Case No. 83052

In the Supreme Court of Nevada

JAIME ROBERTO SALAIS, and TOM MALLOY CORPORATION a/k/a, d/b/a TRENCH SHORING COMPANY,

Petitioners,

vs.

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.

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. Real parties in interest Maikel Perez-Acosta and Rolando Bessu Herrera are individuals.

2. The following law firms have appeared for the real parties in interest: Lewis Roca Rothgerber Christie LLP, Drummond Law Firm, P.C., and The 702 Firm.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED this 20th day of September, 2021.

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By: */s/ Joel D. Henriod*
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ROUTING STATEMENT

Because this petition involves no important questions of statewide importance, it is presumptively assigned to the Court of Appeals. *Cf.* NRAP 17(b)(5).

ISSUES PRESENTED

1. Was it an abuse of discretion to strike Defendants' answer where Defendants waited nearly a year to disclose information that implicates an unpleaded defense, while they used the bulk of the discovery period to build around that defense, depriving Plaintiffs of the opportunity to do the same?

2. Did the district court abuse its discretion when it awarded less than $70,000 in attorney's fees when Defendants' misconduct caused ten additional months of litigation, three hearings, and numerous rounds of briefings?

INTRODUCTION

The facts here are not complicated. As the Complaint alleges, on July 12, 2016, Real Parties in Interest Maikel Perez-Acosta and Rolando Bessu Herrera ("Plaintiffs") were driving their vehicle when they were rear-ended by Jamie Roberto Salias, while he was driving a work vehicle owned by Tom Malloy Corporation (Petitioners and "Defendants").[1] (1.App.2-3.)

Defendants in litigation involving a rear-end automobile collisions rarely have a viable liability defense. These Defendants, however, stumbled upon a supposed bombshell when Plaintiff Herrera's former girlfriend contacted defense counsel and alleged (1) that Plaintiffs had intentionally caused the accident and (2) that Plaintiffs injuries preexisted the accident. But rather than timely disclosing the witness and her statement, as Rules 16.1 and 26 require, they waited nearly a year to finally reveal the potential bombshell at a deposition shortly before the close of discovery.

[1] The veracity of these allegations is not at issue in this Writ Petition.

During this delay, because the potential witness was easily impeachable, defense counsel spent the bulk of the discovery period trying clandestinely to develop a fraud defense informed by the purported witness's statement that might stand independently. When they finally disclosed the information, it was too late for Plaintiffs to obtain an expert or to otherwise investigate the allegations through discovery. By willfully withholding this information from Plaintiffs, Defendants deprived Plaintiffs of the right to prepare for this unpleaded affirmative defense.

It appears Defendants either do not comprehend the gravity of their conduct or continue to understate it deliberately. Defendants want this Court to believe this is about simply neglecting to disclose one person. But this case is about far more than just a technical violation of the disclosure Rules. Instead, it is about one party sitting on news that they thought was a bombshell, while they secretly worked to develop a case around that revelation, only disclosing nearly a year later when they thought they had their ducks in a row. It was an abusive ambush tactic that cannot be tolerated.

STATEMENT OF FACTS

Defendants Learn of a Witness and Obtain Her Statement

On April 28, 2019, then defense counsel Todd Jones ("Mr. Jones")received an email from Plaintiff Herrera's former girlfriend,[2] Nancy Espinoza ("Ms. Espinoza") (3.App.551; 3.App.721; 4.App.934.) The email appeared to open up a new fraud-based defense theory, as Ms. Espinoza alleged that "the accident was planned . . . and [that Plaintiffs] intentionally slammed there [sic] brakes." (*See* 3.App.551.) She also alleged that Plaintiffs had "already had those [medical] conditions prior to the accident." (*Id.*.)[3] Ms. Espinoza's motives were immediately called into question when she ended the email by stating, "I am willing to be a witness and help in any way for finders [sic] fee . . . ." (*Id.*)

On January 5, 2020, Ms. Espinoza again emailed Mr. Jones in-

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[2] To be clear, Ms. Espinoza was no longer Plaintiff Herrera's girlfriend at the time of that email. (3.App.551.)

[3] Plaintiffs deny these allegations. However, as this Answer will discuss, Defendants' failure to disclose this witness and her statement until the eleventh hour of discovery deprived them of any ability to conduct discovery on the issue or seek related experts.

forming him that Plaintiff Herrera was playing semiprofessional baseball and therefore questioning the extent of Plaintiff Herrera's injuries. (3.App.723.) These were only two of at least 21 emails Ms. Espinoza exchanged. (4.App.934; *see also* 3.App.721-24.)

Defendants Wait Almost a Year to Disclose the Witness and Her Statement

By April 28, 2019, Defendants were aware that Ms. Espinoza was an "individual likely to have information discoverable under Rule 26(b)"[4] and of her related "witness statement." *See* NRCP 16.1(a)(1)(A)(i); NRCP 16.1(a)(1)(A)(ii). Yet, they did not disclose her as a witness until March 12, 2020. (3.App.724; 4.App.934.) On April 22, 2020, Ms. Espinoza was deposed, and it was only then that Defendants revealed the existence of her prior statements. (4.App.934; 2.App.317-18.) The following day, they finally disclosed redacted copies of these two emails. (2.App.480.)

Moreover, each of the Plaintiffs had propounded requests for production of documents that compelled Defendants to produce these emails months before they finally did. On December 27, 2018 (16

[4] *See* NRCP 16.1(a)(1)(A)(i).

months before the emails were produced), Plaintiff Perez-Acosta asked for "any written statements regarding the July 12, 2016 motor vehicle collision." (3.App.560.) And in October 2019 (five months after Defendants received the first email), Plaintiff Herrera asked for the "complete file for the incident" including "all recorded and written statements." (2.App.560.) Nevertheless, Defendants withheld the emails until April 23, 2020. (2.App.480.)

On June 30, 2020, discovery closed. (R.App.6.)

Plaintiffs Move for Sanctions and Defendants Provide a Series of Disjointed, Nonsensical, and Unsupported Excuses

On May 4, 2020, Plaintiffs moved to strike Defendants' answer on the basis that Defendants intentionally violated the disclosure requirements of Rule 16.1. (1.App.221.) Generously, the district court gave Defendants five opportunities to brief their opposition to the Motion and three hearings on the Motion. The oppositions and respective oral arguments were incoherent or, at best, inconsistent. Although they have never denied the withholding was intentional.

First, on May 18, 2020, Defendants opposed the Motion based primarily upon the argument that defense counsel's communications with Ms. Espinoza were subject to work-product protection. (*Id.*; 4.App.934.)

At oral argument, the district court gave Defendants additional time to supplement their opposition with authority showing that such communications fell within the work-product doctrine. (4.App.934.) Accordingly, on August 11, 2020, Defendants filed their first supplemental opposition, now arguing that "Ms. Espinoza and her emails in April 2019 were of such a suspect and unreliable nature that defendants' counsel determined such information was not likely to be discoverable." (3.App.708; 4.App.934.) As the district court observed, the Defendants moved the goalpost rather than addressing the work-product question: "Notably, Defendants' counsel did not address the claim Ms. Espinoza's identity or her emails were protected under the work product doctrine, as was the intent of the Court in allowing them to supplement their opposition." (4.App.934.)

In a second hearing, on October 1, 2020, Defendants admitted to the district court that their assertion of the work-product doctrine "may be a little bit inartful." (4.App.935.) In response to Defendants' new arguments, the district court "admonished Defendants' counsel that it is not up to counsel to make a determination as to the credibility of a wit-

ness before she is disclosed." (*Id.*) Nevertheless, the district court expressed reservations about one factor of the *Young v. Ribiero* analysis, i.e., whether sanctions unfairly penalize a party for misconduct of its attorney. (*Id.*)

Plaintiff's counsel had implied that his clients were unaware of the withholding but given the potential exculpatory nature of Ms. Espinoza's allegations, the district court found it dubious that defense counsel would not have informed Defendants of the revelation. And the assertion about what they knew was suspicious, as telling for what it did not say as for what it did.[5] Accordingly, the district court gave Defendants an opportunity to corroborate their implied lack of knowledge by turning over the relevant attorney-client communications for *in camera* review. (*Id.*)

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[5] Defense counsel claimed his client and the liability carrier did not have "personal knowledge" of Ms. Espinoza's emails or ever communicate with her (3 App. 705, 708, 724), which left unaddressed whether he apprised them of the situation and his strategy—*to wit*, that a purported whistleblower had contacted him alleging fraud, that he remained in contact with her, that he was actively working to develop a potential fraud defense around her, and that he planned to withhold that information form Plaintiffs as long as possible.

A series of briefings followed on Defendants' Motion for Reconsideration. (*Id.*; 4.App.779-887.) In essence, Defendants argued the *in camera* review was not appropriate "because attorney client privilege had not been waived." (4.App.935.)

On November 17, 2020, the district court held a third hearing on the Motion, where Defendants reiterated their privilege argument. (4.App.936.) The district court's order notes the dilemma it faced and the respective absurdity of Defendants' position:

> The Court noted its concerns about being able to assess the Defendants' knowledge of Ms. Espinoza without verification. When asked the question "in every discovery motion, we would have to take counsel's . . . word for it and that's it. Is that what you are arguing?" Defendant's counsel answered "[i]n theory, Your Honor."

(*Id.* (alteration in original) (citing Transcript, 4.App.898-921)). In response, the district court gave Defendants yet another bite at the apple, asking for supplemental briefing on "whether Defendants' counsel could have it both ways by asserting attorney client privilege and denying their clients had knowledge of Ms. Espinoza through self-serving affidavits." (*Id.*.)

On December 1, 2020, Defendants filed their fifth and final briefing on the Motion, expanding on their prior arguments. (4.App.890-

897.)

Finally on February 10, 2021, after ten months, numerous briefs, and three hearings, the district court granted the motion, striking Defendants' answer and affirmative defenses as to liability. (4.App.940.) Defendants' writ petition followed.

ARGUMENT

I.

DEFENDANTS FAILED TO COMPLY WITH THEIR DISCOVERY OBLIGATIONS, WAITING A YEAR TO AMBUSH PLAINTIFFS AT THE END OF DISCOVERY

Rules 16.1 and 26 required Defendants to timely disclose witnesses with discoverable information and any witness statements regarding the dispute. Under a Rule 34 request, Defendants were required to produce the witness statements. All of this is true regardless of whether Defendants intended to use the information. Yet defendants willfully declined to make these required disclosures. Thus, they breached their discovery obligations. These are not simply technical violations. This misconduct deprived Plaintiffs of the ability to prepare for this defense in discovery.

A. NRCP 16.1 and 26 Required Defendants to Timely Disclose the Witness and Witness Statements

1. A Party Must Disclose Any Witness Likely to Have Information Relevant to Any Party's Claims or Defenses and Any Witness Statements Concerning the Dispute

Witnesses likely to have discoverable information must be disclosed. NRCP 16.1(a)(1)(A)(i). Rule 16.1 states that "a party must, without awaiting a discovery request, provide to the other parties . . . the name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b)." (*Id.*.) And "discoverable information" is broadly defined to include "any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case." NRCP 26(b)(1). Thus, when a party knows of a witness with information "relevant to any party's claims or defenses," that witness must be disclosed. NRCP 16.1(a)(1)(A), (a)(1)(A)(i), NRCP 26(b)(1).

Furthermore, under NRCP 16.1, "a party must, without awaiting a discovery request, provide to the other parties . . . any record, report, or witness statement, *in any form*, concerning the incident that gives rise to the lawsuit." NRCP 16.1(a)(1)(A), (a)(1)(A)(ii) (emphasis added).

2. Rule 26 Requires Parties to Timely Supplement Their Initial Disclosures with Later-Acquired Information

Defendants had a duty to timely supplement their disclosures when they learned of the witness and her statement: "A party who has made a disclosure under Rule 16.1, 16.2, or 16.205 — or responded to a request for discovery with a disclosure or response — is under a duty to timely supplement or correct the disclosure or response to include information thereafter acquired . . . ." NRCP 26(b)(1).

There is no disclosure exception for situations where the other party knows of the *existence* of the person qualifying as a witness. Defendants concealment of Ms. Espinoza's email statement and the gravamen of her anticipated testimony because "Espinoza's identity was already well-known to Plaintiffs." (Petition at 18.) Defendants' logic fails. Knowing of the existence of a person is not the same as knowing the "individual [is] likely to have information discoverable under Rule 26(e)(1)." NRCP 16.1(a)(1)(A)(i). The later constitutes a witness subject to mandatory disclosure. The former merely constitutes a person.

Indeed, Defendants quote authority recognizing this distinction: "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." (Petition at 18 (emphasis added) (quoting *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 615, 618 (D. Nev. 2020))). And though Plaintiffs were clearly aware of Ms. Espinoza's *existence*, they had no knowledge of the information she conveyed to Mr. Jones, and therefore had no knowledge that she was a "witness" as defined by the Nevada Rules of Civil Procedure. Most importantly, Defendants have never alleged that Plaintiffs were aware of Ms. Espinoza's allegations, nor do they assert this for the first time in their Petition.

In any event, Defendants possessed Ms. Espinoza's statements, which were not sent to Plaintiffs. Regardless of Plaintiff's knowledge of Ms. Espinoza's existence or potential status as a witness, Defendants were required to disclose her statement. They failed to timely disclose that Ms. Espinoza was a witness as well as her statements. Thus, they breached their obligations under Rules 16.1 and Rule 26.

B. Defendants Failed to Disclose the Witness Statements in Response to Requests for Production of Documents

Like initial disclosures, parties have a continuing obligation to timely, supplement discovery responses with after-acquired information. NRCP 26(e)(1) ("A party who has . . . responded to a request for

discovery with a disclosure or response--is under a duty to timely supplement or correct the disclosure or response to include information thereafter acquired . . . .").

Here, each Plaintiff individually propounded a Rule 34 discovery request that encompassed the witness statements that Defendants withheld. For example, on December 27, 2018, Plaintiff Perez-Acosta served Defendants with a request for production that stated, "If you, your agents, employees and/or representatives have prepared or received any written statements regarding the July 12, 2016 motor vehicle collision, please produce a copy of all written documentation that relate to these statements." (3.App.560.)

Similarly, Plaintiff Herrera propounded a request seeking the "complete file for the incident" including "all recorded and written statements." (2.App.560.)

Despite Defendants' continuing obligation to *timely* supplement their responses to these requests, they waited nearly a year to produce the witness statement, even though Plaintiff Perez-Acosta's requests were propounded well-before Defendant received Ms. Espinoza's email.

C. Defendants Were Required to Disclose the Witness and Produce Her Statement Regardless of Whether They Intended to Use the Information or Found It Credible

Defendants appear to claim that they had no obligation to disclose information that (1) they did not intend to use and (2) did not find credible. They are wrong on both counts.

1. Defendants' Purported Lack of Intent to Use the Information Did Not Excuse Their Obligation to Disclose It

Defendants repeatedly rely on the assumption that they had no obligation to disclose Ms. Espinoza as a witness or to produce her statement because, at the time, they had not decided whether to use either. Yet, whether they intended to use the information has no bearing on their obligation to disclose and produce it. First, both *before and after* the 2019 amendments, parties have been required to disclose all witnesses "likely to have information discoverable under Rule 26(b)." NRCP 16.1(a)(1)(A)(i). There has never been an exception for witnesses the party doesn't intend to use. (*See* prior versions of Rule 16.1.)

Second, there is no such exception for witness statements, either. While it is true that the 2019 amendments added that parties need only

disclose those documents they "may use to support [their] claims or defenses," that qualification does not apply to witness statements. *See* NRCP 16.1(a)(1)(A)(ii). The rules states that parties must disclose

> all documents . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, . . . ***and***, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, concerning the incident that gives rise to the lawsuit.

(*Id.* (emphasis added)). In other words, witness statements are not subject to "may use" qualification. The notes of the Advisory Committee further demonstrate this distinction:

> Rule 16.1(a)(1)(A)(ii) incorporates language from the federal rule requiring that a party disclose materials that it may use to support its claims or defenses. <u>However</u>, the disclosure requirement *also includes <u>any</u> record, report, or witness statement in any form*, including audio or audiovisual form, concerning the incident that gives rise to the lawsuit.

NRCP 16.1(a) advisory committee's note to 2019 amendment (emphasis added).

Thus, Defendants were required to timely disclose Ms. Espinoza as a witness along with her witness statements. Their choice to keep her emailed statement a secret is not excused by their purported lack of intention to use it.

2. That Defendants Recognized Ms. Espinoza's Claims Were Problematic Did Not Excuse Their Obligation to Disclose It

As a threshold consideration, the credibility issue is a red herring. It was not simply a witness or witness statement that Defendants chose not to disclose—it was the information conveyed in those allegations. This purported information fueled a whole new theory of defense—one that had not appeared in none of Defendants' papers. Whether Ms. Espinoza was credible or not—and Plaintiffs agree that she certainly is not—Plaintiffs had a right to investigate the issue in discovery, just as Defendants secretly did for nearly a year.

Nevertheless, a party cannot refrain from disclosing and otherwise producing witnesses and documents simply because the party believes they lack credibility. "Credibility of a witness's testimony is a question of fact for the jury." *Anderson v. State*, 86 Nev. 829, 837, 477 P.2d 595, 600 (1970.) As district court admonished, "it is not up to counsel to make a determination as to the credibility of a witness before she is disclosed." (4.App.935.)

In fact, even if evidence were not admissible because it lacked

credibility (which is not the case), that would still not be a basis to withhold it from disclosure. NRCP 26(b)(1) ("Information within this scope of discovery need not be admissible in evidence to be discoverable."). The lack-of-credibility excuse holds no water.

D. Defendants Intentionally Withheld Information They Were Required to Disclose and Waited to Ambush Plaintiff Near the Close of Discovery

Defendants intentionally withheld information regarding Ms. Espinoza and her witness statement. In fact, Defense counsel admits that he believed he did not need to disclose this information while he investigated "whether there was any legitimacy to Espinoza's statements." (3.App. 721.) Accordingly, the district court properly concluded that this was "an intentional discovery violation." (4.App.936.)

Instead of timely disclosing this information in April 2019 when Defendants learned of it, they waited nearly a year, disclosing the witness on March 12, 2020, (3.App.724; 4.App.934); and the witness statement on April 23, 2020. (2.App.480.) With discovery closing in June 2020 and the expert deadline expired, Plaintiffs had no time to seek expert witnesses or gather other information to address this entirely new theory, or to refute this "new" evidence. (R.App 5-6.) Simply put, it was

an ambush.

Defendants attempt to confuse the issue by engaging in the logical fallacy of the false dilemma, stating "Rule 16.1, in conjunction with NRCP 26, does not mandate the disclosure of Espinoza or her emails at the moment she contacted Jones." (Petition at 16.) Of course it doesn't. That does not mean, however, that it is acceptable to wait nearly a year to enable unilateral investigation. As discussed above, the disclosure must be "timely." *Supra* Part I.A.2. Delaying a year is not timely disclosure.

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT STRUCK DEFENDANT'S ANSWER AS TO LIABILITY

The district court may sanction a party for failure to comply with the rules of discovery either under those same rules or under its own inherent authority to impose sanctions. Certainly, mere technical discovery violations will not always support the sanction ordered here. But this is no mere technical violation. This violation, if not sanctioned, would have acted to deprive Plaintiffs of a fair trial. Had Defendants

timely disclosed this information, Plaintiffs could have retained an expert on fraudulent rear-end collisions. And Plaintiffs could have conducted discovery focused on that issue. But Defendants denied Plaintiffs that right. Here, the district court acted within the Rules and its discretion when it struck Defendants' answer as to liability.

A. The Nevada Rules of Civil Procedure Allow Courts to Strike an Answer as a Discovery Sanction

Rule 16.1 provides one avenue for sanctioning a party who does not comply with the discovery rules:

> If an attorney fails to reasonably comply with any provision of this rule, . . . the court, on motion or on its own, should impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:
>
> (A) any of the sanctions available under Rules 37(b) and 37(f); or
>
> (B) an order prohibiting the use of any witness, document, or tangible thing that should have been disclosed, produced, exhibited, or exchanged under Rule 16.1(a).

NRCP 16.1(e)(3). And Rule 37(b) lists seven additional sanctions, one of which allows the court to enter an order "striking the pleadings in whole or in part." NRCP 37(b)(1)(C).

Similarly, Rule 37(c) states that,

> [i]f a party fails to provide information or identify a witness as required by Rule 16.1(a)(1), . . . the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
> . . .
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(1) [which includes "striking the pleadings in whole or in part." NRCP 37(b)(1)(C)].

NRCP 37(c)(1). Thus, under either rule, the court may impose a variety of sanctions, including striking the pleadings *in addition to* blocking the use of the undisclosed information at trial.

B. District Courts Have Broad Discretion to Impose Sanctions

It is well-established that "the district court enjoys broad discretion in imposing discovery sanctions." *Blanco v. Blanco*, 129 Nev. 723, 729, 311 P.3d 1170, 1174 (2013) (citing *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990)); *accord Emerson v. Eighth Jud. Dist. Ct.*, 127 Nev. 672, 681, 263 P.3d 224, 230 (2011); *Ocwen Loan Servicing, LLC v. Redmon*, 479 P.3d 1007 (Nev. App. 2021). "The purpose of these sanctions is to 'command obedience to the judici-

ary and to deter and punish those who abuse the judicial process.'" *Emerson*, 127 Nev. at 678, 263 P.3d at 228 (quoting *Red Carpet Studios Div. of Source Advan. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006)).

Defendants incorrectly assert that "sanctions may only be imposed where there has been willful noncompliance with a court order." (Petition at 20 (citing *GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995)). First, Defendants' argument directly contradicts Rules 16.1 and 37. *See supra* Part II.A. Second, Defendants omit the context of the *GNLV Corp.* decision. There, the Court was considering complete dismissal of a party for unintentional spoliation of evidence—neither of which is the case here.

Here, Defendants are still entitled to move forward to dispute damages, even though their violation of the Rules was, admittedly, intentional.

C. The District Court Considered and Properly Applied the *Young* Factors

Young v. Johnny Ribeiro Bldg., Inc. establishes the factors a district court should consider when imposing case-ending sanctions. 106 Nev. 88, 92–93, 787 P.2d 777, 779–80 (1990). Defendants imply that the district court failed to properly consider these factors. (Petition at

11 (claimed the district court "glossed over" all factors but one)). Yet, the district court devoted four full pages to the *Young* analysis (and several other pages to the related facts and arguments). (4.App.936-40.) Defendants' own analysis is limited to merely 2.5 pages. (Petition at 25-27.) And the district court addressed all eight *Young* factors, while the Petition only discusses a few of them (in cursory fashion).

The district court analyzed each factor and properly concluded that they "weigh[ed] heavily" in favor of the sanctions. (4.App.936.)[6]

1. The Degree of Willfulness of the Offending Party

It cannot be disputed that Defendants willfully chose not to disclose Ms. Espinoza and her statement for nearly a year. *See supra*, Part I.D. In fact, defense counsel's affidavit states that he waited to disclose while he investigated "whether there was any legitimacy to Espinoza's statements"—*i.e.*, until after he could try to develop corroborating material, no matter how long that might take. (3.App.721.) Ultimately, Defendants did finally disclose the witness statement, albeit by ambushing

[6] Some of the below is redundant to arguments addressed in detail above. Therefore, Plaintiffs will not needlessly repeat arguments.

Plaintiffs with it at Ms. Espinoza's deposition. (4.App.934; 2.App.317-18.) This action speaks volumes for their intentions.

2. The Extent to Which the Non-Offending Party Would Be Prejudiced by a Lesser Sanction

Defendants miss the point when they repeatedly argue essentially, "no harm, no foul," by stating that Plaintiffs could not have been prejudiced because the withheld information was favorable to Defendants' case. (*See, e.g.*, Petition at 7 (arguing the information "would have been helpful, not hurtful, to defense's case")). The opposite is true. By withholding this evidence for nearly a year, until the expert deadline had expired and discovery was almost closed, they denied Plaintiffs the ability to seek an expert and otherwise prepare for Defendants' new assertions of fraud.[7]

Defendants' attempt to minimize the impact of this evidence is be-

[7] In fact, Defendants' Answer to the Complaint did not assert a fraud-based affirmative defense that could have clued Plaintiffs in to this ambush.

lied by their own words. They boast of their "strong defense that the accident was a staged set-up by Plaintiffs."[8] (Petition at 14.) And Plaintiffs were entitled to prepare for this "strong defense," including by obtaining an expert on the topic. Defendants' rule violations deprived Plaintiffs of the ability to fairly prosecute their claims.

No lesser sanction could eliminate this unfair advantage regarding liability. And, as would be expected in a rear-end collision, Defendants had no other defense to liability, nor do they argue otherwise in their Petition.

3. The Severity of the Sanction of Dismissal Relative to the Severity of the Discovery Abuse

Here, the discovery abuse was grave. Defendants concealed a purported witness and her email statement to deprive Plaintiffs of any ability to conduct discovery and otherwise prepare for this undisclosed and unpleaded defense theory. As the district court concluded, "[t]he sever-

[8] Though Defendants may believe their fraud defense was a strong one, it was without merit, premised on undue cynicism and smacked of ethnic stereotyping. Had Plaintiffs been given the opportunity to explore this defense in discovery, they would have easily dismantled it.

ity of the sanction is equal to Defense counsel's needless delay and intentional concealment. These kinds of violations are extremely serious and should not and will not be tolerated by the Court." (4.App.939.) Given that Defendants deprived Plaintiffs of the ability to prepare for their "strong defense" by intentionally withholding evidence, striking their answer as to liability is just and necessary. The district court did not strike their answer entirely and is allowing Defendants to try all damages issues aside from, presumably, any damages defense that would be a fruit of the Espinoza communication--*e.g.*, the allegation that Plaintiffs are fraudulently exaggerating their injuries.

4. Whether Any Evidence Has Been Irreparably Lost

Defendant claims, incorrectly, that the *Young* factors come down to "the prejudice to the non-offending party caused by the loss or destruction of evidence," and that willfulness "requires an intent to gain a litigation advantage . . . by destroying material evidence." (Petition at 25-26 (quoting *MDB Trucking, LLC v. Versa Prod. Co., Inc.*, 136 Nev. Adv. Op. 72, 475 P.3d 397, 403–04 (2020)). Again Defendants ignore the context of the holding. In *MDB Trucking*, the court was considering sanctions *because* the defendant had not willfully disposed of relevant

evidence. So, of course, the willfulness of the spoliation and the prejudice it caused were key—in that case.

But lost-evidence remains one of only eight non-exclusive factors in the *Young* analysis. No evidence was lost, here. So it's not surprising that Defendants puts many of their eggs in this basket. But window-of-discovery-time was lost.

5. The Feasibility and Fairness of Alternative, Less Severe Sanctions

This factor largely mirrors the second factor, above. Additionally, the *Young* analysis expressly deals with situations "where the sanction is one of dismissal with prejudice." *Young*, 106 Nev. at 92, 787 P.2d at 779. The equivalent for a Defendant would be completely striking the answer and proceeding to a prove-up hearing. Thus, as it relates to this analysis, the district court already ordered "less severe sanctions." Defendant will still be entitled to contest, at trial, the damages they caused by rear-ending the Plaintiffs.

Anything less would have prejudiced Plaintiffs. Simply striking this witness and her statement would not change the fact that Defendants had sought to secretly built their case around this undisclosed evidence and affirmative defense while improperly keeping Plaintiffs in

the dark. By striking Defendants' answer as to liability, the district court chose the sanction appropriate to alleviate the fruits of Defendants' misconduct.

6. The Policy Favoring Adjudication on the Merits

The district court considered Nevada's policy favoring adjudication on the merits. It recognized that "abusive litigation practices must face sanctions." (4.App.939.) The policy is not absolute, or it would swallow the rule. *See, e.g.*, *Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010) (holding that "the policy of adjudicating cases on the merits would not have been furthered in this case"); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 258, 235 P.3d 592, 602 (2010) (considering the policy favoring adjudication on the merits and nevertheless affirming the district court's order striking defendant's answer as to liability).

Here, the policy favoring adjudication on the merits would not be furthered by allowing Defendants to get away with willfully withholding evidence. As the district court stated, "[A]ny lessor sanctions would encourage further abuse." (4.App.939.)

7. Whether Sanctions Unfairly Operate to Penalize a Party for the Misconduct of His or Her Attorney

The sanctions do not unfairly penalize the Defendants for the conduct of their attorney. With half their eggs in the lost-evidence basket, Defendants place their remaining eggs in this basket. But again, this factor is only one of eight (non-exclusive) factors to consider. Unlike the lost-evidence factor, however, this factor weighs in favor of the sanction.

a. DEFENDANTS DECLINED TO SUPPORT THEIR CONTENTION THAT THEY WERE UNAWARE OF MS. ESPINOZA OR HER STATEMENT

After determining that Defendants violated the discovery Rules to the extreme prejudice of Plaintiffs, the district court recognized that *Young* provided Defendants a potential mitigating factor, i.e., whether the Defendants were even aware of their attorney's misconduct. The district court, having privately practiced in insurance defense, recognized that this information would almost certainly have been reported to both the sophisticated business client and the liability carrier adjuster: "This Court has several years of experience in insurance defense work, and it is hard to fathom that a partner who is advised that a witness became known was not forwarded to the carrier in a monthly bill for over eleven months." (4.App.940.) The district court was rightly

concerned that, if Defendants knew their attorney had been approached by a secret witness and he was working to corroborate before advising Plaintiffs, they either agreed to or acquiesced to this misconduct.

This district court's concerns make sense. Rear-end collisions are almost always attributable to the driver in the rear—so much so that some mistakenly believe that conclusion is axiomatic. And here, defense counsel discovered an allegation that he supposed could completely *exonerate* his client. It is unimaginable that he would not report this incredible revelation to his insurer client or to the individual client.

Thus, this factor weighed against Defendants, and the district court could have stopped right there. Yet, the district court generously provided Defendants additional opportunities to show that they were not aware of their attorney's contact with Ms. Espinoza. Defendants first responded with self-serving affidavits that were comically dodgy. They repeatedly stated that defendants had no "personal" knowledge of Ms. Espinoza's statements and had no direct contact with her. (3.App.705 ("Defendants themselves had no personal knowledge of Ms. Espinoza's emails and never had any communications with her whatsoever."); 3.App.708 ("Defendants Jaime Salais and Tom Malloy Corp.

never had any personal knowledge of Ms. Espinoza's emails or communications concerning the case."); 3.App.724 ("Defendants Jamie Salais and Tom Malloy Corp. never had any personal knowledge of Ms. Espinoza's emails or purported information concerning the case.")).[9]

But the issue was not whether Defendants had spoken directly with Ms. Espinoza or knew her "personally." The issue is whether they knew and ratified, or acquiesced to, defense counsel's misconduct by withholding information about a purported whistleblower while he worked to develop a new defense as the discovery period ran. Though, Defendants' briefings and affidavits affirmatively *imply* that Defendants were unware, nowhere do they state that. It appears obvious from their affidavits that they were intentionally dodging the issue.

Yet again, the district court generously gave Defendants another opportunity to show that their attorney never informed them of this ap-

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[9] Defendants claim that the district court disregarded the "undisputed assertions made in Jones's affidavit." (Petition at 10.) But as the finder of fact, the district court may properly weigh the credibility of witnesses. *See Watkins v. State*, 93 Nev. 100, 101, 560 P.2d 921, 921 (1977). And that's exactly what the district court did, stating that it was "unable to accept this position." (4.App.938.)

parent bombshell allegation. The district court offered to review attorney-client emails *in camera* to verify the implied and dubious assertion that Defendants were unaware. (4.App.935.) Defendants elected not to provide the communications.

b. EVEN IF DEFENDANTS WERE UNAWARE, THEY HAVE NOT BEEN UNFAIRLY "PUNISHED"

Finally, even *if* the Defendants had no knowledge of their counsel's withholding of evidence, such does not excuse the conduct. "The attorney's neglect is imputed to his client, and the client is held responsible for it. The client's recourse is an action for malpractice." *Lange v. Hickman*, 92 Nev. 41, 43, 544 P.2d 1208, 1209 (1976.) In *Huckabay Props. V. NC Auto Parts*, this Court dismissed an appeal for failure to comply with briefing deadlines, rejecting the argument that the dismissal unfairly punished the party for the negligence of its attorney:

> The United States Supreme Court has recognized that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for counsel's unexcused conduct, as to do so would offend general agency principles.

130 Nev. 196, 204, 322 P.3d 429, 434 (2014.) The Court held that "a party cannot seek to avoid a dismissal based on arguments that his or

her attorney's acts or omissions led to the dismissal." *Id.* at 205, 322 P.3d at 434.

8. The Need to Deter Both the Parties and Future Litigants from Similar Abuses.

Withholding evidence is detrimental to our entire civil justice system. The system largely depends upon the integrity of the parties and their attorneys to timely disclose information, whether helpful or harmful to their case, so that the courts are provided a complete accounting of the facts in accordance with the adversarial process. A breakdown in this integrity threatens justice, itself. The need to deter such conduct could not be greater.

Furthermore, Defendants argued that their conduct was not improper because they were unable to find any examples of a party being sanctioned for similar conduct. Of course, if that were the standard, no party could ever be sanctioned for abusive conduct unless another party had previously been sanctioned for the same conduct. Future litigants would have carte blanche to abuse discovery so long as they verified no prior sanctions had issued for such abuse. Affirming this sanction will deter litigants who may be inclined to endorse this faulty reasoning.

III.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT AWARDED ATTORNEY'S FEES

After countless briefings spanning ten months, including the motion to strike, motions for reconsideration, and two rounds of supplemental briefings, and three separate hearings, the district court granted Plaintiffs' motion and awarded fees as a sanction to compensate Plaintiffs for the tens of thousands of dollars they incurred as a result of Defendants' misconduct. Given these facts, $67,000 seems quite low, and certainly reasonable.

The district court properly considered and applied the *Brunzell* factors, which were supported by substantial evidence.

A. The District Court Properly Considered the *Brunzell* Factors

Second, Defendants claim that the district court "failed to conduct a complete analysis of the *Brunzell* factors." (Petition at 28.) The Defendants appear to rest this assertion on the lack of a lengthy analysis in the district court's order. However, when considering the *Brunzell* factors, "express findings on each factor are not necessary for a district court to properly exercise its discretion. Instead, the district court need

only demonstrate that it considered the required factors . . . ." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (citing *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012)). Moreover, where the district court provides limited express findings, the Court can assume the district court adopted the rationale in the motion. See, e.g., *Loerch v. City of Union*, 601 S.W.3d 549, 553 (Mo. Ct. App. 2020) ("[W]hen the trial court does not specify its reasoning in the order granting summary judgment 'we presume that the trial court based its decision on grounds specified in the movant's motion for summary judgment.'" (citation omitted)).

Here, the district court demonstrated that it considered the *Brunzell* factors. (6.App.1245 (citing and quoting the *Brunzell* factors and stating, *inter alia*, that the "hourly rates and time expended [were] reasonable when applied to the *Brunzell* factors.").Notably, Defendants did not analyze the *Brunzell* factors in their own Petition, and they have now waived the right to do so. As their sole argument (regarding *Brunzell*) was that the district court failed to expressly describe its analysis, and no such explicit written order is required, this argument fails.

B. The Fee Award Was Supported By Substantial Evidence

Defendants' arguments that the fee award was not supported by substantial evidence are, themselves, unfounded.

First, Defendants claim that both Attorney Drummond's and Attorney Kane's fee tables were unreasonable because they are "undated" and "fail[] to identify who spent the time on a particular task." (Petition at 29-30.) But the tables shows the date each task was performed. (4.App.964-65; 5.App.1005-06.) And the declarations clearly state that they performed those tasks. (*E.g.*, 4.App.959 (showing that the 37.7 hours on 4.App.964-65 were Attorney Drummond's)). This dispute appears to relate only to 2.75 hours of work performed by "Associate Baron." (See 5.App.1005, entries on 4/22/20; Petition at 30.) Defendants do not appear to claim that the associate's work at the deposition, which is typically a partner's task, was not of the character of work justifying the fees charged for 2.75 hours. Nevertheless, this negligible amount is not worth a remand.

Second, Defendants argue that some attorneys duplicated work by simply reviewing the briefs drafted by Attorney Joel Henriod. But those attorneys have independent duties to their clients. It would be

malpractice for them not to review and analyze the briefs. Alternatively, the separate Plaintiffs' attorneys could have each drafted their own briefs, and Defendant would have been taxed with those fees. By consolidating the work with Mr. Henriod and merely reviewing the finished product, Plaintiffs actually saved money.

Third, Defendants argue that Attorney Kane's fees were similar in amount to Attorney Drummond when Attorney Drummond "merely filed joinders to Herrara's motions." (Petition at 31.) But the record reveals many other tasks in addition to the joinders. (5.App.1005-06.) The Joinders were but a drop in the bucket and nevertheless required some minimum amount of legal research to determine if joinder was appropriate or if, on the other hand, additional arguments were necessary. After all, Attorney Kane still owed a duty to his separate client.

Finally, Defendants quibble with the amount of time Mr. Henriod spend on some of the briefs in relation to their page length. No doubt this Court is aware of two simple facts: (1) a good brief takes time to research and draft and (2) this fact is true regardless of the length of the brief. In fact, concise briefs often take more time than longer briefs, yet provide a clearer picture of the facts and arguments for the courts.

Defendants further argue that Plaintiffs spent considerable time on motions they lost. This is false. Defendants claim they "won" the motion for reconsideration. That's not so. Defendants had argued that they should not have to disclose any part of counsel's reports to the client and carrier *nor* incur any consequence for rebuffing the judge's direction to corroborate their dubious representations. Plaintiffs agreed that Defendants should not have to turn over materials for *in camera* review if they did not want to but demonstrated why the district court would not have to accept their representations if they elected not to corroborate them. The judge adopted Plaintiffs' position, which position Defendants now contest in this petition.

Ultimately, Defendants arguments are unavailing and fail to demonstrate that the district court abused its discretion in awarding $67,000 in fees for the ten months of wasted litigation caused by Defendants' discovery misconduct.

CONCLUSION

Defendants intentionally withheld disclosure of a witness and production of her statements in violation of Rules 16.1, 26, and 34. This

delay prejudiced plaintiffs by preventing them from being able to prepare their case. After careful consideration of the *Young* factors, the district court properly struck Defendants' answer as to liability. And it properly awarded attorney's fees for Defendants' misconduct. In light of the foregoing, this Court should affirm the order of the district court.

Dated this 20th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 6,977 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 20th day of September, 2021.

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CERTIFICATE OF SERVICE

I certify that on September 20, 2021, I submitted the foregoing "Answer to Petition for Writ of Mandamus" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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Respondent

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