In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

JENNY RISH,

Appellant,

vs.

WILLIAM JAY SIMAO, individually; and CHERYL ANN SIMAO, individually and as husband and wife,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JESSIE WALSH, District Judge
District Court Case No. A539455

APPELLANT'S OPENING 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.

This case does not involve any business entities.

Defendant-appellant Jenny Rish has been represented by attorneys at the following firms: (a) ROGERS, MASTRANGELO, CARVALHO & MITCHELL; and (b) LEWIS AND ROCA LLP.

DATED this 15th day of August 2012.

LEWIS AND ROCA LLP

By: *s/ Joel D. Henriod*
_____

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment pursuant to NRAP 3A(b)(1). The district court entered judgment against defendant-appellant Jenny Rish on April 28, 2011 (16 App. 3811), and plaintiffs served written notice of the judgment on Monday May 2, 2011 (16 App. 3818). Rish timely moved for a new trial on Monday May 16, 2011, ten judicial days later. (17 App. 3853.) *See* NRCP 59(b); NRAP 4(a)(4). The district denied the motion for new trial on August 24, 2011 (20 App. 4783), and plaintiffs served written notice of entry of that order on August 25, 2011. (20 App. 4786). Upon resolution of that tolling motion, Rish timely appealed from the judgment on September 14, 2011, less than 30 days later.[1] (21 App. 4802.)

Rish also appeals from the district court's award of attorney fees pursuant to NRAP 3A(b)(8). The district court entered its order granting fees on September 14, 2011 (21 App. 4818), and plaintiffs served written notice of entry of the order on September 15, 2011 (21 App. 4821). Rish timely appealed from the order on October 10, 2011. (21 App. 4850.)

[1] Notwithstanding the pending motion for new trial, Rish also filed a notice of appeal within 30 days of written notice of entry of the judgment on May 31, 2011. (19 App. 4307.) *See* NRAP 4(a)(6). Rish then amended her original notice of appeal to include subsequent orders and amendments to the judgment. (20 App. 4691; 21 App. 4801.)

ISSUES PRESENTED

1) Whether the district court erred in striking defendant's answer near the end of trial for allegedly violating a pre-trial order in limine, which was vague and inconsistently applied and which the district court repeatedly refused to clarify.

2) Whether the district court erred in awarding excessive general damages more than 12 times special damages and in awarding attorneys fees of $1,800 per hour, 2.5 times the lodestar calculation.

3) If there is a remand, whether this Court should reassign the case to another judge.

STATEMENT OF THE CASE

This is an appeal from a $5 million judgment for the plaintiffs in a low-speed, rear-end motor vehicle case, which was entered by the district court after striking defendant's answer during trial. The Eighth Judicial District Court, Clark County; THE HONORABLE JESSIE WALSH, District Judge.

STATEMENT OF THE FACTS

I.

BACKGROUND

Parties involved in "very light impact" accident

Defendant Jenny Rish was following plaintiff William Simao in what plaintiff described as "stop-and-go" traffic (12 App. 91-92.) When plaintiff applied his breaks, defendant noticed too late to stop before bumping into

plaintiff's van. (17 App. 3924.) Defendant described the accident as a "tap" and "very light impact." (17 App. 3924.)

Plaintiffs do not claim neck or back pain over five months after the accident

A few hours after the accident, plaintiff went to a clinic, complaining of pain in his elbow and neck, and tenderness on the back of his head. After the day of the accident, however, plaintiff did not claim any neck or back pain for five months. (7 App. 1607; 8 App. 1923.) Neither defendant or the passengers in her car were injured in the accident. (17 App. 3923 (16:18).)

II.

PROCEDURAL HISTORY

A. Plaintiffs' Motion *in Limine* to Exclude a "Minor" or "Low Impact" Defense

***Plaintiffs' Motion* In Limine**

Less than a month before trial, plaintiffs filed a motion *in limine* (1) to preclude defendant "from Raising a 'Minor' or 'Low Impact' Defense," (2) to limit the testimony of defense expert David Fish, M.D. and (3) to exclude evidence of property damage. (2 App. 392.) Plaintiffs began by arguing their theory of the case—that the accident was not minor, but instead was "moderate" (2 App. 397-98), and then asserted two evidentiary propositions. First, plaintiffs posited that, because defendant had not disclosed a biomechanics expert, expert evidence regarding the severity of the accident should not be admitted absent the searching

analysis for biomechanical expert testimony outlined in, *inter alia*, *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). (2 App. 400.) Second, plaintiffs contended that photographs of the automobile damage and estimates of the cost of repair should be excluded. Plaintiffs argued that this evidence, and the photographs in particular, were more prejudicial than probative, because "to a lay person [they] may only show minor damage." (2 App. 406.)

Defendant opposed the motion, arguing the precept that the facts of the accident should not be kept from the jury. (3 App. 509.) Defendant also asserted that both percipient witnesses and doctors are permitted to comment on the facts of an accident, as it bears on causation and the veracity of a patient's self-reported history. (3 App. 512.) Finally, defendant cited authority rejecting plaintiff's theory that photographs must be excluded unless they are accompanied by expert opinions. (3 App. 514.)

The district court excludes biomechanical testimony and two pieces of evidence showing the property damage

During the hearing on the motion *in limine*, plaintiffs' "minor impact" argument focused on excluding (1) the biomechanical-engineering opinion of Dr. Fish, and (2) the photos and the damage estimates. (3 App. 526.) The court granted the motion, explaining that it would exclude *expert opinion* extrapolating from *property damage*:

> [I]f Defense had a witness, an accident reconstructionist or a biomechanical engineer, then I think the photos and

> the damage estimates come in and that witness could certainly give his opinions, but *Dr. Fish*, *or any medical doctor*, may not testify that because there appears to be minimal *property damage* that somehow the plaintiff must not have been injured as much as he claims to have been, pursuant to the *Hallmark* case.

(3 App. 531-32 (emphasis added).) The court also excluded photographs of the vehicles and evidence of the repair costs, citing "foundation" concerns about evidence showing the amount of "property damage." (3 App. 532.)

The Court's Written Ruling

Plaintiffs' counsel submitted a proposed order on the motion *in limine*, which the court entered on the first day of trial. After identifying the motion and the procedural history, the court's order, in total, said the following:

> **IT IS HEREBY ORDERED** that Plaintiff's request to preclude Defendant from Raising a "Minor" or "Low Impact" Defense is **GRANTED**.
>
> **IT IS FURTHER ORDERED** that Plaintiff's request to limit the trial testimony of Defendant's expert, David Fish, M.D. to those areas of expertise that he is qualified to testify in regards to is **GRANTED**. Neither Dr. Fish nor any other defense expert shall not opine regarding biomechanics or the nature of the impact of the subject crash at trial.
>
> **IT IS FURTHER ORDERED** that Plaintiff's request to exclude the property damage photos and repair invoice(s) is **GRANTED**.

(3 App. 599-600.) The second and third clauses of this order plainly relate to *particular* items of evidence. The second clause mentions only expert testimony, and the third pertains specifically to the photographs and invoices.

As the trial went forward, however, plaintiffs (selectively and inconsistently) urged the court for a much more expansive reading of the order. Perhaps they took license from the first clause of the court's order, even though, on its face, that clause purports to say that the court was granting the motion *as* plaintiff had entitled it. Eventually, plaintiffs' position became that the order, despite its literal terms, should be read as a blanket prohibition that precluded anyone—even the parties themselves—from telling the jury about the scene of the accident if their testimony might relate to the nature of the accident.

Plaintiffs submit a secret*, ex parte *memo arguing that even percipient testimony about the accident must be excluded

As the trial approached, Plaintiffs submitted a confidential, *ex parte* trial brief to the district court. (13 App. 2940.) In the secret memo, plaintiffs acknowledged that his motion *in limine* had specifically asked that "all *expert* witnesses" be precluded from arguing that the impact was too minor to cause the alleged injuries. (13 App. 2970 (emphasis added).) Despite this acknowledgement, plaintiffs went on to argue, for the first time, that it would also constitute a violation of the order if *any lay witnesses, as well,* were called to testify about the facts of the accident. (13 App. 2971-72.)

Defendant seeks clarification that percipient, fact testimony regarding the accident is appropriate

Shortly before trial, at the EDCR 2.67 meeting of counsel, plaintiffs' counsel told the defense that he believed the court's order went beyond expert testimony. (*See* 6 App. 1372.) (At the time, of course, defendant did not know about plaintiffs' *ex parte* brief seeking expansion of the court's ruling.) The comment prompted defendants to file a trial brief that sought clarification that percipient witnesses could speak to their recollections of the facts of the accident, even if evidence of property damage and expert conclusions or characterizations were excluded. (6 App. 1421.)

The district court indicates that not all facts and percipient testimony about the accident are excluded, but refuses to give any clarification

The district court addressed the issue after jury selection but before opening statements. Because the court's utter refusal to give guidance was so extraordinary, we quote from much of the hearing in this section.

At first, the district court took the reasonable position that its prior ruling did not preclude percipient witnesses from discussing the facts of the accident:

> THE COURT: Okay. Thank you. I appreciate the brief argument.
>
> Here's the thing, I don't know that this was motion was really even necessary because the Court's ruling was based on the written pleadings and the argument that the Court heard. And it was a very specific ruling. And I never said defendant can't testify. I don't know what

> she's going to testify to. I sure hope she complies with the Court's pretrial orders.

(6 App. 1382-83.) Later, however, after plaintiffs pressed the notion that the order impacted percipient witness testimony, the court began to equivocate.

Defense counsel responded by imploring the court for clarification, noting the clear divide between a plain reading of the court's order and plaintiffs' arguments. The court simply refused to give guidance and merely directed counsel to review the court's prior ruling:

> THE COURT: This motion didn't really talk anything at all about what Jenny Rish might testify to, although it's titled trial brief on percipient testimony regarding the accident.
>
> MR. ROGERS [defense counsel]: Okay. Let me tell you one thing she has said and then the defend — plaintiff's counsel actually used the word. She described the impact as a tap. *And what we're not clear on now is what can she say and what can't she say. If she's going to appear before this jury and be asked please describe this accident, where can she begin and where does she end?*
>
> THE COURT: I urge you to re-read the order.
>
> MR. ROGERS: Well, the—you can see that the order has confused plaintiff's counsel and us.
>
> MR. WALL [plaintiffs' counsel]: Not one bit. Not one bit.
>
> MR. ROGERS: That's why we're here.
>
> * * *

> MR. ROGERS: The [EDCR] 2[.]67 discussion that he just recited to you show[s] that the parties are not clear on this.
>
> THE COURT: Well, I don't know what to tell you then.

(6 App. 1383-84.)

The defense maintained its position, even suggesting language that it believed would be appropriate under the Court's order. The court disagreed, but refused to give any further guidance:

> MR. POLSENBERG [defense counsel]: And I think, Your Honor, it is admissible for the witnesses to say it was a minor impact.
>
> THE COURT: Well, I don't know what to tell you. I'm not going to tell you how to defend your case. I sure would never presume to tell anybody how to try or defend a case. But, you know, I think the order is pretty clear. There was plenty of opportunity to brief it and respond to it. The Court gave counsel lots of time to argue it because that's my standard procedure. I think we've made a pretty clear record. And I just really hope that, you know, both sides would honor the Court's pretrial orders.
>
> MR. POLSENBERG: But, Your Honor, on what we've done today, if I were doing the opening statement I would say to the jury that this was a minor accident.
>
> MR. WALL: And then I would seek contempt.
>
> THE COURT: I would say that would be a problem.
>
> MR. POLSENBERG: And that's why we're asking for direction from you.

THE COURT: I'm not going to—you know, I can't tell you [that] you can say this, you can't say that, you can say the other.[2] I mean, you're all very smart individuals. You're very respectable lawyers. You're very capable and you're certainly capable of reading and comprehending the Court's order that all the parties briefed and argued.

MR. POLSENBERG: Well, Your Honor, I don't think we briefed and argued this issue. And we certainly would be able to say to the jury that this was just a tap.

THE COURT: Well, I don't think so, Mr. Polsenberg. But I really don't want to engage in any sort of argument. That's not the Court's rule. [*sic*] I think I've done my job to the best of my ability and I would expect all of you to do the same.

MR. POLSENBERG: Here's the problem I have[,] though, the Court said that you wouldn't tell us how to try the case.

THE COURT: Right.

MR. POLSENBERG: I've suggested two things that I would say in opening statement and you've told me both of those I couldn't say. *I can't figure out what I can say*.

THE COURT: Are you the attorney making the opening statement?

MR. POLSENBERG: No.

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[2] To foreshadow one of the arguments, *infra*, it is the premise behind this statement by the district court—a statement that it echoed by over and over in a variety of ways during trial—that created a fundamental problem. It is ***precisely*** the job of the district court in ruling on a motion *in limine* to tell the parties what they can and cannot do, especially if the court seeks to support an outcome-determinative sanction on a party's supposed noncompliance.

> THE COURT: Well, then it's not really an issue.
>
> MR. POLSENBERG: Well, it is an issue, Your Honor.
>
> THE COURT: Well, Mr. Polsenberg, I don't want to argue with you. * * * I've made my ruling. Unless there are any other issues we need to address, I'm inclined to call it a day.

(6 App. 1383-86 (emphasis added).)

Plaintiffs' counsel describes the accident during his opening statement, alluding to a "crash"

During his opening statement, plaintiffs represented that defendant was driving "a Chevy Suburban" and that she "*crashed* into the rear of Mr. Simao's van." (7 App. 1433-34, emphasis added.) Plaintiffs claimed that the "*crash* caused his head to hit a metal cage located behind the driver's seat." (7 App. 1434, emphasis added.)[3]

During opening statements, defense counsel mentions several facts regarding the accident without objection

During his opening statement, defense counsel described the accident, without any objection, as "a car accident that occurred in stop-and-go, bumper-to-bumper traffic." (7 App. 1490-91.) He continued:

> It was traffic time and [Jenny Rish] pulled up behind the plaintiff. And several times, over, stopped, went, stopped and went. She will testify that on the final go, she was

[3] Websters' first definition of "crash" is "to break violently and noisily." Webster's Collegiate Dictionary at 271 (10th ed. 1995).

> stopped behind the plaintiff, who moved a few feet in front of her; she saw the brake lights on his vehicle, she applied the brakes, only just not quite hard enough; and the accident following. [*sic*]

(7 App. 1490-91.) Defendant also relayed that no one claimed to be injured at the scene: "No one in this accident claimed loss of consciousness. No one sustained cuts, bruises, or abrasions. . .paramedics arrived, but they were refused by everyone." (7 App. 1492.) Plaintiffs did not object or argue that defense counsel had violated the order *in limine* in making these statements.[4]

In the trial, Plaintiff presents facts about the significance of the accident

Later, during trial, plaintiffs' counsel suggested with a leading question that plaintiff's vehicle "was rear-ended at an unknown speed, nearly stopped, on the freeway . . . which caused him to strike his head on the cage in the inside of his work van." (7 App. 1643; 10 App. 2342.)[5] Another doctor stated that plaintiff "had a head bang against the wall of [the] cargo van he was driving." (10 App. 2348.) Plaintiffs adduced from their medical witnesses that the accident was "a traumatic event" (7 App. 1561-1563) and "a significant mechanism of injury." (9 App. 2141.).

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[4] Plaintiffs' counsel objected a short time later when defense counsel indicated an intention to play deposition testimony, but on hearsay grounds, not based on any alleged violation of the order.

[5] Counsel's reference to an "unknown" speed was disingenuous. The only reason the speed was "unknown" to the jury was plaintiffs' counsel's efforts to exclude

(continued)

Plaintiff's medical experts admit that their causation opinions rely upon the veracity of the accident history that plaintiff provided to them

Each of plaintiffs' medical experts and treating physicians admitted that they causally attributed Mr. Simao's medical treatment to the April 15, 2005 accident primarily *because Mr. Simao himself did*, in the facts he provided to them. (7 App. 1597-603; 8 App. 1721; 9 App. 2109.) They admitted that they had little or no direct knowledge of the accident itself. (7 App. 1602; 8 App. 1722; 9 App. 2047; 10 App. 2184.) As Dr. Rosler succinctly stated, he knew only what the plaintiff had chosen to tell him:

> Q [by Mr. Rogers]: If I understand your testimony, Doctor, from the direct examination, you really don't know anything about this car accident.
>
> A: All I know what—is what the patient told me, sir.
>
> Q: Which was that he was involved in a rear end accident.
>
> A: Correct.
>
> Q: And, beyond that, you don't know anything.
>
> A: That he hit his head on a metal cage, and that he subsequently developed symptoms of neck pain.

(7 App. 1604.)

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testimony about it.

When the defense objected regarding the doctor's lack of foundation to draw a causal link between plaintiff's neck condition and the accident, plaintiffs' counsel candidly stated the simple analysis behind the doctors' causation opinions and their reliance on Mr. Simao's description of the accident:

> MR. EGLET: …He's basically trying to argue, well, he's not a biomechanical engineer. Well, so what. Guess what? The Supreme Court has said, in fact, it's a doctor who gives medical causation, not a biomechanical engineer. *The doctor, like every doctor's causation opinion[,] is base[d] upon the patient's history*. He's already testified that *the patient gave hi[m] the history of the motor-vehicle accident, period*. That's all that's necessary. In other words, he was pain free, which he testified, before this accident. Immediately subsequent to the accident, he became painful in these areas and remained painful when he saw him…

(7 App. 1594 (emphasis added).) In other words, plaintiffs—by their counsel's own admission—were freely permitted to put facts about the severity of the accident before the jury in the form of their experts' testimony. But their view in this case is that, without a "biomechanics" expert, defendant was barred from responding in kind, even with lay witnesses.

Throughout the trial, the district court refuses to clarify the motion in limine order

At several points during trial, plaintiffs would object when the defense was cross-examining plaintiffs' medical experts about their lack of knowledge regarding the severity of the accident. (*See, e.g.,* 7 App. 1604; 9 App. 2048.) While the district court sustained plaintiffs' objections, the court offered no

guidance at to what facts about the accident were permissible, or who could testify to them. (7 App. 1605; 9 App. 2048.) The details of some of these objections, and the entirely unenlightening colloquies that followed, are set forth in more detail at pp. 15, n. 6, *infra*.

The "Irrebuttable Presumption" sanction

Midway though trial, the district court gave an "irrebuttable presumption" instruction as a sanction against defendant. (10 App. 2326.) The sanction was directed at the defense having asked treating physicians about what they knew of the accident, including whether the defendant was treated at the scene. (10 App. 2316.) The sanction was directed especially at defense medical expert David Fish, M.D., who blurted out that he disputed causation based partly on "looking at the notes that were taken of the events that happened and it's knowing about the accident itself." (10 App. 2308.)

Yet, even in giving the "irrebuttable presumption" instruction, the court sent mixed signals. The instruction informed the jury that an accident of this sort *can* be sufficient to cause the alleged injuries. But, the instruction still allowed the jury to determine whether the accident *in this case* proximately caused the alleged injuries. The instruction stated:

> The Defendant has, on numerous occasions, attempted to introduce evidence that the accident of April 15, 2005 was too minor to cause the injuries complained of. This type of evidence has previously been precluded by this

> court. In view of that, this court instructs the members of the jury that there is an irrebuttable presumption that the motor vehicle accident of April 15, 2005 was sufficient to cause the type of injuries sustained by the plaintiff. Whether it proximately caused those injuries remains a question for the jury to determine.

(10 App. 2370.) his was a harsh and humiliating reprimand in front of a jury, but whether the accident caused plaintiff's alleged injuries was still a jury question.

Even when the court issued its "irrebutable presumption" instruction, defense counsel again requested clarity and direction outside the presence of the jury. (10 App. 2322-26.) Defense counsel spoke at length about how he construed the district court's pre-trial ruling, what he understood was impermissible, and what he thought was permissible based on upon what he had been allowed to tell the jury it would hear during opening statement.

As it did in the pretrial conference, however, the district court simply refused to clarify its position. The court would not even say if plaintiff's counsel had accurately articulated the court's position, but simply referred the defense again back to the order *in limine*.[6]

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[6] The discussion, in relevant part, was as follows:

> MR. ROGERS: If I may, right. I limited my comments to Dr. Fish's testimony. The testimony or questioning of the other witnesses really was borne of something that I'm afraid the Court is unpersuaded by, and that is that the Defense has stated from the outset that we're not sure where we stop.

(continued)

We know that we can't say minor impact and we know we can't say tap, but what we can say is something that I know that this has been not well received by the Court. But that's the truth. We haven't ever commented on anything relating to the severity of the impact, and that's why Dr. Grover's testimony seems such a moment to the Defense because he, in our view, characterized the impact in a fashion that it seemed the Court wouldn't allow.

But whether we can say, for example, as we did in opening statement, that the accident occurred in stop-and-go traffic, we just don't know where we're allowed to go and where we're not allowed to go. There was no intention at any point to violate the Court's order. It was simply trying to figure out where it ends.

And that's what the point of the opening was. And as to the questions asked of Drs. McNulty, and Grover and Rosler, one of the questions, actually, that we intended to ask, but the objection was brought, was whether the doctor was aware that the plaintiff drove from the scene. I was never aware that, that might be a problem, that, that might offend or violate the Court's order.

I was going to ask that -- the doctor next, did you know that Jenny Rish drove from the scene? Those were the words that I was going to speak, but as soon as I said Jenny Rish, the objection came. Not knowing that -- whether Jenny Rish drove from the scene might violate this order, the problem is this. There's an order on a motion, striking the Defense that a minor impact can't cause injury.

Now, that much, I do understand. I get that that's the Court's order. But can we describe the facts of the accident? And I—and if we can, I don't know where to stop. I don't know whether I can say Jenny Rish drove from the scene, as we've said. I don't know whether I can say or have Jenny Rish testify that this is what happened, that this is how I arrived at the scene and this is what I was doing five minutes before. I just don't know what I can and can't do.

There is no intent here to violate the order. It truly is a problem of not knowing. So if we have a clear order saying, listen, you can't say this and you can't say that, I won't. I won't ask another witness, were you aware that Jenny Rish wasn't injured, were you aware that she drove from the scene. I just don't know what it is of those questions that I'm not permitted to ask a witness.

And I don't say this to frustrate you. I can tell that you seem unpersuaded by it, and for that, I'm sorry. But the truth is, I am not clear.

(continued)

Even at the beginning of what would become the last day of trial, defense counsel, who still knew nothing of the secret *ex parte* brief, continued to request clarification about what percipient witnesses could say, in light of the court's

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* * *

> THE COURT: These pre-trial motions *in limine* were extensively briefed and argued. And I don't have the particular motion *in limine* in front of me, the one that precluded defense from arguing that this was a minor impact, and also that, furthermore, that this minor impact couldn't possibly have caused the injuries to plaintiff, that plaintiff sustained.
>
> But the point of the matter was that defense had no witness who could testify that this was a minor impact and no witness who could testify that this was a minor impact that could not have caused the injuries to plaintiff, that plaintiff sustained. Defense simply didn't have any witnesses to so testify. That's why the motion in limine was granted.
>
> MR. ROGERS: Okay. No --
>
> THE COURT: You know, I think --
>
> MR. ROGERS: -- expert witness, I think it was, Your Honor.
>
> THE COURT: Right. No expert witness, which is --
>
> MR. ROGERS: Right.
>
> THE COURT: -- what would be required to, you know, come to those conclusions. That's exactly what would be required. So you know, you're right. You know, I'm not persuaded by that argument. We've heard it before and it's not persuasive. I think the motion should be granted.
>
> Trying to think of a sanction that's suitable – I don't know what other sanction the Court could impose. Plaintiff is not asking that the answer be stricken. Plaintiff's not even asking that the entire testimony of Dr. Fish be stricken. Plaintiff's asking for an irrebuttable presumption. And I think, reviewing the factors laid out in the *Bass Davis* case, that, that's an appropriate sanction, so the motion is granted.

(3/28 Tr. at 101-105.)

(continued)

repeated assertions that it had never excluded percipient witnesses from testifying to the facts of the accident. (12 App. 2762-73.) Plaintiffs' counsel responded (in the context of moving to exclude as a witness the defendant's daughter, who was a passenger in her car) with its broadest public view of the order *in limine*, yet. (*Id*.) Once again, however, *the district court declined every opportunity to disabuse defense counsel of his understanding* and specifically reaffirmed that defendant could testify:

> MR. EGLET: … what's the relevance of her daughter.
>
> MR. ROGERS: The discussion was the admissibility of describing the impact as a minor impact. *The Court has ruled on that. But has not excluded percipient witness testimony about the accident*.
>
> * * *
>
> We in fact this morning read back through the transcript of the hearing we had on March 18th when we asked for clarification on the order and the Court said, "Well, you can't say minor impact. And you can't say tap." *From that, I understand we cannot describe the impact*. *We've obviously make a record of our objections to that since there's been testimony from the plaintiff's treating providers that seems to characterize the accident, substantial and words like that*. However, we're aware of the Court's order. We're going to follow it. That aside, *certainly, we're permitted to have Jenny Rish come in and describe what happened*.
>
> * * *
>
> The plaintiff has repeatedly characterized the accident as I've described. The irrebuttable presumption certainly takes away any prejudice that the Plaintiff may think that they suffer because of a description of the accident. Consider this, Your

> Honor. This is a case where the jury is being asked to determine cause. I don't want to rehash everything. I know you've heard most all of this. But they're being asked to determine cause from an accident that they know nothing about, except for what the Plaintiff's medical providers have told them and whatever the Plaintiffs may tell them today. And the characterization of that accident from those providers is that the Plaintiff's head was slammed into a cage behind his seat. Now, clearly, an idea of this accident has been sent—or this message has been sent the jury. The Court has told the Defense that we can't send a message. That the Defense is not permitted to characterize this accident in any way. But *at no time did the Court say that no percipient testimony or party testimony about this accident will be admitted. That's never happened*.
>
> * * *
>
> Remember, the Defense never once described the impact as minor. Never once used the word tap. Never once said the things the Court said we can't say. Still the curative instruction was read. There—not only does Ms. Rish have a right to describe this, the Plaintiff can't possibly protest it because they can be no prejudice now.
>
> MR. EGLET: Well --
>
> THE COURT: Well, Plaintiff's motion to strike Linda Rish as a witness is granted. *Certainly Mrs. Rish -- Jenny Rish can testify. But I think Counsel needs to be very careful that she complies with the Court's orders and that you're within those parameters. So that's enough said on this subject.* We've kept our jury waiting long enough.

(12 App. 2762-73 (emphasis added).)

B. The District Court Strikes Defendant's Answer for Asking Plaintiff about the Facts of the Accident

During cross-examination, defense counsel asked Mr. Simao about the fact that he had declined any treatment from paramedics at the scene of the accident.

(12 App. 2857.) He admitted that he was declined treatment at the scene. (*Id*.) Defense counsel then asked plaintiff whether anyone in defendant's car was treated at the scene. (*Id*.) Immediately after the question, Plaintiffs' counsel objected and asked to approach the bench. (*Id*.)

At the bench conference, two of plaintiffs' attorneys took turns making strident (and profane) requests that the jury be sent out on recess so that they could make a motion outside the presence. (12 App. 2858-2866.) Although the court initially saw no reason to interrupt the testimony, she ultimately acquiesced to plaintiffs' insistence and excused the jury:

> MR. WALL: How many times have you done this? How many freaking times have you done this with every single witness. You ask if she was injured. What in the world could it possibly be relevant to?
>
> MR. EGLET: Exactly. What? Do you want to get loud?
>
> MR. WALL: Absolutely.
>
> MR. EGLET: Let's do it. Let's excuse this jury and do exactly that.
>
> MR. WALL: You've got -- you've got even no idea what you're in for. I'm going to ask that he be sanctioned in front of the jury, that he be fined in front of the jury, and that the jury be told that he has violated the court order again.
>
> MR. ROGERS: That is absolutely not true. This --
>
> MR. WALL: Then let's excuse them --

MR. ROGERS: -- is --

MR. WALL: -- and make a record.

MR. ROGERS: Let's do it.

THE COURT: *Do you really need to do that?*

* * *

MR. WALL: My request is that he be sanctioned in front of this jury.

THE COURT: *You really need to do that? We were making such progress* with your examination of these other --

MR. EGLET: I'm sorry?

THE COURT: -- this witness.

MR. WALL: How many times?

THE COURT: *We've been making such* --

MR. WALL: How many times?

THE COURT: -- *progress in terms of this trial moving* along since we began with Mr. Wall's examination of your first witness. Now [indiscernible]. *Can we just keep this thing moving?*

MR. EGLET: … I want to have a conference because I think we may be moving to strike the answer at this point. These continuous violations.

(12 App. 2857-60 (emphasis added).)

After the jury was excused, plaintiffs made an oral motion to strike the answer. After a brief argument, the court took a short recess and then came back

and granted the motion. (12 App. 2873.) The court dismissed the jury immediately thereafter. (12 App. 2874.)

Several weeks later, the court entered a lengthy "decision and order," which was drafted on plaintiffs' counsel's letterhead, explaining the ruling. (16 App. 3629.) In an apparent attempt to paint the alleged "violations" as cumulative, the court bolstered the order by mentioning supposed violations of two other orders in limine that *plaintiffs' counsel had not even mentioned* during argument on their oral motion to strike the answer.[7]

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[7] The first order excluded argument that this case was "attorney driven" or a "medical build-up." (16 App. 3633.) During the hearing on the motion, the court made clear that its order would not preclude defendant's right to try show bias on the part of plaintiffs' experts. (2 App. 349.) During trial, plaintiffs objected to a slide during opening statement, which was immediately taken down. (7 App. 1500.) Later, plaintiffs objected to defendant's cross-examination of one of plaintiffs' medical experts. The objection was made on "foundation" grounds by one of plaintiffs' attorneys, but plaintiffs' second counsel later tacked on an argument that it was somehow "medical buildup." (9 App. 2065.) In the following colloquy, counsel focused more on the "foundation" argument and concluded by saying "there's two bases for the objection." (9 App. 2069.) In its order striking the answer, the court asserts that the cross-examination was a "clear" violation of the "medical buildup" order in limine (16 App. 3634), but, in fact, the court at the time gave no basis for its ruling, merely saying, "[s]ustain the objection" (9 App. 2069). In any event, there is no allegation of any further "medical buildup" violation.

The second allegedly "clear" violation occurred when counsel merely put up a slide that referred to an unrelated accident, which allegedly violated an order in limine about other accidents. (7 App. 1500.) The jury was told to disregard the slide. (*Id*.) Counsel for both sides then went through the remaining slides outside the presence of the jury and defendant's counsel voluntarily removed other slides at the request of plaintiffs' counsel. (7 App. 1502-03.) There was no subsequent alleged violation. Amazingly, in the order striking the answer, the district court asserts this was a "clear" violation, relying not on anything ***the court*** said to counsel at trial about the issue (she said nothing), but instead by quoting lengthy

(continued)

C. Judgment and Appeal

Following a prove-up hearing, the district court entered judgment in favor of the plaintiffs.

The district court awards general damages that are more than 12 times the special damages

The district court awarded plaintiff every dollar of their request for damages. (*Compare* 16 App. 3811 *and* 13 App. 2913-2916.) William Simao received $194,390.96 in special damages, plus more than 12 times that amount in general damages: $473,040 for past pain and suffering; $1,140,552 for future pain and suffering; and $905,169 for the "Loss of Enjoyment of Life." (16 App. 3811.)

The court also awarded $681,296 to Mr. Simao's wife for loss of consortium. (16 App. 3811.) The Court also awarded $99,555.49 in costs. (*Id.*)

Awarding fees, the court gave plaintiffs 2.5 times the value of the attorney time incurred

The district court granted plaintiffs' motion for attorney fees pursuant to Rule 68, because the judgment exceeded plaintiffs' $799,999 offer of judgment. (21 App. 4819.) Plaintiffs represented that the lodestar calculation, or "the fair market value of the attorney services" for the time incurred by Mr. Eglet and Mr. Wall was $431,250. (18 App. 4176.) This included an hourly rate of $750 per hour for both Mr. Wall and Mr. Eglet. (18 App. 4173.) Yet, on top of that already

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strident ***arguments*** that were ***made by plaintiffs' counsel at trial.*** (See 16 App. 3632, quoting from 7 App. 1503.)

healthy rate, the district court applied a 2.5 contingency multiplier, awarding a total of $1,078,593.28 in fees. (21 App. 4818.)

The trial court entered a final judgment in favor of plaintiffs, totaling $5,086,785.55. (21 App. 4834-36.) This appeal followed. (21 App. 4850-51.)

SUMMARY OF ARGUMENT

After entering a specific order on a motion *in limine* about expert testimony, the district court made a series of progressive, erroneous, inconsistent and unclear evidentiary rulings using that order as support. During trial, with urging from plaintiffs' counsel, the scope of the order expanded well beyond its terms. Through all this, defense counsel repeatedly asked the court to clarify its rulings, so that counsel could conform their conduct to the rulings. The court refused and merely directed the parties back to the initial order.

Near the end of trial, the district court's decision to strike defendant's answer for alleged violations of the order *in limine* was erroneous for three independent reasons, any one of which compels reversal:

First, under established law from this Court, an outcome-determinative sanction, such as striking an answer, is not the correct remedy for alleged in-trial violations of an order *in limine*. Outcome-determinative sanctions are reserved for pre-trial discovery abuses or a party's refusal to participate in litigation. The

correct ultimate potential sanction for in-trial misconduct that is alleged to have affected or misled the jury is a new trial.

Second, even where this Court has authorized the ultimate sanction of new trial for violation of orders *in limine*, it has mandated that the order and violations must be clear. The order here was anything but clear; it was a moving target, inconsistently applied.

Third, the district court's evidentiary rulings cannot support *any* sanctions because they were erroneous. While the court may have initially been within its discretion to make its ruling about expert testimony admissibility, the court improperly used that ruling as a springboard to deprive defendant of the opportunity to offer basic lay-witness testimony about the accident from which the jury could determine causation.

ARGUMENT

PART ONE:
STRIKING THE ANSWER WAS IMPROPER

Standard of Review

The Court reviews *de novo* the question whether the district court based sanctions on an erroneous understanding of the law. *Bayerische Motoren Werke v. Roth*, 127 Nev. ___, 252 P.3d 649, 657 (2011). This Court also reviews de novo

whether an order *in limine* is specific enough, and a violation of it clear enough, to warrant extreme sanctions. *Id.,* 252 P.3d at 656 ("Whether an attorney's comments are misconduct is a question of law we review de novo.")

I.

STRIKING AN ANSWER IS NOT THE CORRECT SANCTION FOR ALLEGED IN-TRIAL VIOLATIONS OF AN ORDER IN *LIMINE*

The district court improperly conflated two distinct lines of authority from this Court about sanctions for litigation conduct.

* On the one hand is the series of cases—exemplified by *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990)—about sanctions for *pretrial* discovery misconduct, that is, the deliberate refusal to provide or the concealment of information necessary to litigate the dispute.[8]

* On the other hand are those cases – exemplified by *Bayerische Motoren Werke v. Roth*, 127 Nev. __, 252 P.3d 649 (2011) (referred to herein as "*BMW*")—about evidentiary or ethical misconduct *during trial*.[9]

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[8] *Young*, 106 Nev. at 92-93, 787 P.2d at 779-80 (fabrication of evidence during discovery); *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (persistent refusal to participate in discovery); *Foster v. Dingwall*, 126 Nev. __, 227 P.3d 1042 (2010) (repeated failure to respond to discovery or appear for deposition); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. __, 235 P.3d 592 (2010) (failure to attend deposition and repeated failures to provide complete discovery).

[9] *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d. 970 (2008) (improper jury nullification, personal opinion and "golden rule" arguments to jury); *B.M.W*, 252 P.3d 649 (alleged violation of order *in limine*).

These two lines of cases address separate issues that yield distinct legal tests. More importantly, the ultimate sanctions that those cases authorize serve different purposes.

Although the Court has held that outcome-determinative sanctions (such as striking pleadings or entering default) are sometimes appropriate for pre-trial discovery abuses or a party's refusal to participate in litigation, it has never held that such sanctions are appropriate for alleged evidentiary in-trial misconduct. To the contrary, if an attorney has violated an order or engaged in misconduct at trial in a way that might impact the jury—and no lesser sanction is possible—the correct procedure is to await the verdict. If the jury's verdict has not mooted the issue, the trial court then applies this Court's well-established standards to determine whether a new trial is needed. Only in extreme cases, where the prejudice is so palpable that continuing trial would only waste judicial resources, the trial court can declare a mistrial and start the trial anew. The Court's cases make clear, however, that striking an answer is a sanction tailored to fit an entirely different type of misconduct.

The district court conflated the two lines of authority, viewing outcome-determinative sanctions as appropriate for in-trial evidentiary violations and using standards for addressing pretrial discovery abuses to analyze alleged evidentiary misconduct during a jury trial.

A. The Two Lines of Authority form a Dichotomy in which Outcome-Determinative Sanctions Apply Only where a Party Withholds Factual Information

1. The Discovery Misconduct Cases: Young *and its* Progeny

Young is the leading Nevada case about outcome-determinative sanctions for misconduct during the pretrial phase of a case. The plaintiff in *Young* fabricated evidence and then gave inaccurate answers in a deposition about the fabricated evidence. The district court dismissed the complaint as a sanction, and this Court affirmed. The Court noted that the clear due process concerns inherent in outcome-determinative sanctions require narrow tailoring between the infraction and sanction: "[F]undamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated." *Young*, 106 Nev. at 92, 787 P.2d at 779-80. The Court then articulated the now-familiar multi-factor test for sanctioning discovery abuse. *Id*., 106 Nev. at 92-93, 787 P.2d at 780. The Court has since applied the *Young* standard to address a party's persistent refusal to participate in discovery or appear for deposition. *See, e.g., Hamlett v. Reynolds*, 114 Nev. 863, 963, P.2d 457 (1998); *Foster v. Dingwall*, 126 Nev. ____, 227 P.3d 1042 (2010); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. ____, 235 P.3d 592 (2010).

2. The Trial Misconduct Cases: Lioce *and* BMW

With respect to alleged in-trial misconduct that may affect a jury, however, the Court has engaged in an entirely different analysis. Although there is no single leading case like *Young* in this context, the Court addressed these issues comprehensively in *Lioce*, which concerned an attorney who made repeated improper arguments to juries in four different cases. Tellingly, the Court's discussion of its trial misconduct jurisprudence did not cite *Young* or refer to that case's multi-part test. *See generally Lioce*, 124 Nev. at 13-16, 174 P.3d at 978-80. Nothing in *Lioce* suggests that *Young* and its progeny apply or that striking an answer is an appropriate means of sanctioning misconduct that is alleged to have affected a jury. Instead, the Court viewed the appropriate ultimate sanction to be a new trial. Rather than conducting a *Young* multi-factor analysis, the Court focused on precisely the two factors one would expect when an allegation of improper conduct before a jury has been raised — (1) whether the offending party received adequate notice; and (2) whether there was there prejudice to the moving party. *Lioce*, 174 P.3d at 982-87.

The Court addressed similar issues in *BMW*, which is closest to this case, because it (unlike all the other cases cited and discussed in the district court's order below) concerned alleged violations of an order *in limine*. As in *Lioce*, the Court at no point suggested that outcome-determinative sanctions are appropriate

remedies for in-trial misconduct, such as violations of orders *in limine*. And, once again, the Court made no mention of the *Young* factors, but instead focused on the two most appropriate inquiries for addressing evidentiary violations—whether the order *in limine* was clear and whether there was sufficient prejudice to warrant a new trial as opposed to a lesser sanction. *BMW*, 252 P.3d at 656.

In sum, the Court's cases establish a dichotomy. For pre-trial discovery violations, outcome-determinative sanctions are permitted and the inquiry whether they are appropriate is governed by the *Young* test. For alleged in-trial misconduct before a jury, the ultimate potential sanction is a new trial and the inquiry is governed by the *BMW* standards.

B. This Dichotomy Makes Common and Constitutional Sense

The Court did not make this distinction by happenstance. To the contrary, distinguishing between pre-trial and in-trial misconduct makes sense. With respect to extreme pre-trial misconduct, such as the withholding of information in discovery, outcome-determinative sanctions are a potentially correct remedy for a number of reasons.

1. The Applicable Rules of Procedure Reflect Different Approaches

As noted in *Young*, NRCP 37(b)(2)(C) expressly authorizes striking a pleading for failure to comply with discovery orders. *See Young*, 106 Nev. at 92,

787 P.2d at 779. In addition, NRCP 37(d) allows striking a pleading if a party fails to attend his own deposition or to serve discovery responses.

In contrast, when an attorney is alleged to have put improper material before the jury, the situation is governed by an entirely different rule of procedure, NRCP 59, which does not authorize striking a pleading. *See BMW*, 252 P.3d at 656 (analyzing an attorney's alleged violation of an order *in limine* under Rule 59). Instead, NRCP 59(a)(2) provides for a new trial as a remedy to alleged misconduct.

2. Different Sanctions Remedy these Different Problems

Striking a pleading is an appropriate remedial sanction for extreme and repeated discovery abuses; when a party persistently refuses to participate in the pre-trial process, barring that party from re-engaging in that process is a commensurate response. Allowing an outcome-determinative sanction is justifiable where a party withholds information because the judicial system cannot operate if a party is allowed to conceal the truth.

This Court has held that outcome-determinative sanctions are primarily appropriate where "nondisclosure interferes with the exchange of information necessary to litigate a case." *Skeen v. Valley Bank of Nev.*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973) (per BATJER, J.). Thus, this Court "will uphold default judgments where 'the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against

interminable delay and uncertainty as to their legal rights.'" *Hamlett*, 114 Nev. at 865, 963 P.2d at 458 (quoting *Skeen*, 89 Nev. at 303, 511 P.2d at 1054). *See also Fire Ins. Exch. v. Zenith Radio Corp*., 103 Nev. 648, 651, 747 P. 2d 911, 913 (1987) (sanctions may be imposed "where the adversary process has been halted by the actions of the unresponsive party").[10] Extreme sanctions "should only be used in extreme situations, such as destruction of evidence "necessary to prove or disprove" a party's theory of the case. *Nev. Power Co. v. Flour Ill.*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992) (citing *Moore v. Cherry*, 90 Nev. 290, 528 P.2d 1018 (1974)); *see also Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 314, 810 P.2d 785, 788 (1991).

In contrast, alleged evidentiary misconduct during jury trials raises different issues calling for different remedial sanctions. Outcome-determinative sanctions simply do not make common or constitutional sense when the allegation of misconduct is that a party violated an order *in limine* or otherwise put improper material before a jury. The focus in such cases is not on whether the opposing

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[10] This court has found fabrication of evidence, destruction of evidence, failing to comply with discovery orders, intentionally halting the adversarial process, outright refusal to provide discovery responses and failing to appear all constitute willful conduct. *See Young*, 106 Nev. at 95, 787 P.2d at 781 (fabricating evidence); *Fire Ins.*, 103 Nev. at 651, 747 P.2d at 914 (destroying evidence); *Picon v. Ryon*, 99 Nev. 801, 802, 671 P.2d 1133, 1134 (1983) (failure to comply with discovery orders and answer discovery halted adversarial process); *Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973) (failing to appear at deposition).

party has been deprived of finding the truth or developing a case; rather, the focus is on the effect of the allegedly improper material on the jury. *See, e.g., Lioce*, 124 Nev. at 24, 174 P.3d at 985 (rejecting argument that attorney conduct must be intentional, because "[t]he relevant inquiry is what impact the misconduct had on the trial").

A trial court can still employ a variety of sanctions, but any sanction must not exceed what is necessary to remedy the impact on the jury or to validate the trial court's authority. In severe cases where lesser sanctions like curative instructions will be futile, the correct ultimate remedy is precisely what NRCP 59(a)(2) provides and *Lioce* and *BMW* considered a new trial because it is directed toward the harm that was done. In extreme cases, where the prejudice is so palpable that continuing trial would only waste judicial resources, the trial court can declare a mistrial and start the trial anew.

3. Courts Can Effectively Punish and Deter Without Resort to Striking a Pleading

Where the district court believes that attorney misconduct necessitating a mistrial or new trial is *deliberate*, the court also may punish beyond granting a new trial and imposing fees. The court has powerful tools to discipline and deter recalcitrance. The court can reprimand the attorney before the jury, or impose fines and contempt citations. *Glover v. District Court*, 125 Nev. 691, 702-03, 220 P.3d 684, 693 (2009) (the trial judge may instruct the jury to disregard an improper

comment, discipline counsel, remove counsel from trial or order mistrial). The judge may remove the attorney from trial. *Id.* The court can revoke *pro hac vice* privileges, or report any Nevada attorney to the State Bar, which could potentially result in disbarment. *Born v. Eisenman, M.D.*, 114 Nev. 854, 862, 962 P.2d 1227, 1232 (1998) ("Of course, the matter should be referred by the district court to the State Bar of Nevada…if an attorney has committed misconduct in his or her courtroom.") To be clear, courts need not tolerate disobedience.

Thus, the dichotomy between this Court's treatment of discovery sanctions and trial misconduct should not be construed to provide license for misbehavior. Rather, this Court's opinions explain that, in some extreme circumstances, the *prejudice* caused by a party's refusal to disclose discoverable evidence or otherwise participate in discovery fairly *can only be remedied by entry of default*. In contrast, where trial misconduct is at issue, any prejudice to the non-offending party can be remedied by a new trial, and potentially reimbursement of fees. And, because of that limited potential prejudice to the non-offending party, the trial court is able to focus any additional punishment *on the misbehaving attorney*, avoiding collateral damage to his client. There is good reason behind this Court's distinct lines of cases.

C. The District Court's Underlying Errors in Imposing Sanctions

1. The District Court Relied on the Wrong Line of Cases

The district court freely interchanged the two separate lines of authority discussed above, without acknowledging they deal with entirely separate types of misconduct. This is clear from the district court's order (or, more accurately, the order that plaintiffs prepared for the court).

The lengthy order fails to cite any authority holding that outcome-determinative sanctions are permissible for in-trial violation of an order *in limine*. Instead, it relied solely on authority from *Young* and other cases addressing discovery sanctions (*e.g., Foster* and *Bahena*). (16 App. 3653-54.) For all the reasons above, these cases simply do not support what the district court did—they are the wrong cases.[11]

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[11] One portion of the order is particularly telling. In the last full paragraph on page 31 (16 App. 3659), plaintiffs included a string citation of cases in which this Court has upheld outcome-determinative sanctions. Every one of these cases involved pre-trial discovery matters, while none involved violations of an order *in limine*, The order acknowledges as much, as the sentence at the end of the paragraph attempts to justify extending such sanctions to cases like this one: "Additionally, the Nevada Supreme Court has approved consideration of the *Young* factors as a guide for sanctions grounded in violations of court orders *at trial*. *See Romo v. Keplinger*, 115 Nev. 94, 97 (1999)." (16 App. 3659, emphasis added.)

The citation to *Romo* is misplaced, however. This Court in *Romo* did not analyze or endorse use of *Young* for violation of orders *in limine* or any other in-trial evidentiary conduct. To the contrary, the Court ***reversed*** a trial court's entry of a mistrial for a violation of the rule excluding witnesses, finding the district court's reliance on inherent sanction authority was an abuse of discretion. *Romo*, 115 Nev. at 97, 978 P.2d at 966. In *Romo*, this Court mentioned *Young*, but only because the trial court had relied upon it. *See id.* *Romo* ultimately held that *Young*

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2. The District Court did Not Address the Constitutionally Required Nexus between the Conduct and the Sanction

That the district court's order attempts to force a square peg into a round hole is made even more clear from the fact that it did not attempt to address the very first (and arguably most important) inquiry under *Young*—whether striking a pleading is constitutional. As noted above, the Court in *Young* held that due process demands a tight nexus between the discovery order that has been violated and the claims or defenses stricken. *Young*, 106 Nev. at 92, 787 P.2d at 779-80 (due process "require[s] . . . that the sanctions relate to the claims which were at issue in the discovery order which is violated"). In other words, a court may not strike a pleading just because a litigant has engaged in misconduct or has violated court orders; rather, the sanction must be tailored in a way that actually redresses the violation.

But there is no such nexus here. The district court plainly was angry with defendant's counsel and wished to implement a punishment, but the sanction it imposed does not remedy, and is not even tethered to, the violations it found. If a lawyer violates an order in a way that misleads or confuses the jury, striking an answer is not a tailored remedy and does little other than punish his client. If measures designed to correct juror confusion are unavailing, the appropriate remedial sanction is to grant a new trial, just as this Court held in *Lioce* and *BMW*,

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could not apply because the trial court had not held an evidentiary hearing. *Id.*

or—in appropriate cases, not here—a mistrial or particularized sanction against the attorney. Striking the answer was uncalled for in this case.

II.

THERE WAS NO TRIAL MISCONDUCT JUSTIFYING EVEN A MISTRIAL OR NEW TRIAL IN THIS CASE

"For violation of an order *in limine* to constitute attorney misconduct requiring a new trial, [A] the order must be specific [and] the violation must be clear, and [B] unfair prejudice must be shown." *BMW* at 252 P.3d at 656. This case met none of those requirements.

A. The District Court's Moving-Target Rulings Were Not Sufficiently Clear to Support Striking the Answer

Here, as in *BMW*, the exchanges between the court and counsel "demonstrate the confusion regarding the limitations imposed on argument by the order *in limine*." *BMW*, 252 P.3d at 659.

1. Even to Support the Lesser Sanction of New Trial, Orders In Limine *Must Give Clear Notice to the Parties*

As noted above, *BMW*, like this case, involved alleged noncompliance with an order *in limine*. Even though the ultimate sanction that the court considered for such violations in *BMW*—a new trial—is far less severe than the outcome-determinative sanction that the court below imposed, the Court still mandated exacting standards. Specifically, a "violation of an order granting a motion *in limine* may only serve as a basis for a new trial when the order is specific in its prohibition and the violation is clear." *BMW*, 252 P.2d at 656 (internal citation and

quotation omitted). Even if the district court had not erred by holding that outcome-determinative sanctions are proper in cases like this one, its judgment should be reversed for the separate and independent reason that this *BMW* standard was not met here.[12]

Although the district court started out on relatively firm ground before trial by analyzing a motion *in limine* under the law of expert testimony admissibility, its resulting order (which plaintiffs drafted) strayed too far from that law. Even worse, as trial progressed, the court used its limited pre-trial ruling as a roving and inconsistent charter to exclude broad categories of eyewitness fact testimony about the scene of the accident. It became nearly impossible to ascertain what the court was allowing and what it was not. Worse still, despite repeated pleas from defendant's counsel for clarification as the court made rulings that exceeded the scope of its original order, the court gave no guidance and instead repeated the mantra that its original order was clear and directed the parties back to it.

2. The Order in Limine *Related Only to Expert Testimony and Two Specific Items of Evidence*

The motion *in limine* that started the dominoes tumbling (2 App. 391-441) sought exclusion of specific evidence under specific authority. Defendant had,

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[12] If anything, the clear notice standards should be even more stringent when considering outcome-determinative sanctions, since they implicate due process. *Young*, 106 Nev. at 92, 787 P.2d at 779-80. This section demonstrates that the district court's standards fail under *BMW*. Under a constitutional-notice standard,

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prior to trial, disclosed medical doctors as expert witnesses, but had not disclosed a biomechanical engineer. Plaintiffs expressly invoked NRS 50.275 and argued that medical doctors do not have sufficient expertise to testify about matters of biomechanics. (*Id.* at 398.) Plaintiffs relied primarily on *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008)—a recent case about the standard for allowing experts to testify.[13]

Plaintiffs identified the specific evidence that they wished to exclude. First, they sought an order precluding defendants from "referencing or insinuating" any opinion that "1) the subject motor vehicle crash [w]as 'low' or 'minor impact['] [and] 2) that the dynamics of the crash were insufficient to result in the injuries or medical care of plaintiff." (2 App. 396.) Second, plaintiffs sought exclusion of repair invoices and certain photographs showing automobile damage. (2 App. 406-09.)

The district court permitted a short argument on the motion, during which the court expressed a clear understanding that the plaintiffs sought exclusion of expert testimony under *Hallmark*: "Dr. Fish, ***or any medical doctor***, may not testify that because there appears to be minimal property damage that somehow the

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the matter is even more clear.

[13] Avoiding any doubt about their heavy reliance on *Hallmark*, plaintiffs elected to set their discussion of the case apart from the remainder of their motion in limine by using bold type. (2 App. 404.) Indeed, in its order striking the Answer, the district court acknowledged that the motion in limine "was primarily based on

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plaintiff must not have been injured as much as he claims to have been, pursuant to the *Hallmark* case." (3 App. 531-32 (emphasis added).) The court also indicated that without such testimony, the two specific pieces of evidence that were the subject of the motion—the photograph and invoice—could not come into evidence. (*Id.*) Defendant's counsel sought to ensure it understood the ruling: "I mean, can I simply say this is what the accident was and not argue that the accident could not have cause injury based on that photograph?" (*Id.* at 533.) The court refused to answer: "I've made my ruling." (*Id.*)

The district court's written order granted the motion on those same terms. The court did not use sweeping language about fact witnesses or broad categories of evidence. It did not make findings about how the parties could testify about the accident. Indeed, the court did not make any rulings whatsoever about fact witnesses, lay descriptions of the accident scene, or about any evidence other than the specific photographs and invoices identified by plaintiff in the motion. To the contrary, the court merely said that (1) plaintiff's request about a "minor" or "low impact" defense was granted, (2) "Neither Dr. Fish ***nor any other defense expert*** shall not [sic] opine regarding biomechanics or the nature of the impact of the subject crash at trial," and (3) "Plaintiffs' request to exclude the property damage photos and repair invoice(s) is **GRANTED**." (3 App. 600) (emphasis added).

Hallmark." (16 App. 3635.)

3. The Expanding Order and the District Court's Unwillingness to Provide Clarification

If the district court had stayed within the original confines of its order during the trial, it likely would have been within its discretion. But the district court appeared to forget (with urging from plaintiffs' counsel) what it actually ruled. As trial progressed, the court seemed to think that the order was much more broad and held Defendant to this broader (and never articulated) standard. When pressed for clarification, the court refused to give it and, most problematically, ***repeatedly referred defendant back to the order***, without seeming to understand that her progressive rulings were inconsistently expanding it.

This difficulty was foreshadowed at a pretrial hearing. Plaintiffs realized that the court's order precluded only expert testimony and two specific pieces of evidence, but they decided they wanted more. Despite their repeated claims later that the court's order was clear and expansive, ***it was plaintiffs*** who, in their secret trial memorandum, asked the court ***to expand*** its order to cover not just expert testimony but also lay witnesses. (13 App. 2970-72.) When defendant's counsel realized plaintiffs had begun to advocate an expansive reading of the order and were suggesting that it should be broadened to encompass more than just expert testimony and the two specific pieces of evidence, defendant's requested a hearing. (6 App. 1371, 1377.)

Although the district court refused to take a clear position on the scope of the order, the court initially ***rejected*** plaintiffs' request for an expansion of the order: "Here's the thing, I don't know that this motion was really even necessary because ***the Court's ruling was based on the written pleadings and the argument that the Court heard.*** And it was a very specific ruling." (6 App. 1382.) Defendant's counsel sought confirmation that the court did not intend to go beyond its order, and the court provided that confirmation: "I urge you to re-read the order." (*Id.*)

After further arguments by plaintiffs' counsel during the hearing, however, it became increasingly clear that the district court might be under the mistaken impression that her order said things it did not actually say. Defendant's counsel repeatedly implored the court for additional guidance, which the court flatly refused to give. Instead, the court repeatedly referred the parties back to the order *in limine*: "Well, I don't know what to tell you. I'm not going to tell you how to defend your case. I sure would never presume to tell anybody how to try or defend a case. But, you know, I think the order is pretty clear." (6 App. 1384). Counsel tried yet again to explore the gap between the order and the court's apparent acceptance of plaintiffs' arguments, but again the court shut the discussion down, telling one of defendant's lawyers that if he was not the lawyer who would be

making opening statement the court would not discuss the matter. (6 App. 1385-86.)

When trial began, defendant knew only: (1) The court had issued an order that, by its express terms, only precluded expert testimony and two specific pieces of evidence; (2) plaintiff's counsel took the position that the court should expand the order to encompass testimony from fact witnesses; (3) The district court refused to broaden its order or limit fact witnesses; (4) the court nevertheless seemed to think that a broader principle about what could be said in opening statements was tucked away in the intricacies of the eight-page order, although the court would not give guidance on what this principle might be except to refer the parties back to the written order.

Defendant's counsel thus went into opening statements in the unenviable position of having to try to determine what was permissible and what was not. Taking the order on its terms as one about expert testimony and two pieces of evidence, defendants' counsel described for the jury the evidence that would come from lay witnesses about the accident, noting twice that the accident occurred in "stop-and-go, bumper-to-bumper traffic." (7 App. 1490-91.) Counsel also described in detail the expected evidence about the nature of the accident:

> As I stated, bumper-to-bumper, stop-and-go . . . . They got on the freeway and it was traffic time and she pulled up behind the plaintiff. And several times over, stopped, went, stopped, and went. She will testify that on the final go, she was stopped

> behind the plaintiff, who moved few feet in front of her; she lifted her foot up off the brake; she went forward; she saw the brake lights on his vehicle; she applied her brakes, only just not quite hard enough; and the accident following.

(7 App. 1491.) Plaintiff's counsel did not object and the court did not interject.

Defendant's counsel also discussed what the evidence would show about apparent lack of injury to anyone at the scene. Counsel began by noting that "both parties drove home." (7 App. 1490.) Again, plaintiff's counsel did not object. Defendant's counsel thus went on, giving more detail:

> No one in this accident claimed loss of consciousness. No one sustained cuts, or bruises, or abrasions. Both drivers pulled off to the side of the road because of the traffic; paramedics arrived, but they were refused by everyone; the plaintiff got out of his vehicle; went back and spoke with Jenny Rish; and then both parties got back in their vehicles; the plaintiff drove home; and Jenny Rish, and her daughter-in-law, and her four grandchildren continued on their drive, six hours to Gilbert, Arizona.

(7 App. 1492.) Once again, plaintiff's counsel did not object. It was precisely these matters that defendant was freely allowed to discuss in opening statement—nothing more—which later led the district court to strike the answer.

At this point, the rules of the game seemed relatively clear and the angst from the pretrial hearing resolved. Defendant would be permitted to introduce lay witness testimony about the severity of the accident and about the fact there were no injuries at the scene, although the court's *in limine* order excluded expert testimony and two specific pieces of evidence (the invoices and photograph).

Indeed, the next several trial days proceeded without serious incident and the issue came up only once during a brief colloquy on the second day.[14]

Plaintiffs' counsel acted entirely consistently with this understanding—asking questions to experts that included specific factual information about the nature and extent of the accident. For example, on the second trial day, counsel asked a hypothetical question to an expert characterizing the accident as follows: "The patient is a 41-year-old who . . . was the driver of a large van which was rear ended at an unknown speed, nearly stopped, on the freeway. He states he had a hyperflexion and extension movement of his head which caused him to strike the back of his head on a cage in the inside of his work van." (7 App. 1643.)

It was not until the end of the first week of trial that things began to unravel, when plaintiffs' counsel objected to a question that concerned the very matters that had gone without objection during opening statements: the lack of injury sustained by others in Ms. Rish's car. (9 App. 2047.) The sole basis for the objection was "relevance." (*Id.*) During the short bench conference that followed, neither plaintiffs' counsel nor the court mentioned the order *in limine*. In fact, although the district court's order striking the answer pretends it was obvious why the motion was sustained (*see* 16 App. 3693-94), defendant's counsel ***specifically asked*** whether he had strayed into an area that was covered by a prior order: "I'm

[14] This exchange is discussed at greater length, below.

not sure how it's not relevant. Is this something that there's an order?" (9 App. 2048.) The court did not respond. Instead, plaintiffs' counsel responded, stating that "[i]t doesn't matter whether it's [sic] order." (*Id.*) Once again, the court gave no clarification: "Sustain the objection." (*Id.*)[15]

The events that followed—the court's "irrebuttable presumption" instruction and its decision to strike the answer and dismiss the jury—are fully described *supra* at pp. 14. The court refused at nearly every turn to give any clarification and repeatedly directed the parties back to its original written order, notwithstanding defendant's reminders that the prior order addressed expert testimony and two specific pieces of evidence.

On the rare occasions when the district court did something other than refer back to its prior order, the signals it sent were decidedly mixed:

1. During argument about whether the court should give an "irrebutable presumption" instruction, defendant's counsel again implored the court for guidance. (10 App. 2322-25.) Counsel explained his understanding that the order precluded expert testimony about the accident. But counsel also noted the court

[15] That the court sustained the objection on relevance grounds was particularly befuddling and added to the confusion. At the pretrial hearing on plaintiff's motion *in limine*, the court noted that the repair invoice and the photographs ***were relevant***. "I think it's relevant. I don't think that's the issue is that it's not relevant. I think the pictures are relevant." (3 App. 532.) The basis for the court's ruling was not relevance, but that without an expert there could be no "foundation" for the photographs. (*Id.*)

had repeatedly implied that lay witnesses could testify, and that counsel's opening statement had included references to stop-and-go traffic and the fact that Ms. Rish had driven from the scene. Counsel pleaded with the court:

> There's no intent here to violate the order. It truly is a problem of not knowing. ***So if we have a clear order saying, listen, you can't say this and you can't say that, I won't.*** I won't ask another witness, were you aware that Jenny Rish wasn't injured, were you aware that she drove from the scene. ***I just don't know what it is of those questions that I'm not permitted to ask a witness.***

(10 App. 2324; emphasis added.) The court, as always, declined to respond, instead referring back to the order *in limine*. (*Id.* at 2325-26.)

2. The "irrebutable presumption" instruction the court drafted afforded no additional clarity about what kind of non-expert testimony was still in play. The jury was instructed to accept that the accident was sufficient to cause Plaintiff's injuries, but was told that it still had to decide whether plaintiff's injuries were proximately caused by the accident. (10 App. 2370-71.) Once again, counsel was left without guidance, unsure whether offering the lay-witness testimony about the accident that it had promised the jury during opening statement was permissible or not.

3. On the day the district court struck the answer, during argument about whether defendant's daughter could testify, defendant's counsel again sought clarification of the extent of the court's order. On a number of occasions, counsel

repeated his understanding that the court's order did not exclude percipient witness testimony about the accident or preclude defendant herself from describing what happened. (12 App. 2769-70, 2773.) The court did not disabuse counsel of this understanding, and, indeed, affirmed that defendant could testify, albeit with a cryptic caveat that the testimony must be consistent with the court's prior orders. (*Id.* at 2773-74.)

To summarize: (a) The court's order *in limine*, on its face and by its terms, related only to expert testimony and two specific pieces of evidence. (b) plaintiffs clearly recognized that point, because they filed an *ex parte* brief seeking expansion of the order. (c) The court denied that request, but refused to give the parties further guidance, referring back to its original order. (d) In opening statements, defendant was allowed, without objection, to describe the two matters that ultimately led the court to strike the complaint—the nature of the accident and the fact that nobody else at the scene was injured. (e) Despite repeated pleas for clarification, the court refused to give any guidance and simply referred back to its order. (f) Even when it issued an "irrebuttable presumption" instruction, the court informed the jury it still was required to consider proximate causation. (g) The court consistently declined to state that it was precluding percipient witness testimony about the accident or that it was restricting Ms. Rish's ability to testify

about the accident, but, in the end, it struck defendant's answer precisely for attempting to introduce that evidence.

Applying *BMW*, the orders of the court were not "specific in [their] prohibition," nor were the "violation[s] . . . clear." 252 P.3d at 656. A district court complies with *BMW* only when it enters an order *in limine* about specific evidence, applies that order inconsistently to evidence not mentioned in the order, and then steadfastly refuses to respond to requests for clarification about the extent of its ruling. Particularly given the constitutional implications of the case determinative sanction imposed, this Court should reverse.[16]

B. The District Court did Not Find and Plaintiffs have Not Shown Prejudice

"To justify a new trial, ***as opposed to some other sanction***, unfair prejudice affecting the reliability of the verdict must be shown…." *BMW* at 252 P.3d at 656

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[16] ***Counsel did not violate the "medical build-up" order***: The district court also accused defense counsel of violating its order "preclud[ing] argument that this case is 'attorney driven' or a medical build-up case." (16 App. 3685.) Similar to the morphing "minor impact" order, the concept addressed in the motion in limine was markedly different from the one applied at trial. Before trial, plaintiffs had moved to preclude argument that *plaintiff's medical treatment was influenced by his attorneys or anticipation of this litigation*. (1 App. 116, 130; 2 App. 271, 244-350.) Then, at trial—without notice to defense counsel—the order was construed to encompass any comment that plaintiff's medical witnesses had experience testifying in trial.

Defense counsel did not violate the pretrial order, or even broach an impropriate topic. *See, e.g., In re Makris*, 217 S.W.3d 521, 525 (Tex. Ct. App. 2006) ("To establish bias or prejudice, an expert medical witness may be cross-examined regarding the number of times he has testified in lawsuits, payments for such testifying and related questions.").

(citing *People v. Ward,* 862 N.E.2d 1102, 1142 (Ill. Ct. App. 2007) and *Black v. Shultz,* 530 F.3d 702, 706 (8th Cir. 2008)). Plaintiffs have not shown such prejudice.

Because the determination of prejudice depends on the conduct's effect on the verdict, the better course of action would have been for the district court to follow its initial instinct and allow the trial to continue to verdict. Defendant's trial conduct simply cannot amount to irreparable and fundamental error unless, "but for the misconduct, *the verdict* would have been different." *Lioce,* 124 Nev. at 19, 174 P.3d at 982 (emphasis added), quoted in *Grosjean v. Imperial Palace,* 125 Nev. at 364, 212 P.3d at 1079 (2009) (examining the verdict, itself, to determine whether it gives some indication as to whether prejudice occurred), and *BMW*, 252 P.3d at 656. This procedure also makes sense as a matter of judicial economy and sound trial court practice. In many cases, the verdict may moot any need for a new trial, notwithstanding claims of misconduct. If the party claiming misconduct believes it has been aggrieved after the verdict, Rule 59 affords a remedy if the trial court agrees that the result was tainted or there was prejudice.

Any sanction should still be imposed only to correct a wrong that infected the reliability of the jury's verdict, not as a punishment to an attorney for a perceived transgression of a difficult order. *See* 66 C.J.S., *New Trial* § 32. A trial court must conduct this analysis—considering the misconduct's effect on the

verdict—to avoid gratuitously punishing the client for the natural actions of counsel.

In any event, the trial conduct in this case was not the type that would have affected the result to a reasonable probability. A court evaluating alleged trial misconduct considers such factors as how fleeting the comment was and whether counsel directly instructed the jury to reach a certain conclusion, rather than simply leaving open an implication. *Cassim v. Allstate Ins. Co.,* 94 P.3d 513, 524 (Cal. 2004). Indirect comments, even if improper, are generally harmless. *See id.* (citing *People v. Boyette*, 58 P.3d 391 (Cal. 2003)). Here there was no argument or incitement to the jury.

In addition to considering the directness and frequency of the comments, the Court must also consider the trial court's reaction to the misconduct, including any admonition or instructions. *Cassim*, 94 P.3d at 527. The district court here gave curative admonitions to the jury and could have done so again. This Court presumes that the jury followed the district court's instructions. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006); *see also Cassim,* 94 P.3d at 526. Indeed, as members of this court have repeatedly noted, there is little that cannot be remedied by a curative instruction at trial. *See Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 27, 16 P.3d 415, 420 (2001) (MAUPIN, C.J., concurring) (citing *Horn v. Atchison, Topeka & Santa Fe Railway Co.*, 394 P.2d

561, 565 (Cal. 1964)); *DeJesus v. Flick*, 116 Nev. 812, 826, 7 P.3d 459, 468-69 (2000) (ROSE, C.J., dissenting)).

In short, any speculation that defendant's trial conduct would have prejudiced the jury is too remote to justify a mistrial order. The district court erred in stopping the trial.

III.

THE TRIAL COURT MISAPPLIED THE LAW, DEPRIVING DEFENDANT OF THE OPPORTUNITY EFFECTIVELY TO NEGATE CAUSATION

There is a third—and even more basic—ground for reversal here. The underlying evidentiary rulings on which the district court premised its sanction were erroneous as a matter of law. This is significant in determining the validity of the district court's sanction. "To justify a new trial, as ***opposed to some other sanction***, unfair prejudice affecting the reliability of the verdict must be shown, *Black,* 530 F.3d at 706, which includes consideration of whether the '[trial conduct] was actually proper or improper under the law.'" *BMW*, 252 P.3d at 656, (quoting *People v. Ward,* 862 N.E.2d 1102, 1142 (2007)).

While a district court might assert its authority by declaring a mistrial or imposing a punitive sanction for the disobedience of even an improper order, a far different analysis controls the striking of a party's pleading. A district court can impose severe sanctions for violations of an order only if the order was actually correct, so that the disobedience resulted in an incorrect procedure or prejudiced

the opponent. *See Glover v. District Court*, 125 Nev. 691, 220 P.3d 684 (2009) (district court may order mistrial for disobeying order after jeopardy attaches only if the mistrial was a manifest necessity caused by defense); *Lioce v. Coen,* 124 Nev. 19, 174 P.3d 981 (court must consider both correctness of the trial ruling and the effect upon a fair trial before ordering a new trial).

While a district court may sanction an attorney for blatant violation of a court order, the proper remedy is a contempt sanction. Such a situation would not even call for a new trial, moreover, as such a procedure requires an error of law or irregularity undermining due process, as outlined in NRCP 59. A new trial, or a mistrial, is necessary only to correct a wrong that affects the reliability of the verdict, not as a punishment for disobeying a court order. 66 C.J.S., *New Trial* §32; *see also BMW*, 252 P.3d at 649.

As noted above, plaintiffs based their motion *in limine* on *Hallmark*, and the motion concerned expert testimony. Plaintiffs argued that defendants' medical doctors were not qualified under NRS 50.275 to testify about biomechanics. At oral argument, the district court expressed a clear understanding plaintiffs sought to exclude the proffered expert testimony and two specific piece of evidence (3 App. 531-32). In its order striking the answer, the court again acknowledged that the motion *in limine* "was primarily based on *Hallmark*." (16 App. 3635.) The court's order referred only to expert testimony (3 App. 600). Plaintiffs apparently

understood that the order was so limited because they subsequently filed a secret trial brief asking the court to expand the order to include fact witnesses. (13 App. 2970-72.) The court rejected that gambit, reaffirmed that it was not precluding lay-witness testimony, and responded to requests for clarification by referring back to its order. (*See* pp. 15, 41, *supra*.)

Over the course of the trial, however, plaintiffs apparently persuaded the court that its order meant something more. The court eventually took a massive and improper leap, ruling that its order about expert witness testimony somehow meant defendants could not introduce fact testimony—***including from the parties themselves***—about the day of the accident that might lead the jury to disbelieve that the accident caused plaintiffs' injuries.

A. Exclusion of Expert Testimony Does Not Mandate Automatic Exclusion of Percipient Witness Testimony on the Same Subject

NRS 50.275 and cases like *Hallmark* recognize that courts must play an important gatekeeping function with respect to experts due to the potential weight of their testimony and their privileged role at trial. First, their testimony comes with an implicit imprimatur; they are called "experts" and offered as learned professionals. *See Ake v. Oklahoma*, 470 U.S. 68, 82 n.7 (1985); *Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992) (error to allow expert to comment on veracity of witness, because expert lends "stamp of undue legitimacy" to testimony) (internal citation and quotation omitted). Second, experts may offer

opinions that are not based on personal knowledge. Unlike facts, these opinions are more resistant to cross examination, and because they cannot be objectively false they are resistant to the *in terrorem* effect of perjury. *See generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993) (courts must scrutinize expert qualifications because opinion testimony dispenses with the ordinary requirement of first-hand knowledge).

These rationales, however, do not apply with respect to lay-witness fact testimony. Nothing in *Hallmark* (or any case from this Court of which we are aware) suggests that a court must exclude percipient testimony whenever expert testimony is disallowed on the same subject. To the contrary, this Court has consistently held that causation issues are fact issues for the jury. *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981); *Barreth v. Reno*, 77 Nev. 196, 198, 360 P.2d 1037, 1038 (1961).

B. This Court Recognized that Details about an Automobile Accident are within the Jury's Province

More specifically, the district court's rulings are flatly inconsistent with *Fox v. Cusick*, 191 Nev. 218, 533 P.2d 466 (1975). The Court in *Fox* considered whether the trial court erred in granting a new trial in an automobile accident case as inconsistent with the weight of the evidence. To resolve that issue, the Court outlined the province of the jury in such cases. Finding that proximate cause is generally an issue of fact, the Court held that "[w]ith regard to the matter of injury

and damage, it was within the province of the jury to decide that an accident occurred without compensable injury." *Id.* 91 Nev. at 221, 533 P.2d at 468. Describing categories of evidence relevant to the inquiry, the Court noted that "[t]he traffic was light," defendant had "applied his brakes," and the plaintiff was not examined on the date of the accident and "lost no time from employment." *See id.* The district court's ruling below that a jury could not consider fact testimony about these very issues was inconsistent with *Fox*.[17]

C. The District Court's Rule, if Endorsed, Would Be Unworkable and Unfair

Under the district court's analysis, defendants in motor vehicle cases in Nevada will virtually never be able to attempt to refute causation with testimony about the nature of the accident. The Court in *Hallmark* expressed considerable skepticism whether biomechanical engineering is currently an appropriate subject

[17] Plaintiffs below essentially ignored *Fox* and relied heavily on *Davis v. Maute*, 770 A.2d 36 (Del. 2001) and *DiCosola v. Bowman*, 794 N.E.2d 875 (Ill. Ct. App. 2003). Neither case holds that testimony from the parties to an automobile accident about the severity of the accident is foreclosed just because there is no biomechanics expert. Moreover, *Davis* (on which *DiCosola* relied, 794 N.E.2d at 881) has been heavily criticized, *see, e.g., Accetta v. Provencal*, 962 A.2d 56, 61-62 (R.I. 2009) (citing additional authority), and both *Davis* and *DiCosola* have subsequently been limited to their specific facts, *Eskin v. Cardin*, 842 A.2d 1222, 1233 (Del. 2004) ("*Davis* has been misinterpreted as a bar to the admission of photographs without expert testimony . . . *Davis* should be limited to its facts"); *Ferro v. Griffiths*, 836 N.E. 2d 925 (Ill. Ct. App. 2005) (narrowly construing *DiConsola* as a case about specific photographs, rejecting the argument that expert testimony is a necessary prerequisite for admission of accident photographs, and ***affirming***, without an expert, introduction of photographs of an accident indicating minor damage offered to show that accident was not severe).

for expert testimony. *E.g., Hallmark*, 124 Nev. at 502, 189 P.3d at 653 n.27 (concluding that "this court has not yet judicially noticed the general reliability of biomechanical engineering"). The Court indicated that biomechanical testimony is not permitted unless the expert has specific factual information about the starting positions of the vehicles, their speed, distances travelled, and angles of impact. *Id.* Such information is often simply unavailable. If the district court is correct that fact testimony about the severity of an accident is not admissible unless it is supported by a biomechanical expert, litigants are in an impossible Catch-22 given the stringent standards for admissibility established by *Hallmark*.

Moreover, the district court's approach was fundamentally unfair because it was unevenly applied. Unlike defendant, plaintiffs were permitted to put the very issue of the accident's severity before the jury through their own medical experts. Plaintiffs' experts had no independent knowledge about the accident, and they based their opinions about causation specifically on what plaintiffs chose to tell them about the accident.[18] Plaintiffs' counsel conceded this point:

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[18] ***Excluded of plaintiff's 2003 and 2008 motor vehicle accidents***: Under this erroneous approach, personal-injury plaintiffs could manipulate the evidence at trial simply by selecting which facts to disclose to their current doctors. Indeed, that concern is present in this case. Approximately two years before the subject accident, plaintiff was involved in a motorcycle accident. (1 App. 123; 2 App. 316.) He also was involved in a third motor vehicle accident in 2008, after the subject 2005 collision with Rish. (17 App. 3934.) The evidence was excluded because none of plaintiff's doctors attributed his injuries to the 2003 or 2008 accidents. (*Id*.) Yet, those doctors would have no ability to even evaluate the

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> MR. EGLET: …Guess what? The Supreme Court has said, in fact, it's a doctor who gives medical causation, not a biomechanical engineer. The doctor, like every doctor's causation opinion is based upon the patient's history. He's already testified that the patient gave him the history of the motor vehicle accident, period.

(7 App. 1594.) As the Seventh Circuit has explained, the only reason that a plaintiff is permitted to make a *prima facie* showing of causation based on this superficial model—*i.e*., plaintiff's self-reported medical history combined with a physician's opinion that that the self-reported incident is a plausible mechanism of injury—is because "the accuracy and truthfulness of the underlying medical history is subject to meaningful exploration on cross-examination and ultimately to jury evaluation." *Cooper v. Carl A. Nelson & Co*., 211 F.3d 1008, 1020 (7th Cir. 2000).

In sum, the district court's decision to take the entire issue of the accident's severity off the table was unfair, was not compelled by *Hallmark* or any other Nevada case, was inconsistent with *Fox*, and, if accepted, would put parties to automobile accident cases in an untenable and unfair position. Evidence about what actually happened at the scene of an accident is fundamental to a tort case arising from an accident, and should not be hidden from the jury.

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impact of the other accidents, because plaintiff chose not to discuss them in his self-reported medical history. Where plaintiff bears the burden of proof, he should not be the sole arbiter of what is "minor" and what is not.

IV.

THE DISTRICT COURT DID NOT JUSTIFY SUCH A SANCTION

A. The District Court did Not Conduct an Evidentiary Hearing

The district court erred by failing to hold an evidentiary hearing to address the factual issues encompassed in those factors as required under *Young,* 106 Nev. at 90-91, 787 P.2d at 778; *see also Nev. Power Co.*, 108 Nev. at 646, 837 P.2d at 1360; *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 324-25 (1995); *Romo v. Keplinger*, 115 Nev. 94, 97, 978 P.2d 964, 966 (1999). Indeed, this case presents the same circumstances of mere judicial assumptions, as opposed to evidentiary findings, that required reversal in *Nev. Power Co.*. 108 Nev. at 646, 837 P.2d at 1360. There, this Court reversed the Rule 37(b) sanction dismissing the case because the district court made its "findings" without ever holding an evidentiary hearing. Here, even after the district court had determined to strike defendant's answer, the court refused to commit to a meaning of its motion-in-limine order, much less explain how the alleged violation could be deemed reasonable. *Id.*, 108 Nev. at 644, 837 P.2d at 1359.[19]

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[19] Although the *Bahena* decision raises questions about the process due in cases where the sanction is less that "case concluding," the sanction here is the ultimate deprivation of a jury trial, even on damages, taking all issues from the jury. Indeed, defendant had conceded liability in this case, and the only issue for the trial was damages. This was the imposition of the civil death penalty.

Commentators, courts and practitioners refer to sanctions such as the one in this case as the "death penalty" because the sanctioned party loses its constitutional

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B. The District Court did Not Explain its own Reasoning

1. The Court did Not State Reasons at the Hearing

The district court did not articulate justifications for such a severe sanction on the record at the time, and under *Lioce* it is not sufficient to delegate to the prevailing party the task of preparing a order, after the fact, explaining the sanction.

> [W]e now require that, when deciding a motion for a new trial, the district court must make specific findings, both ***on the record during oral proceedings*** and in its order, with regard to its application of the standards described above to the facts of the case before it. In doing so, the court enables our review of its exercise of discretion in denying or granting a motion for a new trial.

Lioce, 124 Nev. at 19-20, 174 P.3d at 982 (emphasis added). "The relevant inquiry is what impact the misconduct had on the trial, not whether the attorney intended the misconduct." *Lioce,* 124 Nev. at 25, 174 P.3d at 985.

2. Plaintiffs Convinced the Court to Let them Prepare the Order

This Court has explained that an ultimate sanction "should only be imposed after thoughtful consideration of all the factors involved in a particular case…." *GNLV Corp.*, 111 Nev. at 870, 900 P.2d at 325; *see also Romo*, 115 Nev. 94, 978

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right to defend itself. Jonathon J. Winn (note), *Death Penalty without a Hearing? How the Nevada Supreme Court's Decision in Bahena v. Goodyear Incorrectly Defines Discovery Sanctions and Denies Due Process to Civil Litigants*, 12 NEV. L.J. 486 (2012). *See also Wyle v. R.J. Reynolds Indus., Inc*., 709 F.2d 585, 591 (9th Cir. 1983) ("Sanctions interfering with a litigant's claim or defenses violate due process when imposed merely for punishment of an infraction that did not

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P.2d 964 (granting mistrial without establishing record of either the extent of the violation or determining the responsible party constituted an abuse of discretion).

> MR. WALL: The other thing I would ask before that happens, Judge, is because some of the case law -- and I know Mr. Polsenberg's aware of it -- requires that when there is a case-concluding sanction, and I'm sure I saw it either in Young or in Foster, the supreme court, although the record here I think is appropriate, also prefers a written order. And so I would ask to be able to prepare that order for the Court.

(12 App. 2888.) In this case, the district court failed to consider the factors, at all, and simply had the prevailing party prepare a justification for the ruling after the fact. The district court's failure to exercise its discretion constitutes an abuse of that discretion. *Massey v. Sunrise Hosp.*, 102 Nev. 367, 724 P.2d 208 (1986); *see* Rex A. Jemison, *A Practical Guide to Judicial Discretion*, NEVADA CIVIL PRACTICE MANUAL § 29.05.

3. The Order, Prepared by Plaintiffs, is Misleading

The order striking the answer contains the repeated conclusion that the motion *in limine* ruling had been "clear and unambiguous." (6 App. 1384.) To read these references, one might expect that the order contains analysis from which an underlying principle of evidence exclusion might be derived. To the contrary, the order contains ***no*** analysis. (3 App. 599-600.) After setting forth the procedural history of the motion, the order is eight lines, which merely state the

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threaten to interfere with the rightful decision of the case.").

fact that the order is granted and include the language quoted above.

While the order does provides extensive analysis about why the district court ruled the way it did, in doing so, the order suggests that this reasoning was communicated to defendant and thus put counsel on sufficient notice to warrant striking an answer. (*See, e.g.,* "Clear Violation of Order During Cross-Examination of Dr. Jorg Rosler," 16 App. 3691-92.) As it turns out, however, the court during trial never expressed most of the order's hindsight justifications. For example, the following is the entire colloquy that occurred with respect to Dr. Jorg Rosler on the second day of trial:

> Q. Do you know anything about what happened to Jenny Rish and her passengers in this accident?
>
> MR. EGLET: Objection, irrelevant, Your Honor. Pretrial motion on this.
>
> THE COURT: It is. Sustained.

(7 App. 1605.)

Sometimes, the order invents colloquies that never actually happened. On page 10 (16 App. 3690), the order refers to a conference outside the presence of the jury at which defendant argued that plaintiffs had opened the door with respect to the order *in limine* by referring to the incident as a "crash." According to the order, the district court "noted" several things and made a specific "finding" about what plaintiff had and had not discussed in opening statement. Based on this

"finding," the order concludes that "Defendant was clearly and unequivocally on notice that such a defense was precluded." (*Id.*) At trial, however, the court did not actually make any findings. The court did not "note[]" anything. The court did not express anything to defendant, "clearly and unequivocally" or otherwise. To the contrary, after the court heard argument, its entire pronouncement on the subject was: "The motion is denied." (7 App. 1489.)

C. The Order Improperly Analyzes the *Young* Factors

1. The degree of willfulness of the offending party

The order starts with the premise, from *BMW*, that "some sort of sanction" is appropriate "if the Order is specific in its prohibition and the violation is clear." (O at 26:19.) The court then makes two assumptions. First, it deems the order *in limine* specific and the violation clear. As set out above, these conclusions flew in the face of the considerable consternation about the meaning and the confines the order. Second, the order assumes intent merely from the repeated occurrences. (O at 28-29.) But intent cannot be inferred simply from an act. Nor can repeated occurrences demonstrates real willful disobedience under the circumstances of this case, set out above.

2. The extent to which the non-offending party would be prejudiced by a lesser sanction

The order does not analyze whether something less could remedy *prejudice* to plaintiffs. Instead, it rationalizes the sanction "to curb the Defendant's

violations" of prior orders. (16 App. 3709:6-8.) This reasoning confuses the deterrence and remedial goals of sanctions, while this factor focuses only on remedying prejudice. There is no prejudice here that calls for the ultimate sanction.[20]

3. The severity of the sanction of dismissal or default relative to the severity of the discovery abuse

Even on this critical point, the order concentrates on the alleged continuous violations. (16 App. 3710:16-17.) Repetitious is not the same as severe, however. If each comment individually does not support a sanction, it is error to conclude that the cumulative effect calls for the sanction. *Bean v. Landers*, 450 S.E. 2d 699 (Ga. Ct. App. 1995) (reversing new trial order). *See also*, *Grosjean v. Imperial Palace,* 125 Nev. 349, 212 P.3d 1068, 1079 (2009). Sanctions must "relate to the claims which were at issue in the discovery order which is violated…." *Young*, 106 Nev. at 92, 787 P.2d at 780. Extreme sanctions should only be used in extreme situations, such the destruction of necessary evidence. *Nevada Power*, 108 Nev. at 645, 837 P.2d at 1359. In this case, the sanction is disproportionate under the circumstances.

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[20] The order also surmises that plaintiffs were prejudiced because the jury saw that "Plaintiffs were repeatedly preventing the jury from hearing about the significance of the impact…." (16 App. 3709:21.) This argument does not justify a mistrial, let alone an ultimate sanction. A limiting instruction would suffice in this situation, as the matter withheld from the jury—in this case, the facts of the accident—did not constitute some vile or scandalous matter, such as some infamous "prior bad act"

(continued)

4. Whether any evidence has been irreparably lost

The order does not address this factor. (16 App. 3710:13-14.)

5. The feasibility and fairness of alternative, less severe sanctions

Again, the order focuses on the alleged violations of the order, rather than the ability to have a trial fairly resolve the merits.

6. The policy favoring adjudication on the merits

The order sidesteps this factor, reciting cases involving discovery abuses and concluding that violations of orders are equally egregious. This is not a thoughtful analysis of the applicability of the ultimate sanction in this case, however.

7. Whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney

The order ignores this factor.

8. The need to deter both the parties and future litigants from similar abuses.

Again, the order concentrates on the notion that the district court cannot allow litigants to disregard orders. Although punishment and deterrence are legitimate purposes for sanctions generally, they do not justify trial by sanctions. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991) (citations omitted). A "sanction imposed for its deterrent effect must be calibrated

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or the availability of casualty insurance.

to the gravity of the misconduct." *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996).

Striking the answer was too severe under the circumstances. This Court should remand for a new trial.

PART TWO:

THE ISSUES TO ADDRESS IF THIS COURT DOES NOT GRANT A NEW TRIAL

If this Court reverses the sanction striking defendant's answer and allows this case to go to trial, the issues in this part do not need to be addressed.

V.

THE DAMAGES WERE EXCESSIVE

The district court followed the inappropriate sanction with an excessive damages award. The general damages, $2,518,761, are more than 12 times the $194,391 awarded for medical expenses. (16 App. 3810.) The disproportion reflects passion and prejudice.

A. Where the Court Sanctions a Defendant by Striking its Answer, the Award of Damages Still Must Be Fair and Reasonable

An award of compensatory damages cannot be punitive in nature, even if it follows a default entered as a sanction. In addition, this Court will reverse a default judgment that does not follow from the evidence.

1. This Court Carefully Reviews Default Judgments to Assess if the Award is Reasonable and Substantiated by the Evidence

In an appeal from a judgment following a default, this Court gives "careful review of the record" to determine whether "the damage award is reasonable and accords with the principles of due process." *Foster v. Dingwall*, 126 Nev. ___, 227 P.3d 1042, 1050 (2010). The damages must also be "proven by substantial evidence." *Id*. at 1050 (despite affirming the sanction, the court applied "careful review" of the damages). *See also, Hoff v. Canal Refining Company, Inc.*, 454 So.2d 188, 196 (La. Ct. App. 1984) (reducing award of general damages in district court's default judgment by 83%). Nothing in Nevada law "entitl[es] a nonoffending party to unlimited or unjustifiable damages simply because default was entered against the offending party." *Dingwall*, 227 P.3d at 1050.

2. Disproportionate Awards Suggest Passion and Prejudice

Appellate courts review a district court's judgment following a default for *indicia* of "passion, prejudice or corruption," similar to judicial scrutiny of jury verdicts for passion and prejudice. *Uva v. Evans*, 147 Cal.Rptr. 795, 800 (Cal. Ct. App. 1978). This case demonstrates such prejudice.

A common indication of passion and prejudice is a disproportion between the award of general damages and the amount of medical expenses.[21] *Uva v.*

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[21] As a practical matter, special medical damages are "a crude estimate of the degree of injury and suffering." Paul D. Rheingold, *How Values Are Attached to*

(continued)

Evans, 147 Cal.Rptr. 795, 800 (Cal. Ct. App. 1978); *Anthony v. G.M.D. Airline Services, Inc.*, 17 F.3d 490, 493 (1st Cir. 1994) (reversing $566,765 judgment on jury verdict because award of general damages was "grossly disproportionate" to $3,000 of medical expenses). For example, an appellate court reversed a default judgment because the award of $30,000 in general damages was "grossly disproportionate," being approximately *12 times* the $2,332 award for medical expenses. *Uva,* 147 Cal.Rptr. at 800. When an award of general damages is so disproportionate to special damages, something is awry.

B. Passion and Prejudice Caused the Excessive Judgment

As discussed above in Part One, the district court overreacted to what it perceived as a violation of its prior order. Plaintiffs stoked the court's anger, and the district court overreacted, when defense counsel demonstrated errors in plaintiff's proposed damages.

1. Defense Raised the Issue that the Requested Award Was Duplicative and Lacked Evidentiary Basis

During the prove-up hearing, the defense demonstrated improprieties in plaintiffs' requested damages. For instance, defendant explained that it was duplicative to award *both* $1,613,552 for pain and suffering *and* another $905,169 for hedonic damages. (13 App. 2919.) *See Banks v. Sunrise Hospital*, 120 Nev.

Cases, § 14:26, MASS TORT LITIGATION. Special damages are considered a "yardstick" for determining other general damages. 23 AM. JUR. PROOF OF FACTS

(continued)

822, 839, 102 P.3d 52, 64 (2004) (permitting "hedonic loss as an element of the general award for pain and suffering"). Defendant also explained that the wife's exorbitant request of $681,296 for loss of consortium was impermissibly based on extrapolation opinion from the hedonic-damages expert. (13 App. 2921.) In addition, the defense noted that plaintiffs had effectively withdrawn their claim for future medical care because the evidence would not support it (13 App. 2919), so any correlated aspect of the future general damages ought to be reduced as well.

2. Plaintiffs Provoked the District Court's Anger

While not responding to the substance of the defense arguments about these damage calculations (13 App. 2923-2929), plaintiffs' counsel presented the righteousness of the party who had "lived by the rules." (13 App. 2927.) Counsel pointedly rekindled the district court's indignation on that subject:

> MR. WALL: …And, of course, they have violated nearly every order that this Court entered before the trial began and as it continued.

(13 App. 2928.) Plaintiffs cynically reminded the district court of the defense's conduct by repeatedly saying the court should "disregard" it: [22]

> And, what I'm asking the Court to do, *despite what they've done in this case*, is to set all of that aside for purposes of establishing what the appropriate damages

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3D §243.

[22] The rhetorical device is not new. Marc Anthony whipped an audience to passion while claiming he was not doing so. William Shakespeare, *Julius Caesar*, Act 3, Scene II.

> are; *set aside every violation of every order* and approach this case, as I know the Court will, to determine damages only on the evidence that's been presented factually in this summation.
>
> * * *
>
> MR. WALL: I admit that *for some who have sat where you sit* that *it may be difficult to disregard the conduct* of one party during the course of a case when it comes time to do that. I'm confident the Court can do that.

(13 App. 2928:19-2929:15 (emphasis added).) Passions invoked, the aim was achieved. The court ignored all infirmities in the request for damages, awarding every dollar that plaintiffs proposed.

Where an excessive judgment results from passion and prejudice aroused by counsel's inappropriate rhetoric, the judgment should not stand. *Lioce v. Cohen*, 124 Nev. __, 174 P.3d. 970 (2008); *DeJesus v. Flick*, 116 Nev. 812, 7 P.3d 459 (2000) (ROSE, C.J., dissenting). Such is the case here.

VI.

THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS FEES

The district court further demonstrated its passion by piling on an excessive award of attorney fees. In fact, the court awarded an hourly rate 2.5 times the "normal" rate of $750.

A district court abuses its discretion in awarding fees that are not "reasonable and justified in amount." *Beattie v. Thomas*, 99 Nev. at 588-89, 668

P.2d at 274. The excessiveness of the $1,078,125 award is especially clear in light of the $431,250 "lodestar" value of the time spent by plaintiff's counsel. (18 App. 4176.) Given the relatively simple nature of this case, awarding even $431,250 would have been an exceptionally high award, notwithstanding the expertise and clout of plaintiffs' counsel. This is not a case that warranted upward modifiers.

A. A $430,000 "Lodestar" Award Would Have Been Generous

Plaintiffs' counsel calculated a lodestar amount of $431,250 for this case. A "lodestar" calculation tallies the number of hours reasonably worked multiplied by a reasonable hourly rate. *See Shuette v. Beazer Homes Holdings Corp*., 121 Nev. 837, 864-65 124 P.3d 530, 548-49 (2005); *University of Nev. v. Tarkanian,* 110 Nev. 581, 591, 879 P.2d 1180, 1186 (1989).

The size of this lodestar calculation stems from the hefty hourly rate of $750 for both Mr. Eglet and Mr. Wall. (18 App. 4173.) There is nothing in the representation required that justified those high rates, however. This was a trial on damages only in a routine motor-vehicle spine-injury claim. Liability was not at issue (12 App. 2882), and plaintiff presented experts well practiced at explaining these types of injuries to juries (8 App. 1715; 9 App. 2109). While appellant does not dispute the experience and clout of plaintiffs' counsel, this was not a case that necessitated that level of experience for plaintiffs to prevail. A thoughtful assessment of all the *Brunzell* factors, including the character of the work to be

done, would not justify even a rate as elevated as $750 per hour. *See Brunzell*, 85 Nev. at 350, 455 P.2d at 33. As such, awarding the $431,250 lodestar amount would have been *more* than fair.

B. This Case Does Not Warrant a Contingency Multiplier

The district court in this case, however, awarded 2.5 times the lodestar figure. (21 App. 4819.) There is nothing extraordinary about this case that would justify such a multiplier.

"The 'lodestar' figure has, as its name suggests, become the guiding light of [federal] fee-shifting jurisprudence." *See City of Burlington v. Dague*, 505 U.S. 557, 559 (1992); *see also Cuzze v. Univ. & Cmty. College Sys*., 123 Nev. 598, 606, 172 P.3d 131, 136-37 (2007) (citing *Dague*). Thus, there is a "strong presumption that the lodestar represents the 'reasonable' fee." *Id*. Because "the lodestar 'is presumed to be the reasonable fee' . . . upward adjustments of the lodestar are appropriate only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts...'" *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air,* 478 U.S. 546, 565 (1986) ("*Delaware Valley I*"), *vacated in part on reh'g,* 903 F.2d 352 (1990). Because lodestar "is the product of a multiplicity of factors ... [*i.e*.,] the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case," multipliers should be

reserved only for exceptional cases that require a quality of representation far exceeding the norm:.

> [A] trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable.

Ketchum III v. Moses, 17 P.3d 735, 746 (Cal. 2001). Most up or down adjustments that might be contemplated are already "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *City of Burlington v. Dague*, 505 U.S. 557, 559; *Ketchum III*, 24 Cal.4th at 1142. "Nor should a fee enhancement be imposed for the purpose of punishing the losing party." *Ketchum III v. Moses*, 24 Cal.4th 1122, 1139, 17 P.3d 735, 746 (Cal. 2001).

Nothing about this case called for "exceptional representation" that "*far exceeds* the quality of representation that would have been provided by an attorney of comparable skill and experience" charging $750 per hour. *Id*. at 24 Cal. 4th 1122, 1139. This case presented no reason to award 2.5 times the lodestar amount.

C. As a General Matter, Contingency Multipliers are Ill-Suited to the Offer-of-Judgment Framework

Plaintiffs argued and the district court agreed that—if plaintiffs do not recover their full contingency fee because Rule 68 allows fees only after the

offer—they should recover a fee with "multipliers" to arrive at an amount approximating a percentage fee. This was error.

Contingency multipliers are usually disallowed in jurisdictions that provide for fees for rejecting an offer of judgment. *See Texarkana Nat'l Bank v. Brown,* 920 F. Supp. 706, 709-10 (E.D. Tex. 1996); *Sarkis v. Allstate Ins. Co*., 863 So. 2d 210, 223 (Fla. 2003). This is, in part, because the policy behind offers of judgment provisions is different from other fee-shifting schemes. Rule 68 and NRS 17.115 are designed to encourage settlement through "penalties." *See Clark v. Lubritz*, 113 Nev. 1089, 1100, 944 P.2d 861 (1997). Allowing contingency mulitpliers only in favor of plaintiffs, however, significantly skews these incentives and creates inappropriate disparity in treatment between plaintiffs and defendants.

In contrast, other fee-shifting statutes, where multipliers are accepted, typically exist to encourage plaintiffs to bring relatively small cases that promote the ends of justice. *See, e.g*., 42 U.S.C. § 1988 (civil rights claims); NRS Chapter 40 (construction defect claims). In such cases, a prominent concern is that the fee award replicate the amount that the plaintiff actually owes to his attorney, or plaintiffs may not bring such claims.

It is not necessary or consistent with the policy behind the offer-of-judgment rule to award significantly more fees to plaintiffs than to defendants. The district court's use of such a multiplier was an abuse of discretion.

PART THREE:

ASSIGNING A DIFFERENT JUDGE ON REMAND

If this Court remands this case, either pursuant to Part One for a new trial or Part Two for determination of damages and fees, it should order that a new judge be assigned to the case.

VII.

THIS COURT SHOULD ASSIGN THIS CASE TO A DIFFERENT JUDGE ON REMAND

Should the Court remand this case, it should also assign a different district court.

A. The Legal Principles on Judicial Disqualification

1. The Code of Conduct Calls for Disqualification when Impartiality may be Questioned

Unlike attorney disqualifications, judicial recusals "may be required on the basis of a mere appearance of impropriety…." *Liapis v. District Court*, 128 Nev. Adv. Op. 39, ___ P.3d ___ (August 9, 2012). Under the Code of Judicial Conduct, a "judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned…." NCJC Rule 2.11(A); *see also* 28 U.S.C. § 455(a). Comment [1] to the rule explains that "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply."

Accord Bauer v. Shepard, 634 F.Supp.2d 912, 948 (N.D. Ind. 2009) ("[T]his general recusal requirement applies whether any of the specific circumstances identified in Rule 2.11 apply."). Federal courts have explained that the use of the words "might reasonably be questioned" in the nearly identical 28 U.S.C. § 455 "clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case." *See, e.g., Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). While bias in the judicial system raises important due process concerns, *Caperton v. AT Massey Coal Co., Inc.*, 556 U.S. 868 (2009), Nevada's Code of Judicial Conduct sets forth a recusal standard even more stringent than the requirements of due process. *See Ybarra v. State*, 127 Nev. ___, 894 P.2d 269, 272 (2011).

2. The Appearance of Partiality Justifies Reassignment

Bias may be actual, or it may consist of the appearance of partiality in the absence of actual bias. *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir.1995); *accord Wolzinger v. District Court*, 105 Nev. 160, 168, 773 P.2d 335, 340 (1989) (reassigning case on remand to "avoid[] a potential appearance of impropriety and further delay occasioned by any future objections to [the prior judge's] participation"). Although judges are generally presumed to be unbiased, an affirmative showing that the adjudicator has prejudged an issue—or reasonably appears to have prejudged an issue—also warrants recusal. *Kenneally v. Lungren*,

967 F.2d 329, 333 (9th Cir. 1992); *accord Leven v. Wheatherstone Condominium Corp.*, 106 Nev. 307, 309, 791 P.2d 450, 451 (1990).

3. The "Duty to Sit" does not Limit Disqualification

This obligation to maintain the appearance of propriety is not foreclosed by a duty of judges "to sit" on their assigned cases. While Rule 2.7 recognizes a duty "to hear and decide matters assigned to the judge," there is an express exception "when disqualification is required by Rule 2.11 or other law." "[T]his apparent 'duty to sit' might seem to temper, if not trample, the duty to recuse on close calls, but Rule 2.7 is nothing more than a tautology." Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification* 52 ARIZ. L. REV. 317, 372-72 (2010). "The purpose of this Rule and the accompanying Comment is not to resurrect a 'duty to sit' that trumps disqualification rules, but simply to emphasize that judges have a duty to do their jobs when they are not properly disqualified." CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 35 (2009); *see generally* Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification--And a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities,* 30 REV. LITIG. 733 (2010). "To the extent that the concepts and rules collide on occasion, the duty of impartiality and mandatory disqualification trumps the more

generalized 'Responsibility to Decide' found in the Code." Jeffery W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 832–34 (2009).

B. Reassignment is Appropriate in this Case

In this case, reassignment is appropriate under the standards.[23] As set out above, the district court ruled for plaintiffs on virtually every point, even on calls that were not seemingly close.

While judicial rulings are not always a basis for reassignment, this is an extreme case. The judge refused to provide guidance about its interpretation of the order *in limine*, going so far as to tell the parties that it was not her responsibility to tell them what they could do under the order. (*E.g.,* 6 App. 1385.) *See Allen v. Rutledge*, 139 S.W.3d 491 (Ark. 2003) (judge exhibited obvious bias toward attorney and repeatedly shut attorney off when attorney sought answers, saying "I'm not up here to answer your questions"). Instead, at plaintiffs' urging, the court, expanded the scope of its order, without notice to defendants, until it extinguished defendant's ability to present *any evidence* relating to the severity—

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[23] *See In re Young*, 943 N.E.2d 1276 (Ind. 2011) (the district court did not meet the standard of Canon 2, which "requires a judge to 'perform the duties of judicial office impartially, competently, and diligently.' Judges must be 'objective and open-minded.' Rule 2.2, comment 1. 'A judge shall perform the duties of judicial office ... without bias or prejudice.' Rule 2.3(A).... A judge shall disqualify himself or herself 'in any proceeding in which the judge's impartiality might reasonably be questioned' including in circumstances when 'the judge has a

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or lack of it—of the accident. Plaintiffs seem to have engaged in these tactics intentionally to obtain a more remarkable recovery without a trial on the merits. This would not be unprecedented, as commentators have noted that some requests for sanctions appear to be a tactical maneuver, instead of a legitimate dispute. Jonathan J. Winn, *Death Penalty Without a Hearing? How the Nevada Supreme Court's Decision in Bahena v. Goodyear Incorrectly Defines Discovery Sanctions and Denies Due Process to Civil Litigations*, 12 Nev. L. J. 486, 487 n.6 (2012) (citing Inst. for the Advancement of the Am. Legal Sys., *Electronic Discovery: A View from the Front Lines 1-2* (2008), *available at* http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf)).

Meanwhile, the district court proved exceptionally susceptible to plaintiffs' objectives, perhaps because of the secret briefs submitted *ex parte* to the court. *Ex parte* briefs are recognized to encourage gamesmanship and confuse the judge with incorrect concepts. *Photovest Corp. v. Fotomat Corp.,* 606 F.2d 704, 710 (7th Cir. 1979). Among the hazards of such briefs are the possibility that the trial judge may prejudge the case and the insidious relationship that develops between the court and the party. *United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984). There is a danger of prejudice whenever *ex parte* contact occurs between the judge and opposing litigants. *Gunether v. C.I.R.*, 939 F.2d 758, 761 (9th Cir. 1991). In

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personal bias or prejudice concerning a party.' Rule 2.11(A).").

addition, *ex parte* communication "involve[s] a breach of legal and judicial ethics." 8B MOORE'S FEDERAL PRACTICE ¶ 43.03[2] at 43-23 (1983) (footnote omitted), cited by *United States v. Earley*, 746 F.2d at 416. *See also, Whitaker-Merrell Co. v. Profit Counselors, Inc.,* 748 F.2d 354 (6th Cir. 1984) ("it is inconsistent with our adversary system for parties to submit and judges to accept *ex parte* trial briefs"). Any such *ex parte* communications "shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding." *Grieco v. Meachum*, 533 F.2d 713, 719 (1st Cir. 1976).[24] Such taint of prejudgment of issues calls for reassignment. *Leven v. Wheatherstone Condominium Corp*., 106 Nev. 307, 791 P.2d 450, (1990) (ordering reassignment "because the district court judge has expressed herself in the premises").

In addition, the district court abdicated its responsibility under *Young* to engage in thoughtful analysis, instead delegating to plaintiffs the preparation of its order justifying the sanction. The prejudice did not end with the ultimate sanction, moreover, as the district court adopted plaintiffs' every contention in awarding damages and fees, even to granting plaintiffs' lawyers over $1,800 per hour. The wholesale adoption of plaintiffs' positions creates an appearance that the court cannot fairly and impartially judge this matter on remand. *See Wolzinger v.*

[24] Since the trial, this Court amended EDCR 7.27 to abolish the practice of *ex parte* briefs. See June 29, 2011 Order in ADKT 461.

District Court, 105 Nev. 160, 168, 773 P.2d 335, 340 (1989) (using discretion to reassign case to "avoid[] a potential appearance of impropriety and further delay").

CONCLUSION

For these reasons, this Court should reverse the district court's sanction and remand for a trial before a different judge.

DATED this 15th day of August 2012.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 20,136 words.

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

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

DATED this 15th day of August 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 15th day of August, 2012, Electronic service of the foregoing APPELLANTS' OPENING BRIEF and APPENDIX shall be made in accordance with the Master Service List as follows:

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