Defendants' arguments relative to Dr. Hurwitz's deposition.

11. Defendants Also Have Not Demonstrated Any Error With Respect to Dr. Juell's Cross-Examination.

For their final evidentiary argument, Defendants claim that Plaintiffs should not have been able to comment on Dr. Juell's malpractice cases at trial. However, they avoid the fact that Plaintiffs are entitled to explore bias of defense witnesses. *See Robinson*, 107 Nev. at 143, 808 P.2d at 527 ("[T]he exposure of a witness's motivation in testifying is a proper and important function of the constitutionally

protected right of cross-examination. . . [T]he same reasoning regarding bias applies in a civil trial."); *Capanna*, 432 P.3d at 732 (confirming the holding of *Robinson*).

This Court reviews a district court's decision regarding the admissibility of expert testimony for an abuse of discretion. *See Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1046, 881 P.2d 638, 640 (1994). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. *See Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 245 P.3d 535 (2010) (citing *Nolan v. State*, 122 Nev. 363, 376, 132 P.3d 564, 572 (2006)). "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." *Jones v. Eighth Jud. Dist. Ct.*, 130 Nev. 493, 330 P.3d 475 (2014) (citing *State v. Eighth Jud. Dist. Ct.*, 127 Nev. 927, 931–932, 267 P.3d 777, 780 (2011) (internal quotation marks and citations omitted)). Similarly, "[a] manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.'" *Id.* (citing *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997)).

On June 12, 2019, a deposition was conducted of Brian E. Juell, M.D. ("Dr. Juell"). 7 AA 1450. During his deposition, Dr. Juell gave the following testimony regarding his involvement in prior malpractice claims:

Q: Have you ever been a defendant in a malpractice case?

A: Yes.

Q: Okay. Can you tell me about it? How many were there?

A: Jeez, I've been sued four times, I think. When I was a resident, I was involved in the care of a trauma patient that developed complication from an arterial line that ended up with limb loss. But I was a resident and, you know, that did go to trial. I wasn't in trial; but I was -- I think there was a settlement made on my behalf by the University. I wasn't party to that settlement resolution, but I was deposed.

You know, there was a situation where I really was trying to do the right thing for the patient; but the attending physician ultimately made the decision to try to reverse that situation, but it was too late. So the -- then I was sued on a case here where a patient had aspiration pneumonia following a hernia repair, and the cause of the aspiration was due to a medication error by the nursing staff, you know, that led to obtundation and failure to, you know, protect his reflexes. I was deposed but dropped from that lawsuit.

Then I was sued on a very complicated case where the patient also had aspiration pneumonia but developed shock and had complications following a vascular procedure and died. And I really didn't do anything wrong, but there was a settlement made on my behalf. I agreed to settle, and then the insurance company and arbitration led to a settlement of $150,000. That was basically risk management, you know, on behalf of the insurance company. I think, you know, they, they told me that I would probably win the case, you know, if it went to trial; but they elected not to pursue it.

And then I had a case of a nerve injury that resolved, and I was dismissed with prejudice on that case by the judge. So, I think those are the only four times that I've personally been sued.

7 AA 1472–1473.

Defense counsel did not object to any questioning or testimony regarding the matter during Dr. Juell's deposition.

On October 14, 2019, however, the defense filed a trial brief requesting that no testimony be brought in regarding Dr. Juell's involvement as a defendant in any prior medical malpractice actions. 4 AA 777–796. The brief cited no case law, but relied upon standard evidentiary rules regarding relevance, improper character evidence, and unfair prejudice. On October 27, 2019, Plaintiffs responded to the trial brief. 7 AA 1439–1475. Within their brief, Plaintiffs argued that the defense waived the issue by failing to object to the testimony during deposition, and additionally provided case law to support the assertion that testimony regarding Dr. Juell's prior medical malpractice suits was proper. There was no decision on the issue prior to trial.

During trial, Dr. Juell opined that Dr. Rives' care of Titina in both 2014 and 2015 complied with the standard of care. 23 AA 5020. Yet this was his first time testifying as a medical expert. 24 AA 5158; 25 AA 5360. He had only testified prior as a treating physician. *Id.* Furthermore, he had only reviewed about 10 to 12 medical malpractice cases before that. 24 AA 5159. Moreover, every report Dr. Juell authored in his career sided with the doctor, and never the patient. 25 AA 5362. Dr. Juell also testified that he was to be paid $32,600 for the 26.5 hours he spent preparing the report in this case and testifying at trial. 25 AA 5363–5366.

Dr. Juell admitted that he diagnosed Titina with pulmonary aspiration syndrome from records, even though he is not a pulmonologist or lung expert.

24 AA 5255. He also admitted that he opined in his report that Titina demonstrated poor wound healing by failing to heal her initial hernia repair, when there was a possibility that Dr. Rives could have done a poor job that resulted in a failed repair. 25 AA 5371–5372. Additionally, Dr. Juell referenced Titina's moderate obesity as a risk factor for her poor wound healing, when in truth Titina's body mass index coordinated with her being overweight. 25 AA 5375–5377. Testimony also revealed that Dr. Juell attributed Titina's total elevated white blood count to her septic syndrome, when in reality there were changes to different types of white blood cells which lessened the effect of the elevated blood count. 25 AA 5407–5409. Additionally, Dr. Juell agreed to the following statements:

> It was known that there were at least two holes created during the July 3, 2015 surgery. This should have put Dr. Rives on notice of a potential problem and the source of the infectious process.
>
> . . .
>
> It was incumbent upon Dr. Rives with full knowledge that the colon had been perforated and repaired during surgery to presume intrabdominal source of the sepsis until proven otherwise.

25 AA 5412–5413.

Subsequently, Plaintiffs' counsel went on to question Dr. Juell about his malpractice history. 24 AA 5290. The defense objected to the line of questioning, and the objection was overruled without further argument. *Id.* In reverting back to the issue during a brief recess, the District Court stated that consistent with the

practice of the Eighth Judicial District, it was its general inclination to have a small area of inquiry for bias and competency. 25 AA 5389. The District Court then identified certain questions that would fit those parameters:

> [H]ave you previously been sued for malpractice? How many times? What was the outcome without going into details?

25 AA 5390.

In response, Plaintiffs' counsel informed the District Court that he did not have those exact questions but did have questions that fit those parameters. *Id.* The District Court reserved its ruling on that matter. 25 AA 5391 ("It's not obviously a ruling yet"). During a brief recess, the District Court returned to the issue and heard argument from both parties regarding their perspective in light of the Court's general inclination. Defendants argued that it would be prejudicial to permit the line of questioning due to issues of relevance, and that allowing these questions would require counsel to have to go into detail regarding Dr. Juell's prior malpractice claims in order to clarify his testimony. Plaintiffs, on the other hand, assured the District Court that the questioning was in line with the Court's general inclination, and go directly toward Dr. Juell's bias against Plaintiffs. Upon consideration, the District Court made the following determination:

> The Court took into consideration everyone's 7.27 briefs and is obviously cautioning all parties that they must comply with their questions, comply with the rules, only ask appropriate questions that can be asked at the time of trial and at this regard, give them some guidance on the type of questions, bias and competency that

have been allowed and then have to see if there's any objections for other things, but that in no way tells me that they can or cannot – that they cannot – can ask impermissible things.

25 AA 5346–5347.

As such, counsel for Plaintiffs proceeded to ask Dr. Juell just one question, "Doctor, do you have any bitterness or bias towards patients that bring medical malpractice lawsuits, because of the fact that you've been sued in the past?" 25 AA 5443. There was no objection.

At the end of the day, Plaintiffs were entitled to explore Dr. Juell's bias, which was evident from the record. *See Upky v. Lindsey*, No. CIV 13-0553 JB/GBW, 2015 WL 3862944, at *19 (D.N.M. June 3, 2015) ("On the other hand, the Court will admit evidence regarding other medical malpractice lawsuits that have been brought against [the plaintiffs] experts. The Court believes that, when an individual testifies as an expert, they necessarily open themselves up to an evaluation of their credibility and experience."); *Underhill v. Stephenson*, 756 S.W.2 d 459, 461 (Ky. 1988) ("For the same reason, the trial judge committed reversible error by refusing the cross-examination of the medical witness concerning a malpractice case which was pending against him. The Underhills had a right to cross-examine the medical expert on all matters relating to every issue. Evidence to show bias of an expert witness is relevant.") (citations omitted); *Willoughby v. Kenneth W. Wilkins, M.D.*, P.A., 310 S.E.2d 90, 97–98 (N.C. App. 1983) ("[W]e hold that evidence of prior medical

negligence claims brought against the expert witness is admissible to show bias or interest on the part of the expert."). Therefore, Plaintiffs urge this Court to determine that Defendants have not presented any error with respect to Dr. Juell's cross-examination.

C. THE DISTRICT COURT PROPERLY AWARDED PLAINTIFFS THEIR REQUESTED ATTORNEY FEES BASED UPON THE REJECTED OFFER OF JUDGMENT, OR ALTERNATIVELY, NRS 18.020(2)(b).

While Defendants cite some of the history of Plaintiffs' motion for attorney fees and costs, they do not earnestly challenge the award of attorney fees and costs based upon the rejected offer of judgment. Indeed, this Court reviews an award of attorney fees and costs with an abuse of discretion standard. *See Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000). This discretionary standard also applies to the District Court's weighing of the *Beattie* factors, as altered by *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998), due to Plaintiffs' prevailing offer of judgment. *See O'Connell v. Wynn Las Vegas, LLC*, 429 P.3d 664, 668 (Nev. Ct. App. 2018) (citations omitted).

The District Court's order granting attorney fees and costs to Plantiffs is lengthy and detailed. 31 AA 6802–6815. Defendants assert in their opening brief that Plaintiffs failed to demonstrate that Defendants' defenses were not brought in good faith. AOB 71–72. However, the District Court's order recites the basis for

reaching the factual findings that Defendants, in fact, did not bring their defenses in good faith. 31 AA 6804–6805. Thus, there is no reason for this Court to reweigh this *Beattie/Yamaha* factor. Defendants also challenge the third *Beattie/Yamaha* factor, despite the District Court's contrary factual findings. AOB 72; 31 AA 6805. Thus, the Court should similarly refuse to disturb this factor. Aside from the recited evidence in the District Court's order granting fees, this Court can also look to the record for supporting evidence. *See, e.g., Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). Therefore, the Court should affirm the award of attorney fees to Plaintiffs based upon the rejected offer of judgment.

If the Court affirms the award of attorney fees to Plaintiffs based upon the rejected offer of judgment, there will be no need for the Court to reach the alternative basis under NRS 18.010(2)(b) for the award of attorney fees. This Court can look to the record, which overwhelmingly supports the award of fees on this alternative basis, to fill in any missing information to affirm the award of attorney fees. *See, e.g., Wynn*, 117 Nev. at 13, 16 P.3d at 428; *see also Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 110 (1970) (explaining that "even in the absence of express findings, if the record is clear and will support the judgment, findings may be implied").

With respect to the *Center* case, Defendants' assertion that their concealment was harmless or inadvertent goes against the express findings of the District Court.

The District Court characterized the concealment of the *Center* case as "willful." 19 AA 4229–4230. Dr. Rives admitted at trial to providing false testimony in discovery. 21 AA 4635–4636. And, Plaintiffs were presumed to have suffered prejudice due to Defendants' failures. *See Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010). Thus, the District Court's alternative award of attorney fees on this initial basis was proper.

Defendants next reargue their preemption argument, even though they have offered an incomplete argument. Notably, the medical documents reflect that Titina's medical bills were indeed paid by MGM's self-funded plan. 7 RA 944–950. Yet, Defendants omitted these documents from their own appendix to make their hypothetical argument. Defendants' argument that a single use of the word "insurance" at trial does not warrant a fees sanction clearly does not appreciate the importance of the collateral source rule. *See Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996) ("We now adopt a per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose."); *Khoury v. Seastrand*, 132 Nev. 520, 539 n.6, 377 P.3d 81, 94 n.6 (2016) ("Such evidence could be used by the jury to diminish the damage award and would thus invoke the collateral source rule.").

Further, there was no legal reason to file the several offers of proof after the close of discovery. As a matter of law, they cannot serve to preserve any error.

See S. Pac. Transp. Co. v. Fitzgerald, 94 Nev. 245, 246, 579 P.2d 1251, 1252 (1978); NRS 47.040(1)(b).

Therefore, the Court should affirm the District Court's award of attorney fees based upon the rejected offer of judgment. If the Court reaches the alternative basis of NRS 18.010(2)(b), the Court should similarly affirm.

D. THE DISTRICT COURT ERRED BY REDUCING PLAINTIFFS' NON-ECONOMIC DAMAGES ACCORDING TO NRS 41A.035, DESPITE THE STATUTE BEING PREEMPTED BY THE ERISA PLAN IN THIS CASE.

The District Court erred by reducing Plaintiffs' non-economic damages according to NRS 41A.035, despite the statute being preempted by the ERISA plan in this case. Distinct from the constitutional challenges to NRS 41A.035 decided by this Court in *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 358 P.3d 234 (2015), Plaintiffs ask this Court to determine that NRS 41A.035 is preempted by the ERISA plan in this case. 5 AA 1005–1046. This preemption argument is similar to the Court's preemption of NRS 42.021 in *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 937, 408 P.3d 149, 155 (2017), where a Medicaid program with both federal and state funding was involved. Essentially, the Court ruled that NRS 42.021 was not intended to operate as a "*double* reduction" of a plaintiff's recovery. *Id.* (emphasis in original). The same is also true of NRS 41A.035, which cannot be interpreted to operate as a double reduction of Plaintiffs' non-economic damages.

The Federal District Court for New Mexico observed that "MGM provides a self-insured health insurance plan to its employees. As mentioned previously, the MGM Plan is a self-funded employee group health plan subject to ERISA; MGM is the Plan administrator and Defendant UMR is the claims administrator. The MGM Plan is administered in Nevada, and there is a "governing law" provision in the Plan states that: 'The Plan shall be construed in accordance with the laws of the State of Nevada, to the extent not preempted by federal law.'" *Med Flight Air Ambulance v. MGM Resorts Int'l*, 2017 U.S. Dist. LEXIS 193428, *10–11, 2017 WL 5634116 (unpublished). The same provisions are present in the MGM ERISA plan in this case. The insurance documents that were admitted as Court's Exhibit No. 13 contain the designation "UMR" or "UMR MGM Resorts." 7 RA 944–950. And, the ERISA plan in this case contains the same governing law provision. 7 AA 1404.

Once the Court has determined that Titina's medical bills were indeed paid by MGM's self-funded plan, the Court can then apply the same preemption argument to NRS 41A.035. 7 RA 944–950. Issues of whether a federal statute preempts state law are questions of law subject to de novo review. *See Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). Since NRS 41A.035 operates to reduce Plaintiffs' non-economic damages, denying preemption would operate as an impermissible "double reduction." Therefore, Plaintiffs requests that this Court reinstate the fully amount of the jury's verdict.

VIII. CONCLUSION

In summary, Plaintiffs urge this Court to affirm the judgment on jury verdict, as well as the award of fees and costs, and reinstate the full amount of the jury's verdict.

Dated this 3rd day of March 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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 17,063 words; or

☐ does not exceed _____ pages.

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

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of March 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENTS/CROSS-APPELLANTS' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL** was filed electronically with the Supreme Court of Nevada on the 3rd day of March 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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