Case Nos. 58504, 59208 and 59423

IN THE SUPREME COURT OF NEVADA

JENNY RISH, Appellant, *vs.* WILLIAM JAY SIMAO, individually; and CHERYL ANN SIMAO, individually and as husband and wife, Respondents.	Electronically Filed Jul 22 2013 08:55 a.m. Tracie K. Lindeman Clerk of Supreme Court

APPEAL

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

APPELLANT'S REPLY BRIEF

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This case presents a litigation tactic in which a party argues for an interpretation of a vague pre-trial order to convince the trial judge that the opponent's counsel has violated the judge's authority, provoking the district court to strike an answer. This maneuver works especially well with a willing or unwitting trial judge, but this Court should encourage all district courts not to permit litigation by sanction, rather than by a trial on the merits.

PART ONE:

STRIKING THE ANSWER WAS IMPROPER

I.

PLAINTIFFS HAVE NO RESPONSE TO DEFENDANT'S SHOWING THAT THIS COURT HAS NEVER EMPLOYED *YOUNG*, OR IMPOSED OUTCOME-DETERMINATIVE SANCTIONS, FOR TRIAL CONDUCT VIOLATING ORDERS *IN LIMINE*

In the Opening Brief, defendant established a number of propositions that plaintiffs cannot refute:

1) The line of authority upon which plaintiffs and the trial court relied below as supporting an outcome-determinative sanction, and upon which plaintiffs continue to rely on appeal, is *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990) and its progeny. Those cases involved parties who engaged in pretrial misconduct that halted the adversary process, refused to participate in

pretrial proceedings, or destroyed or fabricated evidence.[1] Defendants do not dispute, and cannot dispute, that this Court has never endorsed outcome-determinative sanctions in a case involving in-trial misconduct in general or violations of orders *in limine* in particular.

2) Quite to the contrary, there ***is*** a case in which this Court expressly discussed the appropriate ultimate sanction for violations of orders *in limine*. The case is *Bayerische Motoren Werke v. Roth*, 127 Nev. __, 252 P.3d 649 (2011) (referred to hereafter as "*BMW*"). And *BMW*, in turn, relied upon a similar case about proper sanctions for misconduct during trial, *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008) (closing arguments to jury). This Court did not ***cite or even mention*** *Young* in *BMW* or *Lioce*; nor did it suggest that *Young's* multi-part test for outcome-determinative sanctions is appropriate when considering sanctions for alleged violations of orders *in limine*. Instead, the sanction considered in both *BMW* and *Lioce* was a new trial.

3) This was not accidental. In the Opening Brief, for shorthand, defendant called the different approaches for these very different circumstances a "dichotomy" and noted a number of reasons why this dichotomy exists. First, it is

[1] The cases are discussed at length at pages 31-33 of the Opening Brief. Defendant also calls the Court's attention, in particular, to footnote 11 of the Opening Brief, in which defendant identifies a portion of the district court's sanctions order below that makes clear the court was confused about the correct applicable authority.

grounded in the text of the rules. *Young* relied on NRCP 37(b)(2)(C), which expressly authorizes striking a pleading for failure to comply with discovery orders. *Young*, 106 Nev. at 92, 787 P.2d at 779. But in-trial misconduct that potentially impacts the jury is discussed in the ***new trial rule***, NRCP 59, making it hardly surprising that the Court in *BMW* invoked that rule when considering a violation of an order *in limine*. *BMW*, 252 P.3d at 656.[2] Second, even trying to apply the *Young* factors to an alleged violation of an order *in limine* at trial is like trying to jam a square peg into a round hole, further confirming that *Young* does not provide the correct authority here. The very first inquiry under *Young* is as follows: "fundamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated." 106 Nev. at 92, 787 P.2d at 779-80. Thus, the Court obviously had in mind a distinct type of violation. There is no suggestion whatsoever that the Court in *Young* was envisioning application of its

[2] Plaintiffs correctly note that *Young* also relied on courts' equitable powers. (*See* RAB at 31.) But from this noncontroversial point, they take a unsound logical leap, to argue this must mean outcome-determinative sanctions are correct sanctions for alleged violations of orders *in limine*. Of course, *Young* could not have so held, because it (unlike *BMW*) did not involve a violation of an order *in limine*. The Court's observation in *Young* that there are two potential bases for sanctioning fabrication of evidence during discovery – one textual and one equitable – says nothing at all about the correct ultimate sanction for violations of orders *in limine*. Nor does it change the fact that the rules drafters expressly made "[a]n order striking the pleadings" a sanction for abuse like that at issue in *Young*, NRCP 37(b)(2)(C), but did not even anticipate the possibility of a similar sanction for misconduct before a jury and instead included such misconduct in the new trial rule, *see* NRCP 59(a)(2).

rule and test to violations of orders *in limine*, as is confirmed, again, by the fact that the Court did not even mention *Young* in *BMW* when it considered the appropriate sanction for such misconduct.[3] Third, while outcome determinative sanctions make sense for certain types of misconduct, tantamount to pervasive refusals to participate in the litigation process as set forth in *Young* and its progeny, they are decidedly wrong for in-trial misconduct with respect to evidence or attorney arguments or *in limine* rulings that are alleged to have confused or misled a jury. It is far more sensible and saves judicial resources to await the jury's verdict, at which point a prejudice assessment can be made, and then to apply *BMW* and NRCP 59 to determine whether a new trial and a potential award of fees (along with other sanctions like contempt) are in order. (*See* discussion at pp. 31-34 of Opening Brief.)

In the Answering Brief, plaintiffs have little answer for any of this. Their primary response is that this Court, in *BMW*, *Lioce*, and the other cases, did not explicitly mention the dichotomy noted by defendant in the Opening Brief. (RAB at 34-35.) That is, of course, exactly ***our*** point. The concept that outcome-

[3] Further establishing that *Young* did not envision outcome determinative sanctions for alleged in-trial misconduct such as violations of orders *in limine* is the fact that nowhere in the *Young* factors is there any mention whatsoever about whether the alleged misconduct will affect a jury's deliberation. *Young*, 787 P.2d at 779-80. Yet, where the alleged misconduct occurs at trial and involves evidence, witness examination, or attorney arguments, that is the core relevant inquiry – which is precisely why effect on the jury was such a significant factor considered by the Court in *BMW* and *Lioce* for alleged in-trial misconduct.

determinative sanctions might be appropriate in cases involving alleged in-trial misconduct that arguably confused the jury – such as violation of an *in limine* order (*BMW*) or prejudicial closing arguments (*Lioce*) – was not in the Court's (or the parties') contemplation in those cases. The bottom line is this: Plaintiffs have not cited a single case from this Court or anywhere holding that an outcome determinative sanction is appropriate for an alleged violation of an order *in limine*.[4]

Plaintiffs surely attempted to find one. They apparently scoured the country for any authority to support their position and came up with a single out-of-state case – *Chevron Chemical Co. v. Deloitte & Touche*, 501 N.W.2d 15 (Wis. 1993). (RAB at 31-34.) *Chevron Chemical*, however, is a well-known and extraordinary case about dramatic and pervasive misconduct by Deloitte & Touche's legal team. It is most certainly not a case solely about an alleged violation of an order *in limine* or the appropriate sanction for same. To the contrary, *Chevron Chemical* involved an insidious pattern of unethical behavior by counsel both before and during trial so severe and egregious that the Wisconsin Supreme Court believed it created a significant risk of undermining the public's confidence in attorneys and the judicial system. Counsel had been sanctioned before trial no fewer than four times for

[4] For the all the reasons set forth in the Opening Brief and below, there is, however, no need for the Court to enter any type of categorical rule in this case. Even if a hypothetical circumstance can be imagined where such a sanction could theoretically be employed, this is hardly the right case.

discovery abuses. 501 N.W.2d at 21. Its in-trial violations were structural, such as intentional violations of sequestration orders. *Id.* And, most troubling, prior to trial, counsel affirmatively lied to the trial court about a witnesses' availability. The Wisconsin Supreme Court found this transgression was "a violation of one of the most basic ethical precepts under which attorneys operate" and also violated the Wisconsin attorneys' oath. *Id.*

Given all this conduct, taken in sum, the court found an outcome-determinative sanction appropriate. Even so, however, the Wisconsin court was careful to note that such sanctions are appropriate only for egregious conduct and extraordinary cases, and the court expressly cautioned that its holding was not a license for attorneys "to begin trying each other instead of their cases." *Id.* There is no suggestion at all that the court in *Chevron Chemical* would have endorsed the same sanctions for, as here, allegations that counsel during trial asked a witness questions inconsistent with an *in limine* determination. To the contrary, the tenor of the court's discussion and its recognition of the drastic nature of outcome-determinative sanctions strongly suggests it would not have done so.[5]

[5] In addition, as plaintiffs themselves note, in the twenty years since it decided *Chevron Chemical*, the Wisconsin Supreme Court has retreated from its holding, declining to imposed outcome determinative sanctions for counsel's conduct unless the client shares blame. *Industrial Roofing Servs., Inc. v. Marquardt*, 726 N.W.2d 898, 910 (Wis. 2007). There is no evidence in the record here that Ms. Rish had any blame for her counsel's alleged violation of the order *in limine.* Plaintiffs attempt to distinguish *Industrial Roofing* by saying it is inconsistent with, *inter*

(continued)

The district court erred. Its view that it was free to impose an outcome-determinative sanction and then award $5 million in a low-speed accident case solely for supposed order *in limine* violations should be reversed.

II.

THE TRIAL COURT'S ORDER *IN LIMINE* WAS NOT SUFFICIENTLY CLEAR TO WARRANT AN OUTCOME-DETERMINATIVE SANCTION

Plaintiffs do not deny that, under *BMW*, even to support ***the lesser sanction*** of a new trial, an order *in limine*'s prohibition must be clear: "violation of an order granting a motion *in limine* may only serve as a basis for a new trial when the order is specific in its prohibition and the violation is clear." *BMW*, 252 P.3d at 656. In the Opening Brief, defendant set out the procedural history of this case in detail for two reasons: (1) to demonstrate the district court's unwavering refusal to clarify its rulings on plaintiffs' motion *in limine* and plaintiffs' subsequent in-trial objections, and (2) to rebut the misimpression created by the district court's later "decision and order" (drafted by plaintiffs on their own letterhead) that its orders were "clear"

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alia, a criminal case from the United States Supreme Court that holds a client to his attorney's decisions. (RAB at 34, citing *Taylor v. Illinois*, 484 U.S. 400 (1987) and two other similar inapplicable cases from other jurisdictions.) *Taylor* held only that an attorney's misconduct can trump the Sixth Amendment's right to call a defense witness in a criminal case. It is immaterial here. Moreover, plaintiffs' attempt to distinguish Wisconsin law by suggesting it is inconsistent with federal criminal law is, in a word, strained. It is plaintiffs, not defendant, who invoked Wisconsin law in the first place. They can hardly ask this Court to accept the Wisconsin Supreme Court's decision in *Chemical Company*, but then ask the Court to ignore a subsequent limiting decision from the very same court on the ground that federal law is different.

and the violations cumulative. To reiterate, the following are the highlights negating any suggestion that the district court's orders were clear or specific:

1) Plaintiffs' motion *in limine* was not as broad as they now contend (or, at a minimum, defense counsel's understanding otherwise was highly reasonable). The motion referred to specific evidence – expert opinion, photographs, and repair invoices. Underscoring the point, plaintiffs put an entire paragraph in their motion *in limine* in bold type – the key paragraph invoking *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). (2 App. 404.) *Hallmark* is a case about the standard for allowing ***experts*** to testify, not about fact witnesses.

2) In its oral ruling on the motion *in limine*, the district court expressed its understanding that the motion was primarily about experts: "Dr. Fish, ***or any medical doctor***, may not testify that because there appears to be minimal property damage that somehow the plaintiff must not have been injured as much as he claims to have been, pursuant to the *Hallmark* case." (3 App. 531-32 (emphasis added).) Based on that ruling, the court then excluded the two specific pieces of evidence – accident photographs and repair invoices. (*Id.*) Contrary to plaintiffs' repeated assertion that defendant's claims of confusion are post-hoc, counsel immediately sought to ensure he understood the ruling: "I mean, can I simply say this is what the accident was and not argue that this accident could not have caused injury based on that photograph?" (*Id.* at 533.) In what would become a recurring

pattern, the court refused to answer the question, first inviting plaintiffs' counsel to respond and then simply saying: "I've made my ruling." (*Id.*)

3) The trial court's subsequent, short written order did not contain the sweeping language plaintiffs now contend it contained. It merely said it was granting the motion, that neither "Dr. Fish, ***nor any other defense expert***" could "opine" at trial about the impact of the crash, and that the photos and invoices were excluded. (3 App. 600 (emphasis added).)

4) At a pretrial hearing, the breadth of the order came up. (As noted in the Opening Brief, plaintiffs by then had submitted a secret memorandum to the district court, and their comments during a pre-trial meeting indicated to defendants that plaintiffs wanted to use the *in limine* order more broadly than defendant understood.) The colloquy that followed was extraordinary. Defense counsel implored the court to help counsel understand the breadth of the order *in limine*. The court refused. Extended quotations appear in the Opening Brief, and the entire relevant portion of the transcript appears at 6 App. 1371-86.[6] The court let the parties argue at length about what they believed the prior order meant. Defendant's counsel specifically raised the question whether it was limited to experts and the two pieces of evidence. Plaintiffs' counsel argued it should not be.

[6] We respectfully submit that the short snippets from this transcript quoted by plaintiffs (*e.g.*, RAB at 43) are inadequate.

(*Id.* 1371-82.) The court responded by musing that its prior order was specific and was not directed to percipient testimony (*id.* at 1382-83), but as plaintiffs continued to press for something more broad, the ***court refused to answer the question***. Ultimately, Mr. Polsenberg – whom defendant's counsel had brought in, among other things, for the purpose of attempting to clarify this issue (further negating the implication that counsel is some sort of scofflaw who ignores the rules) – was granted permission to address the court. Mr. Polsenberg repeatedly asked the court for guidance so that defendant's counsel could craft his opening statement. (*Id.* at 1385.) The court's response is astonishing – Judge Walsh informed Mr. Polsenberg that, since he was not the lawyer who would be making opening statement, she would not answer his question. (*Id.* at 1385-86.)

5) The opening statement by plaintiffs' counsel betrayed any notion that plaintiffs genuinely understood the order *in limine* as putting off limits discussion about the severity of the accident – plaintiffs (quite misleadingly) twice called the accident a "crash." (7 App. 1434.)[7] Defendant's counsel, in his opening statement, attempted to dip a toe in the water to ensure he understood the court's order in light of plaintiffs' opening statement – first describing the accident as having occurred in "stop-and-go, bumper-to-bumper traffic." (*Id.* at 1490-92.) There was no

[7] *Id.* ("Defendant crashed that Suburban into the rear of Mr. Simao's van."); *id.* ("The crash caused his head to hit a metal cage located behind the driver's seat.").

objection, and the court did not interject. Defendant's counsel continued and made the point that defendant's vehicle was travelling slowly and the impact occurred while defendant was applying the brakes. (*Id.*) Counsel also noted that there were no reported injuries at the scene and that all parties refused treatment from paramedics. (*Id.* at 1492.) Again, there was no objection.[8]

6) Plaintiffs themselves were allowed to put before the jury their version of the accident's history. Plaintiffs' medical experts admitted they had little or no knowledge of the accident and thus their opinions about causation were based on what Mr. Simao himself told them about the accident. (AOB at 12, citing record.) Plaintiffs' counsel candidly admitted that their experts were relying on

[8] It is noteworthy that this last point is the very subject of the question asked by defendant's counsel that enraged plaintiffs' counsel and ultimately led the trial court to stop the trial, dismiss the jury, and strike the answer. (12 App. 2857 ("Q: And the paramedics didn't transport anyone from Mrs. Rish's car?")) When the same point was made during opening statement, however, plaintiffs' counsel did not jump out of his chair or claim outrage. The court did not admonish defendant's counsel or say a word. Plaintiffs did not later ask for any relief about the opening statement. Plaintiffs' response in the Answering Brief as to why they did nothing is telling. They suggest that they did not object merely because they did not need to do so in order to preserve any error for appeal – they were, they say, allowed to wait until evidence was actually introduced. (RAB at 44.) This is nonsense. Defendant is not arguing that plaintiffs waived anything; this is not about error preservation. The point is and always has been this: the fact that defendant's counsel was allowed without objection or intervention by the court to say these things in opening statement is relevant because it (1) confirms the trial court's order was not understood ("clearly" or otherwise) as plaintiffs now contend, (2) rebuts plaintiffs' repeated argument that defendant's counsel had clear notice these subjects were off limits, (3) negates plaintiffs' argument that defendant's counsel was feigning confusion, and (4) explains why defendant's counsel interpreted the order *in limine* as he did later in the trial.

Mr. Simao's description of the accident and that their opinions were being offered to show causation. (7 App. 1594 ("Guess what? . . . [the doctor] already testified that the patient gave hi[m] the history of the motor vehicle accident, period. That's all that's necessary.")) That plaintiffs were unabashedly allowed to put their version of the accident before the jury in this manner further negates any suggestion that defendant's counsel should have understood it as obvious that the *in limine* order prohibited defendant from trying to negate causation by having lay-witnesses respond.

7) The record is rife with examples of the trial court refusing to clarify its order, despite pleas for it to do so when it made certain cryptic rulings. This is consistent with a statement the judge made early on about her order *in limine*, to the effect that it was not her job to tell the parties "you can say this, you can't say that, you can say the other," which, of course, is exactly the job of a trial court in ruling on a motion *in limine*, especially if it is later to be used as a basis for outcome determinative sanctions. (6 App. 1385; *see also* pp. 8-10 & n.2 of the Opening Brief.) As in the order they ultimately drafted for the trial court, plaintiffs in their Answering Brief attempt to use snippets of testimony to suggest defendant's counsel received clear notice of how the court interpreted its order. In the Opening Brief in contrast, defendant endeavored to provide for the Court lengthy and accurate quotations and citations to the transcript to demonstrate the

court's rigid refusal to guide the parties. Further debate about what the transcripts say or do not say is unlikely to be helpful to the Court. We believe we have described the transcripts accurately, but they are in the record and they speak for themselves. The portions defendant believes are relevant are quoted and cited at pp. 13-22, 41-49 of the Opening Brief.[9]

8) Even when the trial court took the step of giving an "irrebuttable presumption," it merely instructed the jury that the accident was "sufficient" to cause the "type" of injuries sustained by the plaintiff, but then told the jury ***it was still for the jury to decide proximate cause***: "Whether it [the accident] proximately caused those injuries remains a question for the jury to decide." (10 App. 2370.) This instruction, which actually was drafted by plaintiffs (*id.* at 2327), simply cannot coexist with plaintiffs' later interpretation (and the interpretation

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[9] One of plaintiffs' specific claims about the transcript, however, requires additional response. Plaintiffs contend "defense counsel essentially admitted he understood the order during the *voir dire* of defendant's medical expert." (RAB at 41.) Plaintiffs' reference is to a segment of the transcript in which plaintiffs' counsel attempted to instruct defendant's expert about what he could and could not say. Like defense counsel, the expert was thoroughly confused and could not understand how he could give his opinion about injury without referring to the nature of the accident. (*E.g.*, 8 App. 1883.) As always, the district court refused to give any guidance, merely referring back to its prior order. (*Id.* at 1881.) In any event, the portion of the transcript where defense counsel supposedly "essentially admitted" he understood what plaintiffs now claim is the breadth of the *in limine* order is nothing of the sort. Counsel simply equated low impact and the photos and invoices with biomedical opinions. (*Id.* at 1886.)

they now press on appeal) of what the *in limine* order supposedly meant – that it excluded any reference at all to the nature or effects of the accident.[10]

9) Up until the very day that it struck the answer, the district court refused to respond to pleas by defendant's counsel for more clarity. Indeed, counsel pointed to the "irrebuttable presumption" instruction and the portion that allowed the jury to determine proximate cause as a basis for his confusion. (12 App. 2769-70, 2773.) As always, the court demurred, refused to acknowledge the position the court later ruled warranted striking the answer, and indeed seemed to affirm that defendant could testify with regard to the accident. (*Id.*)

In the prior section, *supra*, and in the Opening Brief, defendant noted this Court has never before held that an alleged violation of an order *in limine* can lead to an outcome-determinative sanction. Indeed, plaintiffs have not cited a single case from anywhere in the country granting such drastic relief for a similar type of alleged violation. As a result, neither this Court nor any court of which we are

[10] Again, the last question at trial – the specific question that caused plaintiffs to demand an order from the court striking the answer – was asked to Mr. Simao. It was, simply, this: "And the paramedics didn't transport anyone from Mrs. Rish's car?" (12 App. 2857.) In the entire 80 pages of their Answering Brief, plaintiffs never explain how their suggestion that this question was so nefarious and awful can be harmonized with the fact that the trial court had expressly instructed the jury, in specific response to plaintiffs' request for sanctions, that proximate cause was for the jury to decide. Even if plaintiffs could cobble together a theoretical theory of coherence, the proposition that defendant's counsel was confused by the "irrebuttable presumption" proximate cause instruction about the boundaries of the order *in limine* is hardly unreasonable.

aware has had occasion to discuss the standards required by due process before such measures are taken for such alleged violations. We respectfully submit that, at the ***absolute minimum***, a court must require the same level of clarity that this Court demanded to impose ***the lesser sanction*** of new trial in *BMW*. As the foregoing establishes, there was no such clarity here. Not even close.

III.

THE ORDER THAT PLAINTIFFS' COUNSEL WROTE FOR THE DISTRICT COURT IS MISLEADING

At first, when defendant's counsel asked Mr. Simao what would turn out to be the last question of the trial – whether others in defendant's car required paramedics – the trial court was not particularly troubled. Plaintiffs' counsel objected, and the court simply sustained the objection without comment. (12 App. 2857.) When plaintiffs' counsel sought to approach the bench, the court saw no need and declined the request. (*Id.*) The court ultimately relented upon plaintiffs' further demand, but even at the bench the court did not appear troubled or suggested that defendants' counsel had just done something terrible, let alone something so bad that the answer had to be stricken. The court merely asked counsel to move along and attempted to steer the discussion to scheduling matters. (*Id.* 2858-60.) It was only after a profane, angry, and bullying argument by two of plaintiffs' counsel that the court agreed to have a conference outside the presence of the jury. (*Id.* 2857-60) After a very short, strident oral argument from

plaintiffs' counsel and a brief response by defendant's counsel, the court granted the motion to strike the answer from the bench. (*Id.* at 2870.) Plaintiffs demanded the court protect its ruling on appeal by putting reasons on the record and, after a break, the court gave a short explanation of its ruling and dismissed the jury. (*Id.*)[11]

The order striking the answer was not issued by the court until weeks later and appeared to have been written by plaintiffs' counsel on their letterhead (which plaintiffs do not deny in the Answering Brief). (16 App. 3629.) In their drafting, in an apparent attempt to support the extreme sanction imposed by the court, plaintiffs engaged in revisionist history. To suggest that the court's in-trial rulings were "clear and unambiguous" despite the record otherwise, the order misleadingly attempts to give the appearance that Judge Walsh explained the reasoning and the contours of her interpretation of the order *in limine* to defendant's counsel numerous times during the trial. The order, however, conveniently ignores (or cuts off quotes before it gets to) portions of the record indicating otherwise, including the repeated occasions when defendants' counsel implored the court for guidance,

[11] To read plaintiffs' brief, one might think the court took the break to consider the matter and make a reasoned decision ***before*** striking the answer. That is not correct. After a short argument, and before taking a break, the court granted the motion orally from the bench with no analysis. (12 App. 2870.) It was only after plaintiffs' counsel asked the court "to fully protect the record" by making findings on the record that the court took a break and then later returned to give some reasons for the ruling. (*Id.* 2870-72.)

but the court refused to give it. We catalogued many of these and other misleading aspects of the order striking the answer in the Opening Brief. The following are some of the more noteworthy examples:

1) To give the written order bulk and to try to make defense counsel's conduct seem cumulative, plaintiffs tacked on two other supposed violations (use of slides during opening statement and suggestion of "medical build up") as grounds for striking the answer. Plaintiffs' counsel, however, had not even mentioned these supposed violations in asking the court to strike the answer at trial. Moreover, the order's description of these other issues is highly misleading to the extent it suggests that any principle at all was expressed clearly or unambiguously by the court to defendant's counsel. The court's rulings were terse and unremarkable; the type made in trials every day. The most the order can do is quote ***arguments made by plaintiffs' counsel*** as though those were commands from the court. (*See* AOB at n.7 & pp. 22-23, discussing, *inter alia*, 7 App. 3684.)

2) Amazingly, the district court's written order striking the answer refers to supposed violations of the order *in limine* during defendant's opening statement. (16 App. 3691.) As noted above, defendant's counsel during opening statement did indeed refer to the low speed at which the accident occurred and also noted that nobody at the site complained of any injuries or went with the paramedics. (7 App. 1490-92.) As is also noted above and in the order itself, however, ***plaintiffs'***

counsel never objected to these comments and the trial court did not say a word. And, indeed, the opening statements, were given not long after Mr. Polsenberg had expressly implored the court to tell the parties what its *in limine* ruling meant was off limits in opening statements and the court amazingly ***refused to do so*** because Mr. Polsenberg was not the lawyer who would make opening statement for defendant. (6 App. 1383-86.) Moreover, defense counsel's comments came right after plaintiffs referred to the incident as a "crash" before the jury. Thus, far from supposedly putting defendant's counsel on notice of what was permissible and what was not, as the order misleadingly attempts to suggest, the events that transpired during opening statements did exactly the opposite – they further confused defendant's counsel when, later, the answer was stricken because he inquired into the very same subject areas he had mentioned without controversy in opening statement.

3) Trouble started during defendant's examination of Dr. Jorg Rosler, when counsel asked about passengers in the accident. The court's written order says the brief exchange that followed shows a "clear violation" of the order *in limine*. (16 App. 3691.) To the contrary, the court gave counsel no reasons for its ruling whatsoever and merely granted a relevance objection. (*See* AOB at 62, quoting colloquy.) In the Answering Brief, plaintiffs now back away from claiming that this exchange alone should have put defendants' counsel on notice

about how the court was interpreting the order *in limine*. Instead, they refer to two other allegedly similar incidents later in the trial. (RAB at 60.) Those were no more clear or specific.

a) The first of those two supposedly "clear" violations set forth in the order occurred several days later during the cross-examination of Dr. McNulty. Plaintiffs' counsel objected to a question about others in defendant's car on ***relevance*** grounds. During the short bench conference that followed, there was no mention whatsoever of the pre-trial *in limine* ruling. (9 App. 2047-48.)[12] The court once again gave no explanation for its ruling other than to say "sustain the objection." (*Id.* at 2048.) Defense counsel had explained his befuddlement and ***specifically asked*** whether this had anything to do with any pre-trial order: "I'm not sure how its not relevant. Is this something that there's an order[?]" (*Id.*) Rather than invoking the *in limine* order as a basis for the objection, as plaintiffs now suggest is the case, plaintiffs' counsel ***himself*** disclaimed reliance on the *in limine* order: "It doesn't matter whether it's [sic] order." (*Id.*) Thus, the implication in the written order striking the answer that, by this point, the contours of the order *in limine* were clearly and unambiguously delineated for the parties is

[12] That plaintiffs objected on relevance grounds is significant and further negates any suggestion defendants counsel would have understood the question violated the *in limine* order. At the pretrial conference, the court had rejected a suggestion that the order *in limine* was based on relevance. (3 App. 532.)

fantasy. The contemporaneous statement of plaintiffs' own counsel in response to defense counsel's question whether he had acted inconsistently with a pre-trial order makes clear that even plaintiffs were not relying on the order *in limine* when they made their objection.

b) The order striking the answer next relies heavily on ***statements made by plaintiffs' counsel*** (not the court) during a bench conference that occurred later that same day, after another objection to a similar line of inquiry was sustained. (16 App. 3694-95.)[13] After argument by plaintiffs' counsel, defendant's counsel again implored the court for guidance. Again, the court refused to give it, repeating her assertion that the terse, pre-trial written *in limine* order was crystal clear: "Then I suggest you reread the order. It's pretty clear. It's in black and white . . . It's pretty darn clear." (10 App. 2210-11.)

4) In the Opening Brief, defendants demonstrated that, in one extreme case, the written order striking the answer simply invented a colloquy that never occurred and said the court "noted" things it never noted and made a "finding" the

[13] The entire colloquy, not just the arguments of plaintiffs' counsel, can be found in the record at 10 App. 2207-11. In the Answering Brief, plaintiffs' counsel candidly do not deny that, in the order they prepared for the court, they sometimes premised defense counsel's supposed "clear" notice about the court's interpretation of the order *in limine* not on anything ***the court said*** but instead on ***their own*** arguments. (*See* RAB at 62, suggesting defendant's counsel should have inferred from the court's cryptic and terse rulings that she was endorsing everything plaintiffs' counsel was arguing.)

court did not make. (AOB at 62-63, discussing 16 App. 3690.) Plaintiffs have no response.

In sum, the trial court steadfastly refused to give guidance, defendant's counsel was genuinely and reasonably confused, and plaintiffs' post-hoc attempts, in the order they drafted for the court, to give the appearance that everything was "clear and unambiguous" should be rejected.

IV.

THE TRIAL COURT'S *IN LIMINE* RULING DOES NOT JUSTIFY THE SANCTION

A. The Correctness of the Trial Court's Order *In Limine* is Relevant on Appeal

Plaintiffs contend this Court is forbidden from considering the correctness of the district court's ultimate decision that defendants could not offer lay-witness testimony about the nature and severity of the accident. (RAB at 47-50.) Employing one of their favorite techniques, plaintiffs use hyperbole to recast and misstate defendants' arguments for the purpose of trying to knock them down. They say: "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." (*Id.* at 47.) This is not defendant's position, nor did defendant's counsel "carte blanche ignore" the order or willfully violate it. Defendant's argument on appeal is that the order was insufficiently clear

and, indeed, the record reveals repeated fruitless attempts by counsel to obtain reasonable clarification. The question defendant presents on appeal is not whether counsel can wantonly violate an incorrect order, but merely whether this Court, in its reviewing capacity, can take into account the fact that the order was incorrect in deciding whether and what sanctions are appropriate. The answer to that question, under this Court's law, is clearly "yes."

As an initial matter, the correctness of an order is plainly relevant to the issue whether the order was sufficiently clear under *BMW* to warrant sanctions. In trying to ascertain what an order *in limine* means, or what it allows and does not allow, it is reasonable for trial counsel to assume the order is consistent with the law. Put more simply, an ambiguous *in limine* ruling is far more likely to be reasonably understood by counsel as being consistent with the law because, at least on some level, counsel expect trial courts tend to try to follow the law. If the order is erroneous, counsel's misunderstanding about its breadth is more understandable.

Indeed, in determining whether an order *in limine* was sufficiently clear to warrant sanctions, it is especially appropriate for the Court on appeal to take into account that the order is not merely incorrect, but also unjust – because, again, it is hardly unreasonable for trial counsel to assume trial courts mean to avoid unfairness. Plaintiffs, as noted, were permitted to put ***their*** version of the nature of the accident before the jury in the form of their expert's opinions and by referring

to it as a "crash." Plaintiffs' view of the law (and the one they suggest should have been clear and unambiguous to defendant's counsel), however, is that defendants were precluded from responding by putting their own evidence about the nature of the accident before the jury. It is hardly unreasonable for a lawyer who is attempting, during the heat of a trial, to apply an order *in limine* to be doubtful of an interpretation that is so inequitable. It is entirely appropriate for this Court to consider whether the order *in limine* was correct in determining whether it was sufficiently clear to defendant's counsel to warrant severe sanctions.

Moreover, and more fundamentally, this Court already has ruled on this very issue and has rejected plaintiffs' position. In *BMW*, the Court held that, in determining whether or not a misconduct sanction is appropriate for violation of an *in limine* order, the Court must inquire into whether the order was correct. *BMW*, 252 P.3d at 656 ("To justify a new trial, as opposed to some other sanction, unfair prejudice affecting the reliability of the verdict must be shown [citation omitted], which includes consideration of ***whether the argument was actually proper or improper under the law***.") (Emphasis added, internal citation and quotation omitted); *see also Lioce*, 174 P.3d at 983 (considering whether or not an attorney's arguments to the jury were improper in deciding whether sanctions were appropriate). Plaintiffs have no response to this quotation from *BMW*. With respect to *Lioce*, the most they can muster is an attempt to distinguish it in a single

sentence, claiming it is not relevant here because the sanction being considered for the attorney's misconduct in *Lioce* was a new trial, not striking an answer. (RAB at 48.) Plaintiffs' suggestion – that the Court may consider the correctness of a trial court's order *in limine* where the proposed sanction for an alleged violation is a new trial but not where the proposed sanction is the more draconian one of striking an answer – is nonsensical.[14]

The correctness of an order *in limine* is fair game in an appeal from harsh sanctions issued for alleged violations of that order. Plaintiffs' arguments otherwise are without merit.

B. The Trial Court's In Limine Ruling was Incorrect

In the motion *in limine* that led to the ultimate sanction of striking the answer, plaintiffs relied heavily on the *Hallmark* case, which is a case about admissibility of biomechanical experts. The district court's initial *in limine* ruling was similarly based on its understanding of *Hallmark* and was based on expert witness exclusion, not lay-witness exclusion.[15] As the case progressed, however,

[14] Similarly, plaintiffs' reliance on two out-of-state cases where there is clear law from this Court (*see* RAB at 48-50) should be rejected.

[15] Plaintiffs make a half-hearted attempt to suggest it was clear to everyone that the district court's initial *in limine* order applied to all witnesses, not just experts. That is wishful thinking. Plaintiffs' motion *in limine* relied heavily on *Hallmark* – they even bolded the paragraph about *Hallmark* in their motion. (2 App. 404.) During argument on the motion, the trial court thought the motion was about experts, ruling that neither "Dr. Fish, ***nor any medical doctor***" would be permitted to testify

(continued)

the district court morphed its ruling into one that precluded any inquiry at all into the nature or severity (or lack thereof) of the accident.

This was error. As is explained in greater detail in the Opening Brief, *Hallmark* is a case about experts. Given the imprimatur experts carry (and their ability to testify to opinions and rely on otherwise inadmissible material), trial courts must play an important gatekeeping function for expert witnesses. (*See* AOB at 54-55.) But neither those principles nor the *Hallmark* case gave the district court license, as it ultimately held and as plaintiffs now argue, to preclude defendant from attempting to give the jury information about the nature of the accident to help it decide proximate causation.

Plaintiffs' main response is actually a telling admission. Plaintiffs contend that, if indeed the trial court expanded the order beyond its original intent, there is no problem because the court had the power to do so: "A trial court which issues an order *in limine* is not bound by its order." (RAB at 51.) For its part, the trial court denied that its order was changing, constantly referring back to it and

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about the limited property damage. (3 App. 531-32 (emphasis added).) The district court's resulting written order used similar language and used the word "opine," signifying the order was about experts since only experts can testify to opinions – "Neither Dr. Fish ***nor any other defense expert*** shall not [sic] ***opine*** regarding biomechanical or the nature of the impact." (3 App. 600 (emphasis added).) Finally, even in the order striking the answer, the district court acknowledged that the motion *in limine* "was primarily based on *Hallmark*." (16 App. 3635.)

seeming to think it said much more than it did. (*E.g.*, 10 App. 2210-11.) In any event, plaintiffs' response actually supports defendant's main points – (1) that defendant's counsel was confused by the expanding order and (2) that basing harsh sanctions on a moving target is unfair. Put simply, while a trial court perhaps has the ***power*** to expand an order *in limine* during trial, that does not mean it is permissible for the court then to impose an outcome-determinative sanction on the initial order as though it had never changed.

In any event, whenever and however Judge Walsh got to her final understanding of the law regarding accident-severity evidence at trial, her ultimate ruling was incorrect and unjust. The last question asked by defense counsel at trial, which led the court to strike the answer, was asked of plaintiff himself and concerned whether anyone else at the scene was injured. (12 App. 2857.) Plaintiffs' counsel were unabashed at trial in their argument why this subject is supposedly so nefarious – it might, give the jury factual information about the severity of the accident from which they could decide causation. (*Id.* at 2861; *see also* 8 App. 1882 (plaintiffs' argument that the only thing defendant could have witnesses say was that it was "a motor vehicle accident" and "a rear-end" accident, but nothing about nature or severity).) In short, plaintiffs' position is nothing less than this: Plaintiffs in Nevada may sue for millions of dollars in stop-and-go collisions, may call the accident a "crash," may have their experts base opinions

about causation on the plaintiff's description of the accident, and then may preclude the jury ever from hearing anything else about the nature or extent of the collision even from the plaintiff himself on cross examination. The *Hallmark* case holds nothing of the sort, and this Court's decision in *Fox v. Cusik*, 533 P.2d 466 (1975) is exactly to the contrary.[16]

Even the trial court's initial *in limine* ruling (before it changed into an injunction against even lay-witness testimony about the nature of the accident) was indefensible, which is probably why plaintiffs spend so little space in their Answering Brief trying to defend it, and, when they do, focus mostly on procedural issues. (*See* RAB at 53-55.) The district court interpreted *Hallmark* to mean that without biomechanical expert testimony – which, *Hallmark* instructs, is almost never admissible – ***juries in Nevada cannot even look at pictures of the automobiles*** in automobile accident cases. Nothing in *Hallmark*, or any case from this Court of which we are aware, supports this surprising ruling.

[16] Plaintiffs' attempts to distinguish *Fox* should be rejected. (RAB at 52-53.) While they point to minor factual and procedural differences, they do not address its core finding that the jury's proximate cause determination requires analysis of the nature of accident and the injuries sustained. Plaintiffs also mischaracterize defendant's Catch-22 argument. (*Id.* at 54.) To restate it, simply, it is this: Given the very high hurdle imposed by the Court for biomechanical testimony in *Hallmark* and the unavailability of such testimony in most cases, plaintiffs' understanding of *Hallmark* would very often leave defendants entirely unable to put evidence of the nature of automobile accidents before juries.

Defendant also noted in the Opening Brief that it would be unfair to allow plaintiffs like Mr. Simao to put their version of an accident's severity before the jury in the form of doctor's opinions based on a plaintiff's report to them about the nature of the accident, but to deny defendants any opportunity to respond with lay testimony that might tell a different story. Plaintiffs' answer is feeble. They merely assert that, under the law of expert witnesses, it is reasonable for doctors to rely on things their patients tell them, and their opinions can create questions of fact on causation. (RAB at 54-55.) Defendant, however, is not claiming it was improper for plaintiffs to put facts about the accident's severity before the jury through their experts' opinions in this manner. Defendant's argument is that it is unfair to permit them to do so while barring defendants from responding in kind by excluding eyewitness testimony about the nature of the accident.

For all the reasons already stated, the district court erred in imposing an outcome-determinative sanction in this case. The court, however, never should have even gotten that far, because the order *in limine* that defendant's counsel supposedly violated was itself unsound and unjust.

V.

DEFENDANT DID NOT WAIVE APPELLATE ISSUES

Plaintiffs assert that two of the points defendant makes on appeal have been waived. Plaintiffs are incorrect.

A. Defendant Sufficiently Objected

Plaintiffs contend defendant did not preserve the argument that, under *BMW* and *Lioce*, striking an answer is not the appropriate sanction for a violation of an order *in limine*. (RAB at 29.) But defendant did object to the sanction and did object to striking the answer and taking the all issues from the jury based on trial conduct, as opposed to discover abuse. (12 App. 2881-82 ("[I]f the Court is taking this [case from the jury] because of trial counsel's ***trial conduct***, then I think it is too extreme a penalty to place on the client." Emphasis added).) Defendant's counsel made the essential argument that underlies the argument now made on appeal – that the sanction of striking the answer was too extreme for the alleged violation. (*Id*. at 2866 ("That is extreme. That is far too extreme.").) This is sufficient to preserve the issue, even if the precise legal authorities are not invoked. *Western Technologies, Inc. v. All-American Golf Center*, 122 Nev. 869 n.8, 139 P.3d 858 n.8 (2006).[17]

Moreover, the manner in which the trial court decided to strike the answer did not allow for elaborate discussion of the issue. Plaintiffs' motion to strike was made orally during trial and argument was brief, focusing on whether the court's prior orders had been clear. (12 App. 2860-70.) The court ruled immediately from

[17] Once a claim is properly presented, a party is not limited to the precise arguments made below, but can advance related theories. *E.g.*, *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Howard Univ. v. Lacy*, 828 A.2d 733, 739 (D.C. 2003).

the bench without briefing. (*Id.* at 2870.)[18] "Counsel, in the heat of a trial, cannot be expected to respond with all the legal niceties and nuances of a brief writer." *Otterbeck v. Lamb,* 85 Nev. 456, 460, 456 P. 2d 855, 858 (1969). There is no waiver.

B. *Plaintiffs* did Not Have to Move for New Trial for *Defendants* to preserve the Appellate Issue

In a bizarre argument, plaintiffs contend defendants cannot on appeal note that the order *in limine* was insufficiently clear under the standards established in *BMW*, because *plaintiffs* did not move for a new trial. (RAB at 37; *see also id.* at 59 (arguing defendant cannot argue on appeal that the district court made inadequate findings under *Lioce* because, "[t]here was no motion for a new trial in this case.").) This is certainly no reason to overlook the district court's errors in this case.

As an initial matter, plaintiffs are conveniently neglecting to tell the Court that, as a matter of fact, there was a motion for new trial in this case. Defendant filed a motion for new trial expressly arguing that the district court erred in imposing an outcome-determinative sanction. (17 App. 3853 to 18 App. 4144.) Accordingly, plaintiffs' waiver argument is a non-starter.

[18] The court also had refused defense counsel's request to submit briefing before giving the "irrebuttable presumption" instruction. (10 App. 2318, 2319.)

More fundamentally, plaintiffs are moving the target and mischaracterizing defendants' argument. It has nothing to do with whether or not a new trial motion was filed. The point is that, in the leading case about a trial court's power to impose sanctions for alleged violations of orders *in limine*, the Court found the order had to be specific and the violation clear to warrant ***even the lesser sanction of new trial***. *BMW*, 252 P.3d at 656. Put another way, if the notice and clarity standards for imposing the sanction of a new trial for violation of an order *in limine* are not present, then certainly imposition of the greater (and due process depriving) sanction of directing the outcome of the case is improper. Plaintiffs' attempts to recast defendant's arguments more to their liking to try to respond to them should be rejected along with their claims of waiver.

C. The Defendant Asked Questions to Obtain a Ruling to Preserve the Issue

Since the district court would not delineate the boundary beyond which questions were impermissible under its *in limine* ruling, defense counsel was placed in the unenviable position of having to ask questions to determine the parameters of the trial judge's ruling to preserve an accurate issue for appeal. Counsel did not continue to ask questions about the circumstances of the accident for sport, for spite, or out of contempt, but rather to obtain a ruling on the record. Otherwise, appellant would have to come to this Court without a full articulation of what the district court prohibited and allowed in the way

of questioning. *See Jitnan v. Oliver*, 127 Nev. ___, 254 P.3d 623, 629-30 (2011). In such a situation, a respondent could tactically argue—forthrightly or not—that a question left unasked by the appellant's counsel was actually appropriate under the pre-trial ruling and that it was because of defense counsel's strategy, instead of a legal error by the trial judge, that the attorney did not ask a particular question. Where the district judge will not articulate the line of prohibited inquiry, only asking the questions and drawing objections upon which the judge must rule will make the record for appeal.

In a true sense, this principle is the corollary to the rule in *Lioce*. Just as a party must object to improper trial conduct at the time, a party must—where the district court will not clarify a vague order—test the limits of that order at trial to preserve for appeal what its boundaries really are.

VI.

EVEN IF YOUNG APPLIED TO TRIAL CONDUCT, THE DISTRICT COURT FAILED TO PROPERLY ANALYZE THE YOUNG FACTORS

For the most part, plaintiffs do not analyze the *Young v. Johnny Ribeiro*[19] factors beyond simply reproducing quotes from the sanction order, which they themselves prepared. But reliance on the order is not enough, because the order improperly analyzes the *Young* factors. Defendant pointed this out in the opening brief, but plaintiffs, rather than addressing the issue raised, simply recite portions

[19] *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990).

of the order. And where the district court failed to consider a number of the *Young* factors, plaintiffs continue to ignore this deficiency, as well. Stated another way, plaintiff fail to engage in an analysis of the superficiality and ends-oriented reasoning of the order. A real examination of the factors calls for the ultimate sanction to be reversed in this case.

A. Factor One:

"The Degree of willfulness of the offending party"

Willfulness is not Established where there Is Confusion over what is Prohibited

"Willfulness" cannot be inferred from the mere occurrence of a violation. *See Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.gd 938, 941 (1998) (plurality). Indeed, legitimate confusion regarding the state of the law mitigates a finding of "willfulness." In *Lane v. Allstate*, for example, in light of disagreement among the members of this Court on whether a plaintiff's secret recordings of telephone conversations actually was illegal, "it would be unfair to conclude that, although [plaintiff's] conduct was intentional and, as we have now determined illegal, [plaintiff] intended to violate state law." 114 Nev. at 1181, 969 P.2d at 941.

Similarly, in this case, the district court's refusal to clarify the pretrial order caused confusion under which it would be "unfair to conclude" that defense

counsel intended to violate the order.[20] The defense was obliged to find the practical limitations of the court's ruling by trial and error. This is not recalcitrant "willfulness." There can be no "willfulness" in the face of such pervasive confusion.

B. Factor Two:

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

The District Court and Plaintiffs do Not Address this Factor

In the opening brief, defendant pointed out that the district court rationalized its sanction as necessary "to curb the Defendant's violations" of prior orders (16 App. 3709:6-8), without even addressing the efficacy of a lesser sanction. (AOB 63-64.) In simply reproducing language from the order without analysis (RAB 22-23), plaintiffs fail to address this criticism.

It is axiomatic that, "if less drastic sanctions are available, they should be utilized." *GNLV Corp. v. Serv. Control Corp*., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). In this case, however, the order assumes that only an ultimate sanction can rectify any prejudice where "[i]n the eyes of the jury, the Plaintiffs were repeatedly preventing the jury from hearing about the significance of the impact

[20] Indeed, the order on its face does not even prohibit much of the inquiry in question. While plaintiffs particularly object to their physicians being asked about other injuries to passengers in defendant's vehicle (RAB 22), the written *in limine* order did not prohibit these questions (3 App. 599-600).

when in fact [*sic*] th[e district c]ourt had determined that a minor impact defense was unavailable…." (16 App. 3709:21.) This is the sort of issue that is easily remedied by a simple curative instruction. *See Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 27, 16 P.3d 415, 420 (2001) (Maupin, J., concurring). (MAUPIN, J., concurring). In any case, however, neither the district court nor plaintiffs explain why this prejudice is not remedied by a mistrial. An ultimate sanction was inappropriate.[21]

C . Factor Three:

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

Plaintiffs and the District Court Ignore this Factor, which Calls for a Lesser Sanction in this Case

True to form, plaintiffs offer no analysis on this most critical point, only a bare citation to the order, which concentrates on the alleged continuous violations. (16 App. 3710:16-17.) Repetition is not synonymous with severity, however. If each comment individually does not support a sanction, it is error to conclude that the cumulative effect calls for the sanction. *Bean v. Landers*, 450 S.E. 2d 699 (Ga.

[21]Plaintiffs cite to *Lioce* (RAB 23) for the precept that repeated misconduct forces the non-offending attorneys to repeatedly object, potentially engendering in the jury a "negative impression" of the non-offending counsel or client. 124 Nev. at 18, 174 P.3d at 981. The analogy is inapt. *Lioce* recognized this danger where the non-offending counsel was obliged to object three times during closing argument alone. *See* 124 Nev. at 10-11, 18, 174 P.3d at 976-77, 981. Here, plaintiffs promote just five objections, which occurred on different *days* of a trial over *two weeks*. (RAB 21-22.) These few objections, diffused over weeks of testimony, could not have given the jury an impression of obstreperousness.

Ct. App. 1995) (reversing new trial order). *See also*, *Grosjean v. Imperial Palace*, 125 Nev. 349, 212 P.3d 1068, 1079 (2009). Sanctions must "relate to the claims which were at issue in the discovery order which is violated . . . ." *Young*, 106 Nev. at 92, 787 P.2d at 780. Extreme sanctions should only be used in extreme situations, such the destruction of necessary evidence. *Nevada Power*, 108 Nev. at 645, 837 P.2d at 1359. In this case, the sanction is disproportionate under the circumstances.

D. Factor Four:

"Whether any evidence has been irreparably lost"

This Factor Both Militates against an Ultimate Sanction in this Case and Proves that the *Young* Factors do Not Apply to Trial Conduct

Neither the order nor plaintiffs brief addresses this factor. (16 App. 3710:13-14.) The factor is not irrelevant, however, merely because it does not *support* the sanction in this case. That no irreparable harm occurred militates against the extreme sanction. The district court should have weighed consideration.

This factor demonstrates that ultimate sanctions—and the *Young* analysis—are generally reserved for cases of discovery abuse and destruction of evidence. Such a factor, and a resulting sanction, is ill-suited to trial conduct that can be cured by a new trial. While extreme cases of trial misconduct may also call for an award of fees (*Emerson v. District Court*, 127 Nev. __, 263 P.3d 224 (2011)) or

disciplinary referrals to the State Bar, few instances of counsel's trial conduct can ever justify the loss of the client's right to a jury trial, because the resulting need to caution the jury or retry the case does not approach the prejudice resulting from the destruction of evidence.

E. Factor Five:

"The feasibility and fairness of alternative, less severe sanctions"

Just Because the District Court had Already Imposed a Presumption as Punishment did Not Prevent it from Using other Alternatives to the Ultimate Sanction, such as an Instruction or a Mistrial, which would have Remedied any Prejudice

Here again, plaintiffs contend only that the imposition of one form of lesser sanction, an "irrebutable presumption," did not stop the alleged violations. But that argument evades the real issue. Even if the district court seemed disinclined to utilize an cautionary instruction to the jury, a mistrial would have expeditiously remedied any alleged prejudice in the conduct of the trial, while still allowing a determination on the merits. More appropriate lesser sanctions were available in this case.

F. Factor Six:

"The policy favoring adjudication on the merits"

Plaintiff Ignores the Essence of this Factor

For this factor, the plaintiffs justify the dismissal because, in their mind, the alleged infractions equate in severity to reported decisions dismissing cases for

discovery violations. This is a tacit admission that the district court simply disregarded this factor.

G. Factor Seven:

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

The District Court and Plaintiffs do Not Address this Factor

Plaintiffs' answering brief does not address this factor or otherwise justify the district court's disregard for it. Instead, like the district court, plaintiffs assume that a factor is only relevant if it supports a sanction—that the factors are not considerations that must be weighed but, rather, are merely potential justifications that may be selected at leisure to explain the predetermined outcome.

Plaintiffs and the district court disregard the factor because it militates against the sanction. The district court has several tools at its disposal to penalize an attorney without depriving the party of her day in court. (*See* AOB at 33-34.) Such attorney-focused sanctions are especially appropriate in cases such as this, where there is absolutely no indication that the client may have directed the trial strategy at issue.

H. The Factor:

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

The Sanction in this Case Sends the Wrong Message

Plaintiffs' conclusions about the need for punishment and deterrence simply assume (1) that defense counsel intentionally flouted a clear evidentiary ruling repeatedly, and (2) that that should be clear to all observing members of the bar. That assumption is unsubstantiated, especially in the absence of an evidentiary hearing.

It is counterproductive to the policies underlying this deterrence factor to punish innocent parties whose lawyers act in good faith and do not intentionally violate confusing court orders. Indeed, to affirm an ultimate sanction in this circumstance would send the wrong message—that the justice system is capricious and imposes sanctions blindly and unfairly. It also reinforces deliberate attempts to litigate by sanction, including this now familiar scenario, in which a party secures a vague *in limine* ruling and then pushes an broad interpretation to get the district court to strike an answer or *pro hac vice* admission.[22] Any deterrent justification is undercut where cavalier sanctions discourage litigators from zealous

[22] *Todd McGrath; and Pizza Hut of Am., Inc. v. District Court*, Case No. 61527 (Aug. 29, 2012) (granting writ of mandamus ordering district court to reinstate *pro hac vice* after where district court had granted plaintiff's motion to revoke *pro hac vice* for alleged attorney misconduct that, upon appellate scrutiny appeared not to be misconduct at all.

representation under Nevada Rule of Professional Conduct 1.3. *See Marshall v. District Court*, 108 Nev.459, 836 P.2d 47 (1992) (sanction "would have a chilling effect, since [counsel] attempted in good faith to have the district court recognize a new cause of action … [W]e do not wish to discourage attorneys from exercising imagination and perseverance on behalf of their clients").

Any sanction that is more than necessary to deter the particular conduct in question is excessive. And sanctions imposed for the purpose of deterrence require particular appellate scrutiny. "Unlike sanctions that are geared to remedying some prejudice, sanctions based only on principles of deterrence 'call for careful evaluation to ensure that the proper individuals are being sanctioned (or deterred) and that the sanctions or deterrent measures are not overly harsh.'" *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996). In any case, although punishment and deterrence can be legitimate purposes for sanctions, they do not justify trial by sanctions. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991).

PART TWO:

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

VII.

THE DAMAGE AWARD WAS EXCESSIVE, LEGALLY IMPROPER AND DEMONSTRATES THE DISTRICT COURT'S PASSION AND PREJUDICE

A. The Award of General Damages is Excessive and Reflects the District Court's Passion and Prejudice, Not a Reasonable Calculation

The general damages, $2,518,761, are more than 12 times the $194,391 medical expenses (16 App. 3810), a disproportion that reflects passion and prejudice. (*See* AOB 66-69.) In response, plaintiffs cite cases purporting to illustrate the propriety of the award here. (RAB 67-68.) These cases are inapposite.

1. YOUNG V. TOPS MARKET

It is odd that plaintiffs rely on *Young v. Tops Market, Inc.*, 725 N.Y.S.2d. 489, 492 (App. Div. 2001), because that court actually reversed as "excessive" a $7 million pain-and-suffering award that was about seven times the special damages, letting stand an absolute maximum recovery of just over three times special damages. *Id.*

2. AVERYT V. WAL-MART

Plaintiffs next contend that the Colorado court in *Averyt v. Wal-Mart Stores, Inc.*, 265 P.3d 456, 461-62 (Col. 2011) (*en banc*), approved a $5.5 million general

damages award that was "ten times" the economic damages. (RAB 67.) There, however, while past medical bills totaled $500,000, there were actually a total of $4.5 million in special damages, including future medical costs and foregone future earnings. *Id.* at 462. As such, the non-economic damages ($5.5 million) were less than 1.25 times, not "ten times," the economic damages ($4.5 million).

B. The Hedonic Damages are Duplicative of the General Damages

To justify the excessive award, plaintiffs argue that the district court properly awarded separate awards for pain and suffering and hedonic damages. (RAB at 69.) But it was error, especially under the circumstances of the case, for the district court to award Mr. Simao both $1.6 million pain and suffering and, separately, $900,000 for hedonic damages. (13 App. 2919.)

While some jurisdictions allow for a separate award of hedonic damages in addition to pain and suffering, Nevada does not. "[W]e hold that hedonic damages may be included *as an element* of a pain and suffering award of damages." *Banks v. Sunrise Hosp.*, 120 Nev. 822, 839, 102 P.3d 52, 64 (2004) (emphasis supplied). Such a rule recognizes both the "intangible nature of hedonic loss" and the danger in that separating such an inherently speculative concept "into a distinct category will produce duplicative damage awards," "overcompensate the victim," and cause jury "confusion." *Id.* This Court in *Banks* therefore recognized that the

trial court "erroneously permitted the jury to give [the plaintiff] a separate award for hedonic damages." *Id*.

This case does not present any reason to reconsider that approach. In states that permit separate awards, the primary reason is that some injuries, such as dismemberment, may forever impair a plaintiff's function, even if the injury does not cause actual pain. *See Banks*, 120 Nev. at 835-36, 102 P.3d at 61; *Demery v. City of Shreveport*, 55 So.3d 37, 41 (La. Ct. App. 2010). In this case, however, plaintiffs admitted that Mr. Simao can still do everything he did before. (RAB at 67; 12 App. 2839, 2781, 2796.) Plaintiffs alleges merely that he experiences pain when participating in activities he enjoys. (*Id*.) And pain is directly compensated through the award for pain and suffering. Thus, even if this Court were to change the law and allow a personal-injury plaintiff in Nevada to recover a separate award for hedonic damages, it still would be inappropriate in this case.[23]

[23] Similarly, the district court court awarded Mrs. Simao $680,000 for loss of consortium, the precise figure suggested by Dr. Smith, an economist. (13 App. 2921.) Dr. Smith had merely extrapolated from the same testimony that he offered to quantify Mr. Simao's hedonic damages. (12 App. 2691.) Despite that Mr. and Mrs. Simao sought different genres of damages, Dr. Smith assigned the same statistical value to Mr. and Mrs. Simao's lives, $4.1 million, and discounted that sum by mortality rates, *i.e.*, Mrs. Smith was likely to live longer. (12 App. 2733, 2693.) It demonstrates passion and prejudice, or at least a failure to exercise discretion, simply to award the amounts suggested by a party and their experts, based on generic statistics, rather than to consider the particular circumstances and exercise common sense.

IV.

THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES

A. The Contingency Multiplier Jurisprudence Presumes that an Unenhanced Lodestar Figure is Sufficient

Plaintiffs twist defendant's discussion of *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992), to imply that defendant argues for a *per se* ban on lodestar multipliers. (RAB 75.) That is not so. But *Dague* does make clear that such multipliers are uncommon.

Dague recognizes a "strong presumption" that the lodestar calculation, unenhanced by a multiplier, already represents reasonable maximum compensation. *Id.* at 562. To obtain an enhancement, a fee applicant has the burden[24] to prove that "the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation…." *Ketchum v. Moses*, 17 P.3d 735, 746 (Cal. 2001). Absent this, most adjustments that might be contemplated are already "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Dague*, 505 U.S. at 559; *Ketchum*, 17 P.3d at 746, 748.

[24] The fee applicant who seeks more than the lodestar rate bears "the burden of showing that such an adjustment is *necessary* to the determination of a reasonable fee." *Dague*, 505 U.S. at 562 (emphasis original); *accord Ketchum v. Moses*, 17 P.3d 735, 746 (Cal. 2001).

B. Plaintiffs have Not Overcome their Burden to Demonstrate Some Exceptional Circumstance Warranting a Contingency Multiplier

Plaintiffs seem to rely on *Ketchum* to contend that attorneys working on a contingency fee must invariably earn a multiplier simply, because of the risk of not being paid if the case is lost. (RAB 76-77.) But *Ketchum* does not demand multipliers for all contingency cases. "[T]he trial court is not required to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case." *Ketchum*, 17 P.3d at 746; *see also id.* at 743 ("the lodestar figure may then be adjusted upward or downward after considering other factors concerning the lawsuit, including the contingent nature of the fee award") (internal citations omitted).

In awarding fees, a court must evaluate the bare lodestar calculation and analyze whether the basic lodestar rate *already* accounts for extraordinary advocacy, the risk of non-payment or any other exceptional circumstance. In this case, the proper analysis calls for no enhancement.

1. This is a Garden-Variety, Rear-End-Collision Case where Liability was Not at Issue

Plaintiffs have no rejoinder to the following facts about the simplicity of the trial: (1) this was a trial on only damages in a routine motor-vehicle spine-injury claim, (2) liability was not at issue (12 App. 2882), and (3) plaintiff presented experts well practiced in explaining these types of injuries to juries (8 App. 1715; 9

App. 2109). *Ketchum* recognized that the extraordinary representation concept "in particular, appears susceptible to improper double counting." 17 P.3d at 746. Here, to the extent this suit may have presented anything unusual or challenging, plaintiffs' lawyers presumably met that challenge by devoting an sufficient time to the task, *see id.*, a fact already reflected in the lodestar calculation.

2. No Case Is a Sure Winner, So a Generalized Risk of Loss Alone does Not Warrant a Contingency Multiplier

No claim, even if prosecuted by able counsel, has a 100% chance of success. This risk of failure persists in virtually *every* case. If making an unsubstantiated, generalized claim of contingent risk—as plaintiffs do here—were enough to earn a multiplier, then "the lodestar would never end [a] court's inquiry in contingent-fee cases." *Dague*, 505 U.S. at 563. That is not the law.

3. A $750-Per-Hour Rate Already Prices in a Contingency Risk

The $750 rate already prices in consideration of the contingency risk. Plaintiffs want this Court to uphold an effective hourly of $1,875. Such a rate is a full $590 more than the highest billable rate reported in the National Law Journal's 2012 annual survey, a typical resort for litigants justifying they requests to courts.[25] An hourly rate of $750 is *more* than generous.

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[25] The 2012 Law Firm Billing Survey, National L. Journal, Dec. 17, 2012, available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202581351631&The_2012_Law_Firm_Billing_Survey&slreturn=20130511185610. see also B-K

(continued)

C. Contingency Multipliers are Ill-Suited to the Offer-of-Judgment Framework Because they Have the Capacity to Force Litigants to Unfairly Abandon Meritorious Claims

A contingency multiplier is typically not allowed in jurisdictions where fees are granted under an offer of judgment provision. *See, e.g., 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). Plaintiffs cannot dispute this.[26]

Instead, plaintiffs argue that a contingency multiplier should be allowed to compensate a lawyer who loans his services and who bears the risk of losing a case a not being paid, invoking *Ketchum*.[27] Because the non-offering party recognizes that his opponent is represented on a contingency basis, he should, in plaintiffs' view, take the risk of a contingency multiplier under advisement when considering the offer. (RAB 78.) Plaintiffs conclude that contingency multipliers, in this sense, "promote settlement" because they increase risk for the adverse party. (*Id*.)

Lighting, Inc. v. Vision3 Lighting, No. CV 06-02825 MMM, 2009 WL 3838264, at *7 (C.D. Cal. Nov. 16, 2009) (relying on 2007 and 2008 National Law Journal Billing Surveys in deciding a fee dispute).

[26] Although plaintiffs contend that defendant did not include this fine point in her argument in the district court, a party is not required on appeal simply to repeat the same arguments raised in the trial court.

[27] *Ketchum* was not an offer-of-judgment case.

1. The Policy Behind Offers of Judgment does not, as Plaintiffs Suggest, Demand Settlement at Any Cost

But judgment offer policy does not foster settlement merely for settlement's sake. This mechanism should not be construed so punitively as to force a litigant to unfairly relinquish a meritorious claim or defense. *Trs. of Carpenters for So. Nev. Health and Welfare Trust v. Better Bldg. Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985); *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983).

2. Contingency Multipliers Undermine the Prospective-Only Application of Offers of Judgment

Under the offer of judgment provisions, a court can impose fees and costs incurred only *after* it is tendered. NRCP 68(f)(1); NRS 17.115(4)(d). Permitting a contingency multiplier, however, effectively allows an offeror to obtain the entire fee, including that portion incurred before the offer was served. For this reason, the district court's use of a contingency multiplier was an abused of discretion.

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

Rish took great care to apply the Nevada Code of Judicial Conduct and other relevant case law to the record, demonstrating good cause to reassign this case to a different trial judge to avoid the appearance of impropriety. (*See generally* AOB 75-81.) Plaintiffs make no detailed response, however, instead incorporating their prior arguments and raising one substantive point.

While plaintiffs argue that this Court has no authority to reassign unless the appellant raised this issue below (RAB 80), that is not true. *See Liteky v. United States*, 510 U.S. 540, 554 (1994) (appellate courts may assign a case to a different judge on remand regardless of whether request is first made in the trial court); *United States v. Tucker*, 78 F.3d 1313, 1323-24 (8th Cir. 1996) (same); see also *Ryan's Express v. Amador Stage Lines*, 128 Nev. ___, 279 P.3d 166, 173 (2012) (discussing inherent authority of this Court). There is no obligation to ask the district court judge striking the answer to reassign the case upon the appellate court's reversal and remand for a new trial. The issue simply is not ripe until this Court takes action.

CONCLUSION

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

DATED this 1st day of July 2013.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 12,433 words.

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

be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of July 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 1st day of July, 2013, Electronic service of the foregoing APPELLANTS' REPLY BRIEF shall be made in accordance with the Master Service List as follows:

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