IN THE SUPREME COURT OF THE STATE OF NEVADA

JENNY RISH,
Appellant,

vs.

WILLIAM SIMAO, individually; and CHERYL SIMAO, individually and as husband and wife,
Respondents.

Case Nos. 58504
59208
59423

Appeal from the Eighth Judicial District Court of the State of Nevada,
in and for the County of Clark,
The Honorable Jessie Walsh, District Judge
District Court Case No. A539455

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

This case does not involve any business entities.

Plaintiffs-respondents William Jay Simao and Cheryl Ann Simao have been represented by attorneys at the following firms: (a) Aaron & Paternoster, Ltd.; (b) Mainor Eglet; and (c) Eglet Wall.

DATED this 17th day of January, 2013.

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s/ David T. Wall

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ISSUES PRESENTED FOR REVIEW

I. WHETHER DEFENDANT'S APPELLATE ASSERTIONS REGARDING *YOUNG* WERE WAIVED IN THE DISTRICT COURT OR ARE OTHERWISE NONCOGNIZABLE?

II. ASSUMING *ARGUENDO* THE ISSUE IS COGNIZABLE, WHETHER THE DISTRICT COURT PROPERLY CONSIDERED AND APPLIED THE *YOUNG* FACTORS IN STRIKING DEFENDANT'S ANSWER FOR DEFENSE COUNSEL'S REPEATED AND WILLFUL MISCONDUCT?

III. ASSUMING *ARGUENDO* THE ISSUE IS COGNIZABLE, WHETHER THE DISTRICT COURT MISAPPLIED THE LAW AND/OR IMPROPERLY DEPRIVED DEFENDANT THE OPPORTUNITY TO CONTEST CAUSATION?

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VI. WHETHER THE DISTRICT COURT'S AWARD OF DAMAGES WAS EXCESSIVE OR IT ERRED IN AWARDING ATTORNEY'S FEES?

VI. WHETHER, IN THE UNLIKELY EVENT OF REVERSAL, THE CASE SHOULD BE ASSIGNED TO A DIFFERENT DISTRICT COURT JUDGE?

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STATEMENT OF THE FACTS

I. THE ACCIDENT, THE INJURIES, AND WILLIAM SIMAO'S MEDICAL TREATMENT

Plaintiffs William and Cheryl Simao brought this action in district court asserting claims arising from injuries sustained by William in an automobile accident. AA, v. 1, pp. 1-8.

A. William's Testimony Provides an Overview of the Accident, His Injuries, and His Medical Treatment

At trial, William described the effects of the accident on him, and the course of his medical treatment. On the day the accident occurred, April 15, 2005, William was driving a Ford van while in the performance of his floor- and tile-cleaning duties for his business, Americlean. AA, v. 12, pp. 2806, 2810. He was stopped in traffic when his van was struck from behind by a Chevrolet Suburban, driven by defendant.[1] AA, v. 12, 2812-13. The back of William's head struck a steel cage behind the front seat. AA, v. 12, pp. 2811, 2813.

Before the accident, William was in good health. AA, v. 12, p. 2808. He had occasional migraine headaches (once or twice a month). AA, 12, p. 2808. He had never previously suffered from or been treated for neck pain or left shoulder trapezial pain. AA, v. 12, p. 2808.

Immediately after the accident, William experienced pain in the back of his head and neck. AA, v. 12, pp. 2813-14. Medical personnel arrived at the scene, but William declined to be transported to a hospital by ambulance. AA, v. 12, p. 2814. He called his wife, Cheryl, and asked her to take him to Urgent Care once she came home from work. AA, v. 12, pp. 2814-15. William then

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[1]At trial, defendant admitted that she caused the accident. AA, v. 12, pp. 2775-77.

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drove home and, when Cheryl later arrived, he was experiencing pain in his head, neck, and left elbow. AA, v. 12, p. 2816. It was then that Cheryl drove William to Southwest Medical Urgent Care. AA, v. 12, p. 2816.

Upon arriving at Urgent Care, William informed a physician's assistant that he had been in an accident and hit his head on a steel cage in his van, and that he felt painful pressure from the back of his head to the top of his neck. AA, v. 12, pp. 2816-18. X-rays were taken and William was told he had suffered a bruised head, neck sprain, and left-arm sprain. AA, v. 12, pp. 2816-18. He was prescribed pain medication and told that his pain should subside. AA, v. 12, pp. 2818-19.

William returned to Urgent Care in early May, 2005, because he still had pain in his head and neck. AA, v. 12, p. 2819. He returned again on May 26, 2005; at this time, he was still experiencing the same pain, as well as pain from his neck into his shoulder. AA, v. 12, p. 2821. He was told to keep taking pain medication and to return in six months if his pain persisted. AA, v. 12, p. 2821. William waited approximately four months and again returned in October 2005 because his head and neck pain was getting worse. AA, v. 12, p. 2822. During this entire four-month period, William's pain persisted. AA, v. 12, pp. 2823-24.[2]

After October 2005, William underwent various treatment regimens. He was sent to physical therapy for several months, which did not provide long-

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[2]Defendant disingenuously asserts that, after the initial visit to Urgent Care, William "did not claim any neck or back pain for five months." AOB, p. 2. This is nonsense and defendant's ostensible record references do not support the assertion. As just shown, head and neck pain drove William back to Urgent Care twice in May, 2005. And, though he was instructed to return in six months, he lasted only four because his pain worsened. And, as explained in § I(C), the records reveal that – even during this four-month period – William was still being prescribed pain medication for his injuries.

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term pain relief. AA, v. 12, pp. 2824-25. He then underwent an MRI and was referred to Dr. Patrick McNulty, a Board Certified orthopedic surgeon specializing in spine surgery. AA, v. 8, pp. 1715-16; v. 12, p. 2825. Dr. McNulty first met with William on April 18, 2006. AA, v. 8, p. 1719. Having examined the MRI results, Dr. McNulty explained various treatment options to William, including possible surgery. AA, 12, p. 2825. William was "scared" of the prospect of surgery, so as an alternative treatment plan he underwent injection procedures (described in more detail below) in his neck to treat and determine the exact source of the pain. AA, v. 12, pp. 2825-26. He obtained only temporary relief from these injections. AA, v. 12, p. 2826.

Toward the end of 2007, William met again with Dr. McNulty, who again recommended surgery, which again frightened William. AA, v. 12, p. 2827. To obtain a second opinion, William then consulted with Jaswinder Grover, M.D.,[3] in early 2008, who referred him to Hans-Jorg Rosler, M.D., for pain management.[4] AA, v. 12, p. 2828. Dr. Rosler performed a discography/ discogram on William (discussed below) in August 2008. AA, v. 12, p. 2828. William then returned to Dr. Grover, who informed William that he had problems with his C3/C4 and C4/C5 vertebrae. AA, v. 12, p. 2828. Dr. Grover and William discussed various treatment options, including different injections and surgery. AA, v. 12, p. 2828.

In early 2009, William met yet again with Dr. McNulty, who had reviewed the records of Drs. Grover and Rosler. AA, v. 12, pp. 2829-30. At this time, nearly four years after the accident, William still had unsubsiding pain in the back of his head, neck, and left shoulder. AA, v. 12, p. 2830.

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[3]Dr. Grover is a Board Certified orthopedic surgeon with a subspecialty in spinal disorders. AA, v. 9, pp. 2109, 2113.

[4]Dr. Rosler is a pain management anesthesiologist. AA, v. 7, p. 1526.

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As will be more fully described below, Dr. McNulty performed spine surgery on William in late March, 2009. AA, v. 12, p. 2830. For 11 or 12 weeks following the surgery, William's pain subsided by 50% or more. AA, v. 12, p. 2832. About three or four months after the surgery, when William returned to work, his pain returned to the same parts of his body. AA, v. 12, p. 2832. He stopped taking his pain medications because they made him drowsy and kept him from driving or going to work. AA, v. 12, p. 2835. They also made him irritable and depressed. AA, v. 12, p. 2835.

In 2010, William underwent additional injection therapy, which had little effect. AA, v. 12, p. 2834. In the fall of 2010, he met with Dr. Lee, a spine surgeon. AA, v. 12, p. 2835. About a month before trial, Dr. Lee ordered another MRI and referred William to pain management for more injections. AA, v. 12, p. 2836. At the time of trial, nearly six years after the accident, William had suffered pain almost constantly, since the crash. AA, v. 12, p. 2838.

B. Cheryl Testified Concerning the Adverse Impact of William's Injuries on the Parties' Marriage

Cheryl also testified. Cheryl and William had been married 26 years as of the time of trial. AA, v. 12, p. 2778. According to Cheryl, before the accident William was very active, healthy, and happy. AA, v. 12, p. 2779-80. She had never known him to have neck or shoulder pain before the accident. AA, v. 12, p. 2779. He also had never been hospitalized or had surgery. AA, v. 12, p. 2781.

On the day the accident occurred, when Cheryl took William to Urgent Care, William was experiencing pain in the back of his head, neck, and left shoulder and elbow. AA, v. 12, pp. 2782-83. His pain and stiffness continued after the accident, and his headaches increased. AA, v. 12, pp. 2783-84. His

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condition did not improve despite following Urgent Care's instructions. AA, v. 12, p. 2784. From May 26, 2005 through October 6, 2005, William was in continual pain. AA, v. 12, p. 2787. Yet he continued to work in order to support his family. AA, v. 12, p. 2787.

William's pain affected his relationship with Cheryl, as she described:

> A When you live [with] a person who has chronic pain, they tend to think about their pain all the time. And so that leaves little room to have a relationship with the person that you're having a relationship with. So the focus would be on Bill instead of the two of us. So it made things hard.
>
> Q What if anything did you do about that?
>
> A I did my best when he was upset or would get angry or frustrated to leave so that he could, you know, just kind of be by himself and - - cause I know that he wasn't upset at me. He was upset because he was in pain and not feeling well.
>
> Q Now, were these personality traits different from the way he had been before the accident?
>
> A Yes. They were.
>
> . . ..
>
> Q All right. I want you to tell us how the accident has affected - - well, let me ask this first. Has the accident - - and we talked about some of this today. Has it actually affected your marriage?
>
> A It has.
>
> Q I want you to tell the jury how it's affected your marriage. And let's start with your social life, the things that you would go out and do or otherwise do.
>
> A Well, we used to go out and play video poker. We don't do that anymore. Maybe on occasion, but not like we used to. We used to ride motorcycles and in fact we sold them both in 2007 because Bill couldn't ride them anymore.
>
> Q You each had one?
>
> A Yes, we did.
>
> Q Okay. Was something that the two of you enjoyed?
>
> A Yes, we did.
>
> Q What about - - what about issues of intimacy between the two of you?

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> A Because of the strain on the relationship, because of the changes in his personality, I would say that it's decreased about 50 percent.

AA, v. 12, p. 2790; pp. 2795-96.

C. William's Treating Physicians Give Detailed Accounts of His Injuries, Their Cause, His Medical Treatment and Prognosis

Dr. McNulty testified that, before they met, William had completed a diagram which illustrated the areas of bodily pain. AA, v. 8, p. 1719. Dr. McNulty described the diagram as follows:

> Q Well, the question is can you review this diagram with us and describe the location, character and severity of his pain.
>
> A Sure. So essentially this is a front-back figure which the patient will ideally shade in the painful areas and further describe whether or not it's - - in his case he checked off ache, pins and needles, numbness, stabbing, pressure. So you can see he's basically drawn in the back of the neck extending up to the back of the head going out onto the trapezius or the trapezial regions down into the upper back and in between the central portion of the upper back, what we call the periscapular region. There's also some extension onto the front of the left chest and down the left arm.

AA, v. 8, p. 1720.

Dr. McNulty had also reviewed the first diagnostic MRI taken of William at the C4/5 cervical level and the records of his medical history. AA, v. 8, pp. 1733-39. He described his clinical assessment of William:

> A I stated that he primarily had axial cervical pain; meaning, basically, his neck hurt, which also included his upper back, his head. I specifically addressed the MRI finding of narrowing of that C3-4 nerve exit hole which would classically affect the C4 nerve root; classically that is a pattern of numbness, parethesias tingling that goes on to the front of your chest. I stated he did not have that classic pattern.
>
> But it was also in the context that he was complaining of an entire left arm numbness, tingling, parethesias, and I felt it was important to make out the clear distinction that would not be explained by this narrowing of the nerve exit hole in and of itself.

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AA, v. 8, p. 1741.

To define the precise source of William's pain, Dr. McNulty recommended C4 and C5 selective nerve root block injections. AA, v. 8, pp. 1746-47. Dr. McNulty referred William to Dr. Seibel at the Pain Management Center of Southwestern Medical Associates for the injections. AA, v. 8, p. 1747. On a follow-up evaluation with Dr. McNulty on September 6, 2007, the doctor concluded that William had failed a course of the injection therapy in light of persistent pain. AA, v. 8, pp. 1748-49. Dr. McNulty then recommended another MRI and a C3/4, C4/5 transforaminal epidural steroid injection. AA, v. 8, pp. 1749-50.

Dr. McNulty reviewed the results of William's updated MRI when he saw William on November 13, 2007. AA, v. 8, p. 1751. The MRI showed a cervical disc herniation at C4/5 and foraminal narrowing on the left at C3/4. AA, v. 8, pp. 1751. Dr. McNulty also concluded that a C3/4 and C4/5 epidural injection, which he administered to William on November 16, 2007 into his neck and inside his spinal canal, reliably confirmed that the C3/4 and C4/5 levels were the primary structural causes of William's pain because his symptomology was at least 80% improved during the anesthetic phase of the injection. AA, v. 8, pp. 1754-57.

Dr. McNulty reevaluated William on December 6, 2007, and concluded that William "'failed reasonable conservative measures as a disc herniation foraminal narrowing.'" AA, v. 8, pp. 1757-58. According to Dr. McNulty, "[t]he plan was to proceed with a two-level anterior or front cervical reconstruction." AA, v. 8, p. 1758. William, however, decided to get a second opinion. AA, v. 8, p. 1758. On March 28, 2008, he consulted with Dr. Grover. AA, v. 9, p. 2113. Based on his history, Dr. Grover testified that William began having pain after the accident on April 15, 2005. AA, v. 9, pp. 2114,

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2118-19. He stated:

> Q Okay. Now, what is the clinical significance of the fact that you saw Mr. Simao for the first time almost three years after his motor vehicle accident?
>
> A Well, I think he had been having pain for three years. He had - - you know, the history that he provided to me was that he had been suffering from fairly significant pain, intermittently but at times quite significantly, for a period of three years. So the significance was that it emerged into somewhat of a chronic condition by that time.

AA, v. 9, p. 2114. The pain was in William's neck, shoulder and head. AA, v. 9, p. 2114. William characterized the pain as "aching, penetrating, at times unbearable, and pain that was essentially . . . continuous." AA, v. 9, p. 2115. None of William's treatments made him feel better. AA, v. 9, p. 2116.

After his evaluation, Dr. Grover recommended that William undergo another MRI scan of the cervical spine and some electro-diagnostic studies of the upper extremities. AA, v. 9, p. 2124. He also recommended that William be evaluated by his associate, Dr. Rosler, for C3/4 and C4/5 selective nerve root blocks. AA, v. 9, p. 2124.

Dr. Grover explained his clinical impression of William on May 26, 2008, after his updated MRI, as follows:

> A Well, I think he had persistent neck pain, interscapular pain, suboccipital radiculopathy, with some potential subaxial cervical facet pathology C-3/4 and C-4/5 despite a variety of modalities of treatment that had been instituted to that point.

AA, v. 9, 2125.

Dr. Rosler performed left-sided C4 and C5 selective nerve root blocks on May 10, 1008. AA, v. 9, pp. 2150-51. At the time of William's June 2008 evaluation with him, Dr. Grover determined that William had not obtained any long-term improvement in his pain symptoms from the nerve root blocks. AA, v. 9, p. 2151. Dr. Grover then recommended that a cervical discography be

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performed. AA, v. 9, p. 2153. According to Dr. Grover, discography is "the gold standard set forth by the North American Spine Society by which internal disc disruption is diagnosed." AA, v. 9, p. 2153.

On August 8, 2008, the cervical discography was performed by Dr. Rosler. AA, v. 7, p. 1571. The procedure is dangerous. According to Dr. Rosler, there are potentially serious complications from the procedure, such as discitis (an inflammation of the disc), infection, and bleeding. AA, v. 9, pp. 1570-71. There is also a risk of puncturing the esophagus, trachea, carotid artery, and jugular vein, and potentially injecting dye into the spinal cord, which could be catastrophic. AA, v. 9, p. 1571.

Dr. Rosler began the discography by administering a small amount of sedative to William. AA, v. 7, pp. 1572-73. Using fluoroscopy, he then placed the needles into three discs, at levels C3/4, C4/5, and C5/6, and injected dye into them. AA, v. 7, pp. 1573-74, 1576. The results identified the source of William's pain, as described by Dr. Rosler:

> The results were that the discs at 3/4 level and 4/5 level were, in fact, positive. That means that those discs, by injecting dye into those discs, those discs were causing the patient's usual pain, very severe, very severe - - whereas, the C5/6 disc did not reproduce any pain.
>
> . . ..
>
> [T]he clinical significance is such that the two discs at C3/4 and C4/5, where abnormal pain appearance, in those two discs we're [*sic*] also generating the patient's usual pain. So we basically now narrowed down where's the pain coming from, which also correlates to my previous injection, the selective root block at these levels.

AA, v. 7, pp. 1577, 1580.

Dr. Rosler also obtained a post-discogram CT scan, which showed pain producing, significant tears in the outer layer of two of William's discs. AA, v. 7, pp. 1581, 1583. Dr. Rosler described William's clinical status as of August 28, 2008, when he reevaluated him to review the results of the

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discography:

> The patient's symptomatology has not changed or had not changed at that time. He was still complaining of ongoing severe neck pain, interscapular pain, periscapular pain. He had undergone discography study, which revealed positive provocation at the levels C3-4 and C4-5.

AA, v. 7, p. 15. More than three years after the accident, William had failed "a reasonable course of aggressive medical treatment for his chronic, intractable pain syndrome." AA, v. 7, p. 1591. Dr. Rosler recommended that William follow up with Dr. Grover to discuss more definitive treatment options. AA, v. 7, p. 1591.

Based on William's medical history which demonstrated no symptomology of pain before the accident on April 15, 2005, Dr. Rosler was certain that William's symptoms were more likely than not causally related to the accident. AA, v. 7, pp. 1596-98. Dr. Rosler's conclusions were expressed to a reasonable degree of medical probability. AA, v. 7, p. 1599.

William met with Dr. Grover again on September 2, 2008. AA, v. 9, p. 2158. Dr. Grover diagnosed William with C3/4 and C4/5 internal disc disruption. AA, v. 9, p. 2158. They discussed surgery as an option to help William. AA, v. 9, pp. 2158-59. Dr. Grover believed William was a reasonable candidate for surgery because of the significant, and at times debilitating, intensity of his pain. It was Dr. Grover's conclusion, to a reasonable degree of medical probability, that William's symptoms were directly and causally related to the April 15, 2005, accident. AA, pp. 2160-61.

He explained:

> He had an injury where he had an acute probable hypertension injury to his neck, banged that back of his head on the metal cage of the vehicle, and hit the - - and then bent - - and then his neck probably went forward, symptoms for which he was clearly evaluated a few hours after the event at the Urgent Care, documenting these findings, symptoms at that time which were significant enough for the physician assistant evaluating him to order a scan of his head and his brain to make [*sic*] they didn't

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> miss anything correctly, and symptoms which persisted since that time for several years, despite all reasonable and appropriate treatments, including physical therapy, anti-inflammatories, muscle relaxants, and some periodic injections into the spine. So I think if you look at the chronology and development of the patient's symptoms, take into consideration the identified pathology, which, you know, is not a clear brown herniated disc, but there's abnormalities which have taken some more sophisticated analysis over several years to really isolated [*sic*], I think, within a reasonable degree of medical probability, that event, you know, caused his problems for which he was treated.

AA, v. 9, p. 2161.

On cross-examination, Dr. Grover acknowledged that the medical records do not expressly document that William complained of neck pain from the date of the accident to October 6, 2005. AA, v. 10, p. 2187. However, the records still demonstrate that his pain persisted continually from the date of the accident. AA, v. 10, p. 2187. Again, Dr. Grover explained:

> Yeah, I'd be happy to explain that. I believe that absolutely, because Mr. Simao complained of neck pain immediately after the accident. He followed up periodically with the nurse practitioners, but really was told by the nurse practitioner, after initial evaluation of the scans of the head, you can take some muscle relaxants and pain - - but you really don't need to come back and see us for six months.
>
> . . ..
>
> They actually treated for his neck pain, because they continued to prescribe for him ibuprofen and muscle relaxants. which were never prescribed to him before, and those are not medications that are prescribed ordinarily, as far as I know, for migraine headaches. But they are medications that are prescribed for patients that have neck injuries such as Mr. Simao experienced and that which he complained of immediately afterwards. So I believe that he had these ongoing problems.

AA, v. 10, pp. 2187-88.

On November 4, 2008, William met again with Dr. McNulty. AA, v. 8, p. 1758. At this time, William's pain had increased. AA, v. 8, p. 1759. On February 13, 2009, Dr. McNulty administered additional C3/4 and C4/5 epidural injections, which confirmed those levels as significant pain generators. AA, v. 8, p. 1765. Dr. McNulty then recommended anterior

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cervical reconstruction surgery, C3 to C5. AA, v. 8, p. 1768. He performed the surgery on March 25, 2009. AA, v. 8, p. 1773.

The surgery was commenced with an incision to the left side of William's neck. AA, v. 8, p. 1774. Dr. McNulty then exposed William's spine next to his carotid artery, removed the discs, and replaced them with structural cages. AA, v. 8, p. 1774. A plate was then installed and screws placed into the vertebrae. AA, v. 8, p. 1775.

At his first post-operative visit with Dr. McNulty on April 14, 2009, William was experiencing significant improvement. AA, v. 8, p. 1777. This, however, did not last. Eleven months later, on March 23, 2010, William was noted as having left-sided neck pain and trapezial and periscapular radiation. AA, v. 8, p. 1784. Pursuant to Dr. McNulty's recommendation that the patient return to pain management, William was administered nerve root blocks and injections on April 20, 2010, June 10, 2010, September 2, 2010, and November 11, 2010. AA, v. 8, pp. 1788, 1791-92, 1793, 1794. As of November 23, 2010, William still had left-sided neck pain. AA, v. 8, pp. 1785-86. It was Dr. McNulty's conclusion to a certainty that as a result of the April 15, 2005, accident, William injured the C3/4 and C4/5 levels of his neck and that also as a result he has intractable post-operative neuropathic pain syndrome. AA, v. 8, p. 1820. ***Thus, all three of William's treating physicians concurred that his symptoms were caused by the subject accident.***

II. DEFENSE COUNSEL'S REPEATED, INTENTIONAL MISCONDUCT

In her opening brief, defendant all but ignores the misconduct that impelled the district court to strike her answer.[5] As will be discussed in detail

[5]In fact, Rish attempts to "turn the tables" by accusing plaintiffs' trial (continued...)

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below, the district court had entered an order *in limine* prohibiting defendant from introducing any evidence, or otherwise insinuating, that the accident was of low impact and thus incapable of causing William's injury. However, defendant's counsel embarked on a campaign to systematically and repeatedly violate the order.

A. Defense Counsel Engages in Three Successive, Obvious, and *Identical* Violations of the Order *in Limine*

Defendant's contention that her counsel was somehow confused about the order *in limine* strains credulity when one recognizes that his first three violations of that order involved identical misconduct. First, during defendant's cross-examination of Dr. Rosler (one of plaintiffs' medical experts), the following occurred:

> Q [By Mr. Rogers] 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.

AA, v. 7, p. 1605.

Then, three days later (on March 25, 2011) during cross-examination of Dr. McNulty (also testifying as a treating physician and a medical expert), defense counsel asked exactly the same improper question, which prompted another objection and a bench conference outside the jury's presence:

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[5](...continued)
counsel of taking "turns making strident (and profane) requests that the jury be sent out on recess so that they could make a motion outside the presence." AOB, p. 20. She then quotes the transcript of a bench conference that occurred on March 31, 2011, right after Mr. Rogers violated the order *in limine* for the umpteenth time. But the first two remarks that the reporter attributes to Mr. Eglet, were actually uttered by Mr. Rogers. This is one of many places in which the reporter's transcript is deficient.

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Q [By Mr. Rogers] Okay. Do you know anything about the folks in Jenny Rish's car?

MR. EGLET: Objection. Relevance.

THE COURT: What's the relevance, Mr. Rogers?

MR. ROGERS: Well - -

MR. EGLET: May we approach, Your Honor?

THE COURT: Yes.
[Begin Bench Conference]

MR. EGLET: We've already been down this road. Whether anybody was injured or not in Jenny Rish's car or their condition is not relevant. He's already tried this with, I think, Dr. Rosler and the objection was sustained. It's the same thing, Your Honor, it's not relevant.

MR. ROGERS: I'm not sure how it is not relevant. Is this something that there's an order?

MR. EGLET: It doesn't matter whether it's order - -

MR. WALL: What would be the relevance other than some argument of minor impact.

MR. EGLET: Yeah, the fact - -

MR. WALL: Whether Jenny Rish received - -

MR. ROGERS: The relevance is that if one of them were injured or were not, that would be relevant or probative to whether the others were injured.

MR. EGLET: No, no it's not. No it's not. That's the whole point.

THE COURT: Sustain the objection.
[End Bench Conference]

AA, v. 9, pp. 2047-48.

On the same day, during cross-examination of Dr. Grover (yet another of plaintiffs' medical experts), defense counsel for a third time, and with full knowledge of its impropriety, attempted to ask the very same question:

Q [By Mr. Rogers] You know the Plaintiff wasn't transported by ambulance.

A Yes, sir.

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Q You know that Jenny Rish - -

MR EGLET: Objection, Your Honor.

BY MR. ROGERS:
Q - - was lifted from the scene.

THE COURT: Sustained.

MR. EGLET: Your Honor, move to strike - -

THE COURT: Sustained.

MR. EGLET: - - and ask Mr. Rogers to be admonished for violating another court order.

THE COURT: The jury will disregard Mr. Rogers' last question regarding Ms. Rish.

AA, v. 10, p. 2184.

B. After Three Identical and Obvious Violations of the Order *in Limine,* the Court Warns Defense Counsel About Sanctions

After defense counsel's third identical violation of the order *in limine,* another bench conference ensued outside the presence of the jury. During this conference, plaintiffs' attorney (Mr. Wall) stated:

> Despite the ruling of the Court, despite the arguments we've had outside the presence on the issue of minor impact, in opening statement and with each and every witness so far, there's been a question which leads to a conclusion or an argument on minor impact, whether the Defendant was injured in - - whether the doctor knows whether the Defendant was injured in the accident, which could only potentially be relevant to some argument that the accident was too minor to have caused injury, because she wasn't injured.
>
> Each time we've objected. Each time the Court has sustained the objection. I would look for, frankly, some guidance from the Court on what we can do from here out, because it - - I can only assume that it will continue to occur. And so, I don't know whether a progressive sanction that we'd ask for, that there would be a warning from the Court about before this should happen again. . . ..
>
> . . ..
>
> As we discussed a week ago - - I'm not sure - - the motion precluded any argument, any testimony suggesting or supporting a minor impact defense, because they had no expert to say that this accident could not or would not have caused the injuries

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> complained of. It was a global prohibition of arguing or trying to elicit evidence to support an argument of a minor impact defense. The order itself says that their request - - our request to preclude Defendant from raising a minor or low impact defense is granted.

AA, v. 10, pp. 2207-09.

In response, the district court placed defense counsel on notice that it would consider sanctions if further violations occurred:

> THE COURT: I think you're right, and I think that the defense is on notice. I think the order is very clear. I think it clearly has been violated. I was really surprised to hear a question posed of this witness regarding Ms. Rish when the Court sustained a previous question regarding Ms. Rish of another witness and ruled that that was not relevant. So I was really surprised to hear that very same question posed as to Ms. Rish. Yes, I realize she was in the accident, but she's not the reason why we're here.
>
> MR. ROGERS: Well - -
>
> THE COURT: Whether she was injured is not the reason we're here in this trial. So I don't know. It does seem to be at this point to be deliberate, Mr. Rogers. And so, I'm inclined to agree that you're on notice. The Court will consider progressive sanctions. I don't know what they will be. I hope there won't have to be any assessed. But I don't know what else to do to try to get you to comply with the Court's previous orders.

AA, v. 10, pp. 2209-10.

C. After a Defense Expert Later Violates the Order *in Limine*, the Court Imposes a Lesser Sanction, Instructing the Jury that the Accident's Impact is Irrebuttably Presumed Sufficient to Have Caused William's Injuries

Meanwhile, on the previous day, prior to the testimony of defendant's expert, Dr. Fish, plaintiffs' counsel questioned him on voir dire outside the presence of the jury, in order to confirm that he understood the court's order *in limine*. AA, v. 8, pp. 1869, *et seq*. During this examination, the district court informed Dr. Fish that it could impose a number of sanctions if he violated the order. AA, v. 8, p. 1872, ll. 10-16. Then plaintiffs' counsel inquired of Dr. Fish's intentions regarding compliance with the orders *in*

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limine:

> MR. EGLET: I don't think it was hazy. I specifically said - - and this is a very separate court order on this - - that this witness, no Defense witness, is permitted to talk about the mechanism of injury.
>
> You can talk about that fact that there was a motor vehicle accident, that it was a rear-end motor vehicle accident. But they don't get to suggest or imply that it was minor, that it was a tap, that it was low speed, that there was not much property damage, or anything like that, or suggest that it was such a small accident that these injuries couldn't have occurred.
>
> BY MR. EGLET:
> Q Do you under - - that is the court ruling. Are you going to comply with that?
>
> A Absolutely I comply [*sic*] with it. I just don't understand it, that's all.
>
> . . ..
>
> Q Okay. We talked about the nature of the impact of the subject collision, including any reference or comment or testimony that the impact was minor, low speed, a tap, low property damage, anything like that. Do you understand that?
>
> A Yes.
>
> Q Okay. Okay, and you are precluded from offering any opinions regarding biomechanics or the nature of the impact of the motor vehicle collision in this case. Do you understand?
>
> . . ..
>
> MR. ROGERS: The biomechanical question that Plaintiff's counsel just asked about really is the same as the minor impact and photographs and property damage statement. The doctor's aware and we'll comply.
>
> Q You can't talk about the opinions and what kind of forces you think were imparted in the crash or anybody's body. Do you understand that?
>
> A I understand that.

AA, v. 8, pp. 1882-86.

Notwithstanding the district court's clear warnings about sanctions during the March 25 bench conference; and despite the admonitions specifically directed to Dr. Fish during his March 24 voir dire; and contrary to the doctor's assurances that he would abide by the order *in limine*, Dr. Fish

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violated such order when he testified a few days later. On March 28, 2011, when defense counsel asked Dr. Fish to explain the basis of his opinion that the accident did not cause plaintiff William's pain, Dr. Fish responded:

> A Well, it's based on multiple factors. It's based on the actual - - looking at the images of the MRI. It's looking at the discogram and the results of the discogram. It's looking at the pattern of pain. It's looking at the notes that were taken of the events that happened ***and it's knowing about the accident itself***. [Emphasis added.]

AA, v. 10, p. 2308. Plaintiffs' counsel objected and another bench conference ensued. AA, v. 10, pp. 2308, *et seq*. During the bench conference, plaintiffs' counsel argued that Dr. Fish's response regarding the circumstances of the accident violated the order *in limine* because its only purpose was to suggest, without expert testimony, a minor impact was not sufficient to cause plaintiff's injuries. AA, v. 10, p. 2314. As a sanction, plaintiffs' counsel requested that, although striking the defendant's answer was warranted, the trial court should give the jury an irrebuttable presumption instruction – consistent with *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990) – that the accident was sufficient to cause the type of injury William claimed to have been suffered. The district court agreed and instructed the jury as follows:

> Furthermore, ladies and gentlemen of the jury, 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.

AA, v. 10, p. 2334.

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D. In Spite of Imposition of the Lesser Sanction, Defense Counsel Blatantly Violates the Order *in Limine* Yet Again, Impelling the District Court to Strike Defendant's Answer

Undeterred by this sanction, defense counsel then knowingly violated the order *in limine* yet another time. During cross-examination of William Simao on March 31, 2011, defense counsel asked:

> Q Now, we've heard several times through this trial that an ambulance came to the scene.
>
> A Yes.
>
> Q And you declined treatment.
>
> A I did.
>
> Q And the paramedics didn't transport anyone from Mrs. Rish's car?
>
> MR. WALL: Objection. Your Honor - -
>
> THE COURT: Sustained.

AA, v. 12, p. 2857.

Another bench conference then took place, during which plaintiffs' counsel stated that the only purpose of the question concerning the people in defendant's car was to raise an inference that the accident was too minor to cause injuries, which was another violation of the court's order. AA, v. 12, pp. 2862-63; 2865. Counsel explained:

> And in the face of that, in the face of already receiving that sanction [the irrebuttable presumption instruction], he just wildly goes at it, ignoring this Court's order, showing this Court absolutely no respect whatsoever for the orders that you've made in this case, and clearly, consciously, intentionally violating that order by asking our client the exact same question. He hasn't addressed that at all, because he can't. He can't address that because he knows it's the same question and so he wants to say to the Court, "Well, I just don't understand the order. I just don't understand what I can ask and I can't ask." Everybody here is clear on that except him. It's not believable, It's not credible.

AA, v. 12, p. 2868.

Counsel for plaintiffs then requested that the district court impose the

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sanction of striking defendant's answer based on defense counsel's repeated, willful violations:

> I have never, ever seen a lawyer in this state or any other state simply refuse, refuse, to comply with the Court's clear rulings and orders in this case. There is not a case I've ever seen that cries out more for the most severe sanction. This is it. This answer at this point must be struck, this jury dismissed, and we move on to finishing - - because we've just about finished it - - proving up our client's damages in front of this Court.

AA, v. 12, pp. 2869-70.

Again, the district court agreed. Citing the applicable factors in *Young, supra* (factors to which defendant did not object), the district court orally concluded that striking defendant's answer was warranted. AA, v. 12, pp. 2870, *et. seq*.

E. The District Court Memorializes its Oral Ruling in a Written Order

1. The Written Order Identifies the Multiple Instances of Misconduct

In a subsequent Decision and Order Regarding Plaintiffs' Motion to Strike Defendant's Answer, entered on April 22, 2011, the district court elaborated on defense counsel's deliberate, willful misconduct which justified striking defendant's answer. AA, v. 16, pp. 3628-62. The court identified the following violations of the order *in limine* with respect to the "minor impact" defense, as well as other orders:

(1) In opening statement defense counsel presented to the jury a power point slide referencing a motorcycle accident in which William Simao was involved in 2003 (AA, v. 7, p. 1501); this conduct violated an order *in limine* entered on March 11, 2011 (AA, v. 3, pp. 595-597);

(2) In opening statement and cross-examination of Dr. McNulty, defense counsel violated an order *in limine* precluding evidence that the case was "attorney driven" or was a "medical build-up" case (AA, v. 7, p. 1500; v.

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9, p. 2065);

(3) As described above, defense counsel violated the order *in limine* precluding testimony concerning a minor- or low-impact defense, entered on March 8, 2011, in his cross-examination of Drs. Rosler, McNulty, and Grover;

(4) As also described above, Dr. Fish violated the same order *in limine* when he testified that the basis of his opinion included "knowing about the accident itself;"

(5) Dr. Fish also violated the order *in limine* concerning low impact during cross-examination by suggesting that the accident was not "significant" (AA, v. 10, p. 2293.

2. The Court Gives its Written Analysis of the *Young* Factors

In its Decision and Order, the district court further explained why striking the answer was warranted under the *Young* factors.[6] AA, v. 16, pp. 3654-60.

a. *Young* Factors: The Degree of Willfulness

Concerning the degree of willfulness of the violations, the court stated:

> These violations of the Court's Order precluding the "minor impact" defense are considered by this Court to be even more egregious given the numerous hearings outside the presence of the jury wherein this Court repeatedly and unequivocally prohibited the areas of inquiry subsequently broached by counsel for Defendant. Those hearings include:
>
> I. Hearing on the Plaintiffs' Motion in Limine, March 1, 2011;
>
> ii. Hearing outside the presence of jury to discuss "minor impact," March 18, 2011;
>
> iii. Hearing outside the presence of jury to discuss whether the Plaintiffs opened the door to "minor impact" defense during Opening Statement, March 21, 2011;
>
> iv. Objection sustained to counsel for Defendant's question of Dr. Rosler regarding injuries to occupants of the

[6] *See* 106 Nev. at 93, 787 P.2d at 780.

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Defendant's vehicle, March 22, 2011;

v. Objection sustained to counsel for Defendant's question of Dr. McNulty regarding injuries to occupants of the Defendant's vehicle, March 25, 2011;

vi. Objection sustained to counsel for Defendant's question of Dr. Grover regarding injuries to occupants of the Defendant's vehicle, March 25, 2011;

vii. Hearing outside the presence of the jury to discuss "minor impact" defense and the Plaintiffs' notice of seeking progressive sanctions, March 25, 2011;

viii. Objection sustained to counsel for the Defendant's question of Dr. Fish which resulted in response citing to the nature of the impact, March 28, 2011;

ix. Hearing outside the presence of the jury to discuss "minor impact" defense and the Plaintiffs' request for irrebuttable presumption instruction for the Defendant's continued violations of Court's Order, March 28, 2011;

x. Objection sustained to counsel for the Defendant's question of Plaintiff William Simao regarding injuries to occupants of the Defendant's vehicle, March 31, 2011;

At the hearing on the Plaintiffs' oral motion to strike the Defendant's Answer, this Court characterized the continuing violations as having been "willful, deliberate, [and] abusive," (RTP March 31, 2011, pp. 111-12), based on the fact that counsel for Defendant "refuses to comply with this Court's rulings" (RTP March 31, p. 112). Particularly disturbing was counsel for Defendant's systematic insistence upon asking the Plaintiff and three separate treating doctors whether they were aware of any injuries to passengers in the Defendant's vehicle, despite this Court's clear preclusion of that inquiry after each instance of misconduct.

AA, v. 16, pp. 3655-57.

b. *Young* Factors: Prejudice to Non-Offending Party if an Alternative, Lesser Sanction Were Imposed

As to the extent to which the non-offending party would be prejudiced by a lesser sanction, the court noted that the prior lesser sanction of the irrebuttable presumption instruction had no effect on defense counsel. AA, v. 16, p. 3657. The court further determined that plaintiffs would be prejudiced

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by a lesser sanction:

> Given the frequency of the Defendant's violations of this Court's Order precluding a "minor impact" defense, all of which occurred in front of the jury, the Plaintiffs were prejudiced by having this issue repeatedly brought to the jury's attention. In the eyes of the jury, the Plaintiffs were repeatedly preventing the jury from hearing about the significance of the impact when in fact this Court had determined that a "minor impact" defense was unavailable to the Defendants given the lack of evidence (and expert testimony) to support such a defense. In reliance upon this Court's Order granting the Plaintiffs' Motion in Limine, the Plaintiffs had released their biomechanical expert and had neither mentioned his name nor offered his opinion in Opening Statement. The Plaintiffs had relied on this Court's Order that no "minor impact" defense would be presented to the jury. The Plaintiffs had further relied on the fact that such ruling would be upheld by this Court during the course of trial. The unfair prejudice to the Plaintiffs was clearly shown. *See*, [*Bayerische Motoren Werke Aktiengesellschaft v.*] *Roth* [127 Nev. ___, 252 P.3d 649 (Adv.Op.No. 11; 04/14/11)].
>
> This Court also recognizes the prejudice to the Plaintiffs in making objection after objection to the Defendant's inappropriate questions. "[W]hen . . . an attorney must continuously object to repeated or persistent misconduct, the non-offending attorney is placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point." *Lioce v. Cohen*, 174 P.3d 970, 981 (Nev. 2008).

AA, v. 16, pp. 3657-58.

c. *Young* Factors: Relative Severity of Sanction and Violations

Next, with respect to the severity of striking the answer relative to the severity of the abuse, the court noted the "pervasive and continuous nature of the violations" and concluded that a litigant who disagrees with an order may seek redress on appeal but may not continue violating the order at trial. AA, v. 16, p. 3658.

d. *Young* Factors: Feasibility of Alternative, Lesser Sanction

Concerning the feasibility and fairness of an alternative, lesser sanction, the court again pointed out that defense counsel continued to violate its orders after a lesser sanction had previously been imposed. AA, v. 16, pp. 3658-59.

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e. *Young* Factors: Policy Favoring Adjudication on Merits

Regarding the policy favoring adjudication on the merits, the district court said:

> As set forth above, this Court opted for less severe sanctions for all of the violations prior to March 31, 2011, in large measure because of the policy favoring adjudication on the merits. Even the irrebuttable presumption instruction given as a lesser, alternative sanction did not prevent the Defendant from presenting any defense that they actually had evidence to present. It is also worth noting that the Defendant had already agreed on the record not to challenge liability for the accident.

AA, v. 16, p. 3658. The court also cited Nevada case law upholding the striking of pleadings for discovery violations and reasoned that "[t]he willful and deliberate violation of this Court's Orders are equally as egregious as any discovery violations, especially given the fact the repeated violations in the instant case occurred in front of a jury." AA, v. 16, pp. 3659-60.

f. *Young* factors: The Need for Deterrence

Finally, as to the need to deter parties and future litigants from similar abuses, the court noted the need to protect the integrity of the judicial system from the types of abuses which occurred in this case:

> Given its inherent powers derived from the Nevada Constitution and strong case precedent, this Court simply cannot allow litigants to openly and deliberately abuse the litigation process by disregarding Orders of the Court when convenient or tactically advantageous to do so, especially when unfair prejudice to the non-offending party results. Such an allowance would render courts of justice meaningless in the State of Nevada.

AA, v. 16, p. 3660.

III. AFTER STRIKING DEFENDANT'S ANSWER, THE TRIAL COURT CONDUCTS A PROVE-UP HEARING

After the district court struck defendant's answer and discharged the jury, plaintiffs requested a prove-up hearing on the issue of damages under NRCP 55. AA, v. 12, pp. 2874-75. The district court conducted the hearing,

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without additional witnesses, on April 1, 2011. Notably, the trial court allowed defendant to participate in the hearing. *See, e.g.*, AA, v. 13, pp. 2917, *et seq*. At the hearing, plaintiffs' counsel reviewed the history of William's persistent pain, injuries, and prolonged medical treatment, which began on the date of the accident and continued to the time of trial. AA, v. 13, pp. 2907, *et seq*. Plaintiffs requested an award for past medical expenses for William in the amount of $194,390.96 based on the parties' stipulation as to this amount as memorialized in exhibit 1. AA, v. 13, pp. 2912-13. For past pain and suffering, plaintiffs requested an award of $473,040. AA, v. 13, pp. 2913-14. For William's future pain and suffering, plaintiffs requested an award of $1,140,552 based on his life expectancy of 31 more years;[7] this figure works out to seven cents per minute. AA, v. 13, p. 2914.

Plaintiffs also requested an award of hedonic damages (loss of enjoyment of life) for William in the amount of $905,169 and loss of consortium for Cheryl in the amount of $681,286 based on the testimony of plaintiffs' economist. AA, v. 13, pp. 2914-15. Finally, plaintiffs requested an award of attorneys' fees. AA, v. 13, pp. 2916-17.

On September 23, 2011, the district court entered final judgment in plaintiffs' favor which awarded them the amounts of damages set forth above. AA, v. 21, pp. 4827-29. In addition, the judgment awarded plaintiffs attorney's fees in the amount of $1,078,125 and costs of $99,555.49, plus interest, for a total judgment in the amount of $5,086,785.55. AA, v. 21, p. 4828.

Additional facts will be set forth in the portions of the Argument to which they pertain.

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[7]At trial, plaintiffs' economist testified that William's life expectancy, based on a 47 year old male, was 31 years. AA, v. 11, pp. 2654; 2678-79.

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ARGUMENT SUMMARY

SUMMARY OF RESPONSE TO PART ONE: One of defendant's primary appellate contentions, *i.e.,* that the district court erred in applying *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990), was not preserved below. Therefore, her long-winded, strained diatribe concerning the "dichotomy" she perceives in the Nevada law of sanctions can and should be disregarded. And such contention is utterly without merit, in any event. This court's cases, including *Young*, and authorities from other jurisdictions clearly establish that a district court has the power to strike a defendant's answer as a sanction for abusive litigation tactics, even if the abuses occur at trial rather than in discovery.

Also not properly before this court is defendant's next contention, *i.e.*, that there was no misconduct that would have warranted a mistrial or new trial. Inasmuch as neither party moved for a mistrial or new trial based on such misconduct, defendant's argument is a nonjusticiable "red herring." It is also insupportable. Contrary to her wild accusations, the record irrefutably establishes that the order *in limine* clearly prohibited all witnesses, not just experts, from giving testimony suggesting that the impact of the accident was too minor to have caused William's injuries. Thus, defendant misleads when she claims that the order was unclear or that there was some secret "expansion" of such order.

Defendant also waived in the district court her assertion that plaintiff was required to show prejudice before she could be sanctioned for repeatedly and intentionally violating the order *in limine*. Again, the assertion was never made below. And, again, the contention is devoid of merit to boot. Where a litigant's misconduct compromises the integrity of the judicial machinery, that party cannot escape imposition of sanctions by requiring his opponent to prove

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any further prejudice.

Nor can defendant evade the sanctions by arguing on appeal, as she does vociferously, that the district court erred in entering the order her counsel repeatedly and intentionally violated. Litigants and their counsel are bound by orders entered by the district court, unless and until they can seek their reversal through reconsideration or appeal. They are not free to disregard the orders of the trial court and then justify their contumacious behavior by challenging the wisdom of the rulings with which they disagree.

Improperly extending her noncognizable assault on the district court's order *in limine*, defendant asserts that the district court improperly extended this court's decision in *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008), thus ordering an "automatic exclusion of percipient witness testimony" and causing entry of an "unworkable and unfair" order. This appellate concoction bears no resemblance to anything that actually occurred in the trial court.

Finally, this court should also reject defendant's complaint that she was entitled to a hearing on factual issues related to the *Young* factors. In the first place, she never requested such a hearing and, therefore, like most of defendant's other appellate contentions, this assertion was not preserved below. Additionally, the record is replete with evidence bearing on the *Young* factors and, thus, a hearing would have been superfluous. The record also affirmatively establishes that: (1) the district court adequately explained its reasoning, both in open court and in its written order; (2) its order was not "misleading," as defendant misleadingly argues; and (3) the court gave careful, correct, and express consideration to the *Young* factors.

SUMMARY OF RESPONSE TO PART TWO: The record plainly reveals that the district court carefully considered the issue of damages, after

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a dispassionate review of the evidence – and was not, as defendant contends, animated by passion and prejudice. And substantial evidence clearly supports the awards of damages for William's past and future pain and suffering. Additionally, the award of hedonic damages is consistent with this court's case law and does not involve any duplication of the award for pain and suffering. Finally, the court should disregard defendants unsupported and unarticulated contention that an economist cannot testify to the value of damages for loss of consortium. Even if defendant had properly developed the argument in her opening brief (and she did not), it is utterly without merit.

Defendant's contention that a contingency multiplier cannot be used in assessing the amount of fees under Rule 68 and NRS 17.115 is precluded because she did not make the assertion below. In fact, her only trial court attack on the use of a contingency multiplier was the inconsistent assertion that it could not be used in conjunction with an hourly rate that recognized the skill level of plaintiffs' trial counsel. Because the contingency multiplier compensates counsel employed pursuant to a contingency fee agreement for advancing his services and for the increased risk of nonpayment, it can be and was properly applied in arriving at a reasonable award of attorney's fee under Rule 68 and NRS 17.115.

SUMMARY OF RESPONSE TO PART THREE: There should be no new trial in this case and, thus, there is no need to consider defendant's frivolous claim that Judge Walsh should be removed from the case on remand. Moreover, the record affirmatively refutes defendant's claims of bias, which consist of nothing more than a rehash of her other meritless appellate complaints. Finally, matters of disqualification of a trial judge for bias must be determined initially in the district court.

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ARGUMENT

RESPONSE TO DEFENDANT'S PART ONE: STRIKING DEFENDANT'S ANSWER WAS PROPER

I. THE DISTRICT COURT PROPERLY CONSIDERED AND APPLIED *YOUNG* IN STRIKING DEFENDANT'S ANSWER DUE TO DEFENSE COUNSEL'S REPEATED AND WILLFUL MISCONDUCT

In her opening brief, defendant challenges the district court's application of *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 722 (1990), by arguing that *Young* is limited to misconduct occurring during discovery and is not appropriate authority for imposition of sanctions (much less striking an answer) for misconduct that occurs during trial. AOB, pp. 26-35. This argument is fatally flawed for a variety of reasons.

A. Defendant's Argument Regarding the Applicability of *Young* Was Waived Below and Is Improperly Raised for the First Time on Appeal

It is a well settled and firmly established principle that an appellant may not raise an issue for the first time on appeal. *See, e.g., Bower v. Harrah's Laughlin*, 125 Nev. 470, 479, 215 P.3d 709, 717 (2009) (a point not urged in the trial court, unless it goes to jurisdiction of that court, is deemed waived and will not be considered on appeal, citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). When plaintiffs asked the district court to consider the *Young* factors, defense counsel did not assert below that *Young* should not be considered in deciding the issue of sanctions. *See, e.g.*, AA, v. 10, pp. 2315, *et seq*.; v. 12, pp. 2870, *et seq*. For this reason, defendant is precluded from asserting the argument on appeal for the first time.

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B. *Young* And its Progeny Are Not Limited to Misconduct Which Occurs During Discovery, But Rather Establish that Trial Courts Have Inherent Authority to Strike an Answer for Misconduct Occurring During Trial

In her opening brief (at pp. 29-30), defendant asserts:

> 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* [*v. Cohen*, 124 Nev. 1, at 13-16, 174 P.3d 970, 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 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 [*sic*] prejudice to the moving party. *Lioce*, 174 P.3d at 982-87.
>
> The Court addressed similar issues in [*Bayerische Motoren Werke v. Roth*, 127 Nev ___, 252 P.3d 649 (Adv.Op.No. 11; 4/14/11)] 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.

Defendant's baseless and strained interpretation is devoid of merit. Contrary to defendant's assertion, Nevada case law does not establish two separate methodologies for the imposition of sanctions based on the stage of litigation in which misconduct occurs. Although *Young* involved dismissal of a complaint and entry of a default judgment for fabrication of evidence during discovery, nothing in *Young* suggests that such a sanction is unavailable for in-

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trial misconduct. In fact, *Young* supports the opposite conclusion. In upholding the sanction in *Young*, this court stated:

> Two sources of authority support the district court's judgment of sanctions. First, NRCP 37(b)(2) authorizes as discovery sanctions dismissal of a complaint, entry of default judgment, and awards of fees and costs. Generally, NRCP 37 authorizes discovery sanctions only if there has been willful noncompliance with a discovery order of the court. *Fire Insurance Exchange v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 913 (1987). The court's express oral admonition to Young to rectify any inaccuracies in his deposition testimony suffices to constitute an order to provide or permit discovery under NRCP 37(b)(2). Second, ***court have "inherent equitable powers to dismiss actions or enter default judgments for . . . abusive litigation practices."*** *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987) (citations omitted). Litigants and attorneys alike should be aware that these powers may permit sanctions for discovery ***and other litigation abuses*** not specifically proscribed by statute. [Emphasis added.]

106 Nev. at 92, 787 P.2d at 779. Since "litigation" encompasses all phases of a lawsuit,[8] it necessarily follows that *Young* is not limited in its application as defendant contends.

Plaintiffs' argument is further supported by *Chevron Chemical Co. v. Deloitte & Touche*, 501 N.W.2d 15 (Wis. 1993). There, Chevron sued Deloitte alleging negligence and misrepresentation based on its failure to notify Chevron that it had withdrawn an audit report of a fuel supply company's financial statements, which contained an error showing that the supply company was making a profit when it was not. Chevron was a major trade creditor of the supply company, which later filed for bankruptcy. During trial, Deloitte's counsel, among other things, made certain improper statements in front of the jury, causing Chevron to move for entry of judgment as a sanction. The trial court took the motion under advisement and the case went to the jury, which returned a verdict in favor of Deloitte.

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[8]Litigation is "[t]he process of carrying on a lawsuit." Black's Law Dictionary, p. 1017 (9th ed. 2009).

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Thereafter, the trial court considered and granted Chevron's motion for entry of judgment against Deloitte. On appeal, the Wisconsin Supreme Court affirmed, concluding that, "the entry of judgment as a sanction for Deloitte's unprofessional, aggravated, persistent, and contemptuous disregard of the orders of the circuit court is appropriate." *Id*. at 22.

The court in *Deloitte* began its analysis by describing the trial court's reasoning in imposing the sanction of judgment against the defendant:

> Next, the court addressed Chevron's motion for the entry of judgment as a sanction for Deloitte's misconduct. Noting that its prior rulings on the misrepresentation and damages issues were based on the record and the evidence, the court concluded:
>
> > But I will note that the entry of judgment as a sanction for counsel's misconduct would also be appropriate on this record. The record speaks for itself, and I won't attempt to be all inclusive, but . . . there were several areas of misconduct. Defendant concedes there was misconduct, but denies the impact on the jury. But the evidence of the impact is the verdict itself. That verdict is not sustained by the evidence in this case and is only explained as a result of misconduct.
>
> The court then spoke of violations of the sequestration order, the "intentional misrepresentation as to the availability of Mr. Nelson" [a witness]; repeated violations of a local rule governing arguments on objections; inappropriate outbursts; the leveling of charges against opposing counsel in front of the jury; and the mischaracterization of the contents of exhibits. The court then said:
>
> > I recognize that granting judgment would have been a very drastic remedy, but drastic remedies are necessitated by repeated and flagrant disregard for court orders. The conduct on this record is sufficient to merit granting of a new trial, ***but that would reward the defendant for misconduct.*** And here such a sanction is not necessary because the evidence sustains the verdict for the plaintiff. [Emphasis added.]
> >
> > . . .. My expectation is that attorneys follow the rules as established by the Court and the relevant statutory rules and procedures and, when counsel don't, that's not acceptable, and there must be sanctions for them.

Id. at 19.

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Continuing, the Wisconsin Supreme Court discussed the nature of a court's authority to impose sanctions for attorney misconduct:

> Sanctions for attorney misconduct both penalize the offender and deter future misconduct. *National Hockey League v. Met. Hockey Club*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976); *Johnson* [*v. Allis Chalmers Corp.*], 162 Wis.2d [261] at 282-83, 470 N.W.2d 859 [(1991)]. The authority to impose sanctions is essential if circuit courts are to enforce their orders and ensure prompt disposition of lawsuits. *See id.* at 274, 470 N.W.2d 859.
>
> Courts have statutory and inherent authority to impose sanctions for failure to comply with procedural statutes or rules and for failure to obey court orders. *See id*, at 273-74, 470 N.W.2d 859. Chevron relies, correctly we believe, on the authority provided by secs. 805.03 and 804.12, Stats., and the inherent authority courts have to enter judgment as a sanction in a case like this.
>
> We recently discussed an analogous sanction, that of dismissal of the plaintiffs' case. *Johnson*, 162 Wis.2d 261, 470 N.W.2d 859. We held that dismissal may be imposed as a sanction regardless of whether the opposing party has been prejudiced by the noncompliance and regardless of whether the party is responsible for the noncompliance of its attorney. *Id*. at 266, 470 N.W.2d 859. We noted that because the sanction of dismissal is harsh, it should not be considered in the absence of egregious behavior. We said we would uphold dismissal as a sanction if there is a reasonable basis for determining that the noncomplying party's conduct is egregious and there is no clear and justifiable excuse for the party's noncompliance. *Id*. at 274-75, 470 N.W.2d 859.

Id. at 20.

Johnson was overruled in part in *Industrial Roofing v. Marquardt*, 726 N.W.2d 898, 910 (Wis. 2007), insofar as it could be interpreted as concluding that the sanction of dismissal of a complaint with prejudice is warranted based on attorney misconduct even when the client is blameless. But *Industrial Roofing* is inapposite here. The sanction here at issue was not dismissal of a complaint with prejudice. The sanction was to strike defendant's answer. Since defendant admitted liability, the sanction was much less severe than dismissal of a complaint with prejudice. Additionally, the conduct of defense

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counsel in knowingly violating the court's order which gave rise to the sanction is imputed to defendant. *See Taylor v. Illinois*, 484 U.S. 400, 416-17, 108 S.Ct. 646, 656-57 (1987) (argument that preclusion sanction based on attorney's willful misconduct was unnecessarily harsh and that it is unfair to visit the sins of lawyer upon client had no merit); *Link v. Wabash*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390 (1962) (defendant is deemed bound by acts of his lawyer-agent and is considered to have notice of all facts which can be charged upon attorney); *Lange v. Hickman*, 92 Nev. 41, 43, 544 P.2d 1208, 1209 (1976) (notice to attorney is in legal contemplation notice to his client; attorney's neglect is imputed to client and client is held responsible for it).

Nevada case law is not inconsistent with *Deloitte*. For example, in *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 124, 676 P.2d 1318, 1320 (1984), this court noted that it may impose sanctions such as striking a brief, dismissing an appeal, or finding a confession of error when it perceives a lack of regard for its rules or decisions.

Defendant's reliance on *Roth* and *Lioce* in support of her "dichotomy" theory is equally as misplaced as her reliance on *Young*. In *Roth*, the plaintiff, who was injured in an auto accident while a passenger, sued the driver of the vehicle and the vehicle's manufacturer. The jury returned a verdict in favor of plaintiff against the driver, and in favor of the manufacturer against the plaintiff. The plaintiff moved for a new trial as to the manufacturer under NRCP 59(a)(2) based on misconduct of the prevailing party. Specifically, the plaintiff argued that the manufacturer's lawyer intentionally violated an order *in limine* during closing argument when he made two objected-to statements about the plaintiff's nonuse of a seatbelt. The district court granted the motion not only based on these two statements, but also on statements the defense lawyer made about the seatbelt nonuse during opening statement, to which

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there were no objections. On appeal, this court reversed. Its discussion centered primarily on the standards which apply to a motion for new trial based on attorney misconduct. *See* 127 Nev. at ___, 252 P.3d at 656. Similarly, in *Lioce,* the court discussed the standards that district courts are to apply when deciding a motion for new trial based on attorney misconduct during closing argument. 124 Nev. at 14, 173 P.3d at 978.

Defendant argues that *Roth* and *Lioce* somehow apply to bar application of the *Young* factors in cases involving attorney misconduct occurring during trial because *Young* was not discussed in either case. AOB, pp. 29-30. She is woefully mistaken. Her argument completely overlooks the fact that none of the plaintiffs in *Roth* or *Lioce* requested entry of a default judgment against the defendants based on *Young*. Since they did not do so, there was no need for these courts to address the applicability of the *Young* factors in cases involving misconduct at trial. The issue simply never arose.

Nor is there any language in *Roth* or *Lioce* which suggests that this "court's cases establish a dichotomy . . . [f]or pre-trial discovery violations . . . [and f]or alleged in-trial misconduct before a jury . . ." or that "[t]he Court did not make this distinction by happenstance." AOB, p. 30. No such distinction was ever mentioned or made in *Young*, *Roth*, or *Lioce*.

In light of the foregoing, defendant's argument that the alleged dichotomy makes "common and constitutional sense" fails. AOB, pp. 31-34. The argument erroneously assumes that a dichotomy exists, but it does not. Moreover, in cases such as this, application of a dichotomy of sanctions which would bar striking an answer for repeated, intentional in-trial attorney misconduct, but allow the grant of a new trial or mistrial, would make no sense at all. As noted by the trial court in *Deloitte*, although such repeated and flagrant misconduct is sufficient to warrant granting of a new trial, "that would

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reward the defendant for misconduct." 501 N.W.2d at 19.

Additionally, defendants's bizarre interpretation would violate fundamental principles of fairness, convenience, and judicial economy. Defendant's answer was struck on the tenth day of a jury trial. Numerous witnesses, including experts, had testified. To hold that the matter should be remanded for a new trial under these circumstances would not only reward defense counsel for misconduct but also constitute a huge waste of money and judicial resources. It would also create unnecessary inconvenience for witnesses and emotional distress for plaintiffs. *See* NRCP 1 (rules of civil procedure should be construed and administered to secure just, speedy, and inexpensive determination of every action); *Honaker v. Mahon*, 552 S.E.2d 788, 798 (W.Va. 2001) (court cautioned trial courts to be vigilant against misconduct of defense attorneys in violating court's evidentiary rulings in attempt to "flush a losing case down the drain at plaintiff's expense.").

Defendant's assertion that other, lesser sanctions are available and should be used in this case is also totally unavailing. AOB, pp. 33-34. *See Young*, 106 Nev. at 92, 787 P.3d at 781 (dismissal need not be preceded by other less severe sanctions). Contrary to defendant's assertion that "the correct ultimate remedy [was] . . . a new trial" under NRCP 59(a)(2) (*see* AOB, p. 33), striking the answer was entirely appropriate in this case given defense counsel's intentional and repeated disregard of the court's order. Defense counsel is in no position to dictate to the court which sanctions are available for such misconduct.[9]

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[9]Further, it must be recalled that the district court tried lesser sanctions, which proved completely ineffective. The court sustained objections to questions asked in violation of the order *in limine*, it instructed the jury to disregard evidence elicited in violation of the order, and it gave

(continued...)

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Defendant further contends, erroneously, that the requirement in *Young* – that the sanction imposed must relate to the claims or defenses stricken – was not satisfied in this case, and that striking her answer was, therefore, unconstitutional. AOB, p. 36. To the contrary, defense counsel's repeated, incorrigible violations of the order *in limine* were intended to improperly undermine plaintiffs' case by suggesting to the jury that William Simao's injuries could not have been caused by a low-impact accident; therefore, the sanction was directly related to defendant's attempt to assert a baseless defense and served a deterrent purpose as well. *See Foster v. Dingwall*, 126 Nev. ___, ___, 227 P.3d 1042, 1049 (Adv.Op.No. 6; 02/25/10) (entries of default are proper where they are necessary to demonstrate to future litigants that they are not free to act with wayward disregard of court's order, and conduct of party evidences willful and recalcitrant disregard of judicial process).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN STRIKING DEFENDANT'S ANSWER FOR DEFENSE COUNSEL'S DELIBERATE, WILLFUL, BLATANT, AND REPEATED VIOLATIONS OF THE CLEAR TERMS OF THE ORDER *IN LIMINE*

After arguing that the appropriate sanction in this case should have been a mistrial or new trial, defendant next argues that there was no misconduct at trial justifying a mistrial or new trial. AOB, pp. 37, *et seq*. This argument is not properly raised in this appeal. Plaintiffs did not move for a mistrial or new trial in the district court. Defendant's argument is therefore academic and nonjusticiable.[10]

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[9](...continued)
an instruction establishing an irrebuttable presumption. None of these measures had the slightest effect on defense counsel's misconduct.

[10]*See Oak Grove Inv. v. Bell & Gossett Co.*, 99 Nev. 616, 625, 668 (continued...)

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A. From the Outset, it was Clear that the Order *in Limine* Applied to *All* Witnesses, not Just Experts

Insofar as defendant's argument can be construed as a challenge to the sanction of striking her answer, it is utterly meritless. Defendant attempts to challenge the imposition of sanctions for violation of the order *in limine* by contending that the order was limited to testimony of expert, not lay, witnesses. She further contends that the order did not give clear notice to defendant concerning what evidence was allowed or not allowed at trial and that the district court refused to clarify that order. AOB, pp. 37-49. The record plainly refutes this argument.

In the motion *in limine*, plaintiffs requested that "[c]ounsel for defendant, defendant, defendant's expert, Dr. Fish, ***and all other witnesses*** will refrain from referencing or insinuating that 1) the subject motor vehicle accident [w]as a 'low' or 'minor' impact 2) that the dynamics of the crash were insufficient to result in the injuries or medical care of Plaintiff." AA, v. 2, p. 396; emphasis added. At the hearing on the motion, defense counsel did not make any assertion that the motion was limited only to expert testimony, nor did he request clarification concerning fact witnesses. AA, v. 3, pp. 525, *et seq*. After hearing argument, the district court stated, "the motion is granted in its entirety." AA, v. 3, p. 532. The district court's written order granting the motion *in limine* stated that "**IT IS HEREBY ORDERED** that Plaintiff's request to preclude Defendant from Raising a 'Minor' or 'Low Impact'

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[10](...continued)
P.2d 1075, 1080 (1983) (where district court did not rule on issue of damages in order granting summary judgment, argument concerning damages was abstract and not properly before court on appeal), *overruled in part on other grounds, Calloway v. City of Reno*, 116 Nev. 250, 264, 993 P.2d 1259, 1268 (2000).

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Defense is **GRANTED**." AA, v. 3, p. 600. This necessarily precluded defendant from eliciting testimony from ***any*** witness suggesting that the impact was too minor to cause plaintiff's injuries, as was expressly requested in the motion.

B. Accordingly, Plaintiffs Did Not Seek to "Expand" the Order *in Limine* in Their Properly Submitted, Confidential Trial Memorandum

Defendant is also patently in error in asserting that plaintiffs "in their secret trial memorandum, asked the court ***to expand*** its order to cover not just expert testimony but also lay witnesses." AOB, p. 41; emphasis in original. In the confidential trial brief, plaintiffs stated:

> Defense counsel's only purpose to introduce testimony from the Defendant, and or other lay witnesses, as to the actual impact that occurred is to create speculation regarding whether or not the subject impact could have caused the medical conditions being claimed in this case. Because of the rank speculation that would occur should a "minor impact defense" be introduced, this Court has specifically excluded the same from trial and has prohibited Defendant medical expert witnesses from testifying regarding the impact. If Defendant's medical experts (who arguably have some understanding of the effect a minor impact can have on the human body) are prohibited from testifying or suggesting that the subject impact was "minor" given the prejudice that would befall Plaintiffs, then certainly all lay witnesses, including the Defendant herself, should be precluded from testifying to the same.

AA, v. 13, pp. 2971-72. Since plaintiffs had previously requested in their motion *in limine* that defendant, her expert, and "all other witnesses" be precluded from testifying about low impact, the same request in the confidential trial brief was not an improper "expansion" of the motion or order.

Thus, as just demonstrated, the plaintiffs did not, in their confidential trial memorandum, seek to "expand" the scope of the order *in limine*. So even if there was some procedural impropriety in submitting the trial memorandum (and there was not), the claimed prejudice that defendant has identified is illusory.

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Second, as noted by plaintiffs (AA, v. 13, pp. 2940-41), the trial brief was filed in conformity with the procedure outlined in EDCR 7.27, which – at the time in question – provided:

> Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memoranda of points and authorities prior to the commencement of trial by delivering one unfiled copy to the court, without serving opposing counsel of filing the same, provided that the original trial memoranda of points and authorities must be served upon opposing counsel at or before the close of trial.

Defendant does not contend that plaintiffs violated EDCR 7.27. Rather, she contends that reversal is required because plaintiffs ***followed the rule***.

This court has rejected the only two appellate challenges to have been based on this former version of EDCR 7.27.[11] In *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 65 P.3d 245 (2003), one person was killed and another catastrophically injured when they sustained carbon monoxide poisoning from a pleasure boat manufactured by defendant. Plaintiffs brought a products liability action and, after a jury trial resulted in a defense verdict, appealed from the adverse judgment. Among the arguments made by plaintiffs was that the district court erred in accepting ex parte briefs pursuant to EDCR 7.27. Notwithstanding that this court reversed the defense verdict on other grounds and remanded the case for a new trial, it elected not to consider the appellants' contention regarding EDCR 7.27. *Id*. at 110, n. 25, 65 P.3d at 251, n. 25. Obviously, if the court had been concerned about the propriety of the rule, it would not have remanded the case and left the district court free to apply it again.

And in *Olivero v. Lowe*, 116 Nev. 395, 995 P.2d 1023 (2000), the

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[11]As defendant points out, this court has since amended EDCR 7.27 such that service of the trial memorandum must now be contemporaneous with its submission to the court.

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appellant contended that reversal was required because the respondent had filed a "blind" brief pursuant to EDCR 7.27, but had failed to serve it within the time prescribed by the now-superceded rule. This court agreed that service was late, but found that the "error in the proceedings [did] not compel reversal because the error would not have affected the outcome of the trial." *Id*. at 402, 995 P.2d at 1028. As has been demonstrated, plaintiffs' confidential trial memorandum did not "expand" the scope of the order *in limine* and, accordingly, defendant fails in her attempt to show that the outcome of the trial was affected.

C. Defendant's Contention that the Order *in Limine* was Unclear is Without Merit

Defendant's argument about alleged confusion and failure to clarify the order *in limine* is not only meritless, it is disingenuous. Defendant does a grave disservice to this court by attempting to portray defense counsel as a hapless victim, deprived of guidance, and by failing to present a full and accurate depiction of his misconduct that impelled the district court to strike the answer. *See In re Marriage of Fink*, 603 P.2d 881, 886 (Cal. 1979) (appellant's briefing was manifestly deficient where bulk of appellant's argument concerning lack of substantial evidence to support judgment was based on highly selective recitation of record and appellate cited only evidence favorable to his position, ignoring all to the contrary).

As set forth in detail above, defense counsel essentially admitted he understood the order during the voir dire of defendant's medical expert. *See* Statement of the Facts, § II(C). And the record otherwise plainly reveals defendant's trial counsel had specific knowledge that the order *in limine* barred testimony of any witness suggesting or insinuating that the accident was too low of an impact to cause plaintiff's injuries. Despite such knowledge, defense

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counsel repeatedly and intentionally defied and ignored the district court's order, often in substantially identical ways, and disregarded the trial court's warnings and its sustaining of plaintiff's objections. Defense counsel's conduct was deliberate and contumacious, and no less sanctionable than the conduct of defense counsel in *Deloitte*, *supra*.

Defendant's opening brief is deficient in light of the facts set forth herein. It also mischaracterizes the record. For example, defendant states that, "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" and that "the order in limine related only to expert testimony." AOB, p. 38. This is simply not true. The district court did not exclude lay evidence about the "scene" (*i.e.*, the location) of the accident. The district court precluded testimony from "all witnesses" about the nature of the accident, consistent with plaintiffs' request in their motion. Accordingly, defense counsel knowingly violated the clear terms of the order when he asked three of plaintiffs' medical witnesses, and Mr. Simao, if any occupants of defendant's vehicle were injured, as the only possible relevance of such questions was to suggest low impact. And even assuming that the order *in limine* had been restricted to expert witnesses (an assumption that would be demonstrably incorrect), defense counsel still violated the order when he asked ***three*** medical experts if anyone in defendant's vehicle was injured. These violations by themselves would justify the imposition of sanctions.

Defendant further contends – again, erroneously – that, "[t]he district court permitted a short argument on the motion, during which the court expressed a clear understanding that the plaintiffs sought exclusion of <u>expert</u> testimony under *Hallmark*," and that "the district court refused to broaden its order to limit fact witnesses." AOB, p. 39, 40; underscoring in original. As

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previously noted, plaintiffs requested in the motion *in limine* that experts and "defendant . . . and all other witnesses" be precluded from testifying about low impact. AA, v. 2, p. 396. Moreover, the "clear understanding" of the district court during one of the arguments on the motion was the exact opposite of what defendant claims in her brief. ***Prior to the commencement of trial***, counsel and the court had the following discussion:

> THE COURT: Okay. Thank you. I appreciate the brief argument.
>
> 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. 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.***
>
> MR. WALL: ***Well, she can't testify that it was a minor impact.***
>
> THE COURT: ***Right.***
>
> MR. WALL: All right.
>
> THE COURT: ***Right.*** But I don't know what else she may say. I don't know.
>
> . . .
>
> 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.***

AA, v. 6, pp. 1382-84; our emphasis.

Defendant also misleads the court when she states that, when trial began, she knew only that the court "had issued an order that, by its express terms, only precluded expert testimony . . .." AOB, p. 43. To the contrary, based on what occurred at the ***pretrial*** discussion as quoted above, and plaintiffs' specific request in the motion *in limine*, defense counsel had to have known that the order was not so restricted. Additionally, the acknowledgment by

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defendant that the order applied to experts is an admission that defense counsel violated the order each time he asked plaintiffs' three medical experts if they knew if the occupants of defendant's vehicle were injured.

Defendant next seems to argue that a waiver of any assertion of misconduct occurred because, during defense counsel's opening statement to the jury, he told the jury, without objection, that no one was injured in the accident (which is untrue) and that defendant would testify that the accident occurred in "stop-and-go, bumper-to-bumper traffic." AOB, p. 43. This contention is refuted by *Roth*, 127 Nev. at ___, 252 P.3d at 659, where this court stated:

> Whether a motion in limine preserves error depends on whether the error alleged is in compliance with or violation of the court's ruling on the motion. *See* 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence* § 5037.16, at 804-05 (2d ed. 2005). As in *Richmond* [*v. State*, 118 Nev. 924, 59 P.3d 1249 (2002)], where the admission or exclusion of evidence at trial is in harmony with the order in limine, the alleged error at trial is the same as the error alleged in the ruling on the motion. 118 Nev. at 929, 59 P.3d at 1253. Therefore, because there is no new error, the motion in limine properly preserves the error claim. ***However, when "the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal."*** Fed.R.Evid. 103 advisory committee's comment, *reprinted in* 2 *McCormick on Evidence* Appendix A (5th ed. 2003) (citing *United States Aviation Underwriters v. Olympia Wings*, 896 F.2d 949, 956 (5th Cir.1990)). This is because the violation of the prior ruling introduces a new error into the case. Thus, an objection is required when an opposing party or the court violates an order in limine. [Emphasis added.]

Here, plaintiffs objected at trial when, in violation of the order in limine, defendant attempted to elicit testimony from plaintiffs' medical experts and William Simao which would have suggested to the jury that the accident was low impact. (*See*, Statement of the Facts, *supra*.) Therefore, no waiver

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occurred.[12]

Similarly unavailing is the assertion that plaintiffs' counsel acted consistently with defendant's alleged misunderstanding. To support this assertion, defendant refers to a question asked by plaintiffs' counsel to an expert, in which counsel stated that the patient was "'the driver of a large van which was rear ended at an unknown speed, nearly stopped, on the freeway.'" AOB, p. 45. Defendant fails to explain how this question could in any way be consistent with an understanding that evidence of low impact was relevant, or how it concerned "the nature and extent of the accident." AOB, p. 45. The question actually concerned William's medical history after the accident. AA, v. 7, pp. 1644-45. Furthermore, as indicated by counsels' timely objections to defense counsel's improper questions, plaintiffs' counsel clearly understood at all times that evidence of low impact was irrelevant and inadmissible.

D. Defendant's Argument, that "the District Court Did Not Find and Plaintiffs' Have Not Shown Prejudice," is Improperly Raised on Appeal, and is Also Meritless

Defendant contends:

> To justify a new trial, ***as opposed to some other sanction***, unfair prejudice affecting the reliability of the verdict must be shown. *BMW* [*v. Roth*], 252 P.3d at 656 (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.

AOB, pp. 49-50 (emphasis in original).

This assertion is improperly raised on appeal for two reasons. First, since plaintiffs did not seek a new trial, the issue is irrelevant and

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[12]Acceptance of defendant's contention would place an untenable burden on aggrieved litigants by requiring them to protect their opponents from 'over-promising' to the jury in opening statement. Obviously, imposition of such a requirement would be absurd.

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nonjusticiable. *Oak Grove Investors, supra*. Second, the argument was not raised below when plaintiffs requested sanctions under *Young*. AA, v. 10, pp. 2315, *et seq.*; v. 12, pp. 2870, *et seq.* The argument was therefore waived. *Bower, supra*.

Additionally, in the context of entry of default as a sanction for repeated, intentional misconduct, as occurred in this case, the existence of prejudice to the non-offending party is not a requirement. As explained in *Henderson v. Duncan*, 779 F.2d 1421, 1425 (9th Cir. 1986):

> In this case, although no specific showing of prejudice to defendants is made, ***the integrity of the district court is involved***. In this case, the district court did warn explicitly of the consequences of counsel's dilatory behavior, and imposed a schedule for discovery and the filing of the pretrial order. ***Where counsel continues to disregard deadlines, warnings, and schedules set by the district court, we cannot find that a lack of prejudice to defendants is determinative.*** The record in this case reflects clearly that inordinate delay in the expeditious resolution of litigation, and prejudice to the court's need to manage its docket were being exacerbated by counsel's actions. On this record, therefore, we find no abuse of discretion in the district court's dismissal with prejudice. [Emphasis added.]

See also, Temora Trading Co. v. Perry, 98 Nev. 229, 230-31, 645 P.2d 436, 437 (1982) (affirming striking of defendant's answer and entry of default judgment as sanction for defendant's willful failure to comply with court's order with no discussion of requirement of prejudice).

Defendant's citation of *Cassim v. Allstate Ins. Co.*, 94 P.3d 513 (Cal. 2009), in support of her argument concerning the alleged lack of prejudice (AOB, p. 51) is completely misguided and misplaced. The alleged misconduct at issue in *Cassim* does not even begin to compare with the flagrant conduct which occurred in this case. In *Cassim*, "the offending argument was fleeting, comprising just two sentences in the reporter's transcript of a closing argument that covers more than 150 pages." *Id*. at 526. (footnote omitted). It was "a minuscule part of the entire 10-week trial." *Id*. Accordingly, *Cassim* is wholly

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inapposite.

E. Defendant May Not Challenge the Correctness of the Order *in Limine* in this Appeal as Justification for Defense Counsel's Intentional Misconduct

In her opening brief, defendant improperly seeks reversal by asserting the following:

> There is a third—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. . . ..
>
> 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 in 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. Cohen*, 124 Nev. 19, 174 P.3d 981(2008) (court must consider both correctness of the trial ruling and the effect upon a fair trial before ordering a new trial).

AOB, pp. 52-53.

In other words, it is defendant's wholly untenable position that her defense counsel could carte blanche ignore and deliberately violate the order *in limine*, without risking the sanction of striking the answer, because he believed the district court erred in issuing the order.

Again, this argument was not made below and may not be raised on appeal. AA, v. 10, pp. 2315, *et seq.*; v. 12, pp. 2870, *et seq.* And, once again, the argument is bereft of merit.

The authorities cited by defendant in support of her argument do not hold that "a district court can impose severe sanctions for violation of an order only if the order was actually correct, ..." AOB, pp. 52-53. In *Glover v. District Court*, the issue was whether the district court violated a criminal defendant's double jeopardy rights when it granted a mistrial and ordered him

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to stand trial a second time on murder and other charges. 125 Nev. at 696, 220 P.3d at 688. The mistrial was granted because the defendant's attorney repeatedly violated an order *in limine* which precluded reference to a statement made by defendant during police examination. There is no discussion in *Glover* concerning the striking of a pleading in a civil action for intentional violation of an order *in limine*. Similarly, in *Lioce*, the issue concerned whether new trials were warranted for attorney misconduct. Again, there was no discussion about the striking of pleadings as a sanction for intentional violations of a court order.

Defendant's argument is also inconsistent with case law. *See, e.g.*, *Honaker v. Mahon*, *supra*, which was an action by a plaintiff-insured to recover UIM benefits for damages sustained in a motor vehicle accident in which her husband was killed. In *Honaker*, the trial court entered an order *in limine* precluding the defendant from asking about the time or circumstances under which the plaintiff employed her attorney. During cross-examination of a witness, the defendant's counsel violated the order by asking the following questions:

> Q. . . . Okay, well, April 1st, Mrs. Honaker already had hired Marvin Masters to bring a lawsuit; correct?
>
> A. That's my understanding, yes.
>
> Q. So that's just within a week or so of the accident?
>
> A. Yes.
>
> Q. And her husband is just barely in the ground; correct?

Id. at 794.

On appeal from a defense verdict and denial of motions to set aside the verdict and for new trial, the plaintiff argued that the violation of the order *in limine* prejudiced her case. The Supreme Court of West Virginia reversed. It

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prefaced its resolution of the issue of prejudice with a statement of applicable principles concerning orders *in limine*:

> In Syllabus Point 4 of *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995), we stated that:
>
> > Once a trial judge rules on a motion *in limine*, ***that ruling becomes the law of the case unless modified by a subsequent ruling of the court.*** A trial court is vested with the exclusive authority to determine when and to what extent an *in limine* order is to be modified.
>
> In explaining this rule, we further stated that:
>
> > Like any other order of a trial court, ***in limine orders are to be scrupulously honored and obeyed by the litigants, witnesses, and counsel.*** It would entirely defeat the purpose of the motion and impede the administration of justice to suggest that a party unilaterally may assume for himself the authority to determine when and under what circumstances an order is no longer effective. ***A party who violates a motion in limine is subject to all sanctions legally available to a trial court,*** including contempt, when a trial court's evidentiary order is disobeyed. ***To be clear, the only participant not bound by the in limine ruling is the trial court.***
>
> *Tennant*, 194 W.Va. at 113, 459 S.E.2d at 390 (footnote omitted).

552 S.E.2d at 794-95 (emphasis supplied).

In *Taylor v. Southern Pac. Transp. Co.*, 637 P.2d 726 (Ariz. 1981), the trial court in a wrongful death action granted a motion for new trial based on defense counsel's violation of an order *in limine* prohibiting reference to the plaintiff's marital status. On appeal, the court rejected the defendants' argument that they did not violate the trial court's order, explaining:

> On appeal the defendants contend that they were not guilty of misconduct since the questions did not violate the trial court's order, asserting that "evidence admissible for one purpose but not for another is nevertheless admissible." *Montgomery Ward & Co. v. Wright*, 70 Ariz. 319, 220 P.2d 225 (1950). Defendants further contend:
>
> > "The relevance of that question is plainly and simply this—that a person who has experienced multiple marriages is likely to have suffered less grief from the loss

> of one than a person who has experienced and lost but one. The jury is entitled to take that into consideration."
>
> Even if we were to agree that this statement of the law was correct, ***it does not excuse the fact that the trial court had ruled on the question and ordered the defendants to make no mention of Taylor's remarriage. The defendants are, in effect, trying to justify the violation of the trial court's order by arguing the wisdom of the order itself. This they may not do.***
>
> Neither are we persuaded that the purpose of the questions was unrelated to the evidence prohibited by the order of the court in limine. The evidence is sufficient from which the trial court could find that the questions were an attempt to evade the clear directions of the court. Instead of requesting permission out of the presence of the jury to ask the questions, counsel chose to ask them in the presence of the jury. This they did at their peril. We find no error.

Id. at 730 (emphasis added).

The reasoning of *Honaker* and *Taylor* applies here. In this case, defense counsel was not entitled to brazenly disregard the order *in limine* and the sustaining of plaintiffs' objections simply because he disagreed with the rulings. Defendant and his counsel were bound by the order and were "subject to ***all sanctions*** legally available to [the] trial court" for violating the order, *Honaker*, 552 S.E.2d at 794 (our emphasis), ***not merely contempt*** as defendant asserts. AOB, p. 53. Thus, the issue on appeal is not whether the order *in limine* was legally incorrect. Even assuming it was (a point which plaintiffs strenuously dispute), the proper course for defense counsel at trial was to comply with the order and, if the jury returned an adverse verdict, then assert the alleged incorrectness of the order on appeal to this court.

III. THE DISTRICT COURT DID NOT MISAPPLY THE LAW OR DEPRIVE DEFENDANT OF THE OPPORTUNITY TO NEGATE CAUSATION

Defendant contends that the district court misapplied the law by improperly expanding the order *in limine* beyond *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008), and expert witnesses to preclude testimony of

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fact witnesses concerning the accident. AOB, pp. 51-55. This threadbare argument has already been refuted. The motion *in limine*, which was granted in its entirety, expressly requested that "all . . . witnesses" be precluded from insinuating a low-impact accident. AA, v. 2, p. 396.

Additionally, even if the motion *in limine* did not make this specific request, there was no improper expansion of the order. A trial court which issues an order *in limine* is not bound by its order. *See Honaker*, 552 S.E.2d at 795 (quoted above). *See also Straude v. State*, 112 Nev. 1, 5, 907 P.2d 1373, 1376 (1996) (ruling on motion *in limine* is not conclusive), modified on other grounds in *Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002); *Rice v. State*, 113 Nev. 1300, 1311, 949 P.2d 262, 269 (1997) (pretrial order granting motion *in limine* may be modified at trial), criticized on other grounds in *Rosas v. State*, 122 Nev. 1258, 1265 n. 10, 147 P.3d 1101, 1106 n. 10 (2006); *Tschaggeny v. Milbank Ins. Co.*, 163 P.3d 615, 619 (Utah 2007) (trial court is free, in exercise of sound discretion, to alter previous *in limine* ruling, quoting *Luce v. United States*, 469 U.S. 38, 41-42, 105 S.Ct. 460, 463-64 (1984).

A. There Was No "Automatic Exclusion of Percipient Witness Testimony" Based Solely on the Exclusion of Expert Testimony

Defendant further challenges the order *in limine* by asserting that "exclusion of expert testimony does not mandate automatic exclusion of percipient witness testimony on the same subject," and:

> These rationales [concerning expert witnesses], 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.

AOB, pp. 54-55.

In support of her argument that percipient fact testimony was admissible

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in this case, defendant relies on *Fox v. Cusick*, 91 Nev. 218, 533 P.2d 466 (1975). AOB, pp. 55-56. Explaining her reliance on *Fox*, defendant states:

> Describing categories of evidence relevant to the inquiry, the Court [in *Fox*] 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." . . .. The district court's ruling below that a jury could not consider fact testimony about these very issues was inconsistent with *Fox*.

AOB, p. 56 (footnote omitted).

Fox is inapposite. In that case, the plaintiff sued for injuries allegedly sustained in an auto accident and the jury returned a defense verdict. The district court granted a new trial on the grounds that the verdict was against the weight of the evidence. This court reversed and reinstated the verdict. In its opinion, the court stated that there was evidence that the plaintiff had injured his back before the accident and had recurring problems with it. In addition, there was evidence that the plaintiff had strained and twisted his back after the accident. Much of the argument to the jury dwelled upon whether the plaintiff's back complaints were aggravated by the accident or were caused by other events. 91 Nev. at 221, 533 P.2d at 468. In reversing, the court explained:

> It was for the jury to weigh the evidence and assess the credibility to be accorded the several witnesses. It is impossible for us to know whether the jury found for the defendant Fox because of a belief that he did not proximately cause the collision, or because of a belief that the Cusicks did not truly sustain personal injuries as a result of the collision. With 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. The fact that the weight of the evidence bearing on cause may have been against the verdict returned in the view of the trial judge, does not invest him with authority to order that the cause be tried again.

Id.

The present case can readily be distinguished from *Fox*. Here, defendant

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admitted that her negligence caused the accident. AA, v. 12, pp. 2775-77. Thus, there is no factual issue regarding the cause of the collision. Moreover, unlike in *Fox*, there is no evidence that William Simao had prior neck injuries or sustained additional injuries after the accident. Furthermore, William was examined on the day of the accident (unlike the plaintiff in *Fox*) and the order *in limine* did not preclude evidence concerning the traffic and the weather, evidence as to whether defendant applied her brakes, or evidence that William did not lose time from employment. Here, unlike in *Fox*, the sole purpose of the excluded evidence would have been an attempt to raise an inference that the impact was too minor to cause William's injuries. *Fox* is wholly inapposite.

Also of great significance is that the defense attorney in *Fox* did not intentionally violate an order *in limine* which would have justified striking Fox's answer, as did defense counsel in this case, which precludes defendant from challenging the order in this appeal. *Honaker, supra*; *Taylor, supra*.[13]

B. The District Court's Order *in Limine* Was Not "Unworkable and Unfair," as Defendant Contends

In asserting that the order *in limine* was unworkable and unfair, defendant erroneously reasons as follows:

> The Court [in *Hallmark*] indicated that biomechanical testimony is not permitted unless the expert has specific factual information about the starting positions of the vehicles, their speed, distances traveled, and angles of impact. . . .. 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

[13]Defendant asserts that plaintiffs ignored *Fox* and relied in their motion on questionable authority from other jurisdictions. AOB, p. 56, n. 17. Again, this is an improper challenge to the correctness of the order *in limine* which is beyond the scope of this appeal.

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admissibility established by *Hallmark*.

AOB, p. 57.

In the first place, this argument cannot be made in this appeal. As stated previously, the correctness of the order *in limine* could only be an issue on appeal if defense counsel complied with the order (as he was required to do) and the jury returned a verdict in favor of plaintiffs. Thus defendant's alleged concerns about unworkability are unfounded, as the district court's unreviewable order is not binding on other district courts.[14]

Secondly, the so-called "Catch-22" is entirely illusory. ***If*** defendant had retained a biomechanical expert who could opine that the impact of the accident was too minor to have caused William's injuries, the district court would have been faced with an entirely different situation. In such circumstances, the percipient witness testimony may have been admissible and the expert may well have been permitted to rely on its content regardless of its admissibility. *See* NRS 50.285. There is no "Catch-22."

Defendant further states in improperly attempting to challenge the correctness of the order *in limine*:

> 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.

AOB, p. 57. (Emphasis in original; footnote omitted.) Defendant does not cite

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[14]Plaintiffs also take issue with the assertion that information about an accident "is often simply unavailable." Defendant does not demonstrate that such information was unavailable in this case so as to prevent a qualified biomechanical expert from testifying.

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to any part of the record where plaintiffs' medical experts used the term "severe" to describe the accident. *See* NRAP 28(e). Nor was it improper for the medical experts to rely on William Simao's medical records, his patient history as he described it to them, and their examinations of him. *See* NRS 50.285(1) (facts or data in particular case upon which expert bases opinion or inference may be those perceived by or made known to expert at or before hearing). *See also Pinkins v. Cabes*, 728 So.2d 523, 526 (La.App. 1999), where the court stated:

> Concerning damages, Ms. Pinkins testified that she began to experience soreness in her neck and back, as well as her knee, shortly after the accident. That testimony was corroborated by her husband's testimony that she began complaining about her neck and knee immediately after the accident. Further Dr. Diaz testified that Ms. Pinkins apparently suffered a neck sprain in the accident, as well as a contusion on her knee. His conclusion, he admitted, was based on her recitation of the history of her injuries; however, he stated unequivocally that Ms. Pinkins was not a malingerer, and that he believed that she had given him a truthful history, based on his experience with her. Clearly, the above-described evidence is sufficient ***to prove both causation and damages and to establish a prima facie case in favor of the Pinkinses.*** (Emphasis supplied.)[15]

IV. THE DISTRICT COURT WAS NOT REQUIRED TO CONDUCT AN EVIDENTIARY HEARING TO ADDRESS FACTUAL ISSUES REGARDING THE *YOUNG* FACTORS

Defendant contends reversible error occurred because the district court failed "to hold an evidentiary hearing to address the factual issues encompassed in those factors as required under *Young*, 106 Nev. at 646, 837 P.2d at 1360 . . .." AOB, p. 59. Defendant did not request such a hearing below (AA, v. 12, pp. 2870, *et seq*.) and therefore may not make this argument on appeal. *Brown, supra*. *See also F.D.I.C. v. Daily*, 973 F.2d 1525, 1532

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[15]Defendant's suggestion that Simao may have fabricated his history is rank, unsupported speculation not worthy of consideration. AOB, pp. 57-57.

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(10th Cir. 1992) (district court did not abuse its discretion in failing to hold evidentiary hearing before entering default judgment against defendant where defendant had adequate opportunity to respond and did not request evidentiary hearing). Nor did defendant raise this issue in her new trial motion. AA, v. 17, pp. 3852, *et seq*.

Defendant's argument is also not supported by the cases she cites. In *Young*, the issue concerned willful fabrication of evidence during discovery. The district court conducted an evidentiary hearing and concluded that willful fabrication of two sets of diary notations was supported by substantial evidence. This conclusion was based on chemical and microscopic examination of the diary notations and testimony of a forensic expert. 106 Nev. at 90-91, 787 P.2d at 778-79.

In *Nevada Power v. Fluor Illinois*, 108 Nev. 638, 837 P.2d 1354 (1992), the issue concerned the sanction of dismissal of a complaint resulting from demolition of a cooling tower allegedly in violation of discovery orders. This court held that the district court should have held an evidentiary hearing because of the existence of factual issues, explaining:

> Determining whether a party "fail[ed] to obey an order" may, as it does here, involve factual questions as to the meaning of the order allegedly disobeyed and questions as to whether the disobedient party did, in fact, violate the court's discovery order. The only way that these questions of fact can be properly decided is by holding an evidentiary hearing.
>
> In the present case, NPC and CDWR raised questions of fact regarding the meaning of the court's discovery orders and denied that they had disobeyed the orders. Specifically, they contended that their counsel, in good faith, interpreted the court's December order as modifying its September order to mean that the tower could be destroyed any time after February 7, 1989. In addition, NPC and CDWR asserted it was necessary for them to demolish the rest of the cooling tower during an outage; otherwise, the demolition could cost them $200,000.00 per day for replacement energy. Finally, they noted that they had announced to respondents several months ahead of time that they planned to destroy the remaining portion of the cooling tower. We thus concluded that the district court abused its discretion in failing to hold an evidentiary hearing on factual issues relating to

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> the meaning of the discovery orders and relating to whether these orders had actually been disobeyed.

108 Nev. at 644-54, 837 P.2d at 1359.

In *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 900 P.2d 323 (1995), a hotel patron sued the hotel and its linen service for injuries she sustained when a worn-out bathmat slipped out from under her. The district court dismissed the action against the linen service because the hotel had lost the mat. The plaintiff and hotel appealed and this court reversed, concluding that the sanction was too harsh. The court did not discuss the failure to conduct an evidentiary hearing.

In *Romo v. Keplinger*, 115 Nev. 94, 978 P.2d 964 (1999), the district court, without a hearing, granted a mistrial as a sanction because plaintiff's counsel failed to advise witnesses that the witness exclusion rule had been invoked. This court reversed, holding that the court should have made a record as to the extent of the violation and held an evidentiary hearing to examine the witnesses under oath.

The present action is distinguishable from the foregoing cases. Chemical and microscopic examination and testimony from a forensic expert was not required to establish defense counsel's repeated willful disobedience of the order *in limine*. The relevant facts are undisputed. Defense counsel was clearly on notice that the order precluded testimony concerning whether any persons in defendant's car were injured, and the trial transcript constitutes a compelling record as to the extent of the violations of the order. Under these circumstances, the district court did not commit error in not conducting an unnecessary evidentiary hearing with respect to the non-case concluding sanction of striking defendant's answer as to liability only. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. ___, ___, 245 P.3d 1182, 1185-86

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(Adv.Op.No. 57; 12/30/10), where this court said:

> While we reject Goodyear's argument to mandate evidentiary hearings in all cases before a district court may strike a defendant's answer as to liability only, we agree in part with our dissenting colleague that district courts should be encouraged to exercise their discretion to hold evidentiary hearings regarding non-case concluding sanctions ***when requested and when there are disputed issues of material fact*** regarding the discovery dispute identified by the parties. Examination of witnesses who have personal knowledge of the material issues of fact in dispute may assist the district courts in making findings of fact. Although Goodyear requested an evidentiary hearing, it did not make an offer of proof to the district court as to what evidence should be considered in addition to the representations of counsel. [Emphasis added.]

The court in *Goodyear* also declined to extend the holding of *Nevada Power*, *supra*, to non-case concluding sanctions. 126 Nev. at ___, 245 P.3d at 1186.[16]

A. The District Court Adequately Explained its Reasoning at Trial and in the Order Striking Defendant's Answer

Defendant contends:

> 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 [*sic*] 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.

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[16]Defendant erroneously contends the sanction in this case was a "civil death penalty" because it took all issues from the jury. AOB, p. 59, n. 19. This overlooks the principle that a party against whom a default judgment is entered has no constitutional right to a jury trial on the issue of damages. *See Matter of Dierschke*, 975 F.2d 181, 185 (5th Cir. 1992) (it is clear in default cases neither plaintiff nor defendant has constitutional right to jury trial on issue of damages, quoting from 5 Moore's Federal Practice § 38.19[3] (1992)).

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> *Lioce*, 124 Nev. at 19-20, 174 P.3d at 982 (emphasis added [by defendant]).

AOB, p. 60.

In the first place, this contention is absolutely false. In fact, plaintiffs' counsel expressly requested the trial court to "walk through" its reasoning before leaving the bench. AA, v. 12, p. 2870, ll. 6-14.[17] The trial court called a recess, stepped down to study *Young*, and returned to make detailed, oral findings in open court. AA, v. 12, pp. 2870-75. This process fully complied with *Young* and reflected a judicious, dispassionate methodology that is the antithesis of the defendant's wild appellate accusations.

And, once again, defendant's reliance on *Lioce* is unavailing. *Lioce* applies to new trial motions. There was no motion for a new trial in this case. Nor was there a failure of the district court to articulate its reasoning, based on *Young* at the time it orally granted plaintiffs' motion to strike the answer. *See* AA, v. 12, pp. 2870-73. The district court also did not improperly delegate to plaintiffs the task of preparing the written order, which was fully consistent with the trial court's oral consideration of the *Young* factors and its oral ruling. Such a practice is entirely acceptable. *See Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir. 1998) (district judge's near-complete acceptance of findings and conclusions prepared by plaintiff was not objectionable where they were supported by the record); *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981) (that findings were submitted by counsel for prevailing defendant was not grounds for reversal of sanction of

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[17]The transcript wrongly attributes this request to Mr. Rogers. AA, v. 12, p. 2870, l. 6. This another place wherein the court reporter simply got it wrong. If Mr. Rogers had made the request, Rish's assertion on appeal about *Young's* alleged inapplicability would be precluded as invited error. *Pearson v. Pearson*, 110 Nev. 293, 297, 571 P.2d 343, 345 (1994).

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dismissal for failure to comply with discovery orders; adoption of findings and conclusions submitted by party is within sound discretion of trial court).[18]

B. The Order Striking the Answer is Not Misleading

Defendant refers to two isolated parts of the order granting the motion to strike the answer as alleged examples that the order is misleading. First, defendant states:

> While the order does provides [*sic*] 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 in 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.)

AOB, p. 62. What defendant fails to acknowledge, however, is that after the objection was sustained, defense counsel asked the same improper question to three other witnesses after objections were again sustained and the district court put defense counsel on notice that he had violated the order *in limine*. (*See* Statement of the Facts.) Thus, defendant's first attempt to portray the district court's order as "misleading" is, itself, misleading.

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[18]Defendant implies wrongdoing by stating that plaintiffs "convinced" the lower court to allow them to prepare the order. AOB, p. 60. The portion of the trial transcript quoted by defendant (*see* AOB, p. 61) belies this assertion.

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Equally deceptive is defendant's second example of the purportedly "misleading" nature of the order. Defendant contends that the order is inaccurate insofar as it refers to the bench conference conducted after defendant argued plaintiffs had opened the door about impact by referring to a "crash" during opening statement. Defendant complains that the order states that, during the bench conference, 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).

AOB, pp. 62-63.

Again, this argument conveniently overlooks important facts. The part of the order to which defendant refers states:

> At this hearing, the Defendant sought permission to claim a "minor impact" defense based on the door allegedly being opened by the Plaintiffs in their Opening Statement when counsel referred to the accident as a "motor vehicle crash." This Court noted that the Plaintiffs in their Opening Statement did not refer to the nature of the impact, the severity of the impact, the fact that the impact was significant enough to cause the Plaintiff's injuries nor any violence associated with the impact. In fact, this Court noted that Plaintiffs' counsel did not describe the impact of the vehicles in any way.
>
> Based on that finding, the Court denied the Defendant's renewed request to be able to raise a "minor impact" defense. Again, the Defendant was clearly and unequivocally on notice that such a defense was precluded.

AA, v. 18, p. 3690.

During the bench conference, plaintiffs' counsel argued what the order says the court noted, as follows:

> THE COURT: Well, Mr. Wall.

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> MR. WALL: Well, I won't – I've got to be honest with you, I was here, and I did speak, but I don't remember talking about the nature of the impact or the violence of the impact, which is what he just said that I said. So unless there's a transcript that proves that I don't remember saying it, but said it, I would suggest that that's not correct and that it's, in fact, absolutely incorrect. I never discussed that it was a violent impact. I never discussed that it was a noisy impact. I never even discussed that the impact was violent enough, according to the medical providers, that because of how violent it was, it must have caused A, B, and C; none of the things that would open the door to a minor-impact defense.

AA, v. 7, pp. 1488-89. By denying defendant's motion that plaintiffs had opened the door, the district court necessarily accepted Mr. Wall's argument, a fact later reflected in the written order.

C. The District Court Did Not Improperly Analyze the *Young* Factors

Plaintiffs have set forth above the district court's reasoning and analysis of the *Young* factors in deciding to strike defendant's answer. (*See* Statement of the Facts.) Defendant's perfunctory attempt to undermine the court's analysis fails completely. AOB, pp. 63-66.

Concerning the degree of willfulness of the offending party, defendant reasserts the false, lame excuse that there was "considerable consternation about the meaning and the confines of the order," which justified repeated violations of the order. AOB, p. 63. As discussed herein, the record refutes this ludicrous assertion.

With respect to the extent to which the non-offending party would be prejudiced by a lesser sanction, defendant makes the unsupported, conclusory statement that there was no prejudice that supported striking the answer and that a limiting instruction would have remedied plaintiff's having to make repeated objections. AOB, pp. 63-64. This ignores what the court said in *Lioce*, 124 Nev. at 18-19, 174 P.3d at 981:

> [W]hen . . . an attorney must continuously object to repeated or persistent misconduct, the nonoffending attorney is placed in the

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> difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point.
>
> We therefore conclude that when the district court decides a motion for a new trial based on repeated or persistent objected-to misconduct, the district court shall factor into its analysis the notion that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct. Therefore, the district court shall give great weight to the fact that single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent. [Footnote omitted.]

As to the severity of the sanction relative to the severity of the abuse, defendant argues:

> 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 [*sic*] destruction of necessary evidence. *Nevada Power*, 108 Nev. at 645, 837 P.2d at 1359. In this case, the sanction was disproportionate under the circumstances.

AOB, p. 64. This assertion does not adequately address the reference by the district court to the "pervasive and continuous nature of the violations." (*See* Statement of the Facts.)

Defendant also attempts to minimize defense counsel's intentional misconduct by stating:

> 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.

AOB, p. 64. This contention wrongly assumes that no sanctionable conduct occurred. Defense counsel's repeated violations, considered cumulatively, justified the sanction. *See Foster*, 126 Nev. at ___, 227 P.3d at 1049 (continued discovery abuses justified district court decision to strike offending parties' pleadings and enter default judgment); *Grosjean v. Imperial Palace*, 125 Nev. 349, 365, 212 P.3d 1068, 1079 (2009) (cumulative effect of

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misconduct is relevant); *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (striking defendant's answer and entry of default judgment was appropriate response to continuous failure to comply with orders).

Defendant's one-page argument concerning other *Young* factors also fails to adequately address the district court's order, let alone demonstrate reversible error. AOB, p. 65. Based on the record and case law, it is clear the district court did not abuse its discretion. "The district court gave appropriately careful, correct, and express consideration of most of the [*Young*] factors . . .." *Young*, 106 Nev. at 93-94, 787 P.2d at 780. The sanction was fully warranted.

RESPONSE TO DEFENDANT'S PART TWO: THE AWARDS OF DAMAGES AND ATTORNEY'S FEES ARE NOT EXCESSIVE AND SHOULD BE AFFIRMED

V. THE DAMAGES AWARD IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THEREFORE IS NOT EXCESSIVE

A. The Award for William's Pain and Suffering is Not Excessive

In her opening brief, defendant contends that the amount of the judgment is excessive as a result of passion and prejudice on the part of the district court. AOB, p. 68. In an effort to support this argument, defendant quotes certain comments made by plaintiffs' counsel at the prove-up hearing – comments which allegedly "provoked the district court's anger." AOB, pp. 69-70. Defendant, however, points to nothing in the record which establishes that the district court was in any way incited by these innocuous remarks.[19] To the

[19]As in *Cassim, supra*, the allegedly improper remarks which are the (continued...)

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contrary, the following discussion at the hearing demonstrates that the district court's judgment was based solely on the evidence and the law:

> MR. WALL: . . .. 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 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 so far and what's been presented factually in this summation.
>
> MR. ROGERS: But, Your Honor, it's presumed that those things are set aside. I'm not sure why counsel is invoking it. It seems like it's meant to aggravate the Court and we don't want that to enter into the Court's analysis.
>
> THE COURT: Objection is noted for the record. ***I hope you will consider the fact that I will carefully consider everything that was argued and everything that was heard in this court.***
>
> MR. ROGERS: Thank you.
>
> . . ..
>
> MR. WALL: I admit that for some who have sat where you sit that it would 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.
>
> What we've asked for is, reasonable, conservative, and fair in view of the law, in view of the facts, in view of the evidence. We asked that we be allowed to prepare for the Court a proper judgment for the amounts we've set forward and of course the order on the motion to strike the answer to prepare for the Court. Thank you very much.
>
> THE COURT: Thank you, Mr. Wall.
>
> What I would appreciate, frankly, is for counsel to prepare a proposed judgment, but to leave these categories blank so the Court can fill them I, ***and I want an opportunity to review the evidence, I also would like an opportunity to review the cases as cited by counsel.***

AA, v. 16, pp. 2928-30; our emphasis.

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[19](...continued)
basis of defendant's contention were "fleeting" and "a minuscule part" of the trial. 94 P.3d at 526.

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Defendant speculates that the district court acted with passion and prejudice because the general damages (past and future pain and suffering) are allegedly disproportionately high as compared to the medical expenses (12 times as much). AOB, pp. 66-68. In support of this argument, she relies on *Uva v. Evans*, 147 Cal.Rptr. 795 (Cal.App. 1978). In *Uva*, a nine year old girl sustained injuries when she was bitten by the defendant's dog. The trial court awarded her $30,000 in general damages. On appeal, the award was reversed. The court reasoned as follows:

> The evidence showed that Lisa had suffered dog bites on her right forearm and abdomen. The laceration on her arm required stitches, the cuts on her stomach did not. She was given an injection to prevent tetanus ***and within two weeks the doctor described the wounds as "well-healed."*** Total medical expense for these procedures was $182.00. In addition, because the laceration on her forearm had left a scar, the doctor prescribed plastic surgery which would require approximately three days of hospitalization. Estimated costs of the plastic surgical repair were $500 for the surgery, $1500 for hospitalization, and $100-$150 for anesthesia.
>
> Based only upon the above showing, the trial court awarded $30,000 in general damages. We conclude that that award was so grossly disproportionate as to be without evidentiary support and shocking to the conscience. While we do not doubt that the incident was psychologically disturbing to the nine-year-old plaintiff, there was no evidence that it was particularly unsettling nor was it claimed that the medical procedures had been, or would be, unusually painful. In short, the evidence showed that Lisa suffered a couple of average dog bites. The award of $30,000 general damages in compensation for those bites shocks the conscience of this court and compels reversal and remand for a new trial solely on the issue of damages.

Id. at 800-01; emphasis supplied.

Defendant also relies on *Anthony v. G.M.D. Airline Services, Inc.*, 17 F.3d 490 (1st Cir. 1994). AOB, p. 68. There, the plaintiff was struck from behind by a pallet on a forklift driven by the defendant airline's employee. The plaintiff, a pilot, suffered an abrasion to his left leg. However, x-rays determined that the leg was not fractured. Almost two months after the

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accident, the plaintiff went to his aviation doctor because he felt pain behind his left knee. The doctor referred him to a cardiovascular specialist. The plaintiff did not see the specialist until a year later, at which time the specialist ran some tests and told the plaintiff to wear elastic stockings, to rest, and to elevate his leg. ***He neither received nor sought any other medical treatment.*** *Id*. at 491.

The plaintiff then sued the airline for his injury, and obtained a verdict in the amount of $571,000, nearly all of which ($566,765) was for pain and suffering. The First Circuit reversed on the ground that the award was grossly disproportionate to his injury. In so doing, the court noted: (1) the plaintiff's injury was not severe and required no major medical treatment; (2) his medical expenses were only $1,335 and he lost only $3,000 in earnings; and (3) there was no evidence that his current condition was permanent. *Id*. at 494-95.

The facts of the present case are obviously far more extreme than those in either *Uva* or *Anthony*. William has endured constant pain and numerous medical treatments as a result of his injury and still has chronic pain which the evidence shows will continue for the rest of his life. Although William can still perform most of the same tasks he did before the accident, he testified that as of the time of trial he still had constant pain in his head, neck, and shoulders. AA, v. 12, pp. 2838-39. He does not function the same as he did before the accident, cannot turn his head as he previously could, and complains "a lot," AA, v. 12, pp. 2839-42. In analogous cases, courts have upheld substantial awards for pain and suffering.

For example, in *Averyt v. Wal-Mart Stores, Inc.*, 265 P.3d 456 (Colo. 2011), the court held that a damage award of $5.5 million for non-economic damages in favor of a truck driver who ruptured a disc in her spine and injured her shoulder and neck as a result of a fall on defendant's greasy floor was not

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so excessive as to indicate passion and prejudice. The court so held, even though the general damages award was more than ten times the amount of her past medical expenses of $500,000. In *Averyt*, the plaintiff's doctors testified that the driver suffered from chronic pain which induced personality changes, including depression. Meanwhile, friends and fellow truck drivers testified that the plaintiff was in constant pain, and she was upset because she could no longer driver her truck.[20]

Another example is *Young v. Tops Markets, Inc.*, 725 N.Y.S.2d 489 (N.Y.App.Div. 2001). There, the appellate division held that a plaintiff who fell 18 feet at a jobsite was entitled to recover $1 million for past pain and suffering and $2.5 million for 25 years of future pain and suffering. The plaintiff had sustained serious injuries to his femur, spine, pelvis, and knee, which caused continuous pain. He was able to walk with a cane, drive around town, and do light work around the house.

While it would be difficult to find a case in which a plaintiff sustained injuries identical to those which plague William, *Averyt* and *Young* are far more analogous than either *Uva* or *Anthony*. Another deficiency in Rish's argument is that she ignores the deferential standard of review by which such awards are evaluated. As stated in *Stackiewicz v. Nissan Motor Co.*, 100 Nev. 443, 454-55, 686 P.2d 925, 932 (1984):

> We have long held that "[i]n actions for damages in which the law provides no legal rule of measurement it is the special province of the jury to determine the amount that ought to be allowed," so that a court "is not justified in reversing the case or granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury." *Forrester v. Southern Pacific Co.*, 36 Nev. 247, 295-296, 134 P. 753, 768 (1913), quoted in *Southern Pacific Co. v. Watkins*, 83 Nev. 471, 495, 435 P.2d 498, 513-514

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[20]The award in *Averyt* was reduced to a statutory cap of $366,250. *Id.* at 459. However, this reduction played no part in the court's holding.

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> (1967). Similarly in *Brownfield v. Woolworth Co.*, 69 Nev. 294, 296, 248 P.2d 1078, 1079-1081, *reh. den.*, 69 Nev. 294, 251 P.2d 589 (1952), we noted that "[t]he elements of pain and suffering are wholly subjective. It can hardly be denied that, because of their very nature, a determination of monetary compensation falls peculiarly within the province of the jury . . .. We may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable."
>
> In reversing a district court's order granting a new trial on the issue of damages, we recently noted that the mere fact that a verdict is large is not in itself "'conclusive that it is the result of passion or prejudice.'" *Beccard v. Nevada National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3 (1983), *quoting Miller v. Schnitzer*, 78 Nev. 301, 309, 371 P.2d 824, 828 (1962). Similarly, in *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 646 P.2d 553 (1982), although we found the award was "unusually high," we did not find it so "flagrantly improper" as to suggest jury passion, prejudice or corruption. In *General Electric Co. v. Bush*, 88 Nev. 360, 368, 498 P.2d 366, 371 (1972), this Court refused to set aside an award of $3,000,000 when the evidence of special damages went uncontroverted at trial. We refused to "substitute our opinion of damages for that of the jury," when the award, in view of the extent of the personal injuries to the victim, did not "shock our judicial conscience."

Defendant has failed to demonstrate how, under the foregoing standards, the award in this case was in any way flagrantly improper so as to justify a reduction on the basis of passion and prejudice.

B. The Award for Pain and Suffering is Not Duplicative of the Award for Hedonic Damages

Defendant also erroneously asserts that the award to William of hedonic damages is duplicative of the award for pain and suffering, citing *Banks v. Sunrise Hospital*, 120 Nev. 822, 102 P.3d 52 (2004). AOB, pp. 68-69. In fact, *Banks* holds just the opposite. In *Banks*, this court said:

> We agree with California and those jurisdictions permitting plaintiffs to seek compensation for hedonic loss as an element of the general award for pain and suffering. Like California, Nevada does not restrict a plaintiff's attorney from arguing hedonic damages. Moreover, by including hedonic losses as a component of pain and suffering, ***we perceive no problem of confusion or duplication of awards by the jury.*** Accordingly, we hold that hedonic damages may be included as an element of a pain and suffering award of damages.

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> Here, however, the district court permitted the jury to award hedonic damages as a separate and distinct damage award, rather than including hedonic loss as a component of the pain and suffering damages award. Although the district court erroneously permitted the jury to give Banks a separate award for hedonic damages, the error was not prejudicial because the jury could have easily added the value of the hedonic loss to the pain and suffering award. Therefore, ***the record does not reveal that the hedonic damages award was duplicative or excessive.*** Accordingly, the error was harmless.

120 Nev. at 839, 102 P.3d at 64; emphasis added. The reasoning of *Banks* is even more persuasive here, where the award of hedonic damages was properly included within (but considered separately from) the damages for pain and suffering and was made by an experienced trial judge as opposed to a lay jury.

C. Plaintiffs Did Not Withdraw Their Claim for William's Future Medical Care For Lack of Evidence, as Defendant Contends

Defendant further misstates the record when she claims that, "the defense noted [at the hearing] that plaintiffs had effectively withdrawn their claim for future medical care because the evidence would not support it . . .." AOB, p. 69. This is demonstrably false. At the hearing, plaintiffs' counsel explained why no claim for future medical care was being made, which had nothing to do with a lack of evidence:

> This statement by Mr. Rogers that we abandoned, or he even used the word "waived," certain future medical treatments is incorrect. With respect to the stimulator, unfortunately, Dr. Sible didn't get to testify as to the original genesis of that notice to the defense of that particular treatment.
>
> With respect to the future fusion surgery that Dr. Wong testified, because he couldn't come back, pursuant to his own schedule rather than the Court's, he wasn't able to come back and within cross, say that his opinions were to a reasonable degree of medical probability, as the law would require under more staccato [*sic*, *Morsicato v. Savon Drug Stores, Inc.*, 121 Nev. 153, 111 P.3d 1012 (2005)]. So instead, we try and be as fair, and as conservative, and as reasonable as we could, and to follow the law in this case, a novel approach, but we decided to follow the law of the case.

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AA, v. 13, p. 2927.

Moreover, there was abundant evidence of William's need for future medical care. The "stimulator" referred to in the foregoing quotation was discussed at trial by Dr. McNulty. He testified that a spinal stimulator is a pain management device which is surgically placed on top of the spinal canal and connected via a cable to a pulse generator on the patient's "right butt cheek." AA, v. 8, pp. 1810-12. It was Dr. McNulty's opinion that William would need a trial placement of a spine stimulator to determine if a permanent placement would be needed. AA, v. 8, p. 1814. The cost of a trial and permanent placement would be approximately $212,000. AA, v. 8, p. 1816. A five-year replacement of the pulse generator would cost approximately $141,000, and a two-year replacement of the leads would cost approximately $103,000. AA, v. 8, pp. 1816-17.

Additionally, Jeffrey Wang, M.D., defendant's expert, testified that there is a "high chance" that William will require future fusion surgery as a result of adjacent segmental breakdown. AA, v. 11, p. 2505. The cost of this surgery would be $64,527. AA, v. 11, p. 2510.

D. Cheryl's Award for Loss of Consortium Was Proper

The basis of defendant's challenge to the award of damages to Cheryl Simao for loss of consortium is that, "the wife's exorbitant request of $681,296 for loss of consortium was impermissibly based on extrapolation opinion from the hedonic-damages expert." AOB, p. 69, referencing AA, v. 13, p. 2921. Defendant does not cite any authority to support this assertion, nor does she offer any reasoning or explanation as to how or why it was impermissible to rely on the opinion of plaintiffs' economist in calculating the damage award. The argument thus should be disregarded. *See Humane Society v. First Nat'l Bank of Nev.*, 92 Nev. 474, 478, 553 P.2d 963, 965 (1976) (where appellant

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cites no authority to support contention, court need not consider it); *Charmicor, Inc. v. Bradshaw Finance Co.*, 92 Nev. 310, 313, 550 P.2d 413, 415 (1976) (error must be shown affirmatively before judgment will be reversed).

The argument is also dead wrong. In *Banks, supra*, this court held that an expert economist's testimony and methodology concerning the valuation of hedonic damages was proper because it assisted the jury in determining the monetary value of the pleasure of living that the plaintiff would be denied as a result of his injury.[21] 120 Nev. at 837-38, 102 P.3d at 63. The same rationale should also apply with respect to the determination of an award of damages for loss of consortium, which are analogous to hedonic damages. In *General Electric Co. v. Bush*, 88 Nev. 360, 367, 498 P.2d 366, 370 (1972), where an award of $500,000 for loss of consortium was affirmed, this court explained:

> In *Millington v. Southeastern Elevator Co., Inc.*, 239 N.E.2d 897, 36 A.L.R.3d 891 (N.Y.App. 1968), the New York court shifted from the old to the new and ruled that the consortium action on behalf of the wife although based upon the wife's right of support from her husband, more importantly, recognizes instead that consortium covers a variety of other intangible interests which the wife has in the welfare of her husband. These are described as "love, companionship, affection, society, sexual relations, solace and more." The court there emphasizes that the basis of the wife's recovery is the anguish which she suffers when the injury to her husband destroys or impairs those components that make for the traditional marriage she enjoys and that the right to support is not included nor a part of her claim.[22]

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[21]The economist in *Banks* used the "willingness to pay" method of valuing hedonic damages. *See* 120 Nev. at 837, 102 P.3d at 62-63. Plaintiffs' economist in this case used the same method in valuing both William's hedonic damages and Cheryl's loss of consortium damages. AA, v. 11, pp. 2664, *et seq.*

[22]*Bush* was abrogated on other grounds in *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 921 P.2d 933 (1996). *Motenko* was later overruled in

(continued...)

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Additionally, defendant's argument overlooks the testimony of Cheryl Simao, set forth above, which described the significant harmful effects William's injuries have had on their relationship. This evidence, by itself, supports the award. *See, e.g., Caletz v. Estate of Colon v. Blackmon*, 476 F.Supp.2d 946, 949, 966 (N.D.Ill. 2007) (award of damages for loss of consortium to wife in amount of $1,025,000 was not excessive in action arising from multi-vehicle accident in which her husband was injured; jury heard wife describe how accident and husband's injuries affected her life, husband's life, and their marriage); *Lee v. Thomason*, 627 S.E.2d 168, 172 (Ga.App. 2006) (testimony of wife of driver injured in collision supported award of damages for loss of consortium in amount of $938,000; wife testified that "'when he left that night, my husband left. What I've got now is not the same man. He's different. His whole personality has changed.'"); *Staskal v. Symons Corp.*, 706 N.W.2d 311, 322-25 (Wis.App. 2005) (testimony of wife of man injured in construction accident concerning, among other things, the impact his pain and limitations had on his relationship with her, their child and on their own well-being supported award of loss of consortium in amount of $500,000).

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES IN FAVOR OF PLAINTIFFS IN THE AMOUNT OF $1,078,125[23]

Following trial, plaintiffs filed a motion for attorneys' fees, seeking an award under NRCP 68 and NRS 17.115 based on an offer of judgment which

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[22](...continued)
General Motors Corp. v. Dist. Ct., 122 Nev. 466, 134 P.3d 111 (2006).

[23]An award of attorneys' fees under NRCP 68 and NRS 17.115 is reviewed for an abuse of discretion and will not be disturbed unless the trial court's ruling is arbitrary or capricious. *Uniroyal Goodrich Tire v. Mercer*, 111 Nev. 318, 323-24, 890 P.2d 785, 789 (1995).

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defendant rejected. AA, v. 18, pp. 4154, *et seq*. In the motion, plaintiffs included a request under the lodestar approach, based on the number of hours spent by Messrs. Eglet and Wall on the litigation after the date the offer of judgment was served (575) multiplied by a reasonable hourly rate ($750), which equals $431,250. AA, v. 18, p. 4173. Plaintiffs also requested a deviation upward based on a multiplier of at least 2.5 based on a contingent fee risk, the exceptional quality of plaintiffs' counsel's legal work, and the extraordinary results achieved at trial. AA, v. 18, p. 4176. The district court granted plaintiffs' motion and awarded them attorneys' fees in the amount of $1,078,125. AA, v. 21, pp. 4817-19.

On appeal defendant challenges the contingency multiplier on the grounds that "there is nothing extraordinary about this case which would justify such a multiplier [of 2.5]," and "contingency multipliers are usually disallowed in jurisdictions that provide for fees for rejecting and offer of judgment." AOB, p. 72, 74. Defendant did not raise these arguments in her opposition to the motion for fees with respect to the lodestar method (*see* AA, v. 19, pp. 4413-18) and, therefore, her arguments should be rejected.[24] *Brown,*

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[24]In fact, defendant implicitly agreed that a contingency multiplier could be used in determining the amount of the fee. On the use of a contingency multiplier, her sole contention below was that it could not be used in conjunction with an hourly rate that reflected the exceptional skill of plaintiffs' counsel. AA, v. 19, p. 4217, ll. 10-19. This argument failed to recognize that an hourly rate and a contingency risk multiplier compensate for two separate elements, *i.e.*, the attorney's skill and the risk of non-payment. This point is made in more detail in the ensuing paragraphs. What is important to note here, however, is that defendant's express recognition in the district court, that a multiplier could be used ***at all*** in the context of offers of judgment, is inherently inconsistent with the position she takes on appeal that it cannot be used ***at all*** in such context. This (continued...)

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supra.

Additionally, the arguments are meritless. Defendant cites *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638 (1992), to support her argument that a contingency multiplier under the lodestar method was unwarranted because there was nothing extraordinary about this case. AOB, pp. 72-73. *Dague*, however, is inapposite. *See Ketchum v. Moses*, 17 P.3d 735 (Cal. 2001), where the court, after stating that it was not bound by *Dague* and that California courts have continued to apply the lodestar method after *Dague* was decided (*id*. at 745), said:

> [*Dague*] addressed a fee-shifting provision ***under two federal environmental protection statutes***. Significantly, the federal courts have not applied the rationale of the majority in *Dague* to other types of cases involving contingency fees. (*See, e.g., In re Washington Public Power Supply System Securities Litigation* (9th Cir. 1994) 19 F.3d 1291, 1298 [*Dague* does not operate to bar risk fee enhancements in common fund cases].)

Id. at 745, n. 2 (emphasis supplied).

Similarly, the court in *Toshiba Machine Co. v. SPM Flow Control, Inc.*, 180 S.W.3d 761, 783 (Tex.App. 2005), distinguished *Dague*:

> The question in *Dague* was whether the attorney's fees shifting provisions of the federal Solid Waste Disposal Act and Clean Water Act permitted "enhancement" of lodestar attorney's fees where the attorney's fees were contingent. *Dague* at 559, 112 S.Ct. at 2639. The Supreme Court held that such enhancement was not permitted under the statutes in question. *Id*. at 567, 112 S.Ct. at 2648. Since this case involves neither of those statutes, *Dague* offers little guidance and imposes no restrictions here. Moreover, Texas courts consistently allow use of a multiplier based upon the contingent nature of a fee under Texas statutes allowing recovery of attorney's fees. *Dillard Dept. Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 413 (Tex.App.-El Paso 2002, pet. denied).

See also Herbst v. Humana Health Ins. of Nev., 105 Nev. 586, 590, 781 P.2d

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[24](...continued)
inconsistency should not be tolerated. *Tore, Ltd. v. M.L. Rothchild Mgmt. Corp.*, 106 Nev. 359, 363, 793 P.2d 1316, 1319 (1990).

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762, 764 (1989) (correct method for determining amount of attorney's fees under federal statutes has been decided by U.S. Supreme Court and other federal courts).[25]

That the court below properly applied a contingency multiplier is also supported by *Ketchum, supra*. There, the California Supreme Court explained:

> Under *Serrano III* [*i.e.*, *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977)], the lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. (*Serrano III, supra*, 20 Cal.3d at p 49, 141 Cal.Rptr. 315, 569 P.2d 1303.) The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk ***or*** required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. . . ..
>
> The economic rationale for fee enhancement in contingency cases has been explained as follows: "A contingent fee must be higher than the fee for the same legal services as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans." (Posner, Economic Analysis of Law (4th ed.1992) pp. 534, 567.) "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (Leubsdorf, *The Contingency Factor in Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct, rule 4-200(B)(9) [recognizing the contingent nature of attorney representation as an appropriate component in considering whether a fee is reasonable]; ABA Model Code of Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof. Responsibility, rule 1.5(a)(8).).
>
> . . ..

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[25]Defendant's reliance on *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*, 478 U.S. 546, 106 S.Ct. 3088 (1986) (AOB, p. 72) is misplaced for the same reasons as it involved a federal statute. *See id.* at 549, 106 S.Ct. at 3090.

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> Under our precedents, the unadorned lodestar reflects the general local hourly rate for a *fee-bearing case*; it does *not* include any compensation for contingent risk, extraordinary skill, ***or*** any other factors a trial court may consider under *Serrano III*. The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees.

Id. at 741-42, 745-46 (emphasis supplied in part).

Under *Ketchum,* as quoted above, a multiplier is warranted in contingency fee cases "***or***" cases requiring extraordinary legal skill. In her brief, defendant asserts (incorrectly, and with no factual basis) only that extraordinary skill was not required in this case. Since she fails to address the contingency factor, her brief is deficient.

Defendant is also incorrect in her newly-raised assertion that a contingency multiplier cannot be used in the context of fee awards resulting from a rejected offer of judgment. She erroneously asserts that:

> 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 multipliers only in favor of plaintiffs, however, significantly skews these incentives and creates inappropriate disparity in treatment between plaintiffs and defendants.

AOB, p. 74.

In Nevada, the purpose of the offer of judgment provisions in NRCP 68 and NRS 17.117 is to facilitate and encourage settlement of cases. *Matthews v. Collman*, 110 Nev. 940, 950, 878 P.2d 971, 978 (1994). A party who

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unreasonably rejects an offer of settlement voluntarily assumes certain risks if the offeror obtains a judgment more favorable than the offer. Among these risks is the prospect of being required to pay reasonable attorney's fees to the offeror. *Id*.

Contrary to defendant's contention, use of a contingency multiplier in determining the amount of the fee award under Rule 68 and NRS 17.115 does not "significantly skew the incentives [*i.e.*, risk of payment of fees] and create inappropriate disparity in treatment between plaintiffs and defendants." AOB, p. 74. As explained in *Ketchum, supra,* the rationale for allowing a contingency multiplier is to compensate a lawyer who loans his services and who bears the risk of losing a case and not being compensated at all. 17 P.3d at 742. Thus, a contingency multiplier can be an integral part of determining the reasonable value of the fees in question. Since there are risks on both sides, there is no disparity of treatment. Each side is at risk of paying the reasonable value of the service of their opponent's counsel. Additionally, the possibility of using a contingency multiplier in the context of offers of judgment promotes – rather than "skews" – the underlying purpose of encouraging settlements. *See Sarkis,* 863 So.2d at 226 (Pariente, J., dissenting) (adverse party's knowledge that representation of plaintiff is contingent and prospect of an enhanced fee award would be additional factors in promoting settlement).[26]

Defendant's argument also overlooks the fact that there are restraints in

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[26]The *Sarkis* majority, which held that the use of a multiplier was not authorized under an offer of judgment statute and rule, applied a strict construction. 863 So.2d at 223. To apply a strict construction to NRCP 68 and NRS 17.115 would be undermine the policy of encouraging settlements by placing an artificial restriction on assessing the reasonable value of legal services and unduly restricting the scope of the district court's discretion.

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place which guard against the possibility of any unfairness in the use of a contingency multiplier in awarding attorney's fees. As stated in *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005):

> In Nevada. the method upon which a reasonable fee is determined is subject to the discretion of the court, which is tempered only by reason and fairness. Accordingly, in determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a "loadstar" amount of a contingency fee. (Internal quotations marks and footnotes omitted.)

Defendant's reliance on *Texarkana Nat'l Bank v. Brown, supra*, is also unavailing. In *Brown*, the court stated:

> The offer of judgment rule and its underlying policy would be frustrated if parties, like TNB, had to fact the uncertainty and risk of having to pay the opposing party's contingency fee.

920 F.Supp. at 711. Here, plaintiffs motion for fees included a request for an award based on a 40% contingency fee contract in the amount of $1,397,593.38. AA, v. 18, pp. 4170, 4173. However, the district court did not grant this request. AA, v. 21, p. 4819. Defendant therefore is not required to pay plaintiffs' contingency fee.

RESPONSE TO DEFENDANT'S PART THREE:

THERE IS NO BASIS TO REASSIGN THIS CASE TO A DIFFERENT DISTRICT JUDGE

VII. DEFENDANT'S REQUEST FOR REASSIGNMENT OF THIS CASE, ON A PURPORTED REMAND, TO A DIFFERENT DISTRICT JUDGE IS FRIVOLOUS

Finally, in the unlikely event of a remand for a new trial, defendant

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requests reassignment of this case to a different district judge, asserting that Judge Walsh is biased. AOB, pp. 75-81. This request is frivolous.

First, as is abundantly clear from the record and the law as thoroughly discussed herein there is no basis whatever in this case which would support a remand for a new trial. Defendant's request is therefore moot.

Second, defendant's request is not appropriately made in this appeal. *See Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 26, 16 P.3d 415, 419 (2001) (disqualification of trial judge is matter to be determined in district court; therefore, court would not address appellant's argument that district court judge should be disqualified for bias).

Third, defendant's assertion of alleged bias on the part of Judge Walsh is based on a rehash of arguments which are devoid of merit and which have been refuted above. AOB, pp. 78-80. Accordingly, defendant's argument should be summarily rejected. *See Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009) (where challenge to judge fails to allege legally cognizable grounds supporting reasonable inference of bias or prejudice, court should summarily dismiss motion to disqualify judge).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the court affirm the district court's judgment in all respects.

DATED this 18th day of January, 2013.

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s/ David T. Wall

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CERTIFICATION 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 proportionally spaced typeface using WordPerfect 12 in 14-point Times New Roman.

2. The brief exceeds the page limit and type-volume limitations in NRAP 28.1(e)(1) in that it consists of 80 pages and contains 26,556 words; however, contemporaneously with tendering the brief to the Clerk of the Court, respondents are filing a motion for leave to exceed such limitations pursuant to NRAP 32(a)(7)(D).

3. 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)(1), 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.

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s/ David T. Wall

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 18th day of January, 2013. Electronic service of the foregoing Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

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I FURTHER CERTIFY that, on the 18th day of January, 2013, pursuant to NRAP 25(c)(1)(B), I caused a true copy of the foregoing Respondent's Answering Brief to be placed in an envelope, with postage prepaid, and deposited in the United States Mail in Las Vegas, Nevada, addressed to:

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