Case No. 86417

In the Supreme Court of Nevada

KEON KHIABANI, an individual; ARIA KHIABANI, an individual; SIAMAK BARIN, as executor of the ESTATE OF KAYVAN KHIABANI, M.D. (decedent), the ESTATE OF KAYVAN KHIABANI, M.D. (decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN, DDS (decedent), and the ESTATE OF KATAYOUN BARIN, DDS (decedent),

Appellants,

vs.

MOTOR COACH INDUSTRIES, INC.,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

APPEAL
from the Eighth Judicial District Court, Clark County
The Honorable Adriana Escobar, District Judge
District Court Case No. A-17-755977-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Respondent Motor Coach Industries, Inc. (MCI) is a Delaware corporation. Its parent companies are Motor Coach Industries International, Inc. and MCIL Holdings, Ltd. Motor Coach Industries International, Inc. is wholly owned by MCII Holdings Inc., which is wholly owned by New MCI Holdings, Inc., which is wholly owned by New Flyer Holdings, Inc., which is wholly owned by NFI Group Inc. NFI Group Inc. is publicly traded in Canada.

2. MCI has been represented in this litigation by D. Lee Roberts and Howard J. Russel of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; Darrell L. Barger, Michael G. Terry, John C. Dacus, and Brian Rawson of Hartline Dacus Barger Dreyer LLP; and Joel D. Henriod and Justin J. Henderson, formerly of Lewis Roca Rothgerber Christie LLP. Daniel F. Polsenberg, Abraham Smith, Kory J. Koerperich, and Adrienne Brantley-Lomeli of Lewis Roca Rothgerber

Christie, LLP represent respondent in this Court.

Dated this 19th day of March, 2024.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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ROUTING STATEMENT

The *en banc* Court retained the initial appeal, directing the district court on remand to "grant[] MCI's motion to alter or amend the judgment to offset the settlement proceeds paid by other defendants." *Motor Coach Indus., Inc. v. Khiabani ex rel. Rigaud*, 137 Nev. 416, 427, 493 P.3d 1007, 1017 (2021) (*MCI I*).

Although appellants suggest that the Supreme Court should again retain this appeal to resolve "the proper application of this Court's prior published decisions" (AOB 1), the questions left open under *J.E. Johns & Assocs. v. Lindberg*, 136 Nev. 477, 470 P.3d 204 (2020) are not actually presented because appellants presented no evidence below that their settlement proceeds included any allocation to punitive damages or attorney's fees. The Court of Appeals could affirm the district court's judgment based on existing Nevada law. But ignoring appellants' waiver, several of appellants' contentions—such as requiring courts to conclusively presume that 75% of settlement proceeds were allocated to punitive damages in the absence of evidence—would effect a sea change in Nevada jurisprudence that only the Supreme Court could entertain.[1]

[1] Plaintiffs' counsel has also raised similar arguments in another case

STATEMENT OF THE ISSUES

1. Did the district court correctly rule that appellants failed to meet their burden, in attempting to reduce the offset for other defendants' settlements under NRS 17.245, to demonstrate any allocation of the settlement proceeds to punitive-damages claims?

2. Did the district court properly interpret and apply *J.E. Johns* in determining that, unlike the treble damages at issue in *J.E. Johns*, a plaintiff is never entitled to punitive damages?

3. Did the district court correctly rule that the offset for settlement proceeds should not be reduced for hypothetical attorney's fees under NRCP 68?

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without making a prima facie showing of an allocation in the settlement agreement, which may come before this Court on appeal. *See Gallagher et. al. v. Affinitylifestyles.com, Inc. et. al.*, Eighth Judicial Dist. Court No. A-21-834485-B, Doc. No. 1351 (January 12, 2024 Opposition to Motion to Alter or Amend Judgment). So it seems this issue may persist, unless the necessary showing is established in this case.

STATEMENT OF THE CASE

This is an appeal from a judgment entered after appeal and remand when the district court allowed a full offset for prior settlements.

The first appeal: After the jury had awarded appellants (plaintiffs below) $18,746,003.62 and refused an offset for prior settlements, MCI appealed. This Court held that the district court should have granted MCI's motion to alter or amend the judgment to offset the settlement proceeds paid by other defendants and remanded for calculation of the offset due. *Motor Coach Industries, Inc. v. Khiabani*, 137 Nev. 416, 493 P.3d 1007, 1017 (2021) (*MCI I*).

On remand: The parties disputed the offset amount. Plaintiffs presented no evidence that any of portion of the settlements had been allocated to attorney's fees or punitive damages. Instead, relying on *J.E. Johns & Associates v. Lindberg*, 136 Nev. 477, 470 P.3d 204 (2020), they argued that their case merits an exception to the rule requiring an offset for all settlement proceeds from a co-tortfeasor. MCI argued that plaintiffs had waived the issue, had not presented evidence of an allocation, and had not demonstrated their entitlement to punitive damages or attorney's fees even against the settling defendants.

The district court agreed with MCI that it was entitled to an offset for the entire amount of the settlements. Plaintiffs appeal.

STATEMENT OF FACTS

A. The Settlements

Dr. Khiabani died when his bicycle collided with a motor coach designed by defendant MCI. 2 App 302. The plaintiff-heirs sued MCI; the driver, Hubbard; his employer, Michelangelo Leasing; the manufacturer of Khiabani's helmet, Bell Sports, Inc.; and the manufacturer of his bicycle, SevenPlus Bicycles, Inc. *Id*. Plaintiffs sought punitive damages against MCI, Hubbard, and Michelangelo, but not the manufacturers of the helmet and bicycle. 2 App. 303.

A few months later, plaintiffs settled with everyone but MCI. 2 App 303.[2] The motions for determination of good-faith settlements do not mention punitive damages, much less any allocation for them in the settlements. The settlement proceeds from Michelangelo and Hubbard, moreover, were "satisfied through Michelangelo's insurance." 2 App. 303.

[2] The settlement amounts from Hubbard and Michelangelo Leasing, Bell Sports, and SevenPlus Bicycles are found at 2 App 303.

At trial, the jury assessed plaintiffs' total damages at $18,746,003.62. 1 App 140.

B. *The First Appeal*: This Court Reverses the Denial of an Offset

MCI moved to offset the judgment by the full amount of the settlement proceeds from MCI's co-defendants pursuant to NRS 17.245(1)(a) and NRS 41.141(3). 1 App. 168. Plaintiffs opposed the motion on the sole basis that product manufacturers are ineligible to offset settlement proceeds from co-defendants. *Id.* Plaintiff made no mention of punitive damages or attorney's fees, or otherwise suggest that, if an offset were permitted, it would be for less than the full settlement amounts. 1 App. 169. The district court denied any offset. *Id.*

On appeal, this Court reversed, holding that "NRS 17.245 is clear on its face and thus applies to MCI, as there is no dispute that MCI and the other defendants were liable for the same injury" and "the jury calculated the total damages for that single injury and respondents had already received partial payment from the settling defendants." *MCI I*, 137 Nev. at 427, 493 P.3d at 1017. This Court further determined that to hold otherwise would permit a double recovery by respondents for the same injury.

This Court remanded and directed the district court "to offset the settlement proceeds paid by other defendants" and calculate the amount due. *Id.*

C. *On Remand*: The District Court Determines that MCI is Entitled to an Offset of All Settlement Proceeds

On remand, MCI argued that it was entitled to an offset of all the settlement proceeds. MCI pointed out that the offset at issue in *J.E. Johns* involved a statutory entitlement to trebled damages; here, in contrast, plaintiffs are never entitled to punitive damages, so it could not be presumed absent evidence that any portion of the settlement was for punitive damages. 1 App. 172. MCI further argued that the *law of the case* established that the settling defendants' conduct was not malicious. 1 App. 173. MCI also contended that plaintiffs were *judicially estopped* from alleging the settling defendants' conduct justified punitive damages based on their previous representations to the district court and this Court, representations that undergirded procured the judgment on MCI's liability. 1 App. 176. MCI also argued that plaintiffs bear the burden of proof to justify any diminution in the offset, and they disclosed *no evidence* that the settling defendants agreed to apportion part of the settlement to punitive damages. 1 App. 182. Finally, MCI posited that it was dubious that any

settlement funded by an *insurance policy* would have contemplated punitive liability. 1 App. 185.

Plaintiffs contended that Michelangelo and Hubbard resolved their exposure to damages beyond actual damages that are unique to Michelangelo and Hubbard. 2 App. 205. Plaintiffs also argued that their served offers of judgment created an additional "exposure" to an award of attorney's fees, which was also resolved as part of the settlement payment. 2 App. 206. Lastly, they argued they should not be estopped from arguing defendants acted with conscious disregard because the punitive damages exposure was based on Michelangelo's "corporate misconduct in driver screening and driver training—not on Hubbard's actions." 2 App. 207. At no point, however, did plaintiffs introduce any evidence that the settlement agreements actually allocated any portion to punitive damages or attorney's fees.

The district court determined that *J.E. Johns* did not require a reduction, and the judgment would be offset by the full settlement proceeds. 2 App. 310.

The district court found that, while in *J.E. Johns* there was a clear statute that automatically allowed for treble damages, there was not such

an automatic allocation of punitive damages in the settlements here. 2 App. 310. Plaintiffs instead would need to present *prima facie* evidence that the settlement in fact included such an allocation.

The district court also noted that plaintiffs had failed to carry their burden to allocate punitive damages within the prior settlements. "[I]n any case, the Plaintiffs would bear the burden of proof to justify any diminution of the offset." 2 App. 296:4-5. But plaintiffs did not meet that burden:

> I don't have any evidence from the Plaintiffs that the settlements [amount redacted] for any of the parties included or discussed punitive damages. * * * I haven't seen any fact or case law that would… warrant finding punitive damages against the settling Defendants in this case.

2 App. 297:4-12.

The district court further noted that when an insurance policy pays an award, the settlement generally does not include an apportionment for punitive liability on behalf of their insured. 2 App. 207, 296:12-14. Here, the settlements—certainly those for Hubbard and Michaelangelo—were funded by insurance, and there is no indication that those insurance proceeds were allocated for punitive damages. *See also* 2 App. 297:6-8 ("[A]t least I haven't been shown, that a carrier would provide a settlement with respect to punitive damages.").

In addition, the district court determined that plaintiffs are judicially estopped from alleging that the settling defendant's conduct justified punitive damages based on their previous representations to the court. 2 App 311.

SUMMARY OF THE ARGUMENT

Following this Court's mandate in *MCI I*, the district court correctly calculated the offset. Each of the settlements was for the "same injury or the same wrongful death" under NRS 17.245(1), and none of the settling defendants faced a statutory multiple-damage claim, so MCI was entitled to the entire offset. Plaintiffs presented zero evidence that their settlements with other defendants entailed any allocation to punitive damages or attorney's fees. To the contrary, it is highly unlikely that the parties made any such allocation. The district court correctly found that, unlike the statutory damages at issue in *J.E. Johns*, punitive damages are never awarded as of right and—absent evidence of an actual allocation in the settlement—are not presumed. The court also correctly determined that plaintiffs could not retreat from their prior positions that settling defendants had not exhibited conduct meriting punitive damages.

The district court correctly rejected plaintiffs' unworkable theory, which was waived in the first appeal and would reduce every settlement involving a claim of punitive damages by the constitutional or statutory maximum of punitive damages that a jury *could* award—even where the settling parties did not make that allocation. Such a rule would systematically create windfalls for parties who did not actually receive (or pay taxes on) a punitive-damages settlement. Plaintiffs' position would have been especially absurd in this case, where plaintiffs' own arguments to the district court and this Court proved that they had no viable claim of punitive damages against settling defendants.

Similarly, as plaintiffs had not presented any evidence that the settlements allocated funds to a hypothetical, discretionary award of attorney's fees, the district court properly declined to reduce the offsets on that basis.

STANDARD OF REVIEW

The district court's interpretation and construction of NRS 17.245(1)(a) presents a question of law that this Court reviews de novo. *J.E. Johns & Assocs. v. Lindberg*, 136 Nev. 477, 479–80, 470 P.3d 204, 207 (2020). Whether a party has presented sufficient evidence of the terms of

an agreement—including a failure of proof—is a finding of fact reviewed for clear error. *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012) (citing *Kockos v. Bank of Nev.*, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974)).

ARGUMENT

I.

PLAINTIFFS FAILED TO PRESENT A *PRIMA FACIE* CASE THAT THE PRIOR SETTLEMENTS CONTAINED AN AMOUNT FOR PUNITIVE DAMAGES

This Court indicated that there might be a reduced offset *if* a prior settlement included "amounts representing punitive damages." *J.E. Johns & Associates v. Lindberg*, 136 Nev. 477, 484, 470 P.3d 204, 211 (2020) (quoting *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998)). But *J.E. Johns* itself involved statutory treble damages. Punitive damages are different.

Simply put, even if Nevada law does allow in punitive-damages claims an exception to the rule that a non-settling defendant is entitled to a full offset for other settlements, plaintiffs here failed to present a *prima facie* case of such an exception. Plaintiffs did not present a settlement agreement that allocated any portion to punitive damages.

The district court acknowledged both the necessary *prima facie* case and plaintiffs' failure to carry that burden to prove an allocation of punitive damages within the prior settlements. "Plaintiffs would bear the burden of proof to justify any diminution of the offset." 2 App. 296:4-5. But plaintiffs did not meet that burden. "I don't have any evidence from the Plaintiffs that the settlements [amount redacted] for any of the parties included or discussed punitive damages." 2 App. 297:4-12.

A. **A Settlement Credit Is Presumptively for the Entire Settlement**

A non-settling defendant need only prove that it is entitled to an offset of the judgment. *See In re Tex. Gen. Petroleum Corp.*, 52 F.3d 1330, 1340 (5th Cir. 1995). The plain language of Nevada's statutes, NRS 17.245 and 41.141, establish the presumption that a defendant is entitled to an offset for the entire settlements.

Under Nevada's statutory scheme on comparative liability, a defendant is entitled to a full offset for the settlement proceeds from other defendants. While other states allow a jury to assess a party's equitable share of responsibility by having the jury allocate percentages among all tortfeasors, even those not in the trial,[3] a Nevada jury may determine only

[3] Pure comparative negligence, considering the fault of the settled

"the percentage of negligence attributable to *each party remaining in the action*." NRS 41.141(2)(b)(2) (emphasis added). The jury cannot consider the negligence of a settling defendant, but the amount of the settlement is deducted from the verdict:

> If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. ***The judge shall deduct the amount of the settlement from the net sum otherwise recoverable*** by the plaintiff pursuant to the general and special verdicts.

NRS 41.141(3) (emphasis added).

The Uniform Contribution Among Tortfeasors Act also requires this offset. A release of some tortfeasors "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater." NRS 17.245(1)(a). This is the statute expressly construed in *J.E. Johns* and *MCI I*.

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defendants, is still found in medical malpractice cases. NRS 41A.045; *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 363 P.3d 1168 (2015); *Valley Health Sys., LLC v. Murray*, 140 Nev., Adv. Op. 14, ___ P.3d ___ (Mar. 14, 2024).

This offset is essential. As this Court said in the prior appeal in this very case:

> the jury calculated the total damages for that single injury and respondents had already received partial payment from the settling defendants. MCI was therefore entitled to offset the judgment under NRS 17.245. To hold otherwise would permit a double recovery by respondents for the same injury. *See Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) (adopting the double recovery doctrine and explaining that "a plaintiff can recover only once for a single injury even if the plaintiff asserts multiple legal theories").

MCI I, 137 Nev. at 427, 493 P.3d at 1017. An offset is necessary to promote fairness all around, not merely to prevent double recovery to plaintiffs. The offset is the only way to ensure the corollary, that a non-settling defendant should not have to pay more than its equitable share, despite the jury not being allowed to assess the relative responsibility of all tortfeasors. This Court even speaks to a nonsettling tortfeasor's right to "*equitably offset* a judgment by the settlement amount . . . ." *J.E. Johns*, 136 Nev. at 477, 470 P.3d at 206 (emphasis added). A full offset is essential to the statutory scheme of a party being responsible only for its equitable share, rather than a double recovery.

B. **Plaintiffs Did Not Make a *Prima Facie* Case of an Allocation**

To overcome this presumption of a full offset, plaintiffs must present a *prima facie* case by producing an actual allocation between compensatory damages and punitive damages in the settlement agreement among the settling parties. This requirement can be seen in the cases cited in the leading Nevada case. In *J.E. Johns*, this Court relied on two Texas cases that explain this requirement: *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998), and *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 107 (Tex. 2018).

In *Mobil Oil*, the Texas Supreme Court held that a non-settling defendant seeking a settlement credit under the one-satisfaction rule has the burden to prove its right to such a credit. 968 S.W.2d at 927. Once the nonsettling defendant demonstrates a right to a settlement credit,[4] the burden shifts to the plaintiff to show that certain amounts should *not* be credited because of the settlement agreement's allocation. *Id.* at 927-28. The plaintiff can rebut the presumption that the nonsettling defendant is entitled to full settlement credits by presenting evidence showing that the

[4] The defendant meets this burden "by placing the uncontested settlement amount in the record," *id.*, as was done here (2 App. 215).

settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury's award would not provide for the plaintiff's double recovery. *Ellender*, 968 S.W.2d at 928 (requiring a showing of an allocation between actual and punitive damages). A written settlement agreement that specifically allocates damages to each cause of action can establish this *prima facie* case. *Ellender*, 968 S.W.2d at 928.

J.E. Johns also relied on another Texas case stating the same standard for determining whether and how much of a settlement might include punitive damages. In *Sky View at Las Palmas, LLC v. Mendez*, the Texas court explained that "[b]ecause [plaintiff] did not offer any evidence allocating those settlement amounts, and the record does not reflect any such allocation, [plaintiff] failed to rebut the presumption that [the non-settling defendant] is entitled to settlement credits equal to those amounts." 555 S.W.3d 101, 107 (Tex. 2018).

While this Court in *J.E. Johns* addressed treble damages, these citations to Texas cases more fully explain application of these principles in punitive-damages cases. *Cf. Butler v. Balolia,* 736 F.3d 609, 613 (1st Cir. 2013) (a federal court predicting state law may look to "sources cited approvingly by the state's highest court").

To rebut the presumption of a full offset, plaintiffs had to prove either a statutory entitlement to apportionment—as was the case in *J.E. Johns*—or that they and the settling defendants actually allocated a certain amount of the settlement to punitive damages. *Dionese v. City of West Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987) (where a settlement agreement fails to apportion proceeds among the separate and distinctive causes of action, the total amount of the settlement must be set off from the entire verdict); *Knox v. Los Angeles County*, 167 Cal. Rptr. 463, 469 (Ct. App. 1980) (absent good faith allocation of settlement consideration between causes of action in which joint tortfeasor status was alleged, defendants were entitled to setoff of entire settlement figures).

Plaintiffs did neither. They have not made out a case for reducing the offset.

C. Indicia that the Settlements Did Not Include Punitive Damages

As just discussed, after a defendant demonstrates the right to an offset for a prior settlement, "[t]he burden then shifts to the plaintiff to offer proof that the settlement does not provide him with a double recovery." *In re Tex. Gen. Petroleum*, 52 F.3d 1330, 1340 (5th Cir. 1995). "[A] plaintiff that is a party to the settlement agreement is in a better

position than a nonsettling defendant to allocate damages in the settlement." *Mobil Oil*, 968 S.W.2d at 928 (Tex. 1998) (citing *Texas Gen. Petroleum Corp. v. Leyh*, 52 F.3d 1330, 1340 (5th Cir. 1955)).

Here, plaintiffs presented no settlement agreement to prove that the prior settlements were allocated in part to punitive damages. That ends the analysis.

The circumstances here, moreover, further indicate that the settling parties never agreed to any allocation of settlement proceeds to punitive damages.

1. Plaintiffs Did Not Allocate Parts of the Settlements to Punitive Damages, Despite the Negative Consequences

It is easy for a plaintiff to show that a settlement is for punitive damages because of the tax consequences of that allocation. In such a circumstance, that portion of the proceeds is taxable as ordinary income, while proceeds from a general compensatory damages would not be. IRS Publ. 4345 (Rev. Sept. 2023), *available at* https://www.irs.gov/pub/irs-pdf/p4345.pdf; *O'Gilvie v. United States*, 519 U.S. 79, 81 (1996) (citing 26 U.S.C. § 104(a)(2)). Plaintiffs would have to demonstrate that they made that allocation—and actually incurred the tax liability—before they could make out a case for a reduction in the offset.

Plaintiffs here did not allocate any part of the prior settlements to punitive damages or face such a negative tax consequence as a result. Their choices demonstrate that they acted in their own interest in not making such an allocation. To claim that MCI is not entitled to a full offset on the assertion that some of the settlement was for punitive damages, plaintiffs would have to proverbially "put their money where their mouth is." That plaintiffs were not willing to make such an allocation in the settlement should be conclusive that MCI is entitled to a full offset.

2. Insurance Does Not Usually Pay Aspects of Settlements Related to Punitive Damages

Insurance policies generally do not cover punitive damages. *See Lombardi v. Maryland Cas. Co.*, 894 F. Supp. 369 (D. Nev. 1995) (concluding that under Nevada law as predicted by district court, a commercial general liability insurance policy did not provide indemnification for punitive damages).

Here, however, the settling co-defendants advanced funds from their respective insurance policies for this settlement. This use of insurance funds demonstrates that even the defendants did not attribute a portion of the settlement to punitive damages.

Where, as here, there is no explicit agreement that portions of the settlement proceeds were paid on the punitive-damages claim, there is no substantial showing of such an allocation through an arm's length transaction.

D. Plaintiffs Waived these Arguments and Are Barred by Law of the Case and Judicial Estoppel

1. Waiver

Plaintiffs submitted a judgment to the district court that included no offset. When MCI moved to alter or amend the judgment to include a full offset for the settlement, plaintiffs did not claim a reduced offset, even in the alternative. Plaintiffs did not raise the argument in their answering brief in the first appeal. Indeed, this Court in *MCI I*, after holding that an offset would prevent double recovery, held that

> the district court should have granted MCI's motion to alter or amend the judgment to offset the settlement proceeds paid by other defendants, and we remand for calculation of the offset due.

MCI I, 483 P.3d at 1017. MCI's Rule 59(e) motion was to allow a full offset. This Court held the lower court "should have granted" that motion. The district court was correct in determining its role was to implement the full offset under the mandate from this Court. This Court did not hold that only

a portion of the settlement proceeds should have been offset, but rather "the settlement proceeds" without limitation.

Plaintiffs never raised this partial offset issue in the briefing in the first appeal, case no. 78701. In a NRAP 31(e) "notice of supplemental authority" after briefing, they cited *J.E. Johns*, but even then they did not raise the new argument that the offset should be diminished. (Dkt. No. 78701, Doc. 21-04849.) They said only that the *J.E. Johns* opinion is "relevant to the offset issue." *Id.* The new issue was waived in the district court and in the first appeal.

Raise it or waive it is the rule on appeal, even for respondents. *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) ("generally an appellee waives any argument it fails to raise in the answering brief"); *In re Cellular 101, Inc.*, 539 F.3d 1150, 1155 (9th Cir. 2008); *cf. Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 671 F.3d 261, 270-71 (2d Cir. 2012) (parties waived argument by failing to raise it in the first round of appeal); *see also Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 777 n.16, 121 P.3d 599, 604 n.16 (2005) (as respondent "did not raise this issue below, it is waived on appeal").

Supplemental briefs are not the time for new substantive arguments. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 986 n.12 (9th Cir. 2016); *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, 817 F. App'x 347, 349 (9th Cir. 2020) (declining to entertain supplemental authorities and argument that could have been raised before certification of question to Nevada Supreme Court). A respondent must fully respond when the appellant would be entitled to the full relief it is requesting. *See Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 6 n.1, 953 P.2d 24, 27 n.1 (1998) (refusing to let a respondent question the applicability of a doctrine after it had "predicated its brief on the assumption that [the doctrine] is applicable").

That is the case here. MCI requested a full offset in its motion to alter and amend in the district court and in the first appeal. Plaintiffs made no alternative argument. A full offset is what MCI is entitled to.

2. Rule of Mandate and Law of the Case

And a full offset is what this Court ordered. That is the Court's mandate, and plaintiffs cannot argue for a new remedy on remand. That is the law of the case.

"When a reviewing court determines the issues on appeal and reverses the judgment specifically directing the lower court with respect to particular issues, the trial court has no discretion to interpret the

reviewing court's order; rather, it is bound to specifically carry out the reviewing court's instructions." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263–64, 71 P.3d 1258, 1260 (2003); *see also Estate of Adams ex rel. Adams v. Fallini*, 132 Nev. 814, 818, 386 P.3d 621, 624 (2016).

In *State Engineer v. Eureka County*, this Court upheld a district court's order granting judicial review of permits issued by the state engineer. 133 Nev. 557, 559–60, 402 P.3d 1249, 1251 (2017). In a prior appeal, this Court had held that the state engineer's decision "was not based upon substantial evidence and could not stand." *Id.* So on remand, the district court properly vacated the permits. *Id.* Relying on the rule of mandate and the law-of-the-case doctrine, this Court observed that "[a]t no point did we direct the district court to remand to the State Engineer for additional fact-finding." *Id.* If the permittee had not presented sufficient evidence in its initial application, it was "not entitled to a do-over" to present the missing evidence. *Id.*

So, too, here. While this Court, in remanding, also called for a calculation of the offset, that instruction simply followed this Court's normal practice of having the district court apply the holding, as law of the case, to the facts, especially where damages calculations are concerned.

See, e.g., *Valley Health Sys., LLC v. Murray*, 140 Nev., Adv. Op. 14, ___ P.3d ___ (Mar. 14, 2024). This Court did not invite plaintiffs to present new arguments or evidence (which, as discussed, they failed to do) to support a drastically reduced settlement credit. As the only issue raised in *MCI I* was whether strict-liability defendants are entitled to a settlement credit, the proper calculation was a matter of course based on the disclosed value of the settlements. This Court's instruction did not abrogate the law-of-the-case doctrine or open the floodgates for all new issues.

3. Judicial Estoppel

Plaintiffs did not claim that any amount of the settlements was allocated to punitive damages when they and the settling defendants moved for approval as a good-faith settlement under NRS 17.245. This indicated to MCI that it would then be entitled to an offset for the full amount of those settlements. Plaintiffs cannot now claim a different consequence to MCI.

The purpose of a motion for good-faith settlement is to allow the non-settling defendant to determine if the offset from the settlement is sufficient to give up its potential contribution claim against the settling tortfeasor under NRS 17.245. If a settlement allocates damages in a certain manner, that information must be presented to the parties and the

court at the time of the settlement. *See Orange County Water District v. Unocal Corp.*¸2019 WL 12661091 *2 (C.D. Cal. 2019) ("Where a settlement agreement is silent on the issue of allocation, the settlement agreement remains unallocated.") Such notice gives non-settling parties a fair opportunity to object to the allocation, which will have future consequences for an offset. *Id.* Put another way, "the statutory requirement of good faith extends not only to the amount of the overall settlement but as well to any allocation which operates to exclude any portion of the settlement from the setoff." *Knox v. County of Los Angeles*, 167 Cal.Rptr. 463, 470 (App. 1980).

Plaintiffs not only failed to give notice of any allocation, they led MCI to believe that it would be entitled to the full offset. Plaintiffs themselves expressly stated in the motions that MCI would get an offset for the settlement amounts:

> Plaintiffs' remaining claims will be ***reduced by the settlement amounts*** contributed by Michaelangelo and Hubbard. NRS 17.245(1)(a). As set forth above, the remaining defendants will receive a contribution toward any future judgment entered against them.

Respondent's App. 06, 08 (Plaintiffs' Motion for Determination of Good Faith Settlement with Defendants [Michelangelo and Hubbard] Only" Jan. 18, 2018, at 6:5, 8:9) (emphasis added).

Judicial estoppel prevents a party from taking inconsistent positions when "the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true)." *In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 390 P.3d 646, 652 (2017). The court does not have to formally "adopt" the party's argument before judicial estoppel applies. *See id*. That element is satisfied where a court approves a settlement. *Id*. at 56, 390 P.3d at 652 (noting the third element was satisfied because party asserted position in his petition and the district court approved his petition); *Kale v. Obuchowski*, 985 F.2d 360, 361 (7th Cir. 1993) (holding that where court approved settlement, judicial estoppel applied because no case "makes application of judicial estoppel depend on the existence of a judicial opinion adopting the litigant's position; it is enough that the litigant win," and "[p]ersons who triumph by inducing their opponents to surrender have 'prevailed' as surely as persons who induce the judge to grant summary judgment."); *see also Reynolds v. C.I.R.*, 861 F.2d 469, 473 (6th Cir. 1988) (holding that because bankruptcy agreements must be approved as fair and equitable, bankruptcy agreements satisfy judicial acceptance prong of judicial estoppel inquiry).

Plaintiffs obtained approval of their settlements and cut off MCI's contribution rights by asserting that the manufacturer would have an offset for the settlement amounts. In these circumstances, they should not be allowed, first, to attempt to eliminate those offsets completely and, now, to limit them substantially.

II.

THIS COURT MUST REJECT PLAINTIFFS' ARGUMENT THAT ANY NEBULOUS CLAIM OF PUNITIVE DAMAGES REDUCES THE OFFSET

Plaintiffs' position is that any settlement of a claim that includes allegations of punitive damages prevents a full offset for settlement proceeds. They call this "a simple bright-line test that can usually be resolved by examining the complaint." (AOB at 18.) But there are several reasons plaintiffs' proposed test is illogical and unworkable.

Any reduction should be only in the clearest of cases, after *prima facie* evidence rebutting the presumption of a full offset and then a thorough examination of the circumstances.

A. A Punitive Damages "Claim" is Different from the Right to Treble Damages

Treble damages are a statutory entitlement in certain cases and are easily calculable from the face of a settlement. Punitive damages are not.

In *J.E. Johns*, this Court dealt with a claim involving treble repair damages under NRS 113.150(4) for delayed disclosure of defects in property. In such a case, treble recovery is automatic and serves a remedial, rather than punitive, purpose. *Webb v. Shull*, 128 Nev. 85, 92, 270 P.3d 1266, 1270–71 (2012) ("Because it appears that the nature of the damages are concerned with the prohibitive conduct of the seller rather than his state of mind, we conclude that treble damages awarded pursuant to that statute are remedial, not punitive in nature."). Similar statutory damage multipliers can be found in a number of areas.[5]

Punitive damages are different. Unlike treble damages, punitive damages are not calculated based solely on the victim's actual losses. *Webb*, 128 Nev. at 90, 92, 270 P.3d at 1269, 1270-71. Instead, they are determined based on factors such as the defendant's behavior, degree of wrongdoing,

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[5] *E.g.*, NRS 40.150 (treble damages for waste); NRS 41.580 (treble damages for property taken by certain crimes); NRS 41.1395 (double damages for elder abuse); NRS 108.668 (treble damages for failure to release county or hospital lien); NRS 143.120(3) (treble damages for conversion by personal representative); NRS 240A.300 (double damages for document-preparation violations); NRS 569.440 (double damages for trespassing livestock); NRS 576.042(1) (treble damages for violations of farm-product statutes); NRS 598.0999(3) (treble damages for deceptive trade practices); NRS 598.3982(2)(c), (d) (treble damages for repeated ticket-reselling violations); NRS 600.430(2)(c) (treble damages for willful trademark infringement).

and financial capacity. NRS 42.001, NRS 42.005(1), (4); *see also Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987), *abrogated in part by Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006). And as their assessment is based on the defendant's conduct, not the plaintiff's injury, it is impossible to predict the amount, even when the trier of fact elects to award them. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.").[6]

As such, the fact that there is a punitive-damages claim against a settling defendant does not establish that a portion of the settlement is attributed to that claim, let alone the amount of that attribution. This Court should reject plaintiffs' leap from *J.E. Johns*' acknowledgment—that there could be a case where a reduction in the offset is appropriate due to punitive damages—to a rule that an offset is required in any case where punitive damages were alleged.

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[6] While punitive damages in some circumstances are capped, *see* NRS 42.005(1), (2), that ceiling does not create an entitlement to any punitive damages, let alone the statutory maximum. *Bongiovi v. Sullivan*, 122 Nev. 556, 583, 138 P.3d 433, 452 (2006) (jury awarded 1:1 ratio in defamation action).

While this Court in *J.E. Johns* used punitive damages as an illustration of when certain exposure *could* be unique to a defendant, it did not give direction on how to handle the determination of the offset in such a case, aside from citing to the Texas cases discussed above (which contradict plaintiffs' arguments). In this sense, this Court's declarations about offsets for settlements for claims involving punitive damages truly were *dicta*, as the case did not present the issue and the Court did not fully articulate the standards applicable.[7] If anything, the citation to *Mobil Oil* suggests approval of the burden-shifting framework applied in Texas. This Court certainly never held that the offset must be reduced substantially—on the assumption that a jury would choose to award the constitutional or statutory maximum—in every settlement involving a mere claim of punitive damages. And for good reason, because plaintiffs' position is unworkable.

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[7] "A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.'" *St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009), *quoting Stanley v. Levy & Zentner Co.*, 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941). Put simply, "cases are not authority for propositions not considered." *Guo v. Moorpark Recovery Serv., LLC*, 275 Cal. Rptr. 3d 94, 99 (Cal. App. 2021). *J.E. Johns* made only passing reference to punitive damages, such as "exposure beyond actual damages—such as treble or punitive damages…."

B. It is Unworkable for Courts to Speculate About Which Settlements Include Punitive Damages

Plaintiffs assert that every settlement of a case with a claim for punitive damages requires a reduction in the NRS 17.245 offset for the resolution of that claim. To be clear, plaintiffs have not argued that the Court should apply an allocation between compensatory damages and punitive damages that they actually agreed to with the settling defendants, but rather that courts should make up their own allocation in every case *post hoc*. That position is both illogical and impractical, because although parties could agree to an allocation of punitive damages, courts cannot prophesy whether or how much punitive damages will be awarded in any case. *Cf. Mobil Oil Corp.*, 968 S.W.2d at 928-29 ("The issue is not what the parties would have agreed to, but what if anything they did agree to.").

Unlike treble damages, punitive damages are not automatic, and no plaintiff is ever entitled to punitive damages. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000). Courts are ill-equipped to determine in the first instance whether a punitive damages claim merited allocation in a settlement agreement. Even if a jury finds malice, oppression, or fraud, it may simply choose not to assess those damages. NRS 42.005(3). This makes it impossible, without more, for a court to

determine for offset purposes which settlements should have an allocation for punitive damages. Such uncertainty stands in stark contrast to treble damages, which are automatically applied by statute in certain cases.

Plaintiffs contend that a judicially imposed reduction in the offset is appropriate in every case where there is a claim for punitive damages or any *risk* to the settling defendant, no matter how speculative and hypothetical—and no matter if the settling parties *avoided* such an allocation in their actual agreement. They base this argument on this Court's use of the word "exposure" in *J.E. Johns*.

"Exposure," they say, means simply risk. Ergo, they contend, *any risk* of punitive damages justifies automatically reducing the offset based on a hypothetical constitutional or statutory maximum punitives award.

But exposure in general, and specifically as used in *J.E. Johns*, does not mean an offset must be diminished for any conjecture, supposition, hunch, or speculation that punitive damage could have been awarded against the settled defendant based on the complaint. "Exposure" is made of sterner stuff. This Court in *J.E. Johns* did not say that "exposure" would include any possibility of punitive damages. Indeed, that interpretation

contradicts *J.E. Johns*' facts and the authorities it relied upon in reaching its conclusion.

Instead, in *J.E. Johns*, this Court determined that the district court properly offset the judgment by one-third of the pretrial settlement amount because the claim at issue entitled the purchasers by statute to recover treble damages and thus the settlement necessarily accounted for the vendors' exposure to treble damages. 136 Nev. 477, 470 P.3d 204 (2020). That automatic imposition of treble damages established contact with liability for damages beyond the plaintiff's actual harm.

There is no similar automatic imposition of punitive damages.[8] It is difficult to estimate what case or kind of case will see punitive damages—much less the amount. *See Gertz*, 418 U.S. at 350. If anything, it is estimated that, among tort cases, punitive damages are rarest among products liability and medical malpractice cases. Theodore Eisenberg, et al., *The Predictability of Punitive Damages*, 26 J. OF LEG. STUDIES 523 (1997).

[8] The closest thing may be punitive damages for driving under the influence under NRS 42.010, which apply without many of the safeguards of NRS Chapter 42. But these are still not automatic. In any case, that statute does not apply to this products-liability case.

Moreover, *J.E. Johns*' use of the word "exposure" should not be overread considering how other courts resolve these issues. *J.E. Johns* does not itself hold, nor does it cite to any other case that would hold, that a portion of every settlement *must be* allocated to each risk a defendant faces of incurring a damages award based on the complaint. Rather, *J.E. Johns* recognized simply that where a plaintiff is statutorily entitled to damages by operation of law, that category of damages unique to the settling defendant should be considered in the offset. If *J.E. Johns* is read to mean anything more than that, it is quickly contradicted by how other courts treat these issues and the unworkable analysis and impossible speculation it would require.

Indeed, *J.E. Johns* cites to Texas law in the only instance it refers to punitive damages. 136 Nev. at 484, 470 P.3d at 211. Contrary to plaintiffs' proposed rule, Texas actually does apply a simple and workable test. *Bay, Ltd. v. Mulvey*, ___ S.W.3d ___, 2024 WL 874798 *1 (Tex. March 1, 2024). There, "[i]f a defendant proves that a plaintiff has settled with someone else, the defendant is entitled to a credit in the amount of the settlement, unless the plaintiff proves that part or all of the settlement was for an injury other than the one for which the plaintiff seeks recovery." *Id.* It is

a plaintiff's burden to show "that the settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury's award would not provide for the plaintiff's double recovery." *Id.* at *3. A prima facie case of that burden is normally presented (subject to the court's scrutiny)[9] by providing "a written settlement agreement that specifically allocates damages to each cause of action." *Id.* (cleaned up). In the absence of "evidence supporting any particular allocation of value to the" separate damages, however, the court requires "the entire remaining unallocated settlement amount . . . to be credited against the jury's verdict." *Id.* at *8.

[9] Here, the settlement agreement was not produced and there is no suggestion it actually allocates between damages. If it did, that would not end the Court's analysis. Courts are rightfully suspect of parties' agreements regarding allocations and must ensure they are reasonable. *See, e.g.*, *Smith v. Widener*, 724 S.E.2d 188, 191–92 (S.C. Ct. App. 2012) (rejecting plaintiff's suggestion that 100% of damages were allocated to punitives as lacking credibility); *Riley v. Ford Motor Co.*, 777 S.E.2d 824, 831 (S.C. 2015) ("Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests.").

C. It is Unworkable for Courts to Speculate About What Amount or Proportion of the Settlements Are Allocated to Punitive Damages

There is no practical way to allocate lump sum settlements in this context that is not entirely speculative. *See Acadia Partners, L.P. v. Tompkins*, 759 So.2d 732, 737 n.3 (Fla. DCA 2000) (where contract did not allocate damages, "there was no practical way for the trial court to allocate the amounts to be set off for punitive and compensatory damages because such an exercise would have been entirely speculative."). Courts cannot be asked to engage in the "guesswork" of "speculative apportionment of an undifferentiated lump-sum settlement." *Greer v. Advantage Health*, 852 N.W.2d 198, 204-05 (Mich. Ct. App. 2014) (quoting *Velez v. Tuma*, 821 N.W.2d 432, 444 (Mich. 2012)). Doing so "unreasonably burdens them with a determination that they are, in the absence of any statutory guidance, ill-prepared to make." *Id.* at 205. Indeed, such an analysis could result in "a range of potential outcomes" and lead to inconsistent and unpredictable outcomes. *Id.*

Plaintiffs seem to want courts to overcome this uncertainty by assuming and allocating the constitutional maximum amount to punitive damages in each settlement where those damages are alleged, notwithstanding the actual allocation—or absence thereof—in the parties'

settlement agreement. In the district court, plaintiffs argued that only 22% of the settlement amounts should be allocated to compensatory damages. 2 App. 217. They argued that 68% of the settlement should be allocated to punitive damages.[10] That assumes an award of the statutory maximum amount—a 3 to 1 ratio—for punitive damages in a negligence action. 2 App. 217.

Those numbers have no relation to the actual settlement in this case. As a practical matter, a party who does not believe it is liable for punitive damages will not calculate punitive damages in the amount it agrees to settle a case, let alone in an amount equaling the maximum allowed by law. As a legal matter, plaintiffs' proposition is even more troublesome.

One reason it is problematic is because the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution imposes distinct limitations on the size of punitive damages awards. *Bongiovi*, 122 Nev. at 583, 138 P.3d at 452. So unlike treble damages, the maximum permissible

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[10] Plaintiffs would allocate the other roughly ten percent to an undefined claim for attorney fees, which assumes an alternate reality in which the settling defendants rejected the offer of judgment and did not settle, the plaintiffs then obtained a more favorable verdict (in the same amount as at trial), the district court then chose to award fees, and did so in the amount of plaintiffs' contingency fee agreement. 2 App. 217.

award of punitive damages can be elusive even after a full trial and jury verdict.[11] Where the parties settle before trial, divining the hypothetical maximum is impossible.

1. Due Process Can Limit the Ratio of Punitive to Compensatory Damages Even Below a Statutory Cap

The "ratio between compensatory and punitive damages" is a "central feature" of the "due process analysis." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008). Not only will "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . satisfy due process," but when the compensatory damages award is "substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Prior to *Bongiovi*'s adoption of the guideposts in *BMW of North America v. Gore*, 517 U.S. 559, 575 (1996), this Court had also stricken as punitive-damages awards exceeding a 1:1

[11] This plaintiffs' counsel has even argued in another case that the allocation can be extrapolated by using the ratio of compensatory damages to punitive damages ultimately found by the jury for one non-settling defendant and applying it to the other settling defendants' agreements. *Gallagher et. al. v. Affinitylifestyles.com, Inc. et. al.*, Eighth Judicial Dist. Court No. A-21-834485-B, Doc. No. 1351 (January 12, 2024 Opposition to Motion to Alter or Amend Judgment). In that case, the ratio was 9.41 to 1.

ratio. *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 511, 746 P.2d 132, 137 (1987), *abrogated in part by Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006).

2. Plaintiffs Failed to Demonstrate that Punitive Damages were Unique to the Settling Defendants

Plaintiffs contend that *J.E. Johns* established a simple test that requires the court to determine a settling defendant's exposure to punitive damages and then determine if that exposure is unique. The test is senseless and does not derive from *J.E. Johns*. In any case, they cannot prove they meet this test. The evidence to which plaintiffs point are the allegations of the second amended complaint. (AOB at 15.)

Appellants argue that there was evidence on the settling defendants' punitive exposure based on the testimony of alleged corporate malfeasance. (AOB at 15.) However, the record is devoid of any evidence that the settling defendants acted with oppression, fraud, or malice.

For example, plaintiffs allege that Michelangelo negligently hired and trained its driver Hubbard. (OB at 15.) But Michelangelo provided classroom learning curriculum, driver training and employee new hire training, training videos, safety posters, and operator development. 1 App. 183. Jeffrey Justice, the safety director, testified that Michelangelo

provided monthly safety meetings, road tests, and included safety measures in the procedure manual. *Id*.

> Q. Okay. Did the company provide training to newly hired bus drivers?
>
> A. We would typically take them out on a road test, make sure that they could handle the vehicle they were driving.

1. App. 183.

Plaintiffs could not have proved with clear and convincing evidence that Michelangelo acted with oppression, fraud, or malice.

That the settling defendants were not blameworthy is further indication that none of the settlement went to punitive damages. Indeed, the settling defendants never received an assessment of equitable shares by the jury. And because under NRS 41.141 non-parties cannot be on the verdict, any settlement amounts are complete offsets from the judgment principal, itself.

3. Plaintiffs Are Judicially Estopped from Establishing Punitive Liability for Hubbard and Michelangelo

Judicial estoppel prevents a party from taking inconsistent positions when "the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true)." *In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 390 P.3d 646, 652 (2017). The court

does not have to formally "adopt" the party's first position. *See id*. That element is satisfied where a court approves a settlement. *Id*. at 56, 390 P.3d at 652 (noting the third element was satisfied because party asserted position in his petition and the district court approved his petition); *Kale v. Obuchowski*, 985 F.2d 360, 361 (7th Cir. 1993) (holding that where court approved settlement, judicial estoppel applied because no case "makes application of judicial estoppel depend on the existence of a judicial opinion adopting the litigant's position; it is enough that the litigant win," and "[p]ersons who triumph by inducing their opponents to surrender have 'prevailed' as surely as persons who induce the judge to grant summary judgment."); *see also Reynolds v. C.I.R.*, 861 F.2d 469, 473 (6th Cir. 1988) (holding that because bankruptcy agreements must be approved as fair and equitable, bankruptcy agreements satisfy judicial acceptance prong of judicial estoppel inquiry).

Here, plaintiffs were judicially estopped from arguing that Hubbard exhibited despicable conduct. Plaintiffs successfully avoided judgment as a matter of law by pointing to the evidence that MCI's failure to warn *caused* the accident, an argument that necessarily entailed showing that Hubbard would have heeded a warning and avoided the accident. This Court

accepted that argument, finding that "the jury was given the opportunity to consider whether the absence of a warning regarding air displacement would have been acted upon and would have prevented Khiabani's injuries." *MCI I*, 137 Nev. at 425, 493 P.3d at 1015. This Court's determination that Hubbard would have avoid the accident is the law of the case.

Plaintiffs now claim that Michelangelo separately faced punitive liability based on corporate misconduct. (AOB 21.) But underlying that punitive-damage claim is plaintiffs' claim for negligent hiring and negligent training—i.e., a claim that *Hubbard* was improperly trained and had driving infractions on his record. That is a derivative claim. To succeed on that claim, plaintiffs would have needed to establish, among other elements, that *Hubbard's* negligence caused injury. *Hall v. SSF, Inc.*, 112 Nev. 1384, 930 P.2d 94, 99 (1996). Plaintiffs cannot disentangle their corporate-misconduct and driver-misconduct arguments. Because plaintiffs persuaded this Court that Hubbard would have *avoided* the injury but for a proper warning, they are judicially estopped from hypothesizing punitive damages on this basis. 2 App. 311.

4. The District Court Did Not Mandate Adjudication of Punitive Damages

Appellants further contend that the district court "mandated" adjudication by finding that "[w]ithout the jury making a finding of punitive damages, the settling Defendants cannot be charged with punitive damages absent a settlement that specifies the amount." 2 App. 310.

The district court did not mandate adjudication. Rather it recognized that a party is never entitled to punitive damages. It simply stated that absent a jury's finding that plaintiffs were entitled to punitive damages from the settling defendants, plaintiffs must provide the settlement agreement or other evidence to demonstrate that the settling parties intended the proceeds to be allocated to punitive damages.

The district court's finding is consistent with the burden of proof for punitive damages. Plaintiffs must prove that the conduct was intended to injure a person or was with conscious disregard of another's rights. *Garcia v. Awerbach*, 136 Nev. 229, 233, 463 P.3d 461, 464 (2020). Proving malice for punitive damages entails at least the following additional elements: (1) "despicable conduct" NRS 42.005(3); (2) "with a conscious disregard of the rights or safety of others," *id.*, which (3) has a causal "nexus to the specific harm suffered by the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell*,

538 U.S. 408, 409–10 (2003) (the "conduct must have a nexus to the specific harm suffered by the plaintiff"). Each of those elements must be proven by clear and convincing evidence. NRS 42.005(1). "In other words, under NRS 42.001(1), to justify punitive damages, the defendant's conduct must have exceeded 'mere recklessness or gross negligence.'" *Wyeth v. Rowatt*, 126 Nev. 446, 473, 244 P.3d 765, 783 (2010); *see also Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 742-43, 192 P.3d 243, 2554-55 (2008); *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 450-51 (2006) (providing that punitive damages may be awarded to a plaintiff who establishes by clear and convincing evidence that the defendant acted with "oppression, fraud or malice, [either] express or implied" (internal quotation marks omitted)).

Proving malice is as much about what the defendant did as about what the defendant allegedly knew beforehand. *Echanove v. Allstate Ins.* Co., 752 F. Supp. 2d 1105, 1110 (D. Ariz. 2010) ("To recover punitive damages, the plaintiffs must prove each of the following by clear and convincing evidence: (1) Beyond the elements merely required to establish the tort of bad faith, defendant engaged in outrageous, aggravated, malicious or fraudulent conduct similar to that usually found in crime; and (2) Defendant acted with an evil mind in engaging in such conduct").

It was not an error to hold plaintiffs to their burden of proof. Plaintiffs failed to demonstrate that the settling defendants intended to allocate any portion to punitive damages. Without this evidence or a jury's determination on punitive damages, the district court was within its discretion to offset the entire settlement.

III.

PLAINTIFFS ARE NOT ENTITLED TO REDUCE THE OFFSET FOR HYPOTHETICAL FEES

In the same vein, plaintiffs' argument that the settling defendants' potential liability for attorney's fees under NRCP 68 is a unique "exposure" reads *J.E. Johns* incorrectly and misuses the term. Again, plaintiffs cannot claim that the settlement agreement actually allocated a certain sum to attorney's fees. Instead, relying on *Capriati Construction Corp., Inc. vs. Yahyavi*, 137 Nev. 675, 680, 498 P.3d 226, 231 (2021), plaintiffs argue that given service of the offers of judgment, the settling defendants had a substantial "exposure" to costs and fees under NRCP 68. (AOB at 14.) Plaintiffs contend that because the actual damages were determined by the jury to be $18,746,000, the attorney's fee "exposure" is 40% of the actual damages, or $7,498,840.

First, settling defendants were never "exposed" to attorney's fees because they did not reject the offers of judgment. (*See* AOB 2 (Michelangelo settled "in response to an offer of judgment").) Under the then-applicable Rule 68(g), the comparison between the judgment and an "inclusive" offer of judgment such as plaintiffs' (2 App. 256) directed courts to factor in only pre-offer costs, not fees. *See Lee v. Patin*, No. 83213, 541 P.3d 791, 2024 WL 238082, at *1 (Nev. Jan. 22, 2024) (table) (citing pre-2019 NRCP 68(g)). It is true that the offers here were nominally "inclusive of all costs of suit, attorneys' fees, and interest" (2 App. 256)—precluding a separate award by the court after the offer's acceptance. But it would not have mattered even if fees were not included in the offer because plaintiffs had no independent basis under "statute, rule, or contract" for an award of fees. *See Lee*, 2024 WL 238082, at *1 (citing *U.S. Design & Const. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002)). NRCP 68 is not an independent basis: for an "apples to apples" comparison, the offer of judgment itself cannot include fees arising only as a penalty of rejecting the offer. *Id.* So here, what plaintiffs call an "exposure" to attorney's fees—i.e., the prospect of penalties *after* a rejected offer—never materialized.

Second, plaintiffs fail to articulate how the settling defendants, who are not privy to the contingency-fee arrangement, could have allocated any portion of their settlement proceeds to attorneys' fees. Indeed, it was plaintiffs that struck the contingency-fee agreement with their counsel, not settling defendants. *See Capriati*, 137 Nev. at 682-83, 498 P.3d at 233 (Herndon, J., dissenting) ("[I]t would be unfair to require the offeree party to pay the entirety of the contingency fee when the offeree was unaware of the private contingency-fee agreement when he or she rejected the offer of judgment.").

Further, *Capriati* confirms the rule in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983) and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) that even when a Rule 68 offeror beats the offer, the decisions of *whether* to award fees and *how much* are left to the district court's discretion. *Capriati*, 137 Nev. at 679, 498 P.3d at 231 (2021) (a "district court *may* award the entire contingency fee" (emphasis added)). The fee must be reasonable under *Beattie*, so even if the parties had agreed to an amount of fees in the settlement it would still be subject to court review. In this respect, Rule 68 attorney's fees more closely resemble punitive damages, with uncertain entitlement and

amount, than statutory treble damages, which can be calculated with mathematical certainty.

Plaintiffs again point to no evidence that the settling defendants intended a portion of the settlement proceeds to be allocated to attorneys' fees. And because the settling defendants were unaware of what that "exposure" could be it was not an error for the district court to decline to allocate any of the settlement proceeds to attorneys' fees.

CONCLUSION

Plaintiffs failed to make even a *prima facie* case to rebut the presumption of a full offset for prior settlements. This Court should affirm.

Dated this 19th day of March, 2024.

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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 9453 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.

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I certify that on this 19th day of March, 2024, I submitted the foregoing "Respondent's Answering Brief" for e-filing and service *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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