THE SUPREME COURT OF THE STATE OF NEVADA

JAIME ROBERTO SALAIS; AND TOM MALLOY CORPORATION, A/K/A, D/B/A TRENCH SHORING COMPANY,

Petitioners,

vs.

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

Respondents,

and

MAIKEL PEREZ-ACOSTA; AND ROLANDO BESSU HERRERA,

Real Parties in Interest.

No. 83052

REPLY IN SUPPORT OF WRIT PETITION

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INTRODUCTION

With bravado and hyperbole, the answer essentially accuses Petitioners' defense attorneys of being devils disguised as lawyers. The defense attorneys allegedly sat on news they thought was a bombshell; secretly developed a case around the information; disclosed information only after having ducks in a row; and engaged in an abusive ambush. *E.g.*, Ans. at 1-2. These wanton exaggerations are baseless distractions from the district court's error.

Plaintiffs' answer fails to show that defense counsel violated any discovery rules. And the delay in disclosing Espinoza did not justify **any** sanctions, let alone striking Petitioners' pleadings on liability. The answer's assertion of prejudice is imagined and illusory, failing to establish even a whisper of **actual** prejudice. This court should vacate the sanctions orders.

ARGUMENT

A. The answer fails to address whether writ relief is appropriate.

The petition contends that factors necessary for issuance of a writ are satisfied. Pet. 12-15. The answer ignores this point.

B. The answer contains factual inaccuracies.

The answer contains factual inaccuracies that could impact this court's evaluation of the case.

1. Failure to disclose information relating to unpled defenses.

The answer incorrectly asserts that "Defendants waited nearly a year to disclose information that implicates an unpleaded defense." Ans. at vii. The answer also asserts that the delay related to an "unpleaded affirmative defense" and an "unpleaded defense theory." *E.g.,* Ans. at 2, 24.

Actually, Defendants' answer to Plaintiffs' complaint denied all allegations regarding liability and injuries. *E.g.,* 1P.App. 2-3. Defendants pleaded four affirmative defenses indicating Plaintiffs were comparatively negligent or at fault for the accident, three affirmative defenses indicating a third party was responsible for the accident, and seven affirmative defenses attacking Plaintiffs' allegations of injuries and damages. 1P.App. 2-3, 17-19. Plaintiffs' arguments about "unpleaded" defenses are specious.

2. Redaction of emails.

The answer asserts that Defendants only disclosed redacted copies of Espinoza's emails. Ans. at 4. The answer cites "2.App.480." That page does not say anything about emails. Even if emails are included in a category of documents listed on that page, the page contains a standard note indicating (1) some redactions relate to personal information, and (2) a log is available for any redactions relating to a claimed privilege. 2P.App. 480:13-16.

In any event, the redaction was much ado about nothing. The redaction was the name of defense counsel's paralegal, who printed an email and whose name therefore appeared at the top of the page. 2P.App. 331; 7P.App. 1566-67. The paralegal's name was redacted because it was not relevant. 7P.App. 1567:1-6.

3. Opportunities to corroborate information.

Plaintiffs allege 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." Ans. at 7 (bold added). This related to an issue about the "advice of counsel" doctrine (which the defense had never raised) and whether defense counsel Jones had informed his clients (the driver and the driver's employer) about Espinoza's email. *Id.*

The district court's order was much broader than Plaintiffs suggest. The order required defense counsel to provide the judge with copies of all communications between the defense attorneys and clients Salais and Tom Mallory Corporation; all communications between defense attorneys and defense insurance carrier (including all reports and documents related to these communications); and all defense counsel billing records, from the time of Espinoza's first communication until her deposition.[1] 4P.App. 772 (minute order), 774-75 (written order).

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[1] The order was grossly overbroad and clearly invaded the attorney-client privilege and the work-product rule. The order required Defendants to provide the judge – who would be the judge at trial – with file materials that would contain (1) defense

4. Confusion regarding the "advice of counsel" issue.

The "advice of counsel" doctrine arises when a client obtains advice from counsel and uses the advice to explain why the client's subsequent actions were reasonable. 4P.App. 892 (citing cases). When Plaintiffs moved to strike Defendant's answer to the complaint, Defendants' opposition did not assert "advice of counsel," either expressly or impliedly, because that doctrine was not applicable. 4P.App. 892-94. The doctrine appears to have been first raised below by **Plaintiffs' attorneys**, at a hearing on Plaintiffs' motion to strike on October 1, 2020, when Plaintiffs' counsel suggested that there "appears to be an advice of counsel defense" regarding the motion to strike. 4P.App. 817:2-3. The district court picked up on this suggestion and became confused by the doctrine, incorrectly noting that the defense had actually asserted "advice of counsel." 4P.App. 902:22, 903:11.

Plaintiffs' answer to the writ petition now contends that one of the district court's orders "notes the dilemma it faced and the respective absurdity of Defendants' position." Ans. at 8. The answer quotes a portion of defense counsel's

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counsel's mental impressions regarding witnesses and medical claims unrelated to Espinoza; (2) billing records showing the time defense counsel spent on various tasks; (3) records showing defense counsel's evaluation of strengths and weaknesses of evidence and issues; and (4) defense counsel's opinions regarding verdict ranges and settlement evaluations. 4P.App. 789. Defendants moved for reconsideration of the order. 4P.App. 779. The district court granted the motion (4P.App. 940:19-20) and struck the invasive order (4P.App. 941:1-2).

statement that, in theory, a court might need to "take counsel's word for it" when deciding issues relating to information provided by counsel to a client. *Id.*

For one thing, contrary to what Plaintiffs' answer asserts, nowhere in the seven-volume appendix does the district court ever note a "dilemma" created by Defendants' position, and nowhere does the district court note any "absurdity" in Defendants' position.

Further, the quotation of defense counsel's statement is incomplete and out of context. Counsel was discussing the issue of whether the "advice of counsel" doctrine applied, and counsel was explaining that the situation at hand was "**not advice of counsel**." 7P.App. 1589:23-25 (bold added). Indeed, counsel was explaining that the situation involved "the actual **absence** of communication" establishing consideration of the advice of counsel. *Id.* (bold added). In response to this argument, the district court asked defense counsel whether a court would need to take counsel's word on the question. 7P.App. 1590:18-24.

In this context involving the "advice of counsel" issue, defense counsel answered that the district court was correct, "in theory." 7P.App. 1590:25. Counsel's complete answer, which Plaintiffs omit, was:

> MR. ODOU: In theory, Your Honor. What I'm saying is advice [of] counsel defense would be that the counsel received – that the counsel provided the client some advice and they acted upon that advice. Here, there was no action because they were unaware. 7P.App. 1590:25 – 1591:4.

Defense counsel Odou then indicated his view that the district court could rely on an attorney's affidavit in this situation, but if the court was not satisfied with Mr. Jones's affidavit, defense counsel could provide an additional clarifying affidavit.[2] 7P.App. 1591:5-12.

5. Defendants did not withhold anything.

The answer asserts that "Defendants Intentionally Withheld Information," to ambush Plaintiffs later. Ans. 17. The answer improperly conflates the actions of defense counsel with Defendants themselves. The uncontradicted affidavit of defense counsel Jones established he was the only person on the defense side with knowledge of Espinoza, and Defendants themselves had no knowledge of her. 3P.App. 724:24-28. The decision regarding nondisclosure of her information was Jones's alone, not his clients' decision. 3P.App. 725:1-18.

6. Espinoza's emails.

The answer states that there were "at least 21 emails Ms. Espinoza exchanged" with defense counsel Jones. Ans. at 4. This is highly misleading. Espinoza's initial

[2] It is not unusual for attorneys to submit their own affidavits or declarations as part of discovery motion practice, and it is not unusual for judges to rely on these documents. In the present case, there was no basis for the district court's criticism of a judge needing to "take counsel's word" for something relating to a discovery motion. There is equally no basis for Plaintiffs' criticism of defense counsel's response to the judge's question, when counsel replied "In theory, Your Honor" (followed by his comment about the advice of counsel doctrine). 7P.App. 1590-91.

email, which demanded money, raised questions about her veracity and motives, so Jones attempted to obtain her contact information; but Espinoza indicated she wanted to remain anonymous. 3P.App. 721:20-28. Jones informed Espinoza he would not pay for her testimony, and she stopped communicating with him for nine months (April 2019 to January 2020). 3P.App. 722:1-23. Jones was concerned about Espinoza's reliability, and he strongly suspected her motives; he attempted to contact Espinoza during this nine-month time period, but Espinoza did not respond. 3P.App. 722:13-723:8.

Espinoza finally sent another email in January 2020, with information about Herrera's baseball activities; but even then, Espinoza was not responsive to Jones's attempts to obtain information about her motives and to determine "whether she actually had any information on the case." 3P.App. 723:9-19. Thus, it is highly misleading for the answer to assert that Jones and Espinoza "exchanged" numerous emails during this time frame.

C. NRCP 16.1 only requires disclosure of a person who is "likely" to have discoverable information.

NRCP 16.1(a)(1)(A)(i) only requires disclosure of a person who is "likely" to have discoverable information. The rule does not say it requires disclosure of any person who "might" or "possibly" has information. Instead, the rule's drafters used

the word "likely," and they expressly limited the disclosure requirement to persons who are "likely" to have discoverable information.

The district court essentially interpreted the rule to require disclosure of **anyone** who might possibly have information, such as Espinoza. Plaintiffs' answer concedes, numerous times, that the rule only requires disclosure of a person who is "likely" to have discoverable information. *E.g.* Ans. at 4, 6, 10, 11, 14. Yet the answer urges this court to adopt the same broad interpretation the district court adopted, essentially requiring disclosure of any person who might possibly have discoverable information, even if the person is not "likely" to have such information.

1. The word "likely" means "probably."

This court gives meaning to all words in a statute. *Haney v. State*, 124 Nev. 408, 412, 185 P.3d 350, 353 (2008). Therefore, the word "likely" must be given meaning and effect. Further, unambiguous language in a rule is given its ordinary meaning, unless it is clear that this meaning was not intended. *Dornbach v. Tenth Jud. Dist. Ct.*, 130 Nev. 305, 310, 324 P.3d 369, 372 (2014).

The word "likely" is unambiguous and must be given its ordinary meaning. In *State v. Romero*, 849 A.2d 760 (Conn. 2004), the defendant was charged with sexual misconduct "likely" to impair the health and morals of a child. *Id.* at 763 n.2. The trial court instructed the jury that the word "likely" included "possible" impairment of the victim's health and morals. The *Romero* court disapproved the

instruction and held: "We conclude that the term 'likely,' as used in [the statute], cannot be understood fairly to encompass a meaning of either 'possible' or 'in all possibility.'" *Id.* at 768. The word "likely" is commonly understood to denote "when a particular subject matter will **probably** come to be or when its chances of realization are **more probable than not**." *Id.* (bold added).

In the case of *In re B.M.*, 431 P.3d 1180 (Cal. 2018), a defendant was convicted of assault with a deadly weapon. A deadly weapon in California is a weapon "likely to produce" death or great bodily harm. The state argued that a weapon "likely to produce" death or great bodily harm should be construed as a weapon "capable" of producing those results, or a weapon that makes it "possible" to produce those results.

The California Supreme Court rejected this argument and held the state's construction "is at odds with the ordinary meaning of 'likely.'" *Id.* at 1184. The court cited Merriam-Webster Collegiate Dictionary (11th ed. 2014) p. 721, which defines "likely" as "having a high probability of occurring" and "very probable," and the court cited Black's Law Dictionary (10th ed. 2014) p. 1069, which defines "likely" as "probable." *Id.; see also People v. Koback*, 248 Cal. Rptr. 3d 849, 856 (Ct. App. 2019) ("likely" requires "more than a mere possibility").

Here, the district court effectively ruled that defense counsel needed to disclose Espinoza regardless of the nature of her information and regardless of

whether defense counsel believed Espinoza probably had discoverable information. This was an erroneous interpretation of Rule 16.1.

2. An attorney may evaluate whether a person is "likely" to have discoverable information.

The district court essentially ruled that defense counsel should have disclosed Espinoza regardless of the nature of her information, regardless of her lack of credibility, and regardless of whether she was "likely" to possess discoverable information. This was wrong.

In *Shannon v. National Railroad Passenger Corp.*, 2018 WL 11251006 (S.D. Fla. 2018), there was a dispute regarding disclosure of a person under the federal discovery rule, FRCP 26(a)(1), which requires disclosure of any individual "likely to have discoverable information." *Id.* at *2. The plaintiff moved to exclude a person's declaration and business notes, because the notes and the person's identity had not been timely disclosed. *Id.* at *1. The defendant argued that the need for the notes and the person's testimony had not been foreseeable until after the plaintiff made certain claims regarding fabrication of other records. *Id.*

The *Shannon* court excused the defendant's failure to disclose the information, for several reasons: the person was already known to the plaintiff; the person could have been deposed by the plaintiff; the need to explain the notes did not arise until the plaintiff made certain claims; and defense counsel made a credible

argument that the need for the person as a witness was not reasonably foreseeable to defense counsel earlier in the litigation. *Id.* at *2.

In the present case, Espinoza contacted defense counsel Jones; she indicated she was Herrera's former girlfriend; she said she had potential knowledge of the accident; and she said she would testify in exchange for money. She then refused to respond to defense counsel's efforts to communicate with her and to obtain additional information. She eventually contacted defense counsel again – several months later – but even then, her information about Herrera's sports activities seemed dubious until defense counsel verified it by obtaining YouTube videos. Espinoza's deposition was scheduled, but defense counsel had no reason to believe Espinoza would recant her story until she denied it at the deposition. Until that point, defense counsel had no reason to disclose her as a potential witness.

3. The district court erroneously ruled that credibility is irrelevant.

The district court failed to give the word "likely" any meaning or effect, precluding an attorney's evaluation of a person's credibility in determining whether the person is "likely" to have discoverable information, for disclosure purposes. Indeed, the district court harshly criticized defense counsel for making the initial determination that Espinoza lacked credibility. The district court ruled that **"it is not up to counsel to make a determination as to the credibility of a witness**

before she is disclosed." 4 App. 935 (bold added). The district court ruled that counsel is prohibited from investigating such things as whether a person is psychotic or was smoking marijuana when a letter was written, and such an investigation before disclosing a person is "totally unacceptable." 7P.App. 1571:1-3, 13-14, 19.

The answer in the present case asks this court to endorse the district court's view that credibility is irrelevant in counsel's determination about whether a person is "likely" to have discoverable information. *E.g.*, Ans. at 16 (arguing "the credibility issue is a red herring").

The district court was wrong, and Plaintiffs' answer cites no caselaw supporting the district court's view of the rule. Rule 16.1 allows counsel – indeed, the rule effectively **requires** counsel – to determine whether a person is "likely" to have discoverable information, i.e., the person **probably** has such information. And if counsel determines the person is not "likely" to have discoverable information – even if that determination is based on counsel's belief that the person lacks credibility – counsel has no obligation to disclose the person.

Credibility of a potential witness can be considered on the question of whether the person needs to be disclosed. For example, in *Davis v. State*, 928 So. 2d 1089 (Fla. 2005), the defendant contended that prosecutors violated his constitutional right to receive disclosures of exculpatory information because prosecutors failed to disclose the identity of a potential witness who was a fellow inmate with the

defendant. The inmate witness claimed he was involved in negotiations with prosecutors to assist in several cases, including the defendant's case. The defendant contended that, as a result of these negotiations, prosecutors learned of a planned escape by the defendant, and prosecutors used the information against the defendant at trial, without disclosing the inmate witness. *Id.* at 1116.

The *Davis* court rejected the contention. The court noted that the witness was not credible (as found by the trial court), and the witness had no information to offer the defendant. As such, prosecutors "had no reason to list him as a potential witness or disclose him to the defendant as someone having any relevant information." *Id.*

It is absurd for the district court and Plaintiffs to contend that a person's credibility is irrelevant in an attorney's decision on whether to disclose the person as "likely" to have discoverable information. This absurdity can be illustrated by a hypothetical in which a person dressed as a clown goes to the law office of a plaintiff's attorney. The clown has a tattoo on his forehead that reads "I am a liar." The clown hands the lawyer a letter that says: "My name is Bozo; I just got out of prison after multiple convictions for perjury; I spoke to the defendant while traveling on a spaceship; the defendant admitted running the red light; and I will testify for $10,000." The plaintiff's attorney concludes the clown has zero credibility and is therefore not "likely" to have discoverable information, and the letter is completely bogus. The plaintiff's attorney therefore does not disclose Bozo or the letter.

Defense counsel finds out and moves for sanctions. The district court grants the motion, dismisses the plaintiff's complaint, and imposes $70,000 in sanctions against the plaintiff.

In this hypothetical, the plaintiff's attorney was not obligated to disclose Bozo's identity or the letter if there was only a slight possibility Bozo might have discoverable information. Under Rule 16.1, the attorney was obligated to determine if Bozo was "likely" to have discoverable information. The attorney had every right to make a determination that Bozo had no credibility and did not "likely" possess discoverable information; and the attorney had no disclosure obligation, even if the determination was based upon an evaluation of Bozo's lack of credibility. No appellate court would affirm the order dismissing the complaint and sanctioning the plaintiff's attorney in this example. Yet that is precisely the result the answer requests in the present case.

Plaintiffs have cited no law supporting the district court's view that an attorney cannot consider a person's credibility when deciding whether the person is "likely" to have discoverable information.

4. The district court and Plaintiffs' answer improperly expand the scope of disclosure obligations.

The district court greatly expanded the scope of disclosure requirements under NRCP 16.1. The rule does not require attorneys to disclose every person who might

possibly or theoretically have discoverable information. Attorneys only need to disclose persons who are "likely" to have such information. Rule 16.1's use of the word "likely" is obviously intended to have a limiting effect. Otherwise, the rule would require unlimited disclosures of any persons who might possibly or theoretically have discoverable knowledge.

For example, without the word "likely" as a limitation, a personal injury plaintiff would need to disclose every single person who might possibly have seen the plaintiff engage in post-accident physical activities tending to prove or disprove physical limitations or disabilities. Such persons might include neighbors, coworkers, family members, roommates, and friends. Accepting the district court's view of the rule, a plaintiff's complaint could be dismissed – and a plaintiff could be severely sanctioned – if the plaintiff failed to disclose any of these people. Such a result would be absurd. And it would encourage attorneys to make marginal and worthless disclosures. But such a result is within the district court's view of the rule in this case (and within the answer's view of the rule).

Espinoza is a good example. She was plaintiff Herrera's live-in girlfriend for four years. 6P.App. 1279. She would have seen Herrera, and she would have had direct personal knowledge of Herrera's injuries (or lack thereof) and disabilities (or lack thereof) relating to the July 2016 accident. In fact, Espinoza and Herrera had been involved in a prior accident a year before the accident in question, and they

both sustained injuries and treated with the same medical provider. 6P.App. 1299-1305. Thus, Espinoza would have had direct personal knowledge of Herrera's pre-accident physical conditions and disabilities. And despite Herrera's claim of serious injuries from the car accident in this lawsuit, Espinoza had knowledge that Herrera was playing semi-pro baseball after the accident (which was confirmed in a YouTube video and at Herrera's deposition). 3 P.App. 723.

Further, Espinoza undoubtedly would have talked to Herrera after the subject accident, and heard his description of the accident; and she may well have heard Herrera's explanation about why both Plaintiffs did not seek medical treatment immediately after the accident, and why they went to an attorney's office instead. 6P.App. 1346-47.

Thus, from the standpoint of Plaintiffs and their counsel, Espinoza was certainly a person "likely" to have extensive discoverable information regarding liability (based on Herrera's probable description of the accident) and damages (based on Espinoza's observations of Herrera before and after the accident). Yet Plaintiffs did not disclose Espinoza in their initial Rule 16.1 disclosures, and they did not disclose her until April 2020, after Herrera's deposition and after Espinoza's deposition. 2P.App. 358, 360; 5P.App. 1027.

Regarding the fact that Plaintiffs were fully aware of Espinoza at all times, and therefore had their own obligation to disclose her, the answer argues: "And

though Plaintiffs were clearly aware of Ms. Espinoza's *existence*, they had no knowledge of the information she conveyed to [defense counsel] Mr. Jones, and therefore had no knowledge that she was a 'witness' as defined by the Nevada Rules of Civil Procedure." Ans. at 12 (italics in original). The argument is specious. Espinoza was always a person with information about Plaintiffs' claims – especially Herrera's claims. Plaintiffs certainly had knowledge of the information Espinoza possessed from her relationship with Herrera, even if she had never communicated with defense counsel Jones in the first place. Plaintiffs offer no legitimate excuse for why they did not disclose Espinoza until late in discovery. They also offer no plausible explanation regarding why there was a disclosure requirement for Defendants but not Plaintiffs.

Defense counsel called the district court's attention to these facts (*e.g.* 2P.App. 358, 360), but the district court ignored them. Petitioners also called this court's attention to these facts in the petition, including the fact of Plaintiffs' failure to disclose Espinoza as a potential witness until after depositions of Herrera and Espinoza. Pet. at 3-4, 6-7. Plaintiffs' answer completely ignores these facts, presumably because Plaintiffs can think of no plausible rebuttal.

Under these circumstances, the district court erred by expanding the scope of Rule 16.1 and by requiring defense counsel to disclose Espinoza earlier.

D. Defendants' failure to disclose Espinoza's email earlier was not a rule violation and was harmless.

Plaintiffs contend Defendants had an obligation to disclose Espinoza's emails earlier, and their failure to do so was a violation of NRCP 16.1 and 26, justifying the severe sanctions the district court ultimately imposed.[3] Ans. at 10-13.

The answer first relies on Rule 16.1(a)(1)(A)(ii). Ans. at 10-11. This rule consists of a single sentence with two inconsistent and somewhat contradictory phrases. The first phrase requires disclosure of "all documents" that a party possesses that the party "may use to support its claims or defenses, including for impeachment or rebuttal." *Id.* There is no evidence in the present case that defense counsel Jones ever intended to use the emails from Espinoza for any purpose, in light of her abject lack of credibility and her demand for payment for her testimony.

The sentence's second phrase, which is the one on which Plaintiffs primarily rely, states that a party must disclose "any record, report, or witness statement, in any form, concerning the incident that give rise to the lawsuit." *Id.* This broad phrase seems to engulf and subsume the first phrase (referring to documents a party intends to use), essentially making the first phrase meaningless, and eliminating

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[3] Plaintiffs also argue that Defendants were obligated to disclose the emails in response to a request for production under NRCP 34. Ans. at 13. There is no significant difference in the arguments regarding disclosure of the emails under Rules 16.1 and 34, and this reply will therefore not address the arguments separately.

consideration of whether the party intends to use the documents to support its claims or defenses at trial.

Plaintiffs attempt to deal with this contradiction in the sentence by relying on an Advisory Committee note that refers to the second phrase in the Rule 16.1(a)(1)(A)(ii) sentence. Ans. at 15. The answer provides a quotation from the Committee's note (Ans. at 15), but the quotation is incomplete. Although the note does reference the second phrase in the rule, the note goes on to advise that the rule deals with "incident reports, records, logs and summaries, maintenance records, former repair and inspection records and receipts, sweep logs, and any written summaries of such documents." Advisory Committee Note – 2019 Amendment – Subsection (a). The Committee's note then indicates that documents should include those that are prepared or exist at or near the time of the subject incident. *Id.* The note does not deal at all with witness statements, or whether an email to a lawyer constitutes a "witness statement" within the second phrase of the sentence. And Plaintiffs' answer does not provide any case citations indicating that Espinoza's emails constituted "witness statements" for disclosure purposes.

Whenever possible, this court will interpret a rule in harmony with another rule. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000). The first and second phrases in Rule 16.1(a)(1)(A)(ii) should be harmonized so that the second phrase does not conflict with the first phrase.

Here, Plaintiffs recognized that Espinoza's information was highly dubious. Herrera filed a motion in limine to preclude Espinoza, arguing that Espinoza "was not involved in the subject incident," and she had "a tumultuous on-and-off relationship" with Herrera for several years. 3P.App. 585:27. Herrera asserted that Espinoza "attempted to lie" at her deposition. 3P.App. 586:3-6. Herrera argued that Espinoza's information was "pure conjecture and speculation," consisting of "blatant falsehoods" that were not supported by "solid evidence." 3P.App. 586:11-15. Herrera also argued that Espinoza has an "axe to grind," she "is not a credible witness," there is "a credibility issue with Ms. Espinoza," and "she has not been forthcoming with facts related to the Plaintiffs." 3P.App. 586:16-22.

Considering Plaintiffs' own view that Espinoza had no credibility and was worthless as a witness, defense counsel cannot be faulted for similarly concluding that neither Espinoza nor her emails would be used to support defenses in the litigation. Espinoza was no stranger to Plaintiffs, and her emails would have contained information known to Plaintiffs. There was no need for Defendants to disclose the emails.

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E. The sanctions order was erroneous.

1. If anything, the sanction in Rule 16.1 should be used, not the sanctions in Rule 37.

The writ petition established that the district court's severe sanctions order – which struck the answer and affirmative defenses on liability – was an arbitrary and capricious abuse of discretion. Pet. at 20-28. The answer contends that this sanction was appropriate under NRCP 37.[4] Ans. at 19.

Although discovery rules recognize the potential for imposition of Rule 37 sanctions for a violation of Rule 16.1, sanctions under Rule 37 should not be the default source of sanctions. Rather, Rule 16.1 itself contains its own recitation of a sanction for a violation of that rule, namely, prohibiting the use of any witness or evidence that should have been disclosed under the rule. *See* NRCP 16.1(e)(3)(B). When a party fails to disclose information in a timely manner during discovery, the appropriate sanction is exclusion of the information. *Id.; see e.g., Nevada Power Co. v. 3 Kids, LLC*, 129 Nev. 436, 444, 302 P.3d 1155, 1160 (2013).

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[4] The district court invoked its so-called "inherent power" to sanction Defendants. 4P.App. 936:25-26. Because of the "potency" of inherent powers, a court's use of inherent powers to sanction parties "must be exercised with restraint and discretion," and the primary aspect of that discretion is fashioning an appropriate sanction considering the alleged abusive conduct. *See Sparks v. Bare*, 132 Nev. 426, 433, 373 P.3d 864, 868 (2016). Plaintiffs' answer in the present case does not attempt to support the sanctions award on this ground.

The specific sanctions provisions of Rule 16.1 should prevail over the more general sanctions provisions of Rule 37. *See Williams v. State Dept. of Corrections*, 133 Nev. 594, 601, 402 P.3d 1260, 1265 (2017) (holding that under the "general/specific canon" of construction, a specific statute takes precedence over a more general statute). Accordingly, in the present case this court should evaluate the sanctions order under the prism of Rule 16.1, not the more general sanctions provisions of Rule 37.

2. Relevant factors weighed against sanctions.

Drastic sanctions should be imposed only where a party commits severe discovery abuses, such as willfully disobeying a court order or intentionally destroying or altering important evidence, and where less severe alternative sanctions would not suffice. *See GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995) ("willful noncompliance with a court order"); *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 91-92, 787 P.2d 777, 779 (1990) (intentional alterations and fabrication of documents); *MDB Trucking, LLC v. Versa Prod. Co., Inc.*, 136 Nev. Adv. Op. 72, 475 P.3d 397, 403 (2020) (requiring consideration of less severe alternative sanctions).

A claim-terminating sanction for a discovery violation "conflicts with the core principle that case-terminating sanctions are a last resort, appropriate only when no lesser sanction will do." *Id. at* ___, 475 P.3d at 404. The overriding public policy

is this: "Fundamental notions of fairness and due process require that discovery sanctions be just and that sanctions relate to the specific conduct at issue." *GNLV*, 111 Nev. at 870, 900 P.2d at 325.

Both sides in this litigation have evaluated the sanctions order under factors articulated in *Young*, 106 Nev. at 93, 787 P.2d at 780. Those factors are:

(a) The degree of willfulness of the offending party.

On this factor the district court found defense counsel intended to sandbag or ambush Plaintiffs with Espinoza's evidence. 4P.App. 937. Unencumbered by actual evidence, Plaintiffs make a similar contention in their answer. Ans. at 22-23.

Undisputed evidence established a highly unusual situation in which Herrera's former girlfriend Espinoza sent an email to defense counsel with potential information that would help Defendants and hurt Plaintiffs. Espinoza, however, demanded payment for her information, which seemed dubious; and she did not respond to defense counsel's follow-up communications asking for verification and more information. She surfaced again months later, this time hinting she had information about Herrera playing semi-pro baseball despite his claimed injuries and disabilities. Defense counsel verified the baseball information by finding a YouTube video and obtaining Herrera's confirming deposition testimony.

Espinoza later recanted, flip-flopped regarding her information, and disavowed her emails. Defense counsel was not clairvoyant and could not have

anticipated this highly unusual course of events. There was no evidence that defense counsel ever believed Espinoza was "likely" to have discoverable evidence. And Herrera himself viewed Espinoza as a person who has an axe to grind, lies under oath, tells blatant falsehoods, is not forthcoming, and is not a credible witness. 3P.App. 585-86.

Defense counsel Jones certainly would have recognized that he could not use Espinoza as a defense witness at trial without disclosing her during discovery. If anything, Jones's failure to disclose Espinoza shows Jones had no legitimate reason to believe Espinoza's information was credible, or that Espinoza was likely to possess discoverable information. His failure to disclose Espinoza was not a willful effort to evade discovery rules or to hide information and ambush Plaintiffs, as the answer argues.

(b) Prejudice to the non-offending party.

The district court touched on this factor in three sentences in the sanctions order. 4P.App. 939:5-10. Only the third sentence actually deals with prejudice, and this sentence is merely a conclusory statement indicating that imposing a lesser sanction would unfairly prejudice Plaintiffs. *Id.* The sentence offers no explanation of the prejudice. Plaintiffs' answer, however, suggests that Plaintiffs were prejudiced because they were denied the ability to obtain an expert "for Defendants' new assertion of fraud." Ans. at 23.

Plaintiffs' argument is a red herring, highly conjectural, unsupported by evidence, and repugnant to litigation logic. A party seeking severe sanctions must prove actual prejudice by showing that evidence was material to the party's case and that its loss inflicted irreparable harm. *MDB Trucking*, 136 Nev. at __, 475 P.3d at 405. Here, the district court excluded Espinoza from testifying, and excluded her emails from being used at trial. There were no other late-disclosed witnesses for liability, and there were no other exhibits. Plaintiffs' experts were doctors, not accident experts. 1P.App. 22-48. The district court's exclusion of Espinoza's testimony and emails completely eliminated any potential prejudice from late disclosure of her information during discovery. Even the district court rejected Plaintiffs' argument about prejudice relating to potential experts, finding that "none of the expert witnesses regarding liability are affected at all" on this issue. 7P.App. 1572.

Espinoza contacted defense counsel Jones as a potential witness favorable to Jones's clients. As Herrera's four-year live-in girlfriend, she was well-known to Plaintiffs, and her information was already in Plaintiffs' knowledge. The tardy disclosure of her identity and her emails had no impact whatsoever on the case. Even

if there was some minimal impact, it was completely eliminated by excluding Espinoza and her emails from evidence.[5]

(c) The severity of the sanctions and the discovery abuse.

The third factor is the severity of the sanction order compared to the severity of the discovery abuse. *Young* at 93, 787 P.2d at 780. The district court ruled that the severity of striking Espinoza's testimony was minor in comparison to the discovery violations. 4P.App. 939:12-16. Plaintiffs' answer exaggerates defense counsel's conduct and describes the alleged discovery abuse as "grave." Ans. at 24.

There was really no discovery abuse at all, much less a serious or "grave" abuse. Even if Espinoza's information should have been disclosed earlier, the late disclosure did not result in any actual prejudice – especially after the district court excluded Espinoza from trial.

(d) Lost evidence.

The district court found "there is no evidence that has been lost." 4P.App. 939:18. Plaintiffs agree. Ans at 26.

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[5] Ironically, Plaintiffs may have been better off with the delay. If defense counsel had disclosed Espinoza right away, Plaintiffs would have faced rebutting her testimony and attacking her credibility at trial. As it turned out, the exclusion sanction eliminated Plaintiffs' need to deal with Espinoza's story at trial.

(e) Less severe sanctions.

The next factor is the feasibility and fairness of less severe sanctions. The district court mentioned this important factor in only three lines, with a conclusory finding that "it only seems just" to strike the answer as to liability. 4P.App. 939:20-22. This is insufficient. Rule 16.1 authorizes exclusion of evidence as a legitimate, fair, and effective remedy for late disclosures. Here, the district court excluded Espinoza and her emails, and the jury will never hear about her.

Plaintiffs argue that a less severe sanction, such as striking Espinoza and her emails from being used at trial, is insufficient because such a sanction does not deal with the fact that "Defendants had sought to secretly build their case around this undisclosed evidence." Ans. at 26. There is no evidence supporting this argument. In fact, evidence establishes the opposite of Plaintiffs' argument. Defense counsel thought Espinoza's information was worthless and would not be used.

(f) Policy favoring adjudication on the merits.

Young requires consideration of the public policy favoring adjudication on the merits. *Id.* The district court dealt with this factor – which arguably is one of the most important *Young* factors – in two conclusory sentences that contain no analysis. 4P.App. 939. The district court's ruling flies in the face of this court's oft-repeated recognition of the public policy of deciding cases on their merits. The lesser sanction

that the district court already imposed (exclusion of Espinoza's evidence at trial), is fully consistent with the policy of deciding cases on their merits.

(g) Punishing clients for the misconduct of counsel.

The next factor is whether the sanction unfairly punishes Defendants for the misconduct of defense counsel. The district judge referred to his own experience in insurance defense work and concluded that "it is hard to fathom" that the defense attorneys did not inform Defendants (the driver and his employer) of Espinoza's contact. 4P.App. 940:5-7.

There was no evidence that Defendants were ever aware of Espinoza or her contacts with Jones. Everything that happened regarding Espinoza only involved Defendants' attorneys, not Defendants themselves. Plaintiffs complain that Defendants provided insufficient evidence on the question of whether defense counsel informed Defendants about Espinoza. Ans. at 28-30. But **Plaintiffs** are the parties who filed a motion to strike Defendants' answer and affirmative defenses, and Plaintiffs had the burden to prove entitlement to that relief. They should not be allowed to assert a claim for sanctions, without evidence, then rely on alleged inadequacies in the defense opposition.[6]

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[6] Plaintiffs rely on *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 322 P.3d 429 (2014), for the proposition that a party cannot avoid dismissal by contending that the attorney's conduct led to the dismissal. *Huckabay* did not involve discovery abuses, NRCP provisions, or application of *Young*, which is not cited in the opinion. *Huckabay* involved violations of Nevada Supreme Court orders and (continued)

(h) The need for deterrence.

The final *Young* factor is the need for deterrence. The district court found a need for deterrence, and Plaintiffs concur. Ans. at 32. Plaintiffs argue that a breakdown of integrity in this case "threatens justice, itself." *Id.*

This is a rear-end car accident case. Plaintiffs did not seek medical care after the accident, but instead they sought an attorney. They would get a fair trial if there were no defense sanctions at all, but they certainly will get a fair trial with exclusion of Espinoza and her emails. There is no need to deter Defendants, their attorneys, or anyone else. Contrary to the answer's suggestion that the defense position "threatens justice, itself," the Nevada judiciary will not collapse under the weight of discovery abuses if this court vacates the district court's sanctions order.

F. The attorneys' fees award was erroneous.

The writ petition established that the district court erred by awarding nearly $70,000 in attorneys' fees to Plaintiffs, as an additional sanction for the delay in disclosing Espinoza. Pet. 28-31. If this court vacates the underlying sanctions order, the fee award must necessarily be vacated as well. In any event, the Plaintiffs'

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rules. *Huckabay* held the court did not need to consider the party's lack of fault in that context. But in a case involving discovery sanctions, such as the present case, *Young* undeniably requires a district court and this court to consider the factor involving the client's lack of fault.

answer gives short shrift to this issue, essentially just relying on the district court's discretionary action. Ans. at 33-37.

The petition noted that the district court's order was conclusory and did not adequately evaluate the relevant factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). Pet. 38-29. The answer argues that a district court can be affirmed, even if the court failed to make adequate findings. Ans. at 33-34. Explicit findings with respect to an award of attorneys' fees are preferred. *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001). In the absence of explicit findings, this court will affirm an award of fees only if the record clearly reflects that the district court properly considered the relevant factors for the award. *Id.; see also Argentena Consol. Min. Co. v. Jolley Urga*, 125 Nev. 527, 540 n.2, 216 P.3d 779, 788 n.2 (2009) (finding abuse of discretion where fee order was conclusory and failed to include findings of reasonableness).

Here, the district court cited *Brunzell* but failed to provide any meaningful analysis of *Brunzell* factors. 6 P.App. 1245. This deprived the appellate court of any method by which to conduct a thorough analysis of the issue. This was an abuse of discretion, because the record does not otherwise reflect proper consideration of the relevant factors.

The petition also established that fees were awarded for duplicative work of multiple lawyers in three firms, with unreasonable and duplicative amounts of time

spent on various tasks. Pet. at 29-30. A party seeking fees must prove that the number of hours requested was "reasonably expended" and was not "excessive, redundant, or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40 (1983). Here, as shown in the petition, fees were awarded for time that was unreasonable and duplicative, with multiple attorneys spending time reviewing other attorneys' work, appearing at court hearings, and otherwise being far from efficient and reasonable. The large fee award – all stemming from a tardy disclosure of the identify of Plaintiff Herrera's long-time girlfriend – cannot stand.

CONCLUSION

For the reasons stated in the petition and in this reply, the orders imposing sanctions and attorneys' fees should be vacated.

Dated: Oct. 27, 2021

Robert L. Eisenberg

CERTIFICATE OF COMPLIANCE

1. Pursuant to NRAP 21(e), I hereby certify that this reply 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 6,988 words.

DATED: Oct. 27, 2021

Robert L. Eisenberg

Robert L. Eisenberg, SBN 950

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of LEMONS, GRUNDY & EISENBERG, and on this date the foregoing document was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

THE702FIRM
DRUMMOND LAW FIRM
LEWIS ROCA ROTHGERBER CHRISTIE

I certify that I also deposited for mailing in the U.S. Mail at Reno, Nevada, a true and correct copy of the foregoing document to the following:

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

DATED this 27th day of October, 2021.

Margie Nuri
Employee of LEMONS, GRUNDY & EISENBERG