IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES WILLIAM RICHARDS, Appellant, vs. MEI-GSR HOLDINGS LLC dba GRAND SIERRA RESORT, A Nevada limited liability company, Respondent.	**Supreme Court No. 72526** District Court Case No. CV14-01882 (Consolidated with Supreme Court No. 73132)

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that no persons or entities as described in NRAP 26.1(a) must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

This is an appeal from a final order of the Second Judicial District Court ("District Court") and Hon. Elliott A. Sattler (Dept. 10) in and for the County of Washoe granting a motion for summary judgment issued on August 8, 2016, and noticed on August 8, 2016. and the District Court's final order denying Appellant's Motion for New Trial Pursuant to NRCP 59 (filed on August 12, 2016) - order issued on February 7, 2017, and noticed on February 8, 2017. See AA 1306-1307. On February 28, 2017, Appellant timely filed and served a Notice of Appeal (Case No. 72526) - AA 1308-1312. This is also an appeal from a final order of the District Court awarding costs to Respondent, issued on April 20, 2017, and noticed on May 23, 2017. See AA 1389-1391. On May 23, 2017, Appellant timely filed a served an [Amended] Notice of Appeal (Case No. 73132) – AA 1405-1408. The District Court's Orders are appealable pursuant to NRAP 3A9(b)(3). Both appeals were consolidated (into Case No. 72526).

ROUTING STATEMENT - RETENTION IN THE SUPREME COURT

This case was presumptively assigned to the Supreme Court panel to "hear and decide" per NRAP 17(a)(13) as a matter raising as a principal issue a question of first impression involving the United States or Nevada constitution or common law and NRAP 17(a)(14) as a matter raising as a principal issue a question of statewide public importance, or an issue upon which there is an

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inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of two courts. Normally, this case would be heard by the Court of Appeals per NRAP(b)(2) for appeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case. The constitutional issue, conflict and/or public policy concern is if courts grant summary judgment prior to allowing parties to timely disclose experts pursuant to expert disclosure orders, public policy is violated and a threat of defense parties in many cases doing this to achieve a strategic advantage exists.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. The District Court Erred In Granting Summary Judgment Prior To The Expert Disclosure Deadline And Not Permitting Additional Discovery/Expert Disclosures Pursuant To NRCP 56(f)

B. Genuine Issues As To Material Fact Existed, Thus Summary Judgment Should Not Have Been Granted

C. The Court Erred in Awarding Costs To Respondent Since Summary Judgment Was Improperly Granted And Respondent Was Not The Prevailing Party

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STATEMENT OF THE CASE

On February 17, 2016, Respondent MEI-GSR HOLDINGS, LLC dba Grand Sierra Resort ("GSR") filed a motion for summary judgment ("Motion"). AA 483-575. The Motion was prematurely filed prior to the deadline to disclose initial experts, and while the parties were actively and diligently involved in discovery. Moreover, in essence, GSR argued that Appellant James William Richards ("Richards") has no evidence of fault on the part of GSR, and the water on which Richards slipped was "open and obvious," thus Richards "assumed the risk."[1] On March 9, 2016, Richards filed an opposition, and asserted NRCP 56(f) as a basis to deny the Motion, as well as cited a plethora of Nevada case law showing that summary judgment is inappropriate under the facts and circumstances of this case. AA 576-639. On March 24, 2016, GSR filed a reply, and again asserted that Richards presented no evidence or expert opinions to show liability. AA 640-725.

At the hearing on June 9, 2016 (see transcript, AA 881-1007), the Court was provided "argument" – not "facts/evidence" – by Ann Hall, Esq., former defense counsel for GSR, and specifically as it relates to the water stop that was defective/damaged. Richards disagrees with her lay/non-expert assertions as to how it was installed, where it was installed, its purpose and its function, and in the very least genuine issues as to material fact existed as to how the water stop

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[1] GSR made many unsupported statements, and asserted issues of fact as if they were not in dispute. That is false. For example, GSR represented distances of the mat to the shower and how the water stop was installed. *Id.*

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was installed, how it should have been installed, what its purpose was and would it have stopped water from flooding outside the shower had it been installed correctly and working properly. NRCP 56. GSR provided no expert report or affidavit to support Ms. Hall's conjecture. See NRCP 56(c). **Under NRCP 56, it is GSR's burden to prove by competent and reliable evidence that no genuine issues as to material fact exist.** It failed to do so. Richards was denied the right to have experts investigate this assertion and render opinions thereon. The primary way Richards can prove liability in this case and refute affirmative defenses is through experts. As the Supreme Court knows, the NRCP 56 standard 'requires' the District Court to construed in a light most favorable to Richards all facts and evidence, and all factual allegations, evidence and reasonable inferences therefrom which favor Richards must be presumed by the District Court to be correct. Instead, they were construed against Richards when many genuine issues as to material fact existed, and that took away Richards's right to a jury trial. NRCP 38. Also, it is GSR's burden to show there are no genuine issues as to material fact.[2]

Richards's rights were violated when summary judgment was prematurely granted, prior to the expert disclosure deadline. See Court's Order granting

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[2] The Court issues scheduling orders so that the parties know when their expert disclosures are due, and so the parties can rely on same and prepare their cases accordingly. Allowing GSR to file a premature motion for summary judgment, and granting same before expert disclosures are due, is unfair and violates expert disclosure rules. If this result is allowed, all defendants can force a plaintiff's hand early in the case and sneak a peak at their expert reports, or force them to be prepared and spend money prematurely, and then defendants can use those reports in advance to prepare their expert reports. This is not allowed and an unfair tactical advantage, and it violates public policy.

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summary judgment. AA 1009-1013. At the hearing on June 9, 2016, the Court inquired of Richards why he did not submit an expert report or affidavit. AA 881-1007, p. 27, ll, 1-24, p. 28, ll. 1-10. In response, Richards contended that his expert investigation was ongoing and the deadline to "simultaneously" disclose expert reports had not passed (*Id.*, p. 17, ll. 13-25, p. 18, ll. 20-22, p. 27, ll. 8-24, p. 28, 1-17, p. 31, ll. 15-20, p. 33, ll. 20-24, p. 34, ll. 15-22, p. 35, ll. 18-24, p. 36, ll. 22-24 and p. 37, ll. 1-7). NRCP 16.1(a)(2)(B). Moreover, Richards' expert Thomas Jennings needed deposition transcripts to complete his opinions. Further, Richards was considering retaining an expert other than Mr. Jennings (human factors and industrial safety expert), who inspected the bathroom and floor and rendered opinions that the floor failed slip-resistence/friction tests. See report of Mr. Jennings dated July 10, 2016. AA 1014-1019, Exhibit 3 to motion for new trial (this report "new evidence" was attached to the motion for new trial). The other expert would have been in the field of architecture and/or general contracting, and someone who is familiar with bathroom and shower designs and construction, codes/ADA and someone who can opine whether this shower (and the broken water stop) were proper or if they were defective and dangerous. By prematurely seeking summary judgment, GSR denied Richards the right to have experts in different fields to support liability. All of those opinions would be sufficient to deny summary judgment and create genuine issues as to material fact. NRCP 56. Nonetheless, leave pursuant to NRCP 56(f) should have been granted and the motion for summary judgment should have been denied so that Richards could produce his

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expert reports within the court-ordered deadlines.

On August 12, 2016, Richards filed a motion for new trial pursuant to NRCP 59. AA 941-1040. GSR filed an Opposition. AA 1041-1138. Richards filed a Reply. AA 1139-1148. The Court denied the motion. See transcript from hearing on January 4, 2017, AA 1255-1302.[3] See Order denying the motion for new trial - AA 1303-1305.[4]

On September 2, 2016, GSR filed a motion for attorney's fees and costs. AA 1066-1138. On September 26, 2016, Richards filed an Opposition to the motion for attorney's fees and costs. AA 1149-1254. On March 8, 2017, the Court denied the motion (see Order - AA 1303-1305), but allowed GSR to supplement with a declaration, which GSR did. See declaration of Ann Hall, Esq. filed on March 20, 2017, AA 1319-1364. On March 23, 2017, Richards supplemented his Opposition. AA 1365-1375. The motion for attorney's fees and costs was resubmitted, and the Court denied the motion with respect to attorney's fees, but awarded $5,508.61, in costs pursuant to NRS 18.005 and NRS 18.020. See order dated April 20, 2017, AA 1376-1387.

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[3] At the hearing, the District Court made its position known that expert reports needed to be disclosed prior to the expert disclosure deadlines if a motion for summary judgment is filed to defeat it in this instance. AA 1255=1302, p. 8, ll. 8-24, p. 9, ll. 1-24, p. 12, ll. 9-15, p. 13, ll. 14-20, p. 14, ll. 12-19 and p. 17, ll. 20-24. In fact, the District Court admits an issue of fact sufficient to defeat summary judgment would exist with early production of the expert report. *Id.* at p. 17, ll. 20-21, p. 12, ll. 9-15.

[4] In the order denying the motion for new trial (AA 1303-1305), the District Court states Richards should have produced an expert report prior to the court-imposed deadlines.

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STATEMENT OF THE FACTS

Richards was showering in his GSR room at the Grand Sierra Resort ("GSR") on Saturday, May 31, 2014, at approximately 11:32 a.m., when a defective and/or non-maintained/repaired shower door/enclosure permitted excessive water to flood the floor of the bathroom next to the shower, which was not seen by Richards when he stepped out of the shower. See AA 42-267, Depo. of James William Richards, pp. 15-16. Moreover, there was a hole in the glass shower door (presumably the door handle) and the plastic stopper/seal at the bottom of the door was defective or in need of repair/replacement. *Id.* Richards slipped when existing the shower when his foot made contact with the bathroom floor outside of the shower. *Id.* He fell back into the shower and his shoulder and back were injured. *Id.* There was no bath mat in the bathroom near the shower to prevent guests from slipping when getting out of the shower, nor was there a non-slip mat to be placed on the floor of the shower. *Id.*, pp. 16-17, 20-25, 4-5, 134.

Security was summoned, an incident report was taken, photographs were taken and the shower was immediately repaired. AA 332-421, Depo. of Daniel Haney, pp. 38-48. Security/maintenance made admissions that the plastic water stop at the bottom of the shower door/enclosure was defective and needed to be replaced. *Id.;* see AA 422-482, Depo. of Juan Trujillo, pp. 31, 34; AA 322-421, Depo. of Daniel Haney, pp. 46-48.

Richards sustained serious back, neck and shoulder injuries, and had a shoulder surgery. AA 42-267, Depo. of James William Richards, pp. 120-123.

He has been engaging in physical therapy and is under the care of a back/neck orthopedic surgeon. *Id.*

SUMMARY OF ARGUMENT

The decision of the District Court in granting summary judgment was improper and should be overturned. GSR failed to meet the summary judgment standard pursuant to NRCP 56, and Richards properly opposed the motion for summary judgment with what he had at the time (e.g., deposition testimony and documents produced/exchanged pursuant to NRCP 16.1), without expert reports, and asked for more time to conduct discovery. NRCP 56(f). Forcing Richards to oppose a premature motion for summary judgment, prior to the expert disclosure deadline, was unfairly and substantially prejudicial, violated NRCP 56 and the case law interpreting it and violated public policy. It also denied Richards his right to a jury trial on disputes and genuine issues as to material fact. NRCP 38. Finally, when the District Court granted summary judgment, it violated its own discovery/scheduling orders which set a deadline for expert reports, which had not passed.

STANDARD OF REVIEW

A. SUMMARY JUDGMENT

Summary judgment is only proper when the moving party introduces admissible evidence in their moving papers demonstrating that there are no genuine issue as to any material fact against specific parties related to specific claims, and therefore judgment as a matter of law is warranted. NRCP 56(c). *See also Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985).

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The burden of introducing admissible evidence demonstrating the absence of any triable issue of fact remains with the moving party. *Id.* The court must construe all pleadings and evidence in a light most favorable to the party against whom summary judgment is sought, and all factual allegations, evidence and reasonable inferences therefrom which favor the party opposing the Motion must be presumed by the court to be correct. *Butler, supra; NGA # 2 Ltd. Liability Co. v. Rains,* 113 Nev. 1151, 1156-57, 946 P.2d 163, 166-67 (1997). The purpose of Rule 56 is not to cut litigants off from their right of trial by jury if they really have issues to try. *Short v. Hotel Riviera, Inc.* 79 Nev. 94, 103, 378 P.2d 979, 984 (1963). Summary judgment may not be used as a shortcut to the resolving of disputes upon facts material to the determination of the legal rights of the parties. *Parman v. Petricciani*, 70 Nev. 427, 436, 272 P.2d 492, 496 (1954).

Motions for summary judgment and responses thereto shall include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the deposition, answer to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. NRCP 56 (emphasis added).

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District Courts must take great care in granting summary judgment. *Johnson v. Steel, Inc.*, 100 Nev. 181, 182, 678 P.2d 676, 677 (1984) (overruled on other grounds, *Shoen v. Sac Holdings Corp.*, 122 Nev. 621, 635, 137 P.3d 1171 (1992)). A District Court may not simply dispense with the adversary process when it senses the equities of the case are obvious. *Sierra Nev. Stagelines v. Rossi*, 111 Nev. 360, 364, 892 P.2d 592, 595 (1995).

While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Id.* The nonmoving party "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture. *Id.*

NRCP 56(f) provides:

> **When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.**

[Emphasis added]

A party has the right to due process and a jury trial, and Nevada has judicial policy favoring disposition of cases on their merits. See *Havas v. Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 707-708 (1980).

B. MOTION FOR NEW TRIAL

NRCP 59 (New Trials; Amendments to Judgments) permits a new trial or amendment to a judgment if sought within 10 days of notice of entry of an order or judgment, for any of the following grounds [in pertinent part] materially affecting the substantial rights of an aggrieved party . . . (4) newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial . . . (7) error in law occurring at trial and objected to by the party making the motion. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings of fact and conclusions, and direct the entry of a new judgment.

A new trial or amendment to judgment should be allowed when there is plain error or manifest injustice. *Kroeger Properties & Dev. Inc. v. Silver State Title Co.*, 102 Nev. 112, 114, 715 P.2d 1328, 1330 (1986). The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse. *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 244, 577 P.2d 1234, 1235-36 (1978).

Newly-discovered evidence, to have any weight in the consideration of the trial court, must be material or important to the moving party. *Whise v. Whise*, 36 Nev. 16, 24, 131 P. 967, 969 (1913). Newly-discovered evidence must be sufficiently strong to make it probable that a different result would be obtained in another trial. *Id.* The new evidence must be of a decisive and conclusive

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character, or at least such as to render a different result reasonably certain. *Id.* The law demands of the parties all reasonable diligence and caution in preparing for trial, and furnishes no relief for the hardships resulting from inexcusable negligence or want of diligence. *Pinschowers v. Hanks*, 18 Nev. 99, 107, 1 P. 454, 458 (1883). When, therefore, a new trial is sought because of newly-discovered evidence, it should most certainly be shown by the party making the application that his failure to produce such evidence at the first trial was not the result of any negligence upon his part; of that fact the court should be perfectly satisfied. *Id.*

C. MOTION FOR ATTORNEY'S FEES AND COSTS

NRS 18.005 and 18.020 provide that the prevailing party must recover costs against an adverse party against whom a judgment is rendered in an action where the plaintiff seeks to recover more than $2,500.00.

ARGUMENT

A. THE DISTRICT COURT'S DECISION TO REQUIRE EXPERT REPORTS PRIOR TO THE COURT-IMPOSED DEADLINES WAS ERRONEOUS, GENUINE ISSUES AS TO MATERIAL FACT EXISTED TO DEFEAT SUMMARY JUDGMENT AND COSTS SHOULD NOT HAVE BEEN AWARDED

(i) NRCP 56(f) Permitted Additional Time for Richards to Conduct Discovery and Disclose Experts

A plaintiff's request for additional time for discovery in his memorandum in opposition to a summary judgment motion was sufficient for purposes of subsection (f) of this Rule [NRCP 56], where less than a year had passed since the complaint and the granting of summary judgment, and the plaintiff's request for additional time was reflective of his diligence in pursuing the action. *Halimi*

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v. Blacketor, 105 Nev. 105, 106, 770 P.2d 531, 531 (1989) (overruled on other grounds, *Choy v. Ameristar Casinos, Inc.*, 128 Nev. 323, 324, 279 P.3d 191 (2012)) (a request for more discovery must substantially comply with the affidavit requirement of NRCP 56(f)).

Where a party had not been dilatory in pursuing discovery and has demonstrated its diligence by requesting additional time to obtain depositions, it was an abuse of discretion to deny their request at such an early stage in the proceedings. *Ameritrade, Inc. v. First Interstate Bank*, 105 Nev. 696, 700, 782 P.2d 1318, 1320 (1989).

In the case at hand, Richards and GSR were actively and diligently engaging in discovery. The Complaint was filed on September 3, 2014 (AA 1-11). The Complaint was served on September 17, 2014 (AA 14). GSR's Answer was filed on December 12, 2014 (AA 15-20).The Joint Case Conference Report was filed on March 9, 2015, which triggered commencement of discovery. Written discovery had been exchanged, and answers/responses provided (written discovery was all answered by July 8, 2015). There were some disputes as to sufficient answers to objections, but the Richards and GSR were working through them without court assistance. Richards was deposed at length on October 9, 2015 (AA 42-267), as was his wife (now ex-wife) on October 23, 2015 – dismissed plaintiff Sarai Calderon (AA 267-330). Richards took depositions of percipient witnesses (Daniel Haney, Juan Trujillo and Tu Long) from October 9, 2015, to May 12, 2016. AA 332-421, 422-482, 726-766, respectively. It took some time to arrange the deposition of the housekeeper

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who cleaned Plaintiff's room (Tu Long) as she needed a specialized interpreter and no one could be found. She was not deposed until May 11, 2016. The PMK of GSR (Kent Vaughn) also took some time to schedule, and he was not deposed until May 12, 2016 (AA 767-872).

GSR filed a Motion for Summary Judgment on February 17, 2016. This Motion was premature as the parties were actively engaging in discovery, and had not completed taking depositions (including GSR's PMK Kent Vaughn and Tu Long - the housekeeper) and had not made expert disclosures. **GSR submitted its motion for summary judgment on March 24, 2016 (before key depositions could be taken), the same day it filed its reply**. The depositions taken in the underlying case were:

DEPONENT	**DATE OF DEPOSITION**
James Richards	October 9, 2015
Sarai Calderon	October 23, 2015
Daniel Haney	November 19, 2015
Juan Trujillo	November 20, 2015
Tu Long	May 11, 2016 (after the motion for summary judgment was submitted)
Kent Vaughn (PMK)	May 12, 2016 (after the motion for summary judgment was submitted)

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As the Supreme Court can see, Richards and GSR were not dilatory and were actively engaging in discovery.[5] They were able to resolve several discovery disputes without the District Court's assistance. Richards even approached GSR to see if it was interested in a mediation and/or mandatory settlement conference. Instead, GSR prematurely filed a motion for summary judgment which, in effect, violated Richards' rights by shortening his time to conduct an expert investigation and dispensing with simultaneous disclosure of expert reports.[6]

The initial trial date was April 4, 2016 (AA 35). On October 15, 2015, Richards and GSR entered into a stipulation to continue the trial date (AA 878-879). On November 18, 2015, a second trial setting application was submitted, and a jury trial was set for October 31, 2016 (AA 331). That made initial expert disclosures due July 31, 2016. On May 18, 2016, due to the pending motion for summary judgment (filed on February 17, 2016), Richards and GSR entered into a stipulation to extend discovery deadlines, and initial experts became due 30 days after the order on the motion for summary judgment, rebuttal experts became due 30 days after initial experts, and the discovery cut-off became 30 days after rebuttal experts were disclosed (AA 876-877). Per the District

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[5] Two depositions were taken after the motion for summary judgment was filed, and Richards intended to take at least one more deposition of a hotel/casino employee. Richards' experts needed these depositions to complete their opinions.

[6] The Rules are clear that expert disclosures are to be "simultaneous" so that one party does not get an early viewing of the other party's expert reports so it can tailor its reports accordingly. NRCP 16.1(a)(2)(B).

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Court's Order, had the discovery dates not been extended, initial experts would have been due by July 2016 (before summary judgment was granted), rebuttal experts would have been due by August 2016, and the discovery cut-off would have been September 2016. The District Court granted the motion for summary judgment on August 8, 2016, six months after it was filed (AA 1009-1013), thus **the expert disclosure deadline would have been due September 8, 2016, rebuttal experts would have been due October 8, 2016, and discovery would have ended November 8, 2016 (after trial commenced), had summary judgment not been granted. Clearly that would have been insufficient time to conduct expert and remaining discovery, so the October 2016, trial date would have necessarily been continued.**

NRCP 16.1(a)(2)(B) requires the parties to make initial expert disclosures "simultaneously" at an agreed to time period, or as set forth in a scheduling order. See NRCP 16.1(a)(2)(C). Unless otherwise agreed to or ordered, the initial expert disclosures are due 90 days prior to the discovery cut-off. NRCP 16.1(a)(2)(C)(i). Rebuttal expert disclosures are due 30 days after initial expert disclosures. NRCP 16.1(a)(2)(C)(ii). The Court's scheduling orders control the disclosure of experts and how discovery is conducted, and granting summary judgment prior to the expert disclosure deadline disregarded the set discovery schedule.

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In this case, the parties stipulated to have initial expert disclosures due 30 days after the Motion for Summary Judgment was heard and an order was issued. See Stipulation and Order entered on May 18, 2016. AA 876-877.[7] Nonetheless, normally expert disclosures are due 90 days prior to the discovery cut-off. NRS 16.1(a)(2)(C)(i).

Despite Richards being unfairly and substantially prejudiced, and his right to a simultaneous expert disclosure being violated (it is difficult to prove liability when you do not know what defenses are being asserted by GSR or what its experts are saying), Richards produced with his motion for new trial the report of Mr. Jennings. See Mr. Jennings' expert report and materials (AA 1014-1019, 1026-1037); and Declaration of Neal K. Hyman, Esq., AA 1038-1040. As the Supreme Court can see, Mr. Jennings is a very experienced human factors and safety expert, who has testified numerous times in deposition and court. In his report (AA 1014-1019), Mr. Jennings opines the following:

1. Water spray from the shower was allowed to migrate through the door opening used to open and close the shower door and the cracked and broken piece at the base of the shower door.[8]

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[7] It is disingenuous that GSR stipulated to extend the date to disclose experts until after its motion for summary judgment was heard and decided, when it contended Richards did not provide any expert opinions to support his opposition to the motion for summary judgment. GSR has acted with unclean hands and bad faith in this instance.

[8] At the hearing, the Court stated that summary judgment should be denied if it can be shown the broken/damaged water stop permitted, or could have permitted, water to flood the floor. AA 881-1007, p. 19, ll. 2-13. Mr. Jennings opines that the cracked and broken piece at the base of the shower door permitted water spray from the shower to migrate through the door. Thus, summary judgment should be denied, as the Court indicated.

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2. Due to the lack of contrast between the marble/terrazzo surface and the water on the surface, plaintiff was very unlikely to notice the standing water.

3. The surface as objectively tested fell significantly below the 'slip-resistant' standard of 0.50 and was unsafe and slippery.[9]

Also in his report, Mr. Jennings opines[10]:

> Hotels have a responsibility to provide a safe environment for guests within the areas they control. This includes maintaining all floor surfaces in a safe and slip resistant condition whether dry or contaminated with liquids such as water.

Id. at p. 2

* * *

> Although there was a bath mat provided, the mat was already placed on the floor surface in front of the sink area and Mr. Richards testified in his deposition that when something such as the mat is in a specific location, he leaves it in place. From my many years investigating bathroom slip and falls, individuals area not aware of 'slip-resistance' and have an expectation that the floor surface will be safe to walk on whether dry or wet.

Id. at p. 3.

> A clear liquid such as water on a floor surface lacks conspicuity as the clear liquid blends in with the floor surface making it very difficult to discern even when looking down at the surface.

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[9] In his report, the slip-resistance testing of this bathroom floor was grossly below standard and was dangerous. Moreover, the wet slip-resistance reading was 0.15. When dry, the reading was 0.72. *Id.*, p. 4. Even without the opinions of Mr. Jennings, the fact the bathroom floor failed the slip resistance testing is sufficient to find GSR at fault for this fall. Granting summary judgment without the benefit of Mr. Jennings and/or other expert's reports denied Richards his rights and caused him to suffer unfair and substantial prejudice.

[10] Mr. Jennings cites to various safety standards. For example: ASTM Designation F1637-09, Standard Practice for Safe Walking Surfaces, 5.1.3: walkway surfaces shall be slip resistant under expected environmental conditions and use; 5.1.4 interior walkways that are not slip resistant when wet shall be maintained dry during periods of pedestrian use; ICC/ANSI A117.1 - 1998, Accessible and Usable Buildings and Facilities, 302.1: Floor or ground surfaces shall be stable, firm, and slip resistant and shall comply with section 302 (ANSI A117.1 is referenced in the International Building Code, and premise owners must follow it).

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> Also, there was nothing within the documents I reviewed to indicate that Mr. Richards noticed the water on the floor surface as he was stepping out of the shower enclosure. Individuals tend to look in the direction of travel as they begin to walk or step forward and it should be noted that the 'cone of vision' renders anything within 2-3 feet ahead of the intended path of travel is simply not visible as it is out of the line of sight.

Id. at p. 3.

NRCP 59 permits a new trial (even after summary judgment is granted) if there is plain error or manifest injustice. NRCP 59 permits a new trial when newly discovered evidence surfaces which is material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial, and when an error in law occurred and the aggrieved party objected. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings of fact and conclusions, and direct the entry of a new judgment.

In this case, NRCP 56(f) and NRCP 59 justified the order granting summary judgment to be vacated. At the hearing on Richards's motion for new trial, leave to conduct more discovery and disclose experts was repeatedly requested. See hearing transcript on motion for summary judgment (AA 881-1007, p. 17, ll. 13-25, p. 18, ll. 20-22, p. 27, ll. 8-24, p. 28, 1-17, p. 31, ll. 15-20, p. 33, ll. 20-24, p. 34, ll. 15-22, p. 35, ll. 18-24, p. 36, ll. 22-24 and p. 37, ll. 1-7). Further, former co-counsel for Richards (Matthew Minucci, Esq.) submitted a NRCP 56(f) affidavit in support of the opposition to motion for summary judgment; and counsel for Richards (Neal K. Hyman, Esq.) submitted a

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declaration in support of his motion for new trial. See AA 633-635 and 1038-1040, respectively. Additionally, based on the new evidence of Mr. Jennings' expert report finding liability against Defendant (AA 1014-1019), summary judgment should have been defeated. In the very least, the District Court should have allowed Mr. Jennings to be deposed, or GSR should have waited until after expert disclosures and depositions to re-file the motion for summary judgment. Richards intended to have another liability expert in the field of architecture/general contracting, and that is more evidence that the District Court rushed to judgment by granting summary judgment instead of allowing additional discovery, and expert disclosures, prior to considering such a dispositive motion. However, it was substantially unfair and prejudicial to permit summary judgment to be entered, when Richards was denied the benefit of concluding depositions and discovery, and obtaining experts, investigating/testing the issues and producing expert reports.[11] Moreover, Richards' expert(s) needed all the pertinent deposition transcripts to complete their expert opinions. Plaintiff's right to a jury trial on disputed issues as to material fact was denied. See NRCP 38 and Demand for Jury Trial (AA 21-23).

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[11] In the District Court's order denying the motion for new trial (AA 1303-1305), it states as a basis for the denial that Richards did not produce an expert prior in his opposition to the motion for summary judgment. This is evidence the District Court was forcing Richards to disclose experts prior to its own orders setting the expert disclosure deadlines.

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(ii) Genuine Issues As To Material Fact Existed Sufficient To Defeat Summary Judgment

If the Supreme Court does not reverse the decision of the District Court due to violation of the Court's order providing for more time to complete discovery and disclose experts, and finding that Mr. Jennings report (if accepted) would have been sufficient to defeat summary judgment, Richards presented a plethora of facts/evidence in support of the opposition to motion for summary judgment to create genuine issues as to material fact, sufficient to defeat summary judgment. Furthermore, there is an abundance of mandatory case law in Nevada (even with fact patterns more difficult than this case in which to prove liability, i.e., actual notice of water and proceeding to walk on water anyway) that required the District Court to deny summary judgment and allow Richards to proceed with discovery and expert disclosures, and have a jury trial.

The owner or occupant of property is not an insurer of the safety of a person on the premises, and in the absence of negligence, no liability lies. *Gunlock v. New Frontier Hotel,* 78 Nev. 182, 185, 370 P.2d 682, 684 (1962). An accident occurring on the premises does not of itself establish negligence. *Id.* Yet, a business owes its patrons a duty to keep the premises in a reasonably safe condition for use. *Asmussen v. New Golden Hotel Co.,* 80 Nev. 260, 262, 392 P.2d 49, 49 (1964). **Where a foreign substance on the floor causes a patron to slip and fall, and the business owner or one of its agents caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is usually not consistent with the standard of ordinary care.** *Id.* at 262,

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392 P.2d at 50; *Eldorado Club, Inc. v. Graff,* 78 Nev. 507, 509, 377 P.2d 174, 175 (1962) (emphasis added). Where the foreign substance is the result of the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it. *Asmussen,* supra, 80 Nev. at 262, 392 P.2d at 50; *Eldorado Club,* supra, 78 Nev. at 510, 377 P.2d at 175.

In Nevada, to prevail on a negligence theory, a plaintiff generally must establish duty, breach of that duty, causation, and damages. *Perez v. Las Vegas Medical Center,* 107 Nev. 1, 4, 805 P.2d 589, 590–591 (1991). Defendant may prevail on a motion for summary judgment by negating at least one of the elements of negligence. *Id.* at 591. "[A] business owes its patrons a duty to keep the premises in a reasonably safe condition for use." *Sprague v. Lucky Stores, Inc.,* 109 Nev. 247, 250, 849 P.2d 320, 322-23 (1993). **Whether Lucky was under constructive notice of the hazardous condition is, in accordance with the general rule, a question of fact properly left for the jury**. *See* 2 Norman J. Landau, Edward C. Martin & Michael R. Thomas, Premises Liability: Law and Practice §§ 8A.03[2], 8A.03[3] (1992). In *Sprague*, the court stated, "Even without a finding of constructive notice, a jury could conclude that Lucky should have recognized the impossibility of keeping the produce section clean by sweeping. Sufficient evidence was presented before the district court to justify a reasonable jury in concluding that Lucky was negligent in not taking further precautions, besides sweeping, to diminish the chronic hazard posed by the produce department floor. *See Joynt v. California Hotel & Casino,* 108 Nev.

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539, 542, 835 P.2d 799, 801 (1992) ("questions of negligence ... are generally questions of fact").

An old Nevada case addresses some of these issues. In *Rogers v. Tore, Limited*, 85 Nev. 548, 550, 459 P.2d 214, 215 (1969), the Court examined whether the Plaintiff exercised due care in traversing an icy path on her way to work. The Court stated that "the plaintiff's mission was to go to work, and plainly justified her encountering the danger." *Worth v. Reed*, 79 Nev. 351, 356, 384 P.2d 1017, 1019 (1963). The Court further stated that "whether she did so with due care or carelessly is not so clear as to preclude trial on the point." Plaintiff characterized the manner of her walking over the icy pavement in a way that suggested due care, and in response to a motion for summary judgment, the court held that she was entitled to the full benefit of her statement. Similarly, it is not certain that the defendant took reasonable precautions to protect her. The trier of facts might find that such precautions were taken. On the other hand, a contrary conclusion may be permissible in view of the owner's admission that the safety measures used on the sidewalks were not used in the large parking area because of the expense. That admission was not explored in depth. **On summary judgment a court is compelled to grant the plaintiff every advantage to be gleaned from it.**

In general terms, an owner owes an invitee the duty of ordinary care. *Gott v. Johnson*, 79 Nev. 330, 332, 383 P.2d 363, 364 (1963). However, if the danger is 'obvious,' ordinary care does not require a warning from the owner because 'obviousness' serves the same purpose. *Gunlock,* supra, 78 Nev. 182, 370 P.2d

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In *Gunlock* the object over which plaintiff fell (a 30 foot long planter box in a hotel lobby) was 'obvious' because of its size. A summary judgment for the defendant was affirmed on the flat proposition that an owner's duty of care does not extend to an invitee who incurs injury from an obvious danger. There the peril was deemed 'obvious' as a matter of law.

Likewise, in *Harrington v. Syufy Enterprises,* 113 Nev. 246, 247, 931 P.2d 1378, 1379 (1997), the plaintiff was waiting for a friend at a weekend swap meet. She spotted her friend across the parking lot, and walked over to him. The sun was in the plaintiff's face, partially blocking her sight. Nonetheless, plaintiff was aware that a grate with fixed tire spikes was installed across her path. As plaintiff crossed the grate, she tripped on it and fell, injuring her ankle. *Id.* at 247. The supreme court disregarded the "obviousness" of the danger posed by the spikes. Instead, it focused on whether the defendant was negligent in creating an undue risk to its invitee. **The court reasoned that "even where a danger is obvious, a defendant may be negligent in having created the peril or in subjecting the plaintiff to the peril."** *Id.* at 250 (citing *Moody v. Manny's Auto Repair,* 110 Nev. 320, 333, 871 P.2d 935, 943 (1994)). Unlike the non-negligent activities of the defendants in *Gunlock* and *Worth,* the court reasoned that a "reasonable juror could conclude that Syufy Enterprises breached its duty of reasonable care by directing pedestrian traffic over a grate containing unretracted tire spikes." *Id.* Moreover, the Court emphasized that the obvious danger rule only obviates a duty to warn. It is inapplicable where liability is

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predicated upon acts other than a failure to provide adequate warning of a dangerous condition. Consequently, even where a danger is obvious, a defendant may be negligent in having created the peril or in subjecting the plaintiff to the peril. *See Moody*, supra, 110 Nev. at 333, 871 P.2d at 943.

In *Elliot v. Target Corp.*, 2012 WL 3278629, 2012 U.S. Dist. LEXIS 111842 (D. Nev. 2012) the court was not persuaded by Target's attempt to distinguish *Harrington* on the basis of affirmative conduct. Target contended that because Ms. Elliot affirmatively grabbed the mop hook, thereby causing the shelf to fall, her actions were qualitatively different from those of the plaintiff in *Harrington,* who was simply walking. However, the Court stated that Target's argument failed to acknowledge that the plaintiff in *Harrington* affirmatively walked across the spike strip, despite knowing of its existence, thereby causing her to fall and injure herself. *Harrington* is instructive because in both cases the plaintiff was complaining that the owner of land negligently created a hazard to invitees.

In *Elliot*, the Court held that, "Target's remaining argument, that Ms. Elliot's comparative negligence caused the accident is similarly without merit. **Whether Ms. Elliot's negligence in continuing to pull the hook was greater than Target's possible negligence is a question of fact for the jury to decide.** *See Joynt*, supra, 108 Nev. 539; *see also* NRS 41.141.

In *Wagon Wheel Saloon & Gambling Hall, Inc. v. Mavrogan*, 78 Nev. 126, 128, 369 P. 2d 688, 689-90 (1962), the Court rejected the Defendant's contention that Plaintiff's contributory negligence be decided as a matter of law.

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The Wagon Wheel urged that the Court decide Plaintiff's negligence as a matter of law. The Court stated, "Usually, the issue is one of fact; it becomes a question of law only when the evidence is of such a character as to support no other legitimate inference. *Carter v. City of Fallon*, 54 Nev. 195, 201, 11 P.2d 817, 816, 818-819 (1932); *Gordon v. Cal-Neva Lodge, Inc.*, 71 Nev. 336, 338, 291 P.2d 1054, 1056 (1955). The evidence before us is not of such character. While descending the stairway, Mavrogan did not particularly notice the nails and wood on the step where he slipped and fell a moment later. He had no prior knowledge of their existence at that place. He was looking at others who were also walking down the stairway, and at the bus which he and others intended to board for their return trip to San Francisco. His attention was momentarily attracted in another direction. **Under such circumstances it was for the jury to determine whether he exercised ordinary care for his own safety."**

In *Worth*, supra, 79 Nev. 351, 384 P.2d 1017, an elderly woman has notice of a toilet over-flowing in her hotel bathroom. Her son advises her of such. Maintenance is called, and they proceed to perform repairs. There is a large amount of water in the bathroom. The maintenance worker leaves the room, ostensibly to get cleaning materials. Before he can return, the elderly woman enters the bathroom and slips on the water, falling and injuring herself. The Nevada Supreme Court found, "The record does not disclose the quantity of water on the powder room floor in the area of Julia's fall. One may easily fail to notice water on a tiled floor. Though there is much in the record from which a jury could have concluded that the hazard was known or so apparent to Julia

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that she could reasonably be expected to discover it, (the warnings from her son not to use the bathroom, which warnings, however, did not tell her of the peril in the powder room; the fact that a repair man was called; and the presence of water in the area of her fall was seen by her son and the maintenance man), **it seems to us that the jury was equally free to characterize the peril as one that was neither apparent nor obvious. The issue was one of fact, rather than law. Water, if it was indeed on the floor before Plaintiff's fall, could have been on the floor between inspections. However, taking the evidence regarding water on the floor along with the evidence that a janitor was headed to the restroom with a bucket and a mop in the light most favorable to Plaintiff, we conclude that Plaintiff has shown that there exists a genuine issue of material fact on the matter of actual or constructive notice. Thus the failure of the maintenance man, when he left the room to get mop and bucket, to warn Julia that a danger still existed could reasonably have been considered by the jury to be a breach of the defendant's duty of ordinary care."** (emphasis added).

As was argued at length in the opposition to motion for summary judgment (AA 576-639), and in the motion for new trial and reply in support of motion for new trial (AA 941-1040 and 1139-1148, respectively), and at the hearing on both motions (see hearing transcripts, AA 881-1007 and 1255-1302, respectively), several fact witnesses (including the plaintiff James William Richards) testified at deposition under oath regarding facts and circumstances sufficient to create genuine issues as to material fact regarding the following:

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Evidence/Testimony	Genuine Issues as to Material Fact	Appendix
Depo. of James William Richards, Plaintiff	Richards stayed in a GSR room as a guest at GSR's hotel/casino, took a shower, noticed a hole in the door (serving as a handle)	AA 42-267, at p. 10
" "	Richards did not notice a shower/bath mat; rather, he only saw a decorative rug (not a bath mat according to him) near the sink – not the shower	*Id.*
" "	Richards testified about the mat in front of the sink: "Honestly, to me, it didn't look like a shower mat. The ones I usually see are like a - I want to say like a towel material. Usually it's like - I don't know what type of fabric it is - and you put it down on some of them have - already had, like, a place mat type of thing that's not as furry, I guess you can say. It just looked like a nice mat, you know, one that shouldn't get all soaked up and watery.	*Id.* at 173-74, ll. 16-17, 20-25, l. 4-5
" "	Richards dried his body off in the shower, including his feet, placed the towel around his waist and proceeded to exit from the shower	*Id.* at pp. 15-16
" "	As Richards stepped onto the bathroom floor (not the shower floor), after exiting the shower, his foot slipped out from underneath him, causing him to fall backwards into the shower and sustain injuries to his shoulder and back	*Id.*
" "	Richards contends the shower door, either through the hole or through the cracked water stop, permitted a large (inordinate or excessive) amount of water to saturate the bathroom floor	*Id.*
" "	When asked about if he had water on his feet when exiting the shower, Richards testified: "Honestly, I can't give you the assessment, because apparently, after looking at everything, there was water actually on the floor as well, so regardless if my feet were dry or not, I still would have stepped in water."	*Id.* at p. 34

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" "	When asked about the amount of water on the floor, Richards testified the sink rug, placed near him after the fall, absorbed some of the water, but became saturated and there was still a substantial amount of water on the floor. "Whatever was below me was saturated and there was - I do recall there was still a substantial amount of water on the floor."	*Id.* at p. 24-25
" "	**Richards testified unequivocally that the water ended up on the bathroom floor because "the shower leaked because the seal was cracked."**	*Id.* at p. 59
" "	**Richards testified that the maintenance man, Juan Trujillo, told him the seal was broken and he needed to replace it, and that the water leaked because there was a crack in the seal**	*Id.* at p. 62
" "	When asked what GSR did wrong, Richard testified: "If they feel like there's a safety issue, they should have provided a mat at the shower themselves, number one." When asked "It's your testimony they did not provide a mat?" Richards responded "exactly."	*Id.* at p. 134
" "	Richards testified he believes he slipped and fell as a result of a large accumulation of water on the bathroom floor, and the water accumulation was a result of the cracked door seal	*Id.* at pp. 24-25, 34, 220, 59, 62, 94, 166, 191
Depo. of Juan Trujillo (GSR maintenance)	It is admitted, and undisputed, that the water stop at the bottom of the shower door was cracked/defective, needed repair and was replaced by GSR immediately after this fall	AA 422-482, at p. 31
" "	Mr. Trujillo admitted the water stop, when working, is there to prevent water from seeping out of the shower	*Id.* at p. 34
" "	Mr. Trujillo testified that maintenance typically gets the call to perform repairs on the property from "the girls that clean the room"	*Id.* at p. 43

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Depo. of Daniel Haney (GSR security)	When Mr. Haney observed the shower after responding to the call, he observed the water guard as being cracked, and he stated the water guard is to keep water from seeping out of the shower; upon inspection of the bathroom, there were no bath mat or rubber mats in the bathroom or in the shower stall; the water stop was "cracked and broken"	AA 332-421, at pp. 46, 50, 83
Depo. of Sarai Calderon	Plaintiff's wife (now ex-wife) moved the rug from under the sink to where Richards had fallen in an effort to "sop up" some of the water; and she also put down towels to "sop up" the water	AA 267-330, at p. 9
	Sarai Calderon testified she believes Richards slipped and fell as a result of a large accumulation of water on the bathroom floor, and the water accumulation was a result of the cracked door seal	*Id.* at pp. 9-10, 43-44
York Risk Services claim file notes (produced during discovery by GSR)	"Juan Trujillo came to the room. Daniel [Haney] showed him 'the plastic piece at the bottom of the shower that was cracked and broken, he removed that piece and went to get a new one to replace. Trujillo has the broken piece for evidence." "Liability: based on attorney letter and security report it appears that the rubber piece at the bottom of the glass door was in need of replacement which allowed water to go and pool outside the shower onto the floor. Therefore liability will be adverse."	AA 619-621, Exhibit 4 to Opposition to Motion for Summary Judgment, at pp. 17-18
GSR Housekeeping Guidelines (produced during discovery by GSR)	Maids are required to perform turn-down services on rooms prior to guests arrival and must "replace math mat, place clean rubber mat on tub." Also, maids must "report all maintenance defects."	AA 622-629, Exhibit 5 to Opposition to Motion for Summary Judgment

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Two fact witnesses were deposed almost two months after the motion for summary judgment was submitted. By filing the motion for summary judgment prematurely, GSR deprived Richards of valuable deposition testimony and evidence to defeat summary judgment (also the District Court deprived Richards this right by not affording more time for discovery pursuant to NRCP 56(f)). In addition, the names of other fact witnesses were learned in those depositions, and that may have led to more facts and evidence to use in opposition to the motion for summary judgment.[12] By way of example and not limitation, the depositions of Tu Long (housekeeper) and Kent Vaughn would have provided the following valuable facts to defeat summary judgment:

Evidence/Testimony	**Genuine Issues as to Material Fact**	**Appendix**
Depo. of Tu Long (housekeeping)	Ms. Long testified her training consisted of reporting things she finds wrong or incorrect to management	AA 726-766, p. 11, ll. 8-14
" "	If something is wrong or broken, she reports it to a manager	*Id.* at p. 12, ll. 6-16
" "	Ms. Long puts and replaces bath mats in bathrooms, and there is only one; and some rooms they put down a "carpet type thing"	*Id.*, at p. 16, ll. 14-25, p. 17, ll. 1-4
" "	In the shower rooms, they now put the carpet-type thing down in front of the shower but, before, it was in front of the sink; she doesn't recall when the change occurred or why	*Id.* at p. 19, ll. 1-24

[12] The security supervisor, maintenance supervisor and housekeeping supervisor are witnesses who may have provided additional information to defeat summary judgment.

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" "	She is required to inspect the shower for problems, breaks, cracks and defects, and if she finds them, she is to report them to management/maintenance, and have them repaired	*Id.* at p. 21, ll. 11-23; p. 24, ll. 2-8
" "	She does not recall finding any breaks or cracks in the shower when this fall occurred or prior thereto	*Id.* at p. 23, ll. 22-25
" "	When cleaning a bathroom, she steps on a bath mat in front of a shower already used by a customer, and then she replaces it	*Id.* at p. 30, ll. 5-14; p. 31, ll. 2-11
" "	One of her essential job functions is to report repair work that is needed in rooms	*Id.* at p. 32, ll. 4-9
" "	She recalls inspecting showers before and finding seal cracks and other problems	*Id.* at pp. 34-35
" "	If she saw a seal crack, she should call maintenance or somebody to repair it	*Id.* at p. 36, ll. 10-15
Kent Vaughn (PMK)	Mr. Vaughn was the PMK designed by GSR, and his testimony binds the company	AA 767-872, at p. 6, ll. 6-20
" "	GSR has policies and procedures regarding investigating incidents and accidents, and they send security to take witness statements, document the incident or accident scene, take photographs, fill out reports, etc.	*Id.* at pp. 22-23
" "	Mr. Vaughn responded "possibly" when asked if he expected security to speak with housekeeping staff to see if they noticed whether or not the water stop was broken prior to going into the room	*Id.* at p. 28, ll. 21-25

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" "	Mr. Vaughn admitted he would not necessarily replace a known cracked water stop as he feels cracked does not always warrant repair/replacement, but he will replace it if it's broken or if a customers asks for it to be replaced; and he did not test the piece to see if it's defective	*Id.* at pp. 29-31
" "	Maintenance relies on housekeeping to inspect for defects and problems and report them; and there is no record housekeeping inspected for defects in the water stop or reported this defect in the water stop prior to this fall	*Id.* at pp. 35-36
" "	Mr. Vaughn admitted he has seen the "bath mat" placed in front of showers and also in front of sinks; he believes consistency is important and he thinks they should be placed in front of the sink	*Id.* at p. 40, ll. 5-18

As the Supreme Court can see, Ms. Long and Mr. Vaughn provided key information that Richards could have used to defeat summary judgment, but the District Court arbitrarily denied Richards' request for more discovery pursuant to NRCP 56(f). There was no evidence the request was made in bad faith or the parties were acting dilatory. Rather, they were actively and professionally engaging in discovery. Ms. Long admitted part of her job is to inspect for cracked water stops, and report them to be repaired. It is evident she failed to do so in this case (that is evidence of negligence). Mr. Vaughn said he might not even replace a cracked seal, and he did not test the one in this case (that is evidence of negligence). Also, Mr. Vaughn admitted the "bath mat" is placed sometimes in front of the shower and sometimes in front of the sink, but he prefers consistency and wants them in front of the shower. Richards testified he

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did not think the "fuzzy mat" in front of the sink was a "bath mat" because it was in front of the sink - not the shower - and it did not look like a bath mat to him. This is a negligent practice of GSR and is confusing to its customers (Richards thought the sink mat was not to be moved). Also the investigation of GSR is negligent in that all key witnesses were not interviewed so that information and evidence could be preserved. Further, Mr. Vaughn testified that management counts on housekeeping to inspect for defective water stops and report them, and there is no record that Ms. Long did so in this case. That is further evidence of negligence.

Based on the plethora of genuine issues of material fact stated above, stated in the opposition to motion for summary judgment, and argued to the District Court, there is no proper basis for summary judgment to be granted. In fact, the summary judgment standard required the District Court to construe all pleadings and evidence in a light most favorable to Richards, and all factual allegations, evidence and reasonable inferences therefrom which favor Richards must be presumed by the District Court to be correct. Richards provided ample facts and evidence to defeat summary judgment in his opposition to motion for summary judgment, and requested additional time to conduct discovery. NRCP 56(f). Sworn deposition testimony and evidence produced by GSR during litigation is competent and credible evidence to defeat summary judgment. **A party has the right to due process and a jury trial, and Nevada has judicial policy favoring disposition of cases on their merits. See *Havas*, supra, 96 Nev. at 570, 613 P.2d at 707-708.** Therefore, the decision granting summary

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judgment should be reversed, and this case should be remanded for completion of discovery, expert disclosures and trial.

(iii) An Award of Costs Was Erroneous As Summary Judgment Was Improper And GSR Was Not a Prevailing Party

NRS 18.020 (and NRS 18.005) only permit an award of costs for the "prevailing party." Since summary judgment was improperly granted, if the Supreme Court reverses the decision to grant summary judgment, then the order/judgment awarding costs of $5,508.61, to GSR should also be reversed. Aside from the granting of summary judgment, there is no basis for GSR to be awarded costs.

CONCLUSION

Richards was denied his right to a jury trial when summary judgment was improperly granted. The District Court violated its own orders when it required Richards to disclose experts and expert reports prior to the court-imposed deadlines for such disclosures. Permitting defendants to force a plaintiff to disclose experts early, when the Rules provide for simultaneous disclosure of experts, is unfair and improper. Had the District Court permitted Richards to disclose and produce his expert report, sufficient evidence would have existed to support liability so that summary judgment would be denied.

Even without the expert report, Richards provided a plethora of deposition testimony and evidence to defeat summary judgment. Richards and Sarai Calderon testified there was excessive or an abundance of water on the bathroom floor, and it came from the shower through either the hole in the door or through a damaged water stop. Defense witnesses acknowledged the damaged or

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defective water stop, and it was immediately replaced. Also, records produced by GSR show that a bath mat and rubber mat should have been in the bathroom, not just the fuzzy mat by the sink. Also, GSR (through its housekeepers and maintenance personnel) are supposed to look for and replace defective items in rooms, including water stops. The multitude of Nevada cases cited by Richards in his opposition to motion for summary judgment are on point, and involved cases where plaintiffs absolutely knew there was water or a hazard, however they were not advised of its dangerous aspects, condition or qualities. Those are akin to this case. Richards did not know the floor was hazardous and failed slip-resistance tests, was not informed of the defective and leaking shower, did not know of excessive water on the floor and was not provided with a proper bath mat (in a proper location), or told to use the fuzzy mat by the sink. As such, genuine issues as to material fact existed to defeat summary judgment. Finally, an award of costs is improper as GSR is not the prevailing party as summary judgment was improperly granted.

Dated this 18th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

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:

1. This brief has been prepared in a proportionally spaced typeface using Wordperfect Version X6 in Times New Roman font, size 14 (2.5 spacing);

2. I further certified that this brief complies with the page 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 9745 words (less than 14,000).

3. Finally, 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 and volume number, if any, 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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CERTIFICATE OF SERVICE

I certify that on the 18th day of September, 2017, I electronically filed with the Clerk of the Nevada Supreme Court this Appellant's Opening Brief and electronically served a copy of same upon all counsel of record:

____ by personally serving it upon him/her; or

__X_ by electronic service through e-flex for the Nevada Supreme Court, to its registered user

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