THE SUPREME COURT OF THE STATE OF NEVADA

JAIME ROBERTO SALAIS, AND TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA, AND THE HONORABLE RONALD J. ISRAEL,

Respondents,

and

MAIKEL PEREZ-ACOSTA, AND ROLANDO BESSU HERRERA,

Real Parties in Interest.

Case No._____

PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, PROHIBITION

ROBERT L. EISENBERG (SBN 950)
rle@lge.net
SARAH M. MOLLECK (SBN 13830)
smm@lge.net
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada, 89519
(775) 786-6868 telephone

ATTORNEYS FOR PETITIONERS

THE SUPREME COURT OF THE STATE OF NEVADA

JAIME ROBERTO SALAIS, AND TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA, AND THE HONORABLE RONALD J. ISRAEL, Respondents, and MAIKEL PEREZ-ACOSTA, AND ROLANDO BESSU HERRERA, Real Parties in Interest.	Case No._____

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. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

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

Mokri Vanis & Jones, LLP
Wood, Smith, Henning & Berman LLP
Lemon, Grundy & Eisenberg

3. If litigant is using a pseudonym, the litigant's true name: Not applicable.

DATED: June 11, 2021

Robert L. Eisenberg

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE **PAGE NO.(S)**

TABLE OF AUTHORITIES (cont'd.)

CASE **PAGE NO.(S)**

TABLE OF AUTHORITIES (cont'd.)

CASE **PAGE NO.(S)**

RULES AND STATUTES

TABLE OF AUTHORITIES (cont'd.)

RULES AND STATUTES

INTRODUCTION

Petitioners Jaime Roberto Salais and Tom Malloy Corporation, d/b/a Trench Shoring Company (Defendants) hereby petition for a writ of mandamus or prohibition, requiring the district court to vacate its February 10 and May 17, 2021 orders that strike Defendants' Answer as to liability and impose an award of attorney's fees and costs. The district court manifestly abused its discretion when it struck Defendants' liability defenses for waiting to disclose a witness already well known to Plaintiffs (real parties in interest).

The district court also manifestly abused its discretion when it punished Defendants for asserting attorney-client privilege when Defendants never placed attorney-client communications at-issue, and sought to protect communications with counsel.

The district court further manifestly abused its discretion by misapplying applicable factors in sanctioning Defendants for the actions of their counsel when the district court failed to identify how Plaintiffs were prejudiced by the late disclosure and why exclusion of the witness from trial was not the only appropriate remedy.

Writ relief is needed because Defendants do not have a plain, speedy, and adequate remedy in the ordinary course of law, and because Defendants will suffer

irreparable injury for paying the sanctions award with no guarantee that Plaintiffs will reimburse the money should the district court's orders be reversed on subsequent appeal.

ROUTING STATEMENT

This petition should be retained by the supreme court under NRAP 17(a)(11) and (12) because it raises an issue of first impression regarding whether a party is required to disclose a witness equally available or known to the opposing party, when the first party is unsure whether it will use the witness in support of its case, and the petition raises an issue of statewide importance regarding the imposition of sanctions in the absence of prejudice to the opposing party.

This petition also raises a question of first impression of whether a court can sanction a party for refusing to waive attorney-client communications when the party has not put a claim or defense at issue such that the privileged communication would be subject to waiver. NRAP 17(a)(11).

ISSUES PRESENTED

1. Whether the district court abused its discretion and acted arbitrarily and capriciously in finding, without substantial evidence, that defense counsel intentionally concealed a witness who was of dubious credibility and would have been favorable only to Defendants, not Plaintiffs.

2. Whether the district court abused its discretion in finding that Defendants were forced to either waive the attorney-client privilege or were "assumed" to have known about a witness when there was contrary evidence in the record and Defendants never placed the advice of counsel at issue.

PROCEDURAL HISTORY

A. The car accident and witness Espinoza.

This case arises out of a July 2016 accident involving three vehicles – a gold car driven by a supposedly unknown party, a silver car in which Plaintiffs were passengers, and a work truck driven by Defendants' employee. 7P.App. 1404-05, 1457-58. The accident occurred when the gold car suddenly cut off the silver car and slammed on its brakes. *Id.* The Defendant driver was unable to stop in time and rear-ended Plaintiffs' vehicle. *Id.* Immediately after the accident, the Plaintiffs did not seek medical treatment; instead, they drove to an attorney's office. 6P.App. 1346-47.

A complaint for personal injuries was filed in April 2018. 1P.App. 1. Defendants' Answer was filed May 5, 2018, disputing liability and asserting various affirmative defenses. 1P.App. 11.

In April 2019, defense counsel Todd Jones received an unsolicited email from a person named Nancy Espinoza, who represented herself to be the former girlfriend

of Plaintiff Herrera. 3P.App. 721. Espinoza alleged she had knowledge the accident was a set-up. 3P.App. 551. Espinoza offered to be a witness in the case, but only in exchange for money. *Id.*

Suspicious of the email and Espinoza's motive as an ex-girlfriend, Jones informed Espinoza he was prohibited from paying her for testimony, as she had demanded, but Jones requested to meet in person or speak on the phone in order to ascertain her truthfulness and motives. 3P.App. 771-72. Espinoza refused. *Id.* Jones attempted several times to arrange a meeting or call with Espinoza, but she ceased communicating with him. *Id.* This led Jones to believe that Espinoza was not likely to have credible information related to the accident but was simply seeking money. *Id.*

After ceasing communications, Espinoza reached out to Jones unprompted a second time, nearly a year later in January 2020. 3P.App. 723. Espinoza claimed she had another "tip" that Plaintiff Herrera was playing semi-pro baseball (although he was claiming serious injuries from the car accident). *Id.* She refused, however, to meet in person or speak with Jones and again ceased all communication with him. *Id.* Jones, however, independently confirmed the veracity of this tip by locating online YouTube videos showing Herrera playing baseball. *Id.* In his deposition, Herrera confirmed that he was playing baseball on a semi-pro team. *Id.*

After Herrera's deposition and confirming the veracity of Espinoza's tip, Defendants disclosed Espinoza as a witness in their supplemental NRCP 16.1 disclosures on March 12, 2020. 2P.App. 268.

Espinoza's deposition was taken on April 22, 2020. 2P.App. 399-464. Before her deposition, Espinoza sent Jones another email recanting her prior emails, citing her "separation" from Plaintiff Herrera at the time she first contacted Jones and saying she sent "a false statement about things I have no evidence of, because I wanted to ruin his case." 4P.App. 758. This statement further validated Jones's concerns regarding Espinoza's credibility and his decision to not disclose Espinoza the moment she first contacted him. 3P.App. 725.

During her deposition, Espinoza contradicted her prior statements to Jones regarding information she had about the accident being a set-up. 2P.App. 316-17. When newly-retained defense counsel Joel Odou attempted to impeach Espinoza with copies of her email communications with Jones, Plaintiffs objected and claimed that Defendants had hidden discoverable evidence in the case – specifically, the emails between Jones and Espinoza. *Id.* After Espinoza's deposition, Defendants supplemented their disclosures with all emails between Jones and Espinoza. 2P.App. 466-502.

B. Motion to Strike Answer

Plaintiffs subsequently filed a motion to strike Defendants' Answer. 1P.App. 221. They expanded upon their initial objection regarding the non-disclosure of emails and instead claimed that Defendants had willfully failed to disclose Espinoza as a witness until *after* her deposition and failed to include emails between Espinoza and Jones in response to a written discovery request. 1P.App. 223. This discovery request was directed to the corporate Defendant and asked for its "complete file regarding the incident," indicating a request for the company's investigation into the accident. 1P.App. 226.

Plaintiffs claimed they were prejudiced by Defendants' non-disclosure of Espinoza because they had incurred costs by retaining expert witnesses. They failed, however, to explain how the alleged "hiding" of Espinoza (Plaintiff Herrera's girlfriend) related to their expert costs and how or why they would not have retained such experts in the first place. 1P.App. 225. The experts Plaintiffs had retained, moreover, were medical experts to opine on causation and damages. 1P.App. 22-48.

Espinoza's existence as a witness was always known to Plaintiffs. At his own deposition in October 2019, Plaintiff Herrera admitted that Espinoza was his "girlfriend," with whom he had been living for nearly four years. 6P.App. 1279. They dated at the time of the accident. 6P.App. 1282. In fact, Herrera and Espinoza

had been involved in a prior accident a year before the July 2016 accident, where both allegedly sustained injuries and treated at the same medical provider. 6P.App. 1299-1305.

Despite Plaintiffs' knowledge of Espinoza as a witness regarding alleged injuries and disabilities, Plaintiffs themselves failed to disclose Espinoza as a potential witness until six months *after* Herrera's initial deposition and after Espinoza's deposition. 5P.App. 1027.

Defendants opposed Plaintiffs' motion to strike, providing all of the Espinoza emails for the court's review. 2P.App. 356. Counsel Jones also provided an affidavit in a supplemental opposition that informed the court of his concerns with the legitimacy and veracity of Espinoza's identity and the fact she sought money in exchange for testimony. 3P.App. 720. Jones informed the court that Espinoza's failure to contact him for nine months after he refused to pay her confirmed his suspicions regarding the lack of any veracity of her claims. 3P.App. 725. Jones also informed the court that he never intentionally withheld disclosure of Espinoza in order to thwart discovery, noting that her information would have been helpful, not hurtful, to the defense's case. *Id.* Thus, defense counsel made a decision to not disclose information *helpful to the Defendants* because of his concerns regarding the witness's motivation and lack of veracity. *Id.*

Jones also averred that no Defendant, at any time, had contact with Espinoza or had any personal knowledge of Espinoza or her emails with defense counsel. 3P.App. 724-25. Instead, all defense contacts with Espinoza were with Jones and not the Defendants themselves. *Id.* Jones averred that it was his decision, not that of his clients, to delay disclosing Espinoza as a witness due to concerns over her lack of veracity. *Id.*

Plaintiffs themselves also recognized Espinoza's dubious credibility. In seeking to preclude her from testifying at trial, Plaintiff Herrera argued that Espinoza had a "tumultuous on-and-off relationship" with Herrera, and that she was not a witness to the accident. 3P.App. 585-86. Herrera argued that Espinoza tried to lie during her deposition and say she had not communicated with Jones. *Id.* Conceding to Jones's precise concerns regarding Espinoza's credibility, Plaintiffs argued that "Espinoza has some type of axe to grind against the Plaintiff," and her "limited correspondence with defense counsel" and her deposition testimony proved that "she is not a credible witness." *Id.* Thus, Plaintiffs themselves recognized Espinoza's lack of credibility and sought to prohibit her from testifying.

The district court held a hearing on Plaintiffs' Motion to Strike. The district court appeared to believe that Defendants had an obligation to disclose even if they believed the witness was lying about having information related to an incident and

testifying only because he or she was financially motivated. 7P.App 1570-71. The district court found, however, that "none of the expert witnesses regarding liability are affected at all" in regard to Plaintiffs' assertions that they were prejudiced by expending costs to retain experts. 7P.App. 1572. The district court ignored the fact that Espinoza was equally – if not more so – available to Plaintiffs as she was Plaintiff Herrera's girlfriend. 7P.App. 1578.

The court struck Espinoza's deposition testimony and emails as the "most minimal" sanction and reserved its right to impose additional sanctions pending a determination on whether Defendants themselves personally knew about Espinoza. 7P.App. 1579-80. Instead of holding an evidentiary hearing, however, the court ordered defense counsel to turn over *in camera* all communications and billing between defense counsel and their clients, including litigation and trial strategy that had no bearing on the Espinoza issue, from the date of Espinoza's first unsolicited contact to the present. 4P.App. 774-777. This was despite the fact that Defendants had not placed the advice of their counsel at issue. 4P.App. 893-894.

Defendants filed a motion for reconsideration of the court's order requiring them to turn over all attorney-client communications. 4P.App. 779. Without holding an evidentiary hearing, the court instead found that Defendants were "assumed" to have knowledge and therefore had agreed to defense counsel's actions

regarding the Espinoza issue, because they were asserting the "advice of counsel" defense (when in fact Defendants never raised this defense). 7P.App. 1588-89. The district court ignored the undisputed assertions made in Jones's affidavit that Defendants themselves had no knowledge of Espinoza and that Espinoza was a person only Jones knew about as he investigated her veracity. 7P.App. 1591-92. Instead, the court found that in exchange for refusing to waive attorney-client privilege and protect communications and advice unrelated to Espinoza, Defendants would be punished and prohibited from asserting that they personally were unaware of their defense counsel's actions. 4P.App. 940.

C. The district court's order striking the Answer.

The district court issued its order on February 10, 2021. 4P.App. 933. The order found that Espinoza had discoverable information because she claimed to have knowledge of the circumstances surrounding the accident and the extent of Plaintiffs' injuries. 4P.App. 936. Ironically, the order said nothing about the fact that Plaintiffs failed to disclose Espinoza under the same reasoning – that as Herrera's live-in girlfriend, she had knowledge of Herrera's injuries/disabilities and his statements about accident. *Id.*

The court found that sanctions should be awarded under the *Young* factors for Defendants' failure to disclose Espinoza, despite the fact she was equally known

to Plaintiffs, despite the fact that Plaintiffs themselves sought to exclude Espinoza based on her lack of credibility, and despite the absence of any prejudice to Plaintiffs. 4P.App. 936. The court arbitrarily and capriciously rejected Jones's assertions that the decision to not disclose Espinoza was his decision alone, and instead punished Defendants for invoking the attorney-client privilege for communications with counsel. 4P.App. 937-38. Even though disclosure of Espinoza and her emails would have been *helpful* to the defense and *harmful* to Plaintiffs, the court concluded that Defendants' counsel (not Defendants themselves) had intentionally hid evidence supporting a fraud defense to the "extreme detriment of the opposing party." The court failed to identify what that detriment was. *Id.*

The court's analysis glossed over the remaining *Young* factors. The court failed to explain how a lesser sanction would prejudice Plaintiffs, when Plaintiffs themselves knew of and failed to disclose Espinoza. 4P.App. 939. Moreover, the court noted no evidence had been lost. *Id.*

In considering whether sanctions unfairly operated to penalize Defendants for their counsel's alleged misconduct, the court found defense counsel was "given every opportunity" to prove that their clients, Defendants, had no knowledge of Espinoza, despite the fact that the court did not hold an evidentiary hearing and despite defense counsel offering to provide the court affidavits from Defendants.

4P.App. 940, 7P.App. 1591. The court sanctioned Defendants for claiming attorney-client privilege as to communications with counsel, finding that Defendants prevented "Plaintiffs from exploring their claims outside of self-serving affidavits." 4P.App. 940 (emphasis added). Calling the Jones affidavit "self-serving" despite all evidence produced, the court found Defendants offered no support for their position that they had no knowledge of Espinoza. *Id.*

In addition to striking Espinoza as a witness, the court also struck Defendants' Answer and affirmative defenses as to liability, precluding Defendants from introducing any evidence regarding disputed liability in this case, including testimony from the defendant driver. *Id.*

On top of excluding Espinoza and striking Defendants' Answer as to liability, the district court also awarded attorney's fees and costs against the Defendants personally. 4P.App. 491. Providing no analysis on the *Brunzell* factors other than the fleeting conclusion that certain hourly rates were "reasonable," the court awarded a total of $67,780.45 in attorney's fees and costs to Plaintiffs. 6P.App. 1244-46.

ARGUMENT

A. A writ petition is necessary and appropriate.

Mandamus is available "to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station." *See* NRS 34.160.

Mandamus controls a manifest abuse or arbitrary or capricious exercise of discretion, or clarifies important issues of law. *Bennett v. Eighth Judicial Dist. Ct.*, 121 Nev. 802, 806, 121 P.3d 605, 608 (2005). Alternatively, prohibition arrests the proceedings of a tribunal when such proceedings are in excess of the tribunal's jurisdiction. NRS 34.320.

Writs are available when no plain, speedy or adequate legal remedy exists. *See* NRS 34.170. Writs may be appropriate remedies when addressing pretrial discovery orders. *Columbia/HCA Healthcare Corp. v. Eighth Jud. Dist. Ct.,* 113 Nev. 521, 526, 936 P.2d 844, 847 (1997). Mandamus may also be appropriate when a district court abuses its discretion or acts arbitrarily and capriciously in awarding sanctions, because the sanction must fit the violation. *City of Sparks v. Second Jud. Dist. Ct.*, 112 Nev. 952, 955, 920 P.2d 1014, 1016 (1996). To determine whether a subsequent appeal would provide an effective remedy, each case must be individually examined, and extraordinary relief may be granted "where circumstances reveal urgency or strong necessity." *Jeep Corp. v. Second Jud. Dist. Ct.*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

Here, a subsequent appeal after the final judgment fails to provide an effective remedy because, if the district court's orders stand, Defendants will be forced to try this case only as to causation and damages without the benefit of their liability

defenses, including their strong defense that the accident was a staged set-up by Plaintiffs. Evidence and testimony regarding liability, such as the defendant driver's testimony that the gold car caused the accident, will be excluded at trial. Defendants will be prejudiced because the jury will hear evidence related only to damages. Without the ability to present liability defenses at trial, an appeal from the final judgment will be an inadequate remedy, as the appeal will only be based on a partial record in this case related only to damages.

Writ relief is also appropriate because the district court's sanctions orders were abuses of discretion and were arbitrary and capricious. In *Sparks*, the district court sanctioned a defendant under NRCP 16.1 and NRCP 37 for allegedly not acting in good faith and violating a pretrial order. 112 Nev. at 955, 920 P.2d at 1016. This court granted a writ of mandamus vacating the district court's sanction order. *Id.* It found that "implicit in the district judge's authority to sanction is that the district judge must design the sanction to fit the violation." *Id. citing Nevada Power v. Fluor Illinois*, 108 Nev. 638, 646–47, 837 P.2d 1354, 1360–61 (1992) (sanction for attorney's fees pursuant to NRCP 37 must be limited to violation of the discovery order at issue). The *Sparks* court found the sanctions were unwarranted because the conduct of the defendant and its counsel did not fit the complained-of violations at issue. *Id.*

Just like in *Sparks*, the district court's sanctions orders in the present case are invalid because they are not limited to the complained-of violation at issue. The alleged violation is a delay in disclosing Espinoza and her email communications. When a party fails to disclose a witness or document under NRCP 16.1, the remedy is to prohibit the party from using the witness or document at trial. NRCP 16.1(e)(3)(B) (2019). Here, the district court went beyond that sanction in a manifest abuse of discretion by also striking the Defendants' Answer on liability based on its finding that Defendants' actions were intentional and intended to sabotage Plaintiffs, with no substantial evidence to support that finding. Similarly, the district court's sanctions orders are arbitrary and capricious when (1) Plaintiffs themselves knew of Espinoza at all relevant times and failed to disclose her as a witness and (2) Plaintiffs argued that Espinoza was not a credible witness and should not be permitted to testify based on her vendetta against Plaintiff Herrera – the very thing with which Jones was concerned. Striking the entirety of Defendants' Answer as to liability and awarding nearly $70,000 in attorney's fees in addition to excluding Espinoza was an abuse of discretion and an arbitrary and capricious decision for which mandamus should issue.

B. Standard of review for sanctions orders.

This court reviews a non-case-ending sanctions order for an abuse of discretion. *Valley Health Sys., LLC v. Peterson*, 134 Nev. 634, 638, 427 P.3d 1021, 1026 (2018), *as corrected* (Oct. 1, 2018). "Noncase-concluding sanctions will be upheld if the district court's sanction order is supported by substantial evidence." *Id.* at 639, 427 P.3d at 1027. "An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination...." *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 89, 343 P.3d 608, 614 (2015).

C. NRCP 16.1 and NRCP 26 do not mandate disclosure of Espinoza from the moment she contacted Jones.

Plaintiffs argued, and the district court found, that Defendants should have disclosed Espinoza and her emails from the moment she contacted Jones. Plaintiffs also argued, and the district court found, that Defendants' counsel tried to "sandbag" Plaintiffs and build a fraud defense. 4P.App. 937. The district court's finding was a manifest abuse of discretion, however, in light of the applicable law and facts.

Rule 16.1, in conjunction with NRCP 26, does not mandate the disclosure of Espinoza or her emails at the moment she contacted Jones. Rule 16.1 requires a party to disclose the name of each individual "likely to have discoverable information under Rule 26(b)," including for impeachment or rebuttal. NRCP

16.1(1)(A)(i) (emphasis added). Rule 26 permits discovery into any nonprivileged matter that is relevant to a party's claims or defenses and proportional to the needs of the case. NRCP 26(b). A party is under an obligation to supplement its 16.1 disclosures to include "after acquired information" if the party learns that its initial disclosures are either incomplete or incorrect "and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." NRCP 26(e) (emphasis added).[1] The purpose of initial disclosures is to "alert the opponent to the existence of a witness whose testimony may be helpful to the disclosing party." *In re Sonic Corp. Customer Data Security Breach Litigation,* 2018 WL 11255772, *3 (N.D. Ohio, 2018; unpublished).

In *V5 Techs. v. Switch, Ltd.*, the court examined whether a party violated its duty with respect to supplementing its disclosures when it failed to disclose a witness known to both parties until after the discovery deadline. 334 F.R.D. 615, (D. Nev. 2020). In examining FRCP 26(a) and (e), the counterparts to NRCP 16.1(a) and NRCP 26(e), the court denied the defendant's motion to strike the witness because the defendant was on notice of the witness's "potential pertinence" during discovery,

[1] No rule requires an attorney to disclose the identity of a person whose story is so far-fetched and lacking credibility that the attorney does not reasonably believe the person is "likely to have discoverable information," particularly when the person demanded money for testimony, and the person's story would favor the attorney's case if the person had any credibility.

including depositions. *Id.* at 618-619. The court held a formal disclosure is not required "when the identity of a witness and subject areas of pertinent information are well-understood by the opposing party." *Id.* at 618.

V5 Techs held that courts are "particularly disinclined to find a disclosure violation when the party seeking sanctions itself previously exposed its own knowledge of the information omitted from formal disclosures." *Id.* at 618 (emphasis added). The court found no disclosure obligation was triggered with respect to the witness and that there was no "sandbagging or bad faith conduct" given that the party seeking sanctions already knew about the witness. *Id.* at 618, fn. 3.

Here, neither NRCP 16.1 nor NRCP 26 required disclosure of Espinoza at the time of her initial contact with Jones, as the court erroneously found, because (1) Defendants did not intend to use Espinoza's alleged information because of its lack of credibility, 3P.App. 723, and (2) Espinoza's identity was already well-known to Plaintiffs, who likewise failed to disclose her.

When Espinoza first contacted Jones, there was no information for Defendants to disclose because Jones did not intend to use Espinoza as a likely witness given his legitimate concerns regarding her credibility. 3P.App. 722-723.

Nothing occurred with Espinoza during the next nine months, except for the deposition of Plaintiff Herrera, wherein Herrera himself identified Espinoza as his

girlfriend at the time of the accident and was living with her *at the time of his deposition*. 6P.App.1279. Despite this, Plaintiffs themselves never formally disclosed Espinoza as a witness until *after* her deposition six months later.

Espinoza's next unsolicited communication to Jones was in January 2020 with the "tip" that Plaintiff Herrera was playing semi-pro baseball. 3P.App. 723. When Jones independently verified this fact in March 2020 before the continued deposition of Herrera, he promptly disclosed Espinoza as witness. 3P.App. 724. It was only at this time that, under NRCP 16.1, Espinoza was an individual "likely to have discoverable information under NRCP 26(b)" regarding claims and defenses–specifically, defenses related to Herrera's alleged injuries. This disclosure was timely, within discovery deadlines, and made as soon as Defendants had identified that they may use Espinoza to support their defenses. *Id.* No earlier disclosure was required and it was an abuse of discretion for the district court to find otherwise. Moreover, given that Plaintiffs themselves knew of Espinoza, no disclosure obligation was triggered with respect to Espinoza at the time of her initial contacts with Jones. *V5 Techs.*, 334 F.R.D. at 618.

The district court's decision to the contrary was a manifest abuse of discretion and not supported by substantial evidence.

D. The district court's February 10, 2021 sanctions order is an abuse of discretion and is arbitrary and capricious.

Rather than applying NRCP 16.1's exclusion remedy, the district court also sanctioned Defendants pursuant to its inherent power under *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). It did not find that Defendants had violated a court order, but instead found that sanctions should be awarded under its inherent powers for alleged "abusive litigation practices," for the late disclosure of Espinoza and her emails. 4P.App. 936. In addition to striking Espinoza and her emails, the court struck Defendants' Answer as to liability and awarded attorney's fees and costs.

"Generally, sanctions may only be imposed where there has been willful noncompliance with a court order or where the adversary process has been halted by the actions of the unresponsive party." *GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). "Fundamental notions of fairness and due process require that discovery sanctions be just and that sanctions relate to the specific conduct at issue." *Id.*, at 870, 900 P.2d at 325.

The district court's February order was a manifest abuse of discretion because it went beyond the sanction for failure to disclose, it misapplied the *Young* factors,

it was not based on substantial evidence, and it was arbitrary and capricious, especially given Plaintiffs' similar failure to disclose.

1. The remedy for late disclosure is exclusion.

If a party fails to comply with disclosure requirements, "the party cannot use any witness or information not so disclosed unless the party shows a substantial justification for the failure to disclose or unless the failure is harmless." *Capanna v. Orth*, 134 Nev. 888, 894, 432 P.3d 726, 733 (2018). When a party fails to abide by NRCP 16.1's disclosure requirements, "the appropriate analytical framework" is NRCP 37(c)(1). *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265, 396 P.3d 783, 787 (2017). Under NRCP 37(c)(1), "the party is not allowed to use that information or witness" as evidence unless the failure was "substantially justified or harmless." *Id. citing* NRCP 37(c)(1).

Here, the court's draconian sanctions order not only excluded Espinoza and her emails but also sanctioned Defendants by striking their Answer as to liability and awarded attorney's fees. This was an abuse of discretion because the district court's decision went beyond the analytical framework set forth in *Pizarro-Ortega*. Specifically, the court found that no evidence had been lost in the case (4P.App. 939), and that Plaintiffs' claimed prejudice of incurring expert costs was unrelated to liability, which is what Espinoza's testimony concerned. 7P.App. 1572. Indeed,

Plaintiffs' expert disclosures reveals the retention of medical experts who would testify as to causation and future damages. 1P.App. 22-48.

The court failed to explain what the "extreme detriment" was to Plaintiffs or how Plaintiffs were prejudiced by defense counsel's decision to wait to disclose a witness with whom Plaintiffs were already familiar – perhaps even more familiar than Defendants, given that she was Plaintiff Herrera's live-in girlfriend. Because the district court's sanctions order went beyond exclusion of the witness with no evidence of prejudice to Plaintiffs, it was a manifest abuse of discretion. *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (manifest abuse of discretion is a clearly erroneous application of a law or rule.).

2. The district court's confusion over "advice of counsel."

The record reflects confusion over "advice of counsel," a term the court – not Defendants – proffered in the case. 7P.App. 1576. The district court's confusion infected its analysis on the "willfulness" factor when considering sanctions under *Young*. The court believed that since Defendants refused to waive the attorney-client privilege and produce "all communications and billing," including privileged communications unrelated to Espinoza, Defendants were relying on "advice of counsel" regarding whether they actually knew about Espinoza. The court then found that it would be "assumed" that Defendants themselves had knowledge of

Espinoza and agreed to defense counsel's actions. 7P.App. 1588. This finding was erroneous as a matter of law and unsupported by the evidence.

The "advice of counsel" defense arises when a party seeks an advantage in litigation by revealing part of a privileged communication. *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995). The party is deemed to have waived the privilege regarding the subject matter of the communication the party revealed. *Id.* Advice of counsel, however, "is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner." *Fid. & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516, 520 (E.D. Pa. 1996). Rather, the client must take an "affirmative step in the litigation to place the attorney's advice at issue." *Id.*

In *Aetna Cas. & Sur. Co. v. Superior Ct.*, 200 Cal. Rptr. 471, 475 (Ct. App. 1984), the plaintiff argued that an insurer relied on "advice of counsel" and waived attorney-client communications regarding the transaction for which advice was sought. The court disagreed and found the insurer was not arguing its conduct was "reasonable *because their counsel opined* so, but that their conduct was reasonable because the *facts* indicated no valid claim existed." *Id.* (emphasis in original). The insurer was prepared to defend itself not because it was "advised to do so" but

because the advice was correct and it was prepared to defend itself on the correctness of that fact. *Id.* This was not "advice of counsel" and no privileged was waived. *Id.*

Here, Defendants never suggested they were relying upon "advice of counsel" regarding Espinoza. There was no affirmative step taken by either Defendant to assert advice, if any, given by Jones regarding Espinoza. Rather, Defendants continuously asserted that "advice of counsel" was not an issue and they had not waived attorney-client privilege, especially as to communications that had no bearing on the Espinoza issue. 4P.App. 890-96.

Jones filed an uncontradicted affidavit establishing he was the only person on the defense side with knowledge of Espinoza, and Defendants themselves did not know of her. 3P.App. 724-25. Jones never stated that his clients relied on his advice on when to disclose Espinoza; instead, that decision was his alone. *Id.* Jones's affidavit does not place "advice of counsel" at issue nor waive the attorney-client privilege. *Id.* The privilege is held by the Defendants as clients and it is theirs to waive. NRS 49.095.

When a district court makes a decision that is "contrary to the evidence in the record," it is a capricious exercise of discretion. *Atl. Specialty Ins. Co. v. Eighth Jud. Dist. Ct.*, 2021 WL 1191318 (Nev. 2021; No. 81481; unpublished). This includes a district court that effectively disregards affidavits in the record and statements

made at hearings. *Id.* at *1-2. The court's decision to disregard undisputed facts in Jones's affidavit, in the absence of any evidentiary hearing, was arbitrary and capricious.

The district court manifestly abused its discretion when it sanctioned Defendants for refusing to waive the attorney-client privilege and instead "assuming" Defendants knew about Espinoza, particularly when Defendants never asserted "advice of counsel" as a defense to sanctions. The district court's error infected its remaining analysis, particularly regarding its finding on whether sanctions unfairly operated to penalize a party for the alleged misconduct of counsel. 4P.App. 940.

3. The district court misapplied the *Young* factors.

The court's *Young* analysis focused primarily on the "degree of willfulness of the offending party," and ignored whether Plaintiffs were actually prejudiced by the late disclosure of Espinoza and her emails. "Essentially, the *Young* factors come down to the willfulness or culpability of the offending party, the prejudice to the non-offending party caused by the loss or destruction of evidence, and 'the feasibility and fairness of alternative, less severe sanctions.'" *MDB Trucking, LLC v. Versa Prod. Co., Inc.*, 136 Nev. Adv. Op. 72, 475 P.3d 397, 403 (2020). Willfulness "requires an intent to gain a litigation advantage and harm one's party

opponent by destroying material evidence." *MDB Trucking,* 475 P.3d at 404.

The court found no evidence was lost or destroyed. Instead, it found Defendants' counsel intended to ambush Plaintiffs during Espinoza's deposition, but failed to state how Plaintiffs were prejudiced, particularly when Plaintiffs themselves knew Espinoza was a witness and the district court struck Espinoza and her emails anyway. Instead, the district court implied intent against Defendants for the actions of their counsel because Defendants invoked the attorney-client privilege for communications with counsel. This finding was completely contrary to Jones's affidavit and law on "advice of counsel."

The second and fourth *Young* factors require a district court to assess prejudice to the non-offending party caused by the loss or destruction of the evidence. *MDB Trucking, LLC,* 475 P.3d at 405. Prejudice "depends on the extent and materiality of the evidence lost or destroyed." *Id.* A party seeking sanctions should prove actual prejudice by showing that the lost evidence was "material to the party's case and that its loss inflicted irreparable harm." *Id.* (emphasis added).

Compounding the district court's errors regarding its finding of willfulness by Defendants and confusion over "advice of counsel," the district court's decision was erroneous because it failed to explain how Plaintiffs were prejudiced by the late disclosure of Espinoza and why the feasibility and fairness of a less severe sanction

would fail to cure any prejudice. The decision failed to identify what the prejudice was to Plaintiffs, who (1) already knew of the existence of Espinoza (Plaintiff Herrera's girlfriend) and failed to disclose her themselves, and (2) were successful in moving to exclude Espinoza and her emails as evidence in the case, thus impacting Defendants' liability defense. Espinoza's testimony did not have any bearing on Plaintiffs' experts – a finding the district court made. *See* 1P.App. 225 *and* 7P.App. 1572. Instead, her testimony would have gone to liability and the district court excluded her and her emails from trial. The district court failed to find how Espinoza was "material" to Plaintiffs' case and how the later disclosure of Espinoza would have "inflicted irreparable harm" to Plaintiffs' case, especially given that Plaintiffs knew about her.

After admitting that no evidence had been lost in the case, the district court failed to evaluate why alternative measures were insufficient to cure any alleged prejudice to Plaintiffs. 4P.App. 939. Despite the fact the court had already stricken Espinoza as a witness, the court summarily concluded that because Defendants sought to conceal information regarding liability, "it only seems just" to also strike Defendants' Answer as to liability. *Id.* This conclusory statement fails to evaluate whether striking Espinoza and her emails, which also related to liability, was a sufficient alternative sanction, especially in light of this court's policy favoring

adjudication of cases on their merits. The district court's failure to evaluate alternative measures was an abuse of discretion.

E. The district court's May 17, 2021 fee award is an abuse of discretion.

The district court also imposed a punitive $67,780 attorney fee and cost award against Defendants for fees for Plaintiffs' three attorneys. 6P.App. 1244-46. The court found that Plaintiffs should be awarded all costs and reasonable attorney's fees for the deposition of Espinoza and Plaintiffs' Motion to Strike as discovery sanctions. The court's decision on sanctions, however, was based upon the erroneous determination that (1) Defendants had an obligation to disclose Espinoza the moment she contacted defense counsel, and (2) Defendants willfully "hid" Espinoza to prejudice Plaintiffs. As established, no substantial evidence supports these findings.

The district court's fee award should also be vacated because it awarded attorney's fees based on insufficient evidence and it failed to conduct a complete analysis of the *Brunzell* factors.

An award of fees must be "reasonable." NRCP 37(c)(1). In evaluating reasonableness, the district court must consider the factors set forth in *Brunzell v. Golden Gate National Bank,* 85 Nev. 345, 349–50, 455 P.2d 31, 33 (1969). A fee award must be supported by substantial evidence. *Logan v. Abe,* 131 Nev. 260, 266,

350 P.3d 1139, 1143 (2015). It is preferred that district courts expressly analyze each factor relating to an award of attorney's fees. *Id.; see also*, *Henry Prod. Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998) (district court's failure to state basis for fee award is arbitrary, capricious, and abuse of discretion).

Here, the district court abused its discretion in awarding nearly $70,000 in attorney's fees to Plaintiffs' attorneys because it did not analyze the *Brunzell* factors, there was no substantial evidence supporting the fee award, and the fees awarded were largely duplicative.

While the district court cited to *Brunzell* in its order awarding fees, the order fails to include any discussion or application of the factors to each of the three attorneys who requested fees. Instead, the court made the conclusory determination that the requested rates of counsels Drummond and Kane were "reasonable," and a fee of $750 per hour was "reasonable" for Mr. Henriod's work. 6P.App. 1245. This single paragraph constitutes a conclusory award with no explanation for its basis. *See Henry Prod.*, 114 Nev. at 1020, 967 P.2d at 446.

The award should also be vacated because the supporting documents are largely insufficient. For example, "Exhibit 1" to Plaintiff Herrera's fee request is an undated, unidentified document containing a table of dates, hours, and purported description of time spent. 4P.App. 963-65. This document fails to identify who

spent the time on the particular task. *See* 5P.App. 995-96. The same is true of Plaintiff Perez's fee request, which also includes an undated, unidentified document containing a table of requested fees. 5P.App. 1005-06. As Defendants pointed out, some of the work was done by associates, but the associates' time is simply lumped in with partner time and billed at a partner rate. *Id.*, 5P.App. 1016. The district court's order completely fails to address or account for this.

The court also awarded fees for work that was largely duplicative of work performed by other attorneys. Such an award of fees is unreasonable as a matter of law, because a court should exclude hours that are excessive, redundant, or otherwise unnecessary. *MetroPCS v. A2Z Connection, LLC*, 2019 WL 2425690, at *2 (D. Nev. Feb. 11, 2019; unpublished). While some duplication of effort might be necessary in complex cases, awards for duplicate time by senior attorneys and associates should be avoided. *See id.* at *3; *Copper Sands Homeowners Ass'n, Inc. v. Copper Sands Realty, LLC*, 2016 WL 10719389, at *4 (D. Nev. July 18, 2016; unpublished), *report and recommendation adopted,* 2016 WL 10719386 (D. Nev. Sept. 27, 2016; unpublished) ("[C]ourts ought to examine with skepticism claims that several lawyers were needed to perform a task, and should deny compensation

for such needless duplication as when three lawyers appear for a hearing when one would do.").

Here, counsel Henriod prepared most of Plaintiffs' briefing on these matters. 5P.App. 995-96. Despite Henriod's extensive experience, counsels Drummond and Kane both charged to review Henriod's work. 4P.App. 963-65, 5P.App. 1005-06. Additionally, all three attorneys for Plaintiffs appeared at the hearings to argue. *Id.* This is the type of duplicative work the *Metro PCS* court found excessive, redundant, and unnecessary.

Counsel Kane's fees of $17,375 are particularly unreasonable as his client, Plaintiff Perez, merely filed joinders to Herrera's motions yet his counsel charged nearly the same amount in attorney's fees. 5P.App. 1005-06. Similarly, Henriod spent 13 hours preparing an 8-page document and 20 hours preparing a 7-page document. 5P.App. 995-96, 1018-20. Such time was unnecessary and unreasonable, particularly because Plaintiffs did not prevail on one of the matters (a Motion for Reconsideration). 4P.App. 940. Consequently, those fees should not have been awarded.

///

///

///

CONCLUSION

Defendants did not have an obligation to disclose Espinoza as a witness the moment she contacted defense counsel Jones and demanded payment in exchange for testimony. The district court erred in finding that Defendants, through their counsel, had "hidden" Espinoza as a witness when Defendants did not intend to use Espinoza as a witness until March 2020, and when Espinoza was equally available and well-known to Plaintiffs long before that date.

The district court also erred when it found that Defendants had relied on "advice of counsel" and that, in the absence of disclosing attorney-client communications, Defendants would be "assumed" to have adopted their counsel's position in the absence of credible evidence to the contrary. The court ignored reasonable explanations for the actions taken, including the fact that both Defendants' counsel and Plaintiffs had serious concerns regarding Espinoza's credibility. The court inferred willful intent where none was evidenced. This was arbitrary and capricious.

While the district court may have had discretion to exclude Espinoza as a witness under NRCP 16.1, the district court manifestly abused its discretion by also striking Defendants' Answer to liability, when it found no evidence was destroyed. It failed to consider whether and how Plaintiffs were prejudiced. It abused its

discretion in awarding attorneys' fees that were largely duplicative and unnecessary.

For the foregoing reasons, this court should issue a writ of mandamus or prohibition requiring the district court to vacate its orders of February 10, 2021 and May 17, 2021.

DATED: June 11, 2021.

ROBERT L. EISENBERG (SBN 950)
rle@lge.net
SARAH M. MOLLECK (SBN 13830)
smm@lge.net
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada, 89519
(775) 786-6868 telephone

ATTORNEYS FOR PETITIONERS

VERIFICATION

State of Nevada)
) ss.
County of Washoe)

Robert L. Eisenberg, being first duly sworn, deposes and says:

That he is a member of the law firm of LEMONS, GRUNDY & EISENBERG, attorneys for Petitioners in the above-entitled Petition; he has reviewed district court filings and he is therefore familiar with the facts and circumstances set forth in the Petition; and that he knows the contents thereof to be true, based upon his review of district court filings.

This verification is made pursuant to NRS 15.010.

Robert L. Eisenberg

Subscribed and sworn to before me
this 11 day of June, 2021.

Notary Public

JENNIFER JACOBSEN
Notary Public-State of Nevada
APPT. NO. 14-13950-2
My Appt. Expires 04-18-2022

CERTIFICATE OF COMPLIANCE

1. Pursuant to NRAP 21(e), I hereby certify that this petition complies with NRAP 32(a)(9) and the formatting requirements of NRAP 32(a), including the fact that this petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this petition complies with the word-count limitation of NRAP 21(d), because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 6,974 words.

DATED: June 11, 2021

Robert L. Eisenberg, SBN 950

CERTIFICATE OF MAILING

I hereby certify that I am an employee of LEMONS, GRUNDY & EISENBERG, and on this date I served a copy of the foregoing ***Petition for Writ of Mandamus, or in the Alternative, Prohibition,*** and a C.D. of ***Appendix Volumes 1-7***, by depositing true and correct copies, postage prepaid, via U.S. mail to:

Adam Kutner
ADAM S. KUTNER, P.C.
1137 S. Rancho Dr., Suite 150-A
Las Vegas, Nevada 89102
(702) 382-0000
info@adamskutner.com
Attorneys for Petitioner

Joel D. Odou
Nick Adams
WOOD, SMITH, HENNING & BERMAN LLP
2881 Business Park Court, Suite 200
Las Vegas, Nevada 89128-9020
(702) 251-4100
jodou@wshblaw.com
nadams@wsblaw.com
Attorneys for Petitioner

Michael C. Kane
Bradley J. Meyers
THE702FIRM
400 South 7th Street, Suite 400
Las Vegas, Nevada 89101
service@the702firm.com
Attorneys for Maikel Perez-Acosta

///

Craig W. Drummond
Liberty A. Ringor
DRUMMOND LAW FIRM
810 S. Casino Center Blvd., Suite 101
Las Vegas, Nevada 89101
Craig@DrummondFirm.com
Liberty@DrummondFirm.com
Attorneys for Rolando Bessu Herrera

Joel D. Henroid
LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Jhenriod@lewisroca.com
Attorneys for Maikel Perez-Acosta and Rolando Bessu Herrera

Honorable Ronald J. Israel
Eighth Judicial District Court, Department 28
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

DATED this 11 day of June, 2021.

Employee of LEMONS, GRUNDY & EISENBERG