No. 9

No. 9

NOTM
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Nevada Limited Liability Company, d/b/a/ THE
PALMS CASINO RESORT

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, Plaintiffs, v. FIESTA PALMS, LLC, et al., Defendants.	Case No. A531538 **NOTICE OF MOTION AND MOTION TO AMEND JUDGMENT ON THE VERDICT** Date: Time: Dept: X

PLEASE TAKE NOTICE that Defendant FIESTA PALMS, LLC dba THE PALMS CASINO RESORT, by and through its attorneys of record Kenneth C. Ward, Keith R. Gillette, and ARCHER NORRIS, moves to amend the Judgment on the Verdict filed by this Court on April 12, 2011. This Motion is made pursuant to NRS 17.130 and on the grounds that the Judgment on the Verdict does not accurately calculate the post-judgment interest rate as a variable interest rate to be readjusted every six months.

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This Motion is further based upon the papers and pleading filed herein, the below Memorandum of Points and Authorities, and oral argument.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant FIESTA PALMS, LLC dba THE PALMS CASINO RESORT ("THE PALMS") moves to amend the Court's Judgment on the Verdict ("Judgment") filed on April 12, 2010. The Judgment holds THE PALMS and Co-Defendant BRANDY BEAVERS joint and severally liable to the Plaintiff for $6,051,589.38. The Judgment sets the interest rates as follows:

> "Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of $1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006) until fully satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100 DOLLARS ($427,027.00 [*sic*]) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS ($274.62) per diem thereafter.
>
> Post-Judgment Interest shall accrue at the legal rate on future damages in the amount of $4,142,355.00, until fully satisfied."

The Court's calculation of **post-judgment** interest on Plaintiff's **past damages** has been erroneously set at the interest rate of 5.25%, as opposed to adjustable amount mandated by NRS 17.130(2). The Judgment erroneously calculates the amount of post-judgment interest and must therefore be amended.

II. LEGAL ARGUMENT

A. Legal Standard for Post-Judgment Interest

Nevda Revised Statute 17.130(2) governs the calculation of interest on a judgment:

> "When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the commissioner of financial institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. **The rate must be adjusted accordingly on each January 1 and July 1 thereafter until judgment is satisfied.**" (Emphasis added.)

The Nevada Supreme Court has plainly stated that **pre-judgment** interest must be calculated using a single rate in effect on the date of judgment, not a periodic biannual rate. *Lee v. Ball*, 121 Nev. 391, 396 (2005). However, this fixed rate only applies until the date of judgment. The fixed rate does not apply to post-judgment interest. Instead, the rate must be adjusted every six months until satisfied. NRS 17.130(2). As explained in *Kerala Props., Inc. v. Familian*, "the biannual rate adjustment applies postjudgment, *i.e.*, **when the judgment is entered until it is satisfied, and not prejudgment**." 122 Nev. 601, 606 (2006) (emphasis added).

Therefore, pursuant to NRS 17.130(2), "the prime rate at the time of judgment plus 2%" calculation applies to **past** damages from the date of service of the complaint until the date of judgment. The adjustable post-judgment rate that must be reevaluated on every January 1 and July 1 until judgment is satisfied applies to both Plaintiff's past and future damages.

B. The Judgment Should Be Amended to Reflect the Appropriate Adjustable Post-Judgment Interest Rate

The Judgment issued by this Court correctly determines the pre-judgment interest rate on Plaintiff's past damages at a rate of 5.25% (3.25% prime rate plus an additional 2%), as required by NRS 17.130(2). However, the Judgment then calculates a *per diem* rate of interest after judgment until fully satisfied at an amount of $274.62. This is incorrect. The post-judgment interest rate must be adjusted every January 1 and July 1 until the judgment is satisfied. *Keralas Props., Inc. v. Familian*, 122 Nev. 601, 606 (2006). This Court cannot set a fixed rate of post-judgment *per diem* interest when NRS 17.130(2) and the Nevada Supreme Court are clear that **post-judgment interest is variable**. Just as the post-damages interest rate for Plaintiff's future damages will be periodically calculated until satisfied, the interest on Plaintiff's **post-judgment past damages must be calculated in the same manner**.

As such, the Judgment should be amended to adequately reflect the law on calculation of post-judgment interest. Rather than setting a fixed *per diem* amount of post-judgment interest, the Court should amend the Judgment to state that any and all interest accruing after the entry of judgment will be calculated using a rate adjusted on each January 1 and July 1 until the judgment

1 is fully satisfied, as required by NRS 17.130(2).

2 **III.**
CONCLUSION
3

4 The Judgment filed by this Court does not appropriately set the rate for post-judgment
5 interest in this matter. As explained above, instead of using a fixed interest rate resulting in the
6 $274.62 *per diem* amount, the appropriate interest rate for both Plaintiff's past and future
7 damages must be readjusted on each January 1 and July 1 from the date of judgment until
8 judgment is satisfied. Therefore, Defendant THE PALMS respectfully requests that the Court
9 GRANT its Motion to Amend the Judgment on the Verdict to reflect the proper adjustable interest
10 rate for post-judgment interest as required by NRS 17.130(2).

11

12 Dated: May 2, 2011

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19 LLC, a Nevada Limited Liability Company,
d/b/a/ THE PALMS CASINO RESORT

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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, Plaintiffs, v. FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a/ The Palms Casino Resort, et al., Defendants.	CASE NO:. A531538 DEPT NO: 10 BENCH TRIAL DATE: 10/25/10 HEARING DATE: 7/5/11

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER having come on for hearing on July 5, 2011, with respect to Defendant's Motion to Amend Judgment on the Verdict, before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration, this Court finds and concludes as follows:

FINDINGS OF FACT

Within the Judgment on the Verdict filed April 12, 2011, the reference to interest accrual on the Judgment is articulated as follows:

> Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of $1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006) until fully satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100 DOLLARS ($427,027.00 [*sic*]) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS ($274.62) per diem thereafter.
>
> Post-Judgment Interest shall accrue at the legal rate on future damages in the amount of $4,142,355.00, until fully satisfied.

Defendant Fiesta Palms LLC (hereinafter, Defendant or "Palms") objected to this articulation of interest to be awarded as to post-judgment interest on past damages, as developed within its Motion to Amend Judgment. Plaintiff filed no opposition to said Motion, and concurred that the interest rate was improperly articulated.

CONCLUSIONS OF LAW

NRS 17.130 mandates that determination of post-judgment interest on past damages. The Judgment on the Verdict filed April 12, 2011 erroneously articulates the interest rate as "5.25% (3.25 prime + 2)."

Dated: July 26, 2011

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ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Amend Judgment on the Verdict is granted.

Dated: 16 Sept 2011

Jessie Walsh
Hon. JESSIE WALSH
DISTRICT COURT JUDGE

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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, Plaintiffs, v. FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a/ The Palms Casino Resort, et al., Defendants.	Case No. A531538 Dept: 10

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that Defendant's Motion to Amend Judgment on the Verdict was entered in the above-captioned matter on the 19th day of September, 2011. A copy of said Order is attached hereto.

///

///

Dated: September 22, 2011

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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, Plaintiffs, v. FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a/ The Palms Casino Resort, et al., Defendants.	CASE NO:. A531538 DEPT NO: 10 BENCH TRIAL DATE: 10/25/10 HEARING DATE: 7/5/11

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER having come on for hearing on July 5, 2011, with respect to Defendant's Motion to Amend Judgment on the Verdict, before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration, this Court finds and concludes as follows:

FINDINGS OF FACT

Within the Judgment on the Verdict filed April 12, 2011, the reference to interest accrual on the Judgment is articulated as follows:

> Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of $1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006) until fully satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100 DOLLARS ($427,027.00 [*sic*]) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS ($274.62) per diem thereafter.
>
> Post-Judgment Interest shall accrue at the legal rate on future damages in the amount of $4,142,355.00, until fully satisfied.

Defendant Fiesta Palms LLC (hereinafter, Defendant or "Palms") objected to this articulation of interest to be awarded as to post-judgment interest on past damages, as developed within its Motion to Amend Judgment. Plaintiff filed no opposition to said Motion, and concurred that the interest rate was improperly articulated.

CONCLUSIONS OF LAW

NRS 17.130 mandates that determination of post-judgment interest on past damages. The Judgment on the Verdict filed April 12, 2011 erroneously articulates the interest rate as "5.25% (3.25 prime + 2)."

Dated: July 26, 2011

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1
2 **ORDER**
3 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to
4 Amend Judgment on the Verdict is granted.
5
6 Dated: 16 Sept 2011

Hon. JESSIE WALSH
DISTRICT COURT JUDGE
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CERTIFICATE OF SERVICE

Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC
Court and Action No: District Court, Clark County, Nevada Action No. A531538

I, Tracy Pico, certify that I am over the age of eighteen years and not a party to this action or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut Creek, California 94596-3728. On September 22, 2011, I caused the following document(s) to be served: **NOTICE OF ENTRY OF ORDER ~ DEFENDANT'S MOTION TO AMEND JUDGMENT ON THE VERDICT**

☒ by placing a true copy of the document(s) listed above, enclosed in a sealed envelope, addressed as set forth below, for collection and mailing on the date and at the business address shown above following our ordinary business practices. I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

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Co-Counsel for Defendant
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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 22, 2011, at Walnut Creek, California.

An Employee of Archer Norris

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual,

Plaintiff,

vs.

FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

CASE NO: A531538

DEPT NO: 10

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

THIS MATTER having come on for hearing on July 5, 2011 with respect to Defendant's Motion for New Trial before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration hereby finds,

FINDINGS OF FACT

In seeking a new trial, Defendant offered the following four (4) arguments:

1. Plaintiff's counsel engaged in misconduct;
2. The Court erred in allowing testimony of certain providers;
3. The evidence was insufficient to justify the verdict; and

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4. The Court erred in striking defense experts.

This Court makes the following Findings of Fact with respect to the following Conclusions of Law and Order as set forth herein.

1. <u>Plaintiff's Counsel Did Not Engage In Misconduct</u>

Defense counsel, during Opening Argument, the evidentiary phase of the trial, and Closing Argument, accused Plaintiff's counsel of engaging in a systematic "medical build-up," and manipulation of the medical records.

Post-trial, Defense counsel, in moving for a mistrial, then accused Plaintiff's counsel *and* this Court of engaging in a systematic *ex parte* conspiracy, rendering the trial unfair and impartial. At no time did this Court engage in unpermitted contact with the Plaintiff, nor did this Court rely on the contents and/or points and authorities contained in any "blind" briefing in support of its findings, conclusions, and/or verdict herein.

Post-judgment, Defense counsel, in moving for a new trial, argued that Plaintiff's counsel engaged in blatant premeditated and reprehensible misconduct.

Defendant argued that Plaintiff's counsel's alleged misconduct constituted an *irregularity in the proceedings*. Defense counsel argued that it was well settled under Nevada law that attorney misconduct constitutes an irregularity in the proceedings; however, they cited no Nevada law, or any authority, for that matter, in support of this position.

Defense counsel pointed to two (2) *examples* (arguments) of misconduct:

1. Plaintiff's counsel withheld evidence in regards to Plaintiff's tax returns; and

2. Plaintiff's counsel withheld evidence relied upon by Dr. Schifini.

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This Court finds that Plaintiff's counsel did not withhold evidence in regarding Plaintiff's tax returns.

Mr. Dinneen was asked to look at the vocational issues, the types of work that Plaintiff was able to do prior to his accident, to look at what vocational options he may have in the future and then calculate that loss. He was also asked to look at the costs of future medical care and calculate those values, as well.

Mr. Dinneen met with the Plaintiff, reviewed his medical records, three (3) years of tax returns, and social security materials in forming an opinion that Plaintiff was disabled.

Mr. Dinneen testified that Plaintiff was qualified by the Federal Government as being disabled.

Mr. Dinneen testified to a reasonable degree of economic and professional probability that Plaintiff's income was *reported.*

Defense counsel was critical of the fact that Mr. Dinneen, during his testimony at trial, and in response to defense counsel's inquiry as to whether Mr. Dinneen knew if any of Plaintiff's income was reported, indicated that he had received a letter from Plaintiff's tax preparer advising that the subject returns had, in fact been filed.

Mr. Dinneen's trial testimony occurred on November 2, 2010. The letter was dated October 20, 2010. Defense counsel did not mark the letter as an exhibit or move to admit the letter.

The subject letter was not the subject of direct examination, and the information relative to the same was brought out through cross-examination in response to counsel's inquiry as to whether Mr. Dinneen knew if any of Plaintiff's income was in fact reported. Mr. Dinneen was provided the letter from the tax preparer subsequent to his deposition, but

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1 merely days before his testimony. Defense counsel never moved to admit the document, but
2 did question Mr. Dinneen as to the authenticity of the letter.
3 Equally, this Court finds that Plaintiff's Counsel did not withhold evidence relied
4 upon by Dr. Schifini.
5
6 Defense counsel argued that Plaintiff's counsel withheld 100+ documents that Dr.
7 Schifini relied upon in providing expert opinions at trial.
8 First, defense counsel decided **not** to depose Dr. Schifini.
9 Secondly, Dr. Schifini reviewed *all* the medical records in the case.
10 Third, defense counsel's only objections relative to Dr. Schifini's testimony were
11 foundation and hearsay. Defense counsel did not object to the records relied upon, or the
12 introduction of the documents other than on a *foundation* and *hearsay basis*, which related to
13 Dr. Schifini's ability to provide expert testimony, and not his reliance on the documents.
14
15 Fourth, the records that counsel referred to were introduced and admitted into
16 evidence, with the only objections being *foundation* and *hearsay*. Each any every one of
17 these documents had been previously disclosed to the Defendant and were no more than the
18 records of other treating physicians contained in Dr. Schifini's file.
19 2. <u>**The Court Did Not Err In Allowing The Testimony Of Certain Providers**</u>
20 Defense counsel was also critical of the fact that this Court qualified and admitted
21
22 certain treating providers during trial. Defense counsel's position was that none of the
23 providers were designated as expert witnesses nor provided expert reports. Defense counsel's
24 argument was that they never had notice of the testifying providers' opinions until trial and
25 that they were *prejudiced* as a result.
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This Court finds that defense decided not to depose a single treating physician in a case where the Plaintiff was alleging a constellation of profound injuries.

Defense counsel was fully aware of the nature and substance of the claimed injuries and had also been given the medical records generated by all of Plaintiff's physicians. Defense counsel was free to depose the treating physicians. They chose not to do so.

3. The Court Finds Evidence Was Substantial To Justify The Verdict

This Court heard the extensive testimony of Plaintiff's treating physicians, including, but not limited to Dr. Schifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shah, Dr. Shannon, and Dr. Tauber on the issues of injury to the Plaintiff and the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial, and heard testimony regarding past medical expenses of $376,773.38 and future medical expenses in the amount of $1,854,738.00.

The Court also heard testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, awarded as past pain and suffering the amount of $1,243,350.00 and future pain and suffering in the amount of $1,865,025.00.

The Court heard the testimony of Plaintiff's vocational and economic loss expert, Terrence Dinneen, on the issue of Plaintiff's loss of economic opportunity, vocational

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disability, and loss of past and future earnings, and heard evidence concerning the significant detrimental impact of Plaintiff's injuries upon his ability to transact in the field of real-estate purchases, refurbishment, was presented with evidence and testimony that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, was presented with the calculations of Mr. Dinneen with respect to the same and, in this Court's discretion, awarded past lost income in the amount of $289,111.00 and future lost income in the amount of $422,593.00.

As to the allocation of liability, the Court found liability against Defendant Fiesta Palms, LLC, and found that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and in other and further manners as elucidated at the time of trial. In reaching its verdict, the Court heard and relied upon the testimony of Brandy Beavers with respect to the conduct of both herself and the Palms, and the testimony of Palms' employees regarding the fact the Palms know that promotional items were being thrown into crowds prior to the subject event, had a meeting and set up policies to prohibit said conduct, and then knowingly violated said policies. The Court, in its discretion, therefore apportioned liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

4. **The Court Did Not Err In Striking Defense Experts**

Defendant presented two (2) non-medical experts in this trial, Dr. Thomas Cargill (Economist) and Forrest Franklin (Liability), neither of whom opined that their opinions were given to a reasonable degree of professional probability as required under Nevada law.

Forrest Franklin, Defendant's liability expert, was retained to develop and render an opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and promotional articles into crowds.

Mr. Franklin offered the following opinions:

1. Throwing memorabilia as a promotional effort into crowds is not a substandard protocol;

2. It is not unsafe to throw things into crowds; and

3. It is not below the standard of care to throw items into a crowd.

None of these opinions, however, were given to a reasonable degree of professional probability.

Dr. Cargill offered the following two (2) opinions at trial:

1. Plaintiff could not have made as much in the current financial market as he could have back in 2004 because the bubble burst in the housing market; and

2. Mr. Dineen's discount rates were inappropriate.

Neither of these opinions was given to a reasonable degree of professional/scientific probability.

CONCLUSIONS OF LAW

1. Plaintiff's Counsel Did Not Engage In Misconduct

This Court concludes as follows:

As supported by substantial evidence, Plaintiff's counsel did not engage in misconduct.

Specifically, Plaintiff's counsel did not withhold evidence in regarding Plaintiff's tax returns. The information relied upon by Mr. Dinneen was of the type contemplated and permitted by NRS 50.275.

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Equally, this Court concludes that Plaintiff's Counsel did not withhold evidence relied upon by Dr. Schifini.

Nevada law makes it clear that a new trial is not warranted on grounds of *surprise* based on testimony which, *with reasonable diligence*, could have been anticipated.

Furthermore, the "surprise" contemplated by Rule 59 (a) must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against.

Defense counsel did not exercise reasonable diligence and cannot argue *surprise* since they chose not to depose a single treating provider. As a result of this failure, defendant did not discover the entirety of the materials contained in Dr. Schifini's file.

The records about which Defendant complains were introduced and admitted into evidence, with the only objections being *foundation* and *hearsay*. Each and every one of these documents had been previously disclosed to the Defendant and were no more than the records of other treating physicians contained in Dr. Schifini's file. Accordingly, no documents were withheld by the Plaintiff, Defendants were timely provided with all documents serving as the basis of Dr. Schifini's opinion, and no prejudice resulted.

As such, the Court concludes that there was no misconduct on the part of Plaintiff's Counsel.

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1 2. **The Court Did Not Err in Allowing The Testimony of Certain Providers**

2 This Court concludes as follows:

3 Defense counsel cannot argue *surprise* with respect to the testimony of Plaintiff's
4 treating physicians since they chose not to depose a single treating provider and did not
5 exercise reasonable diligence.

7 The scope of a witness' testimony and whether that witness will be permitted to testify
8 as an expert are within the discretion of trial court. *Prabhu v. Levine*, 1996, 930 P.2d 103, 112
9 Nev. 1538, rehearing denied.

10 Once the district court certifies an expert as qualified, the expert may testify to all
11 matters within the expert's experience or training, and the expert is generally given reasonably
12 wide latitude in the opinions and conclusions he or she can state. *Fernandez v. Admirand*, 108
13 Nev. 963, 969, 843 P.2d 354, 358 (1992); *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d
14 1299, 1303 (1989) (a proposed medical expert should not be scrutinized by an excessively
15 strict test of qualifications); *Freeman v. Davidson*, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989)
16 ("[a]n expert witness need not be licensed to testify as an expert, as long as he or she
17 possesses special knowledge, training and education, or in this case, knowledge of the
18 standard of care"); *Wright v. Las Vegas Hacienda*, 102 Nev. 261, 263, 720 P.2d 696, 697
19 (1986) ("[a] witness need not be licensed to practice in a given field ... to be qualified to
20 testify as an expert").

23 Under Nevada law, treating physicians are not considered retained experts. They
24 should be allowed to testify as to treatment, diagnosis (including causation), and prognosis
25 based upon their treatment of the patient and their medical training. *Id.*

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Plaintiff's treating providers were not subject to the strict disclosure or reporting requirements under Nevada law. *Id.*

Even if this Court were to determine that Plaintiff's counsel failed to comply with the disclosure requirements, which it does not, the decision whether to permit expert witness to testify where there has been failure to comply with disclosure requirements is committed to the trial court's discretion. NRCP 26(b)(4). *Murphy v. Federal Deposit Ins. Corp.*, 1990, 787 P.2d 370, 106 Nev. 26.

Defense counsel was fully aware of the nature and substance of the claimed injuries and had also been given the medical records generated by all of Plaintiff's physicians. Defense counsel was free to depose the treating physicians. They chose not to do so.

Plaintiff's treating providers were permitted to rely on the opinions of non-testifying experts as a foundation for their opinions given at trial.

As such, the Court concludes that there was no error in allowing the testimony of certain providers.

3. <u>The Evidence In The Case Was Substantial And Sufficient To Justify The Verdict</u>.

The Court concludes that the testimony of Plaintiff's treating physicians, including, but not limited to Dr. Schifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shah, Dr. Shannon, and Dr. Tauber to be persuasive and to provide substantial evidence on the issues of Plaintiff's injury and the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial and, accordingly, and in this Court's discretion,

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awards as past medical expenses the amount of $376,773.38 and future medical expenses in the amount of $1,854,738.00.

Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial, the Court concludes that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that conclusion, and in this Courts discretion, awards as past pain and suffering the amount of $1,243,350.00 and future pain and suffering in the amount of $1,865,025.00.

The Court concludes the testimony of Plaintiff's vocational and economic expert, Terrence Dineen, was substantial and persuasive on the issue of Plaintiff's loss of economic opportunity, vocational disability, and loss of past and future earnings, and concludes the Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to his physical limitations resultant of the subject injury, concludes that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts the calculations of Mr. Dineen with respect to the same and, in this Court's discretion, awarded past lost income in the amount of $289,111.00 and future lost income in the amount of $422,593.00.

As to the allocation of liability, the Court concludes that liability lies against Defendant Fiesta Palms, LLC, and concludes that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and

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in other and further manners as elucidated at the time of trial. The Court's conclusion with respect to liability is made and based upon the testimony of Brandy Beavers with respect to the conduct of both herself and the Palms, and the testimony of Palms' employees to the fact the Palms knew that promotional items were being thrown into crowds prior to the subject event, had a meeting and set up policies to prohibit said conduct, and then knowingly violated said policies. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

As such, the Court concludes that the evidence in the case was substantial and sufficient to justify the verdict.

4. **The Court Did Not Err In Striking Defense Experts**

To testify as an expert witness under NRS 50.275, a witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional/scientific probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.

While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on the basis of "possibility" or some other standard lower than "a reasonable degree of professional probability."

Accordingly, the testimony of Cargil and Franklin did not satisfy the "assistance" requirement of NRS 50.275.

Regardless, this Court determined both liability and damages independent of striking the testimony of Defendant's two expert witnesses aforesaid, and determined the same upon the basis and weight of Plaintiff's economics and vocational expert, Mr. Dineen, Plaintiff's testimony, and the testimony of Defendant's employees called in Plaintiff's case-in-chief.

As such, this Court concludes that there was no error in striking Defense experts.

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ORDER

On the basis of the foregoing, it is hereby Ordered that Defendant's Motion for a New Trial be denied.

Dated this 26 day of Sept, 2011.

[signature]
DISTRICT COURT JUDGE

Submitted by:

BENSON, BERTOLDO, BAKER & CARTER, CHTD

[signature]

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the Findings of Fact, Conclusions of Law; and Order denying Defendant's Motion for New Trial was filed on the 29th day of September, 2011. A copy of said Order is attached hereto.

Date: 10/4/11

BENSON, BERTOLDO, BAKER & CARTER

[signature]

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October, 2011, a true and correct copy of the above referenced document was served via 1st Class, U.S. Mail, postage thereon fully prepaid to the following interested parties:

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Archer Norris
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Attorneys for Defendant Fiesta Palms

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Co-counsel for Fiesta Palms

[signature]
An Employee of Benson, Bertoldo, Baker & Carter

ORIGINAL

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CLERK OF THE COURT

6
7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

* * *

9
10 ENRIQUE RODRIGUEZ, an individual,
11 Plaintiff,
vs.
12
13 FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO
14 RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive,
15 and ROE BUSINESS ENTITIES I through X, inclusive,
16 Defendants.

CASE NO: A531538

DEPT NO: 10

17
18 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL**

19 THIS MATTER having come on for hearing on July 5, 2011 with respect to
20 Defendant's Motion for New Trial before the Honorable Jessie Walsh, presiding, and the
21 Court having considered the evidence and the arguments of counsel and taken the matter
22 under advisement for further consideration hereby finds,
23
24 **FINDINGS OF FACT**
25 In seeking a new trial, Defendant offered the following four (4) arguments:
26 1. Plaintiff's counsel engaged in misconduct;
27 2. The Court erred in allowing testimony of certain providers;
28 3. The evidence was insufficient to justify the verdict; and

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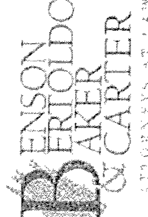

4. The Court erred in striking defense experts.

This Court makes the following Findings of Fact with respect to the following Conclusions of Law and Order as set forth herein.

1. Plaintiff's Counsel Did Not Engage In Misconduct

Defense counsel, during Opening Argument, the evidentiary phase of the trial, and Closing Argument, accused Plaintiff's counsel of engaging in a systematic "medical build-up," and manipulation of the medical records.

Post-trial, Defense counsel, in moving for a mistrial, then accused Plaintiff's counsel *and* this Court of engaging in a systematic *ex parte* conspiracy, rendering the trial unfair and impartial. At no time did this Court engage in unpermitted contact with the Plaintiff, nor did this Court rely on the contents and/or points and authorities contained in any "blind" briefing in support of its findings, conclusions, and/or verdict herein.

Post-judgment, Defense counsel, in moving for a new trial, argued that Plaintiff's counsel engaged in blatant premeditated and reprehensible misconduct.

Defendant argued that Plaintiff's counsel's alleged misconduct constituted an *irregularity in the proceedings*. Defense counsel argued that it was well settled under Nevada law that attorney misconduct constitutes an irregularity in the proceedings; however, they cited no Nevada law, or any authority, for that matter, in support of this position.

Defense counsel pointed to two (2) *examples* (arguments) of misconduct:

1. Plaintiff's counsel withheld evidence in regards to Plaintiff's tax returns; and
2. Plaintiff's counsel withheld evidence relied upon by Dr. Schifini.

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1 This Court finds that Plaintiff's counsel did not withhold evidence in regarding
2 Plaintiff's tax returns.
3 Mr. Dinneen was asked to look at the vocational issues, the types of work that Plaintiff
4 was able to do prior to his accident, to look at what vocational options he may have in the
5 future and then calculate that loss. He was also asked to look at the costs of future medical
6 care and calculate those values, as well.
7
8 Mr. Dinneen met with the Plaintiff, reviewed his medical records, three (3) years of
9 tax returns, and social security materials in forming an opinion that Plaintiff was disabled.
10 Mr. Dinneen testified that Plaintiff was qualified by the Federal Government as being
11 disabled.
12
13 Mr. Dinneen testified to a reasonable degree of economic and professional probability
14 that Plaintiff's income was *reported*.
15 Defense counsel was critical of the fact that Mr. Dinneen, during his testimony at trial,
16 and in response to defense counsel's inquiry as to whether Mr. Dinneen knew if any of
17 Plaintiff's income was reported, indicated that he had received a letter from Plaintiff's tax
18 preparer advising that the subject returns had, in fact been filed.
19
20 Mr. Dinneen's trial testimony occurred on November 2, 2010. The letter was dated
21 October 20, 2010. Defense counsel did not mark the letter as an exhibit or move to admit the
22 letter.
23 The subject letter was not the subject of direct examination, and the information
24 relative to the same was brought out through cross-examination in response to counsel's
25 inquiry as to whether Mr. Dinneen knew if any of Plaintiff's income was in fact reported. Mr.
26 Dinneen was provided the letter from the tax preparer subsequent to his deposition, but
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merely days before his testimony. Defense counsel never moved to admit the document, but did question Mr. Dinneen as to the authenticity of the letter.

Equally, this Court finds that Plaintiff's Counsel did not withhold evidence relied upon by Dr. Schifini.

Defense counsel argued that Plaintiff's counsel withheld 100+ documents that Dr. Schifini relied upon in providing expert opinions at trial.

First, defense counsel decided **not** to depose Dr. Schifini.

Secondly, Dr. Schifini reviewed *all* the medical records in the case.

Third, defense counsel's only objections relative to Dr. Schifini's testimony were foundation and hearsay. Defense counsel did not object to the records relied upon, or the introduction of the documents other than on a *foundation* and *hearsay basis*, which related to Dr. Schifini's ability to provide expert testimony, and not his reliance on the documents.

Fourth, the records that counsel referred to were introduced and admitted into evidence, with the only objections being *foundation* and *hearsay*. Each any every one of these documents had been previously disclosed to the Defendant and were no more than the records of other treating physicians contained in Dr. Schifini's file.

2. <u>The Court Did Not Err In Allowing The Testimony Of Certain Providers</u>

Defense counsel was also critical of the fact that this Court qualified and admitted certain treating providers during trial. Defense counsel's position was that none of the providers were designated as expert witnesses nor provided expert reports. Defense counsel's argument was that they never had notice of the testifying providers' opinions until trial and that they were *prejudiced* as a result.

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This Court finds that defense decided not to depose a single treating physician in a case where the Plaintiff was alleging a constellation of profound injuries.

Defense counsel was fully aware of the nature and substance of the claimed injuries and had also been given the medical records generated by all of Plaintiff's physicians. Defense counsel was free to depose the treating physicians. They chose not to do so.

3. **The Court Finds Evidence Was Substantial To Justify The Verdict**

This Court heard the extensive testimony of Plaintiff's treating physicians, including, but not limited to Dr. Schifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shah, Dr. Shannon, and Dr. Tauber on the issues of injury to the Plaintiff and the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial, and heard testimony regarding past medical expenses of $376,773.38 and future medical expenses in the amount of $1,854,738.00.

The Court also heard testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, awarded as past pain and suffering the amount of $1,243,350.00 and future pain and suffering in the amount of $1,865,025.00.

The Court heard the testimony of Plaintiff's vocational and economic loss expert, Terrence Dinneen, on the issue of Plaintiff's loss of economic opportunity, vocational

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1 disability, and loss of past and future earnings, and heard evidence concerning the significant
2 detrimental impact of Plaintiff's injuries upon his ability to transact in the field of real-estate
3 purchases, refurbishment, was presented with evidence and testimony that sufficient
4 opportunity existed and exists in the repressed real estate market for Plaintiff to continue to
5 profitably purchase, refurbish and sell real-estate absent said physical limitations, was
6 presented with the calculations of Mr. Dinneen with respect to the same and, in this Court's
7 discretion, awarded past lost income in the amount of $289,111.00 and future lost income in
8 the amount of $422,593.00.
9
10 As to the allocation of liability, the Court found liability against Defendant Fiesta Palms,
11 LLC, and found that Defendant Beavers also failed to act in the manner of the average
12 reasonable person under similar circumstances in a manner creating a foreseeable harm to
13 patrons of the Palms by throwing promotional items into a crowded environment and in other
14 and further manners as elucidated at the time of trial. In reaching its verdict, the Court heard
15 and relied upon the testimony of Brandy Beavers with respect to the conduct of both herself
16 and the Palms, and the testimony of Palms' employees regarding the fact the Palms know that
17 promotional items were being thrown into crowds prior to the subject event, had a meeting
18 and set up policies to prohibit said conduct, and then knowingly violated said policies. The
19 Court, in its discretion, therefore apportioned liability at 60% to the Palms and 40% to
20 Beavers, with no finding of comparative fault on the part of the Plaintiff.
21
22
23 4. **<u>The Court Did Not Err In Striking Defense Experts</u>**
24 Defendant presented two (2) non-medical experts in this trial, Dr. Thomas Cargill
25 (Economist) and Forrest Franklin (Liability), neither of whom opined that their opinions were
26 given to a reasonable degree of professional probability as required under Nevada law.
27
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1 Forrest Franklin, Defendant's liability expert, was retained to develop and render an
2 opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and
3 promotional articles into crowds.
4 Mr. Franklin offered the following opinions:
5
6 1. Throwing memorabilia as a promotional effort into crowds is not a substandard protocol;
7
8 2. It is not unsafe to throw things into crowds; and
9 3. It is not below the standard of care to throw items into a crowd.
10 None of these opinions, however, were given to a reasonable degree of professional
11 probability.
12 Dr. Cargill offered the following two (2) opinions at trial:
13 1. Plaintiff could not have made as much in the current financial market as he could
14 have back in 2004 because the bubble burst in the housing market; and
15 2. Mr. Dineen's discount rates were inappropriate.
16 Neither of these opinions was given to a reasonable degree of professional/scientific
17 probability.
18 **CONCLUSIONS OF LAW**
19
20 1. **Plaintiff's Counsel Did Not Engage In Misconduct**
21 This Court concludes as follows:
22 As supported by substantial evidence, Plaintiff's counsel did not engage in
23 misconduct.
24 Specifically, Plaintiff's counsel did not withhold evidence in regarding Plaintiff's tax
25 returns. The information relied upon by Mr. Dinneen was of the type contemplated and
26 permitted by NRS 50.275.
27
28

1 Equally, this Court concludes that Plaintiff's Counsel did not withhold evidence relied
2 upon by Dr. Schifini.
3 Nevada law makes it clear that a new trial is not warranted on grounds of *surprise*
4 based on testimony which, *with reasonable diligence*, could have been anticipated.
5 Furthermore, the "surprise" contemplated by Rule 59 (a) must result from some fact,
6 circumstance, or situation in which a party is placed unexpectedly, to his injury, without any
7 default or negligence of his own, and which ordinary prudence could not have guarded
8 against.
9 Defense counsel did not exercise reasonable diligence and cannot argue *surprise* since
10 they chose not to depose a single treating provider. As a result of this failure, defendant did
11 not discover the entirety of the materials contained in Dr. Schifini's file.
12 The records about which Defendant complains were introduced and admitted into
13 evidence, with the only objections being *foundation* and *hearsay*. Each and every one of
14 these documents had been previously disclosed to the Defendant and were no more than the
15 records of other treating physicians contained in Dr. Schifini's file. Accordingly, no
16 documents were withheld by the Plaintiff, Defendants were timely provided with all
17 documents serving as the basis of Dr. Schifini's opinion, and no prejudice resulted.
18 As such, the Court concludes that there was no misconduct on the part of Plaintiff's
19 Counsel.
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2. **The Court Did Not Err in Allowing The Testimony of Certain Providers**

This Court concludes as follows:

Defense counsel cannot argue *surprise* with respect to the testimony of Plaintiff's treating physicians since they chose not to depose a single treating provider and did not exercise reasonable diligence.

The scope of a witness' testimony and whether that witness will be permitted to testify as an expert are within the discretion of trial court. *Prabhu v. Levine*, 1996, 930 P.2d 103, 112 Nev. 1538, rehearing denied.

Once the district court certifies an expert as qualified, the expert may testify to all matters within the expert's experience or training, and the expert is generally given reasonably wide latitude in the opinions and conclusions he or she can state. *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992); *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989) (a proposed medical expert should not be scrutinized by an excessively strict test of qualifications); *Freeman v. Davidson*, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989) ("[a]n expert witness need not be licensed to testify as an expert, as long as he or she possesses special knowledge, training and education, or in this case, knowledge of the standard of care"); *Wright v. Las Vegas Hacienda*, 102 Nev. 261, 263, 720 P.2d 696, 697 (1986) ("[a] witness need not be licensed to practice in a given field ... to be qualified to testify as an expert").

Under Nevada law, treating physicians are not considered retained experts. They should be allowed to testify as to treatment, diagnosis (including causation), and prognosis based upon their treatment of the patient and their medical training. *Id.*

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1 awards as past medical expenses the amount of $376,773.38 and future medical expenses in
2 the amount of $1,854,738.00.
3 Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and
4 "before and after" lay witnesses who testified at the time of trial, the Court concludes that
5 Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of
6 the subject incident which have detrimentally impacted his daily living and functioning and,
7 consistent with that conclusion, and in this Courts discretion, awards as past pain and
8 suffering the amount of $1,243,350.00 and future pain and suffering in the amount of
9 $1,865,025.00.
10 The Court concludes the testimony of Plaintiff's vocational and economic expert,
11 Terrence Dineen, was substantial and persuasive on the issue of Plaintiff's loss of economic
12 opportunity, vocational disability, and loss of past and future earnings, and concludes the
13 Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-
14 estate purchases, refurbishment, and sales due to his physical limitations resultant of the
15 subject injury, concludes that sufficient opportunity existed and exists in the repressed real
16 estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate
17 absent said physical limitations, and is persuaded by and accepts the calculations of Mr.
18 Dineen with respect to the same and, in this Court's discretion, awarded past lost income in
19 the amount of $289,111.00 and future lost income in the amount of $422,593.00.
20 As to the allocation of liability, the Court concludes that liability lies against Defendant
21 Fiesta Palms, LLC, and concludes that Defendant Beavers also failed to act in the manner of
22 the average reasonable person under similar circumstances in a manner creating a foreseeable
23 harm to patrons of the Palms by throwing promotional items into a crowded environment and
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in other and further manners as elucidated at the time of trial. The Court's conclusion with respect to liability is made and based upon the testimony of Brandy Beavers with respect to the conduct of both herself and the Palms, and the testimony of Palms' employees to the fact the Palms knew that promotional items were being thrown into crowds prior to the subject event, had a meeting and set up policies to prohibit said conduct, and then knowingly violated said policies. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

As such, the Court concludes that the evidence in the case was substantial and sufficient to justify the verdict.

4. **The Court Did Not Err In Striking Defense Experts**

To testify as an expert witness under NRS 50.275, a witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional/scientific probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.

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While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on the basis of "possibility" or some other standard lower than "a reasonable degree of professional probability."

Accordingly, the testimony of Cargil and Franklin did not satisfy the "assistance" requirement of NRS 50.275.

Regardless, this Court determined both liability and damages independent of striking the testimony of Defendant's two expert witnesses aforesaid, and determined the same upon the basis and weight of Plaintiff's economics and vocational expert, Mr. Dineen, Plaintiff's testimony, and the testimony of Defendant's employees called in Plaintiff's case-in-chief.

As such, this Court concludes that there was no error in striking Defense experts.

///

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ORDER

On the basis of the foregoing, it is hereby Ordered that Defendant's Motion for a New Trial be denied.

Dated this 26 day of Sept, 2011.

[signature]
DISTRICT COURT JUDGE

Submitted by:

BENSON, BERTOLDO, BAKER & CARTER, CHTD

[signature]

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CLERK OF THE COURT

JUDG
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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES I through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10

JUDGMENT ON THE VERDICT

The above-entitled matter having come on for a bench trial on October 25, 2010 before the Honorable Jessie Walsh, District Court Judge, presiding. Plaintiff ENRIQUE RODRIGUEZ appeared in person with his counsel of record, STEVEN M. BAKER, ESQ. of the law firm of Benson Bertoldo Baker & Carter. Defendant FIESTA PALMS, L.L.C. appeared by and through its counsel of record, KENNETH C. WARD, ESQ. of the law firm of Archer Norris. Defendant BRANDY BEAVERS is in default and was not in attendance. Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the merits of their cases.

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ATTORNEYS AT LAW

The Honorable Jessie Walsh rendered a verdict in favor of Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, as to claims concerning negligence arising from premises liability resulting in the injuries to ENRIQUE RODRIGUEZ in the amount of $376,773.38 for past medical expenses; $1,854,738.00 for future medical expenses; $1,243,350.00 for past pain and suffering; $1,865,025.00 for future pain and suffering; $289,111.00 for past lost income; $422,592.00 for future lost income, for a total judgment against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS of $6,051,589.38.

The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	60%
Defendant BRANDY BEAVERS	40%

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiff ENRIQUE RODRIGUEZ and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff ENRIQUE RODRIGUEZ, shall have and recover against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, the sum of SIX MILLION, FIFTY-ONE THOUSAND, FIVE HUNDRED EIGHTY NINE AND 38/100 DOLLARS ($6,051,589.38).

Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of $1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006) until fully satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100

DOLLARS ($427,027.00) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS ($274.62) per diem thereafter.

Post-Judgment Interest shall accrue at the legal rate on future damages in the amount of $4,142,355.00, until fully satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to his costs of $149,146.18 as the prevailing party under NRS 18.020 and NRS 18.010.

DATED this 11th day of Apr, 2011.

HONORABLE JESSIE WALSH
District Court Judge

SUBMITTED BY:

4/5/11

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10

NOTICE OF ENTRY OF JUDGMENT

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PLEASE TAKE NOTICE that a Judgment was entered in the above-captioned matter on the 12th day of April, 2011. A copy of said Judgment on the Verdict is attached hereto.

DATED this 15th day of April, 2011.

BENSON BERTOLDO, BAKER & CARTER, CHTD.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2011, I served a copy of the Notice of Entry of Judgment via 1st Class, U.S. Mail, postage thereon fully prepaid to the following:

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An employee of Benson, Bertoldo, Baker & Carter, Chtd.

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10

JUDGMENT ON THE VERDICT

The above-entitled matter having come on for a bench trial on October 25, 2010 before the Honorable Jessie Walsh, District Court Judge, presiding. Plaintiff ENRIQUE RODRIGUEZ appeared in person with his counsel of record, STEVEN M. BAKER, ESQ. of the law firm of Benson Bertoldo Baker & Carter. Defendant FIESTA PALMS, L.L.C. appeared by and through its counsel of record, KENNETH C. WARD, ESQ. of the law firm of Archer Norris. Defendant BRANDY BEAVERS is in default and was not in attendance. Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the merits of their cases.

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BENSON BERTOLDO BAKER & CARTER
ATTORNEYS AT LAW

The Honorable Jessie Walsh rendered a verdict in favor of Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, as to claims concerning negligence arising from premises liability resulting in the injuries to ENRIQUE RODRIGUEZ in the amount of $376,773.38 for past medical expenses; $1,854,738.00 for future medical expenses; $1,243,350.00 for past pain and suffering; $1,865,025.00 for future pain and suffering; $289,111.00 for past lost income; $422,592.00 for future lost income, for a total judgment against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS of $6,051,589.38.

The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	60%
Defendant BRANDY BEAVERS	40%

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiff ENRIQUE RODRIGUEZ and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff ENRIQUE RODRIGUEZ, shall have and recover against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, the sum of SIX MILLION, FIFTY-ONE THOUSAND, FIVE HUNDRED EIGHTY NINE AND 38/100 DOLLARS ($6,051,589.38).

Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of $1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006) until fully satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100

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DOLLARS ($427,027.00) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS ($274.62) per diem thereafter.

Post-Judgment Interest shall accrue at the legal rate on future damages in the amount of $4,142,355.00, until fully satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to his costs of $149,146.18 as the prevailing party under NRS 18.020 and NRS 18.010.

DATED this 11th day of Apr, 2011.

HONORABLE JESSIE WALSH
District Court Judge

SUBMITTED BY:

4/5/11

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF VERDICT

THIS MATTER HAVING COME ON FOR TRIAL before the bench, commencing on October 25, 2011, and a verdict being entered on March 14, 2011, this Honorable Court Finds and Concludes as follows:

1) Liability in favor of the Plaintiff in this matter was determined as consistent with the Findings of Fact and Conclusions of law granting Directed Verdict pursuant to NRCP 52 entered in this matter on March 10, 2011.

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2) The Court finds the testimony of Plaintiff's treating physicians, including, but not limited to Dr. Shifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shaw, Dr. Shannon, and Dr. Tauber to be persuasive on the issue of the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial and, accordingly, and in this Court's discretion, awards as past medical expenses the amount of $376,773.38 and future medical expenses in the amount of $1,854,738.00.

3) Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial, the Court finds that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, and in this Courts discretion, awards as past pain and suffering the amount of $1,243,350.00 and future pain and suffering in the amount of $1,865,025.00.

4) The Court finds the testimony of Plaintiff's economist, Terrence Dineen, persuasive on the issue of Plaintiff's loss of economic opportunity, vocational disability, and loss of past and future earnings, finds and concludes the Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to his physical limitations resultant of the subject injury, finds that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts the calculations of Mr. Dineen with respect to the same and, in this Court's discretion, awards

past lost income in the amount of $289,111.00 and future lost income in the amount of $422,593.00.

5) As to the allocation of liability the Court finds liability against Defendant Fiesta Palms, LLC, as set forth in Finding and Conclusion #1, above, but finds that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and in other and further manners as elucidated at the time of trial. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

WHEREFORE, this Court finds and concludes that a verdict be entered in said amounts as set forth on the stipulated Verdict form attached hereto as Exhibit #1.

Date: 19 Apr 2011

Hon. Jessie Walsh, District Court Judge

BENSON BERTOLDO BAKER & CARTER
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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT; BRANDY BEAVERS; DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10 TRIAL DATE: 10/25/10

VERDICT

The Honorable Jessie Walsh, presiding judge in the above-entitled action, hereby finds for Plaintiff ENRIQUE RODRIGUEZ as follows:

1. The Court finds against Defendant FIESTA PALMS, L.L.C.

2. The Court finds against Defendant BRANDY BEAVERS.

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3. The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	60 %
Defendant BRANDY BEAVERS	40 %

4. The total amount of the plaintiff's damages is divided as follows:

Past Medical Expenses	$376,773.38
Future Medical Expenses	$1,854,738.
Past Pain and Suffering	$1,243,350
Future Pain and Suffering	$1,865,025.
Past Lost Income	$289,111.
Future Lost Income	$422,592.

5. Further, the Court finds that Defendant Fiesta Palms, L.L.C. acted with conscious disregard of the rights or safety of others when it was aware of the probable dangerous consequences of its conduct and willfully and deliberately failed to avoid those consequences.

Yes / (No)

DATED this 9th day of ~~February~~ Mar, 2011.

[signature]

HON. JESSIE WALSH, District Court Judge

BENSON BERTOLDO BAKER & CARTER
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10

NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF VERDICT

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PLEASE TAKE NOTICE that the Findings of Fact and Conclusions of Law in Support of Verdict was entered in the above-captioned matter on the 21st day of April, 2011. A copy of said Findings of Fact and Conclusions of Law in Support of Verdict is attached hereto.

DATED this 27th day of April, 2011.

BENSON BERTOLDO, BAKER & CARTER, CHTD.

By: ______________________
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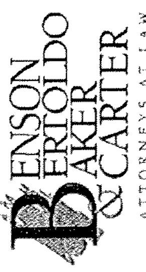

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2011, I served a copy of the Findings of Fact and Conclusions of Law in Support of Verdict via 1st Class, U.S. Mail, postage thereon fully prepaid to the following:

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[signature]
An employee of Benson, Bertoldo, Baker & Carter, Chtd.

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CLERK OF THE COURT

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Attorneys for Plaintiff
6
7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**
9 * * *

10 ENRIQUE RODRIGUEZ, an individual, 11 Plaintiff, 12 vs. 13 FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES I through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, 17 Defendants.	CASE NO: A531538 DEPT NO: 10

18
19 **FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF VERDICT**

20 THIS MATTER HAVING COME ON FOR TRIAL before the bench, commencing
21 on October 25, 2011, and a verdict being entered on March 14, 2011, this Honorable Court
22 Finds and Concludes as follows:
23
24 1) Liability in favor of the Plaintiff in this matter was determined as consistent with the
25 Findings of Fact and Conclusions of law granting Directed Verdict pursuant to NRCP 52
26 entered in this matter on March 10, 2011.
27
28

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1 2) The Court finds the testimony of Plaintiff's treating physicians, including, but not
2 limited to Dr. Shifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shaw, Dr. Shannon, and Dr. Tauber to
3 be persuasive on the issue of the reasonableness, necessity and causation of past and future
4 medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal
5 tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries
6 with respect to the same, future lumbar fusion, cervical modalities, and other and further past
7 and future medical services and expenses as elucidated at trial and, accordingly, and in this
8 Court's discretion, awards as past medical expenses the amount of $376,773.38 and future
9 medical expenses in the amount of $1,854,738.00.
10
11 3) Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez,
12 and "before and after" lay witnesses who testified at the time of trial, the Court finds that
13 Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of
14 the subject incident which have detrimentally impacted his daily living and functioning and,
15 consistent with that finding, and in this Courts discretion, awards as past pain and suffering
16 the amount of $1,243,350.00 and future pain and suffering in the amount of $1,865,025.00.
17
18 4) The Court finds the testimony of Plaintiff's economist, Terrence Dineen, persuasive
19 on the issue of Plaintiff's loss of economic opportunity, vocational disability, and loss of past
20 and future earnings, finds and concludes the Plaintiff suffered significant detrimental impact
21 to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to
22 his physical limitations resultant of the subject injury, finds that sufficient opportunity existed
23 and exists in the repressed real estate market for Plaintiff to continue to profitably purchase,
24 refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts
25 the calculations of Mr. Dineen with respect to the same and, in this Court's discretion, awards
26
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28

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1 past lost income in the amount of $289,111.00 and future lost income in the amount of
2 $422,593.00.
3 5) As to the allocation of liability the Court finds liability against Defendant Fiesta
4 Palms, LLC, as set forth in Finding and Conclusion #1, above, but finds that Defendant
5 Beavers also failed to act in the manner of the average reasonable person under similar
6 circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing
7 promotional items into a crowded environment and in other and further manners as elucidated
8 at the time of trial. The Court, in its discretion, therefore apportions liability at 60% to the
9 Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.
10 WHEREFORE, this Court finds and concludes that a verdict be entered in said amounts as
11 set forth on the stipulated Verdict form attached hereto as Exhibit #1.
12
13
14
15 Date: 19 Apr 2011 [signature]
16 Hon. Jessie Walsh, District Court Judge
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT; BRANDY BEAVERS; DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10 TRIAL DATE: 10/25/10

VERDICT

The Honorable Jessie Walsh, presiding judge in the above-entitled action, hereby finds for Plaintiff ENRIQUE RODRIGUEZ as follows:

1. The Court finds against Defendant FIESTA PALMS, L.L.C.

2. The Court finds against Defendant BRANDY BEAVERS.

///

///

3. The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C. 60 %

Defendant BRANDY BEAVERS 40 %

4. The total amount of the plaintiff's damages is divided as follows:

Past Medical Expenses $396,773.38

Future Medical Expenses $1,854,738.

Past Pain and Suffering $1,243,350.

Future Pain and Suffering $1,865,025.

Past Lost Income $289,111.

Future Lost Income $422,592.

5. Further, the Court finds that Defendant Fiesta Palms, L.L.C. acted with conscious disregard of the rights or safety of others when it was aware of the probable dangerous consequences of its conduct and willfully and deliberately failed to avoid those consequences.

Yes / No

DATED this 7th day of ~~February~~ Mar, 2011.

HON. JESSIE WALSH, District Court Judge

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CLERK OF THE COURT

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DISTRICT COURT
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CLARK COUNTY, NEVADA
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15
ENRIQUE RODRIGUEZ,
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Plaintiff,
17
v.
18
FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE PALMS CASINO RESORT, et al. ,
19
20
Defendants.
21

Case No. A531538

DEFENDANT FIESTA PALMS, LLC'S NOTICE OF MOTION AND MOTION FOR NEW TRIAL

Dept: X
Hearing Date:
Hearing Time:
Hearing Dept:

22
23 COMES NOW defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company,
24 d/b/a/ THE PALMS CASINO RESORT ("the Palms" or "Defendant") by and through its counsel
25 of record, Marsha L. Stephenson, Esq., of the law firm of STEPHENSON & DICKINSON, P.C.,
26 and Kenneth C. Ward, Esq., of the law firm of ARCHER NORRIS, and hereby file the following
27 Defendants' Notice of Motion and Motion for New Trial.
28 **PLEASE TAKE NOTICE** that on the 5 th day of May, 2011, at the hour of

In Chambers, or as soon thereafter as counsel can be heard, Defendant will bring the foregoing motion on for hearing before the Honorable Jessie Walsh in Department X of the Eighth Judicial District Court, at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, NV 89155.

This Motion is made and based on the Notice of Motion, Memorandum of Points and Authorities, Declaration of Kenneth C. Ward in Support of Motion ("Ward Decl.") and exhibits thereto, [all of which are annexed hereto], all pleadings and papers on file in this action, and any and all further argument and evidence in support hereof that the Court may hear and receive.

This Motion is based on the fact that there were several irregularities that led to an unjust verdict against the Palms. First, the prevailing party, plaintiff Enrique Rodriguez ("Plaintiff"), and his counsel, engaged in misconduct that materially prejudiced the Palms by producing documents at trial for the first time, which prevented the Palms from being able to review the documents and prepare for the documents prior to trial. Second, the court committed error in permitting the Plaintiff to have four medical treaters testify on behalf of 25 treaters, and in subject areas in which they are not qualified. Third, the body of evidence the Palms produced at trial demonstrated that Plaintiff's evidence was insufficient to justify the verdict, and finally, the Court was in error when it granted Plaintiff's motion to strike the Palms' experts' opinions.

As will be unveiled in the moving papers, these facts, issues and circumstances all combined to deny the Palms a fair trial. These defects can only be remedied by the granting of new trial.

Dated: March 22, 2011

ARCHER NORRIS

Kenneth C. Ward (Bar No. 6530)
Keith R. Gillette (Bar No. 11140)

Attorneys for Defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a/ THE PALMS CASINO RESORT

No. 4

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CLERK OF THE COURT

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Attorneys for Defendant
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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, Plaintiff, v. FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE PALMS CASINO RESORT, et al. , Defendants.	Case No. A531538 **DEFENDANT FIESTA PALMS, LLC DBA THE PALMS CASINO RESORT'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF ITS MOTION FOR NEW TRIAL** Dept: X Hearing Date: Hearing Time: Hearing Dept:

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TREATISE

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I.
INTRODUCTION

The verdict in this case constitutes a serious miscarriage of justice. There were several irregularities that led to an unjust verdict against defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE PALMS CASINO RESORT ("the Palms"). First, the prevailing party, plaintiff Enrique Rodriguez ("Plaintiff"), and his counsel, engaged in misconduct that materially prejudiced the Palms by producing documents at trial for the first time, which prevented the Palms from being able to review the documents and prepare for the documents prior to trial. Second, the court committed error in permitting the Plaintiff to have four medical treaters testify on behalf of 25 treaters, and in subject areas in which they are not qualified. Third, the body of evidence the Palms produced at trial demonstrated that Plaintiff's evidence was insufficient to justify the verdict. Finally, the Court was in error when it granted Plaintiff's motion to strike the Palms' experts' opinions.

As will be unveiled in these moving papers, these facts, issues and circumstances all combined to deny the Palms a fair trial. These defects can only be remedied by the granting of new trial.

II.
FACTUAL BACKGROUND

This case involves claims that on November 22, 2004, plaintiff Enrique Rodriguez ("Plaintiff") was in the sports bar at The Palms Casino for the purposes of watching a football game, and during the game's half-time, an unknown patron dove for a souvenir, thrown into the bar area by a blindfolded "Palms girl," and struck the Plaintiff's left knee. Plaintiff further alleges that he then struck another patron while falling and injured the left side of his head. Over the last five years, Plaintiff has been under the care of numerous medical providers with a diverse range of specialties.

On October 25, 2010, the bench trial began in the matter of *Enrique Rodriguez v. the Palms*, No. A531538, in the Eastern District of Nevada, Clark County, and concluded with the parties' closing arguments on November 10, 2010. (See Declaration of Kenneth C. Ward ("Ward

1 Decl."), filed in conjunction herewith, ¶ 2.) The Honorable Jessie Walsh returned the verdict in
2 favor of Plaintiff on March 7, 2011, with Notice of Entry of Judgment served on the Palms on
3 March 15, 2011. (Ex. A to the Ward Decl., ¶ 3.)

4 **A. Plaintiff's Economist Expert's Testimony.**

5 The Palms' economist expert, Thomas Cargill, took the position that there was insufficient
6 information from which to calculate a wage loss. Plaintiff's own economist, Terrance Dinneen,
7 testified that he met with the plaintiff in 2008 and asked for information with which to calculate
8 his wage loss. (Deposition of Terrance Dinneen ("Dinneen Depo."), attached as Exhibit B to the
9 Ward Decl., 41:15-42:14, 30:2-20.) In response to Mr. Dinneen's request, Plaintiff produced no
10 social security information, but did produce three tax returns during the six-year period of 1999 to
11 2004. (Dinneen Depo, 46:2-17, 56:17-20, 55:5-6, 73:23-74:10, Ex. B to Ward Decl.) Of those
12 six years, there were three years without any returns at all.

13 To calculate past and future lost earnings, Plaintiff's economist took the total income and
14 averaged it over six years. (Dinneen Depo., 30:8-20, 75:22-76:15.) Approximately 70% of that
15 income came from one year, 2004. (*Id.* at 75:22-76:15.) Oddly enough, the tax returns from
16 2001 and 2004 were prepared and signed in 2009 <u>after</u> the economist had requested the
17 information, and once litigation was underway. (Dinneen Depo., 39:24-42:4, Ex. B to the Ward
18 Decl..) Mr. Dinneen stated that he did not know if they were filed or not filed, reporting that all
19 he had was the tax returns, signed on various dates, such as 2009 for a 2004 tax return. (*Id.* at
20 41:2-9.) Plaintiff testified from the witness stand that he gave his economist all of the back up
21 information to support his income claim, and that he prepared and signed the 2004 tax return in
22 2009 <u>after</u> the economist requested the information. (Ward Decl., ¶ 5.) However, at trial, Mr.
23 Dinneen produced a letter from a person who allegedly prepared the returns saying that the
24 returns had been filed; it was a one line letter from the tax preparer dated October 20, 2010.
25 (Ward Decl., ¶ 6; November 4, 2010 Trial testimony, 71:20-73:19, 81:12-22, attached as Exhibit
26 K to the Ward Decl.) Mr. Dinneen testified at trial that he never provided the document to the
27 Palms. (*Id.*) This document was never provided to the Palms, even though Mr. Dinneen had
28 purportedly provided his entire work file and that letter was not included. (Ward Decl., ¶ 6.)

B. Plaintiff's Medical Treaters' Testimony.

Plaintiff did not have any disclosed medical experts and none of his treaters (52 of them) prepared reports. In spite of this, the Court allowed treaters to testify about other treaters' findings, and those same treaters were also permitted to testify as to what they thought other treaters' opinions were or would be if they were aware of the patient's ongoing complaints. Additionally, two anesthesiologists were allowed to testify about back surgeries and knee replacements which had not been specified by the orthopedists.

There was a spine surgeon, Dr. Thalgott, who had at least six entries in his records that he would not do surgery on this plaintiff's back. (Ward Decl., ¶ 9.) Further, he had not seen the plaintiff in over three years. (*Id.*) In spite of that, the anesthesiologist, who also had not seen the plaintiff for over three years, testified that the plaintiff needed a multi-level back fusion and that he was quite certain that if Dr. Thalgott knew what had transpired with this plaintiff in the last three years, that Dr. Thalgott would change his mind and agree that surgery was necessary. (November 8, 2010 Trial Testimony, 91:21-95:20, 96:18-98:4, 98:17-101:22, Exhibit M to Ward Decl.)

Plaintiff's disclosed life care planner, Kathleen Hartmann, provided a life care plan calling for $294,000 for all of the medical relating to a spinal stimulator. (Dinneen & Hartman initial expert report, Ex. L to the Ward Decl., ¶12.) Dr. Schifini, an anesthesiologist, was allowed to testify that these numbers were all wrong and the number was actually $960,000. (*Id.*; Nov. 1, 2010 Trial Testimony, 53:13-56:19, 122:17-25, Ex. J to the Ward Decl.) The life care planner's numbers also did not include a figure for fusion and she included a range of $80,000 to $160,000 for knee replacements. (*Id.*) Again, Dr. Schifini, the anesthesiologist, was able to testify that his back surgeries and knee replacements would be $686,000. (*Id.*)

C. Dr. Joseph Schifini's "New" Documents.

The Palms subpoenaed all records from Plaintiff's treater, Dr. Joseph Schifini. (Ward Decl., ¶10.) The Palms only received approximately 21 pages from Dr. Schifini at that time. (*Id.*) However, at trial, Dr. Schifini was permitted to testify regarding approximately 117 pages of documents that the Palms were unaware of and the Palms were never been notified by Dr.

Schifini or Plaintiff's counsel that such documents existed. (Ward Decl., ¶ 11.) Plaintiff's failure to disclose the documents put the Palms at a great disadvantage in its cross-examination of Dr. Schifini, who provided critical testimony during the trial. (Ward Decl., ¶ 11.)

D. The Plaintiff Moved to Strike the Palms' Experts' Testimony, and the Court Granted the Motion.

Plaintiff filed his Motion to Strike Trial Testimony on approximately November 16, 2010. (See Ex. G to Ward Decl., ¶ 13.) Plaintiff's points and authorities essentially argued that the Palms' experts, Forrest Franklin and Thomas Cargill "did not establish a sufficient foundation since neither provided opinions to a reasonable degree of probability." (*Id.*) Plaintiff stipulated on the record that Mr. Franklin and Dr. Cargill are both qualified. (*Id.* at ¶ 14.) The Court granted the Motion to Strike on March 2, 2011. (Ex. H to the Ward Decl.).

III.
LEGAL ANALYSIS

A. The Court May Grant A New Trial.

A new trial may be granted pursuant to N.R.C.P. 59(a) when an aggrieved party's substantial rights have been materially affected by any of the [grounds stated in the rule]." *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1035-37; N.R.C.P. 59. Pursuant to N.R.C.P. Rule 59, a new trial may be granted to a party "for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party":

> (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (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 the 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 and conclusions, and direct the entry of a new judgment.

B. Plaintiff Counsel's Blatant and Premeditated Act of Putting Evidence On that It Knew Defense Counsel Had No Knowledge of Constitutes Reprehensible Attorney Misconduct and is Grounds for this Court to Grant a New Trial.

In this case, Plaintiff and Plaintiff's counsel engaged in misconduct by putting on evidence they knew the Palms was unaware of, which resulted in the Palms being surprised and unprepared for the evidence, such that a new trial is justified. N.R.C.P. Rule 59 provides that a court may grant a new trial for an irregularity in the proceedings by adverse counsel. A new trial based upon the prevailing party's misconduct does not require proof that the result would have been different in the first trial without such misconduct. *Barrett v. Baird*, 111 Nev. 1496, 908 P.2d 689 (1995) (overruled on other grounds by *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).) "The 'surprise' contemplated by NRCP 59(a) must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against." *Havas v. Haupt*, 94 Nev. 591, 593 (1978).

It is well settled under Nevada law that attorney misconduct or the prevailing party's misconduct constitutes an irregularity in the proceedings that is grounds for a new trial. Although there are many instances of misconduct by Plaintiff and Plaintiff's counsel, two particular acts constitute misconduct that materially affected the Palms. First, Plaintiff withheld evidence regarding Plaintiff's tax returns. Although he never reported to Mr. Ward again, when Plaintiff's economist, Mr. Dinneen testified at trial, he had with him a letter from the person who allegedly prepared the returns saying that the returns had been filed. Mr. Dinneen based the majority of his wage loss claim opinions on Mr. Rodriguez's tax returns, which were admittedly prepared only <u>after</u> Mr. Dinneen had requested them to form his opinion for this litigation.

From this scant information, Mr. Dinneen projected a wage loss of almost a million dollars. Although Plaintiff claimed to have bought and sold hundreds of home as a real estate investor, there was no evidence to support this claim. It may be that he has bought and sold a few homes, but it is unlikely that he has been involved in this business to any great extent.

The Palms was also blindsided by one of Plaintiff's treating specialists, Dr. Schifini, who presented at trial approximately 100+ documents in support of his opinions—none of which had ever been provided to the Palms, and were not included in the 21+ documents Dr. Schifini produced in response to his document subpoena. Dr. Schifini was introduced as one of plaintiff's treating anesthesiologist/pain management specialists. Dr. Schifini testified that his first visit with plaintiff was in November 2007. (Oct. 28, 2010, Trial Testimony, 7:14-16, attached as Exhibit I.) He was well aware that he had over 120+ documents regarding Plaintiff's treatment, yet he only produced 21+ documents to the Palms prior to trial. It was only at trial that he (and arguably Plaintiff and Plaintiff's counsel) opted to "surprise" the Palms with 100+ documents that it had never seen before. This made it incredibly difficult for Defendant to continue to properly defend the case and cross-examine Dr. Schifini.

C. The Court's Order Permitting Plaintiff to Introduce Evidence of Testimony of Unavailable Treaters Prejudiced the Palms' Right to a Fair Trial and is Grounds for Grant of a New Trial.

Pursuant to N.R.C.P. Rule 59(a)(1), a Court may grant a new trial if there are "irregularity of the proceedings" or an "abuse of discretion" preventing a fair trial. In addition, Rule 59(a)(7) authorizes a new trial where an error of law occurred during trial and the moving party objected to that error during trial. See *Bass-Davis v. Davis*, 122 Nev. 442, 453, 134 P.3d 103, 110 (2006).

The Court permitted Plaintiff, over the vehement objections of the Palms' counsel, to introduce opinion testimony of Plaintiff's non-retained, non-disclosed expert treating doctors, Dr. Shannon, Schifini, Shaw and Kidwell. Plaintiff's failure to disclose these experts put the Palms in a quagmire, because the Palms never had notice of the testifying treaters' "expert" opinions until they were given at trial, and once the opinions were given, the Palms was not allowed to rebut them using its own properly designated expert Dr. Becker, since Dr. Becker had not included his rebuttal opinions in his written report. The Palms was severely prejudiced by Plaintiff's failure to disclose the identities of his testifying expert witnesses, and was further severely prejudiced by the Court's allowing those unidentified experts to testify.

Treating healthcare providers, who were neither designated per NRCP 26 as non-retained experts nor provided expert reports, may not offer expert opinions on aspects of Plaintiff's

condition outside the scope of their treatment of plaintiff. As the Court saw throughout the progress of the trial, Plaintiff did not have any retained medical experts. With regard to Plaintiff's medical case, his counsel elicited testimony from only four treating healthcare providers, not from all of Plaintiff's treaters. Plaintiff attempted to have these four treaters aggregate the opinions and conclusions of the other 25+ treaters. The testimony by witness is represented in this chart:

Witness	Testified Regarding
Mary Ann Shannon / Las Vegas Neurosurgery	American Medical Response
Mary Ann Shannon / Las Vegas Neurosurgery	Nathan Heaps, M.D. (Spring Valley Hospital Medical Center)
Mary Ann Shannon / Las Vegas Neurosurgery	John G. Nork, M.D. (Associated Physicians)
Mary Ann Shannon / Las Vegas Neurosurgery	Eric Campbell, D.C. / William Simpson, M.D. (Wellness Group)
Mary Ann Shannon, Las Vegas Neurosurgery	Mary Ann Shannon (Las Vegas Neurosurgery)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Joseph Nicola, D.C. (Integrated Health Care)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Yakov Treyzon, M.D.
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Casiano Flaviano, M.D. (Family Wellness Center)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Walter M. Kidwell, M.D. (Pain Institute of Nevada)
Russell J. Shah, M.D.	Rancho Physical Therapy
Russell J. Shah, M.D.	F. Michael Ferrante, M.D. (UCLA)
Russell J. Shah, M.D.	Lawrence Miller, M.D. (California Hand Surgery / Olympic Anesthesia)
Russell J. Shah, M.D.	Robert Gutierrez, M.D. (orthopedic surgeon)
Russell J. Shah, M.D.	Matt Smith Physical Therapy
Russell J. Shah, M.D.	Valley Rehabilitation
Russell J. Shah, M.D.	G. Michael Elkhanich, M.D. (Bone & Joint Institute)
Russell J. Shah, M.D.	Russell J. Shah, M.D.
Russell J. Shah, M.D.	Kelly Hawkins Physical Therapy
Joseph Schifini, M.D. / Las Vegas Surgery Center	F. Michael Ferrante, M.D. (UCLA)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Douglas S. Stacey, D.P.M. (Foot & Ankle Surgery Group)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Govind Koka, D.O. (Medical Associates of Southern Nevada / Primary Care Consultants)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Michael J. Crovetti, D.O. (Bone and Joint Institute)
Joseph Schifini, M.D. / Las Vegas Surgery Center	John Thalgott, M.D. (Center for Disease and Surgery of the Spine)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Joseph J. Schifini, M.D. (Las Vegas Surgery Center)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Lawrence Miller, M.D. (California Hand Surgery)

Witness	Testified Regarding
Joseph Schifini, M.D. / Las Vegas Surgery Center	Thomas Vater, D.O. (VaterSpine)

Those four providers (Schifini, Shah, Kidwell and Shannon) offered their own "expert" opinions as to all of the other nontestifying, treating healthcare providers' (such as orthopedic surgeons) opinions, conclusions, and courses of treatment, both past and future, as well as testifying that the non-testifying treaters' bills and expenses were reasonable and necessary, and finally provided cost information for treatments outside the scope of their normal treatment or expertise.

A particularly striking example comes in the testimony of Dr. Schifini, one of Plaintiff's treating anesthesiologist/pain management specialists. Dr. Schifini testified that his first visit with plaintiff was in November 2007. (Oct. 28 Trial Testimony, 7:14-16, Ex. J to the Ward Decl.) He testified he did not speak with Dr. Ferrante, a pain management specialist at UCLA who saw Rodriguez once in September or October 2006 and performed 1 1/2 hour IME at the specific request of his attorneys. (Nov. 1 Trial Testimony, 64:23-65:5, Ex. J to Ward Decl.; Trial Exh. 25, UCLA 000006). In short, Dr. Schifini had no connection whatsoever with Dr. Ferrante or Dr. Ferrante's treatment of plaintiff. This notwithstanding, on questioning from Plaintiff's counsel, Dr. Schifini testified as to Dr. Ferrante's qualifications and background. (Nov. Trial Testimony, 10:3-11:8, Ex. I to Ward. Decl.) Dr. Schifini then proceeded to discuss in detail the opinions and conclusions that he believed that Dr. Ferrante would have reached had he followed Plaintiff's treatment. (Nov. 1 Trial Testimony, 141:2-142:17, Ex. J to the Ward Decl.)

Dr. Schifini then began to discuss what he believed was Dr. Larry Miller's treatment of Plaintiff as memorialized in his records. Dr. Miller, an anesthesiologist and pain management specialist in Los Angeles, last saw Plaintiff in May 2007, fully six months before Dr. Schifini's first consult with plaintiff. Dr. Schifini did not refer Plaintiff to Dr. Miller. Dr. Miller did not refer Plaintiff to Dr. Schifini. The two doctors did not consult. Dr. Schifini knew nothing about Dr. Miller's treatment except what was reflected in his records. Yet, Dr. Schifini testified that he agreed with Dr. Miller's diagnosis, and that Dr. Miller's treatments were medically necessary and related to the Palms injury, and the charges were reasonable. (Oct. 28 Trial Testimony, 22:4-

27:22, 44:20-9, Ex. I to Ward Decl.,.)

Dr. Schifini next proceeded to give the same sort of expert testimony with regard to the treatment of plaintiff by Drs. Crovetti, Koka, Stacey, Vater, and Thalgott, all as memorialized in their records. (*Id.* at 28:6-30:12, 44:10-45:12, 45:14-48:10, 54:22-55:15, 64:13-65:20.)

Finally, and most significantly, Dr. Schifini proceeded to testify as to the specific costs of the proposed spinal cord stimulator that he opined to Dr. Ferrante would believe was necessary, had Dr. Ferrante actually treated plaintiff within the past several years. He specifically stated that the costs of lifetime surgeries, surgeons, replacement batteries, replacement electrodes, and office visits would total $721,000. (Oct. 28, 2010 Trial Testimony, Ex. I to Ward Decl, 76:14-25.) This was an improper expert opinion, as no foundation was laid for it, nor was it disclosed previously, nor was Dr. Schifini disclosed as an expert. Moreover, Dr. Schifini's costings are some three times greater than Plaintiff's own expert lifecare planner Kathleen Hartman, R. N.'s estimates:

Spinal Stimulator had trial July 14th helped 32.77 yrs*	2008	2009	Permanent to be placed by Dr. Vader	Pain control and control of symptoms of chronic pain disorder Trial completed	Perm - $96,145(2) Elec – $10,310 (5) Battery$4,000 (8) Remove - $9,320(2)***	192,290 51,550 32,000 18,640	192,290 [7] 51,550 [7] 32,000 [7] 18,640 [7]

(Dinneen & Hartman initial expert report, p. 17, attached as Exhibit L to the Ward Decl.)

By way of further example, Dr. Kidwell, one of plaintiff's treating anesthesiologists/pain specialists, testified that although he had never spoken with Dr. Thalgott (an orthopedic surgeon in Los Angeles who had not seen plaintiff for at least three years before the date of trial), and although Dr. Thalgott had written that plaintiff was not a surgical candidate, it was Dr. Kidwell's opinion that if Dr. Thalgott knew what had transpired between then and now, he would change his opinion. Dr. Kidwell testified not as to what he thought would be the course, but what he thought Dr. Thalgott, a non-testifying treating doctor, would prescribe. (November 8, 2010 Trial Testimony, 40:24-41:14, , Exhibit M to the Ward. Decl.) This is pure speculation.

Via this tactic, Plaintiff was able to offer into evidence the "expert opinions" of 28 different healthcare providers through only four witnesses, subjecting only four witnesses to cross-examination on the "opinions" of 28 different providers as understood by the four testifying treaters. However, the law does not allow a treating provider, otherwise not disclosed as an

expert, to offer expert opinions as to the treatment that would be prescribed or recommended by another, non-testifying treater. The Court's considering this testimony in its verdict is error.

Plaintiff's entire medical case, a series of opinions of "experts by proxy" is improper under NRCP 16 and 26, is inadmissible hearsay, and is completely without foundation. Plaintiff did not demonstrate any foundation for any of the testifying treaters to offer the opinions they offered with regard to plaintiff's back surgery needs, what Plaintiff's MRIs showed, whether his knee surgeries were necessary, whether the non-testifying treaters' bills were reasonable, or the lifetime costs for plaintiff's proposed spinal cord stimulator, some $723,000 as testified by Dr. Schifini of his trial testimony. These opinions and the other opinions like them should not have been considered by this Court in rendering its verdict in this case.

Prabhu v. Levine (a.k.a. Franco) inapposite

At a pretrial hearing on this issue, Plaintiff relied on *Prabhu v. Levine (a.k.a. Franco)*, 112 Nev. 1538 (1996) in support of his argument that treating doctors can provide expert testimony regardless of whether they have been disclosed as expert witnesses or issued NRCP 26 reports. The Court allowed this testimony, over defendant's objection. The Court did, though, note the Palms' continuing hearsay and relevance objections regarding the use of testifying treaters to get into evidence the opinions of nontestifying treaters, as well as foundationless opinions on costs, future treatment and other relevant issues, as well as the Palms' objections on the basis that the experts were not disclosed as experts and did not issue reports per NRCP 16 and 26.

Prabhu, as the Court is aware, was a medical malpractice lawsuit. The manner in which the trial court allowed the treating doctor to provide expert testimony in that case is substantially different from the manner in which plaintiff was allowed to present "expert" testimony via treating physicians in this case. The Palms respectfully submits that the Court committed error by considering the non-disclosed "expert" testimony of plaintiff's treating physicians.

In *Prabhu*, the plaintiff Ms. Franco sued her doctor for medical malpractice. Ms. Franco's treating ophthalmologic surgeon Dr. Levine performed five surgeries on her to correct maladies caused by Dr. Prabhu's misdiagnoses. Dr. Levine did not testify at trial, but his deposition was read into the record, providing his opinions as to causation and standard of care, as well as Ms.

Franco's prognosis.

Prabhu's counsel made objection to Dr. Levine's testimony because he was not disclosed as an expert under NRCP 26 (no mention was made of expert reports), but was only identified as a treating physician. However, the decision reflects that Prabhu's counsel was unable to show prejudice at this technical failure because Prabhu's counsel deposed Dr. Levine and learned all of his opinions at deposition. Prabhu's counsel, then, had the opportunity to secure his own experts' opinions to counter Dr. Levine's. Accordingly, Prabhu's counsel could not show any surprise or prejudice at Levine's testimony at trial, especially considering that testimony was simply Levine's own deposition taken by Prabhu's own counsel. Under those circumstances, the Court found no abuse of discretion in allowing the testimony of the treating doctor on ultimate issues in the case.

The nature of Dr. Levine's testimony and treatment of plaintiff is different from the testimony—to which the Palms objected—that was offered by Drs. Shannon, Schifini, Shah and Kidwell. Unfortunately, defendants have been unable to locate any other Nevada decision discussing the exact issue confronting this Court on this point. Unlike Dr. Levine's testimony, though, where he offered expert opinions on issues learned within the scope of his own specific and detailed treatment of Ms. Franco, Mr. Rodriguez's testifying treating doctors as described above have offered opinions on ultimate issues such as causation based not on their own treating opinions, but on the opinions and records of other doctors, unrelated to their treatment of plaintiff.

This testimony is far broader than—and radically different from—the testimony offered by Dr. Levine in the *Prabhu* case, and should not be allowed.

1. *Two parts to valid expert disclosure*

Indeed, under the prevailing authorities, these providers cannot offer testimony at all other than as percipient witnesses (i.e., testimony outside the scope of their specific treatment of plaintiff) without having been disclosed as experts pursuant to NRCP 16(a)(2)(A) and NRCP 26. While the Supreme Court in *Prabhu* seemed to minimize plaintiff's failure to designate Levine as an expert, the fact is that defendant in that case was not prejudiced and so the trial court had not abused its discretion. In the case where prejudice is patent—as here—expert disclosures are

crucially important in allowing a defendant to prepare its case.

Under Nevada law, there is a two-part disclosure requirement for expert witnesses. Nevada Rule of Civil Procedure 16.1(a) provides a party must disclose the identities of potential experts, and the disclosure must be accompanied by a written report prepared and signed by the witness. NRCP 16.1(a)(2)(A) and (B). Accordingly, for a witness to be allowed to offer expert testimony at trial, he must first be formally disclosed as such and, if specifically retained to provide expert testimony, he must generate a formal written report.

None of Mr. Rodriguez's testifying treating doctors were designated as experts. They were all identified in 16.1 disclosures as treating physicians and percipient witnesses, but none were disclosed in Plaintiff's expert disclosures as "non-retained" experts. This may seem like a technical distinction. After all, all of them were available for deposition, and, like in the *Levine* case, the Palms could have deposed all of them and learned their opinions. However, plaintiff had 30+ treating healthcare providers in this case. It is patently unfair and prejudicial to either require the Palms to have deposed every single one of them on the off chance that one might offer expert testimony, or for the Palms to have to wait until trial to find out which providers are going to offer expert testimony. Here, Plaintiff was required by NRCP 16.1 and 26 to have timely designated as experts the four treaters who testified at trial. Because he did not, the Palms was severely prejudiced in preparing its defense.

2. *NRCP 16 disclosure of treating healthcare provider as expert is mandatory.*

While so-called "non-retained experts" like treating healthcare providers may not necessarily be required to provide written reports under 16.1(a)(2)(B), they still must be timely and formally disclosed as experts under 16.1(a)(2)(A). The reason is the nature of their opinion testimony: Lay witnesses, those "not testifying as an expert," (NRS 50.265), may provide opinions rationally based on the perception of the witness (e.g., speed or height), only experts can provide opinions "based on scientific, technical, or other specialized knowledge," (NRS 50.275), which are by definition expert opinions.

The authorities are clear that a treating doctor, otherwise **not** retained for purposes of litigation, is nonetheless **still providing** expert testimony if the testimony consists of opinions

1 based on "scientific, technical, or other specialized knowledge," regardless of whether those
2 opinions were formed during the scope of interaction with a party prior to litigation. *Musser v.*
3 *Gentiva Health Servs.*, 356 F.3d 751, 757, fn. 2 (7th Cir. 2004); *Cf. O'Conner v. Commonwealth*
4 *Edison Co.*, 13 F.3d 1090, 1105 n.14 (7th Cir. 1994).[1] Accordingly, it is clear that while a
5 treating physician may not necessarily be required to offer a written expert report, the treating
6 physician/healthcare provider must always be disclosed as an expert if he/she is going to be called
7 at trial to offer any testimony outside the bare facts of his/her treatment.

8 Plaintiff has argued that he did comply with all of the Court's disclosure rules with regard
9 to percipient witnesses and accordingly the Palms has for years known the identities of all of
10 Plaintiff's treating healthcare providers. He has argued that no prejudice will result from
11 Plaintiff's "form over substance" failure to formally disclose the treating healthcare providers,
12 previously disclosed as percipient witnesses, as experts under NRCP 16.1(a)(2)(A). This was,
13 after all, essentially the ruling in *Prabhu*. However, and in addition to the specific prejudice to
14 the Palms here discussed above, the authorities are clear that the federal rules and their NRCP
15 counterpart demand this formal disclosure:

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> Formal disclosure of experts is not pointless. Knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial. Gentiva should not be made to assume that each witness disclosed by the Mussers could be an expert witness at trial. *Cf. Patel v. Gayes*, 984 F.2d 214, 217-18 (7th Cir. 1993) (affirming, under the pre-1993 Federal Rules of Civil Procedure, the exclusion of expert testimony as to duty of care from treating physicians when they were not disclosed as experts). The failure to disclose experts prejudiced Gentiva because there are countermeasures that could have been taken that are not applicable to fact witnesses, such as attempting to disqualify the expert testimony on grounds set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report. In sum, we agree with the district court that even treating physicians and treating nurses must be designated as experts if they are to provide expert testimony.

Musser, supra, at 757 – 758 (emphasis added).

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27 In this case, just as in *Musser*, Plaintiff sought to elicit expert opinion testimony from

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[1] Treating physicians are not exempt from the disclosure and report requirements because "we do not distinguish the treating physician from other experts when the treating physician is offering expert testimony…."

treating healthcare providers including physicians, none of whom were formally designated as experts under the civil rules. The Palms never had the opportunity to depose any of plaintiff's treating providers as experts, as they were never designated as such.

This is an important distinction, as the court in *Musser* recognized. There are "countermeasures" that the Palms could have taken to address the treating providers' "expert" testimony, most significantly developing rebuttal expert testimony on the various providers' opinions as elicited in their depositions. The Palms could not do this here, as Plaintiff never designated which providers it would seek to elicit expert testimony from at trial. There is no Nevada authority on point unfortunately, but the federal authorities, including *Musser*, affirm that treating physicians must be disclosed as experts if they are to provide expert testimony. Defendant has been sorely prejudiced by Plaintiff's having elicited expert testimony from non-disclosed, non-retained experts at trial.

3. *A written report required where bases for opinions stray from the core of treatment*

The second part of the expert disclosure under Nevada law is the written report requirement. Of course, an expert witness specifically hired by counsel to provide testimony in litigation must also prepare a written report containing all of his opinions and conclusions as well as the factual bases therefor. NRCP 16.1(a)(2)(B). A properly disclosed treating physician or healthcare provider may provide expert testimony without issuing an expert report, but only so long as the bases for her opinions are limited to her personal observations, diagnosis, and treatment of plaintiff. *Roberson v. Bair*, 242 F.R.D. 130, 134 (D.D.C. 2007).

However, and significantly for this case, an expert report is required when that treatment provider's testimony strays from the core of the physician's treatment. *Fielden v. CSX Transp., Inc.*, 482 F.3d 866, 870 (6th Cir. 2007). See *Kirkham v. Societe Air Fr.*, 236 F.R.D. 9, 12 (D.D.C. 2006) (written report requirement applies to opinions on causation, prognosis, and permanency.) By way of example, any opinion offered by a treating physician or healthcare provider (who has been otherwise properly disclosed) that is based on information contained in a report of a defense medical examination, an agreed medical examination for purposes of workers compensation, or

any other information outside of the scope of a treating physician's examination and treatment of plaintiff, is of a consulting nature, and the witness purporting to offer that opinion will be considered a consulting expert who is subject to the report requirement. *Shapardon v. West Beach Estates,* 172 F.R.D. 415, 417 (D. Haw. 1997).

Here, this is exactly the sort of opinion that Plaintiff's for testifying treaters offered. Their opinions were of a consulting nature, and were not formed solely within the scope of their treatment of Plaintiff. Many of the facts and opinions testified to by Dr. Shannon, Dr. Schifini, Dr. Kidwell and Dr. Shah were outside the scope of their treatment of Plaintiff, and were based on reviews of the other non-testifying treaters' records as well as defendants' own experts' reports—they criticized the Palms' own expert Dr. Becker. This is something a treating doctor would never normally do, and something that is the exclusive provenance of retained expert witnesses. Those select few treating healthcare providers aggregated the hearsay testimony of these nontestifying providers and offered previously non-disclosed expert opinions based thereon at trial. Such testimony is clearly inadmissible, and to admit it is an abuse of discretion and an error in law.

4. *Plaintiff's testifying treaters not qualified under Daubert to offer opinions on treatment/conclusions/opinions of nontestifying treaters.*

Assuming *arguendo* that Plaintiff's treating providers were properly disclosed, they still must be qualified to offer the opinions they seek to offer. The statute governing the admissibility of expert testimony in Nevada courts is NRS 50.275, which has been construed to track with Federal Rule of Evidence 702. *Hallmark v. Eldridge*, 189 P.3d 646, 650 (Nev. 2008). NRS 50.275 states that

> [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge. *Id.*

Therefore, to qualify as an expert witness under NRS 50.275, the witness must satisfy three requirements:

> (1) he or she must be qualified in an area of 'scientific, technical or other specialized knowledge' (the qualification requirement); (2)

> his or her specialized knowledge must 'assist the trier of fact to understand the evidence or to determine a fact in issue' (the assistance requirement); and (3) his or her testimony must be limited 'to matters within the scope of [his or her specialized] knowledge' (the limited scope requirement).*Hallmark*, *supra*, 189 P.3d at 650.

The determination of competency of an expert witness is largely within the discretion of the trial judge. *Walton v. Eighth Judicial Dist. Court ex rel. County of Clark*, 94 Nev. 690, 693 (1978). Before a person can testify as an expert witness, the court must first determine whether that person is qualified in an area of scientific, technical, or other specialized knowledge. The court should consider the following non-exhaustive factors: (1) formal schooling and academic degrees, (2) licensure, (3) work/employment experience, and (4) practical experience and specialized training. *Hallmark*, *supra*, 189 P.3d at 650-51.

Second, once a witness is found to be qualified, the anticipated testimony must assist the trier of fact in understanding the evidence or determining a fact in issue. NRS 50.275. Testimony will only assist the trier of fact if it is both relevant and the product of reliable methodology. *Hallmark*, *supra*, 189 P.3d at 651. Nevada does not blindly follow *Daubert*, but does use the factors outlined in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), for guidance in determining whether an expert's testimony is based on reliable methodology. *Higgs v. State*, 222 P.3d 648, 657-58 (2010). Under *Daubert*, a judge may wish to consider whether the evidence at issue (1) has been tested, (2) has been subjected to peer review and publication, (3) has a known or potential error rate, and (4) has general or widespread acceptance. *Daubert*, *supra*, 509 U.S. at 593-94. However, application of the Daubert factors is not mechanical; Nevada judges are allowed to consider any other relevant factors. *Higgs*, supra, 222 P.3d at 657-58.

Finally, once a physician is qualified as an expert, he or she may testify to all matters within the scope of his or her knowledge, experience or training, subject to the court's discretion concerning whether the expert is truly qualified to render such testimony. *Fernandez v. Admirand*, 108 Nev. 963, 969 (1992). Mere designation as an expert in one area, though, does not give the witness a license to unconstrained testimony on all scientific, technical, or other

specialized matters. *Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994) (holding that an expert sociologist could not testify as to criminology or domestic violence); *see also Lord v. State*, 107 Nev. 28, 33 (a detective witness was not qualified to testify that a person's injuries were caused by a fight despite the witness' extensive law enforcement experience).

Notwithstanding that none of the testifying treaters were disclosed as experts, the testifying treaters themselves did not have the qualifications to opine on any and every medical issue in this case. For example, Dr. Kidwell, an anesthesiologist, is not qualified to offer credible expert testimony as to what treatment Dr. Thalgott, an orthopedic spine surgeon who had not seen plaintiff since 2008, would currently prescribe if he were to examine Plaintiff. In 2007 Dr. Thalgott wrote in his treatment record that Plaintiff was not a candidate for back surgery. However, at trial, Dr. Kidwell testified that, had Dr. Thalgott followed plaintiff's treatment since 2007, he would now recommend back surgery. There is simply no foundation for this "opinion" from Dr. Thalgott via Dr. Kidwell. Likewise, Dr. Schifini simply is not qualified to testify as to what Dr. Ferrante, a pain management specialist at UCLA who saw Plaintiff several years before, and with whom Dr. Schifini never consulted, would currently recommend for Plaintiff. These and the other "opinions" elicited by Plaintiff's counsel are improper and should not have been admitted as evidence.

5. *Plaintiff's selected few treaters' aggregation of nontestifying providers' opinions and records are inadmissible hearsay*

NRS 51.035 defines hearsay generally as a statement offered into evidence to prove the truth of the matter asserted. Hearsay is inadmissible except as otherwise provided by law. NRS 51.065.

Testimony of one treating physician as to the collective opinion of a group of other physicians of different opinions and specialties who do not testify is inadmissible hearsay under NRS 50.285. *Estes v. State*, 122 Nev. 1123, 1140-41 (2006). In *Estes v. State*, in a proceeding to determine the defendant's competency to stand trial, one of the defendant's physicians—who had been properly disclosed as an expert—testified as to his mental illness. *Id.* at 1141. During this testimony, the physician voiced a "collective opinion" of the defendant's competency on behalf

of herself and other mental health professionals who were currently trading plaintiff but who were not called to testify at the proceedings. *Id.* On review, the Supreme Court of Nevada held that such testimony constituted inadmissible hearsay. *Id.*

However, the Court noted that NRS 50.285 allows otherwise properly disclosed and qualified experts to base their opinions on facts or data not otherwise admissible, if that information is of a type reasonably relied on by experts in the field. *Id.* Therefore, the physician's reasonable reliance on the opinions of her colleagues in forming her own diagnosis was "marginally appropriate." *Id.*

Applying the rule in *Estes* to this case, since Plaintiff's treating healthcare providers were never disclosed as experts (*supra*, at pp. 1-5), they cannot be otherwise accepted as experts, regardless of their qualifications. Accordingly, such non-disclosed treating healthcare providers may not offer testimony based on hearsay, which they might otherwise do had they been properly qualified. As set out above, treating healthcare providers who *have been* disclosed as non-retained experts may testify *only* as to what is encompassed within their personal observations and treatment of the Plaintiff. Treating healthcare providers who *have not been* disclosed as non-retained experts *may not* testify as to any matters "based on scientific, technical or other specialized knowledge."

Here, Plaintiff did not disclose any treating physicians as experts, and so they must be precluded from offering any expert testimony on any matters "based on scientific, technical or other specialized knowledge." Regardless of disclosure, Plaintiff's selected few experts were never qualified to aggregate the records, observations and opinions of the non-testifying treaters. Finally, because plaintiff's treating healthcare providers were never disclosed, they may not rely on hearsay, which they otherwise might be allowed to do.

"The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless." *Musser* at 758, citing *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996). While defendant had the opportunity to depose the treaters during discovery, it never had the opportunity to depose them as experts because they were never disclosed as such. As discussed in *Musser*, this is a very important distinction, and

plaintiff's failure to disclose prevented defendant from being able to prepare for trial, which has severely prejudiced the Palms.

Clearly, the Court considered some, if not all, of the inadmissible testimony in calculating its almost $6 million verdict in this matter. This testimony should never have been admitted, and by permitting its admission, the Court made it difficult, if not impossible, for the Palms to effectively defend against Plaintiff's medical damages claims.

D. The Body of Evidence that the Palms Presented at Trial Conclusively Demonstrates the Evidence was Insufficient to Justify the Verdict.

N.R.C.P. Rule 59 authorizes new trials where the verdict is against law, or where the evidence is insufficient to justify the verdict. The general rule is that when there is substantial evidence to sustain the judgment, it will not be disturbed, but an exception to the general rule exists where, upon all the evidence, it is clear that a wrong conclusion has been reached. *Brechan v. Scott*, 92 Nev. 633, 555 P.2d 1230 (1976).

Plaintiff has the burden of proving the fact of damage and the amount of damages. *Mort Wallin v. Commercial Cabinet Co.*, 105 Nev. 855, 857 (Nev. 1989). Each item of damages must be "proven by a preponderance of the evidence." *Las Vegas-Tonopah-Reno Stage Lines v. Gray Line Tours*, 106 Nev. 283, 290 (Nev. 1990).

1. *Plaintiff Must Establish the Amount of Damages by Substantial Evidence.*

"[T]o justify a money judgment the amount … must be proved," and "there must be substantial evidence as to the amount of damage, as the law does not permit arriving at such amount by conjecture[.]" *Cathcart v. Robison, Lyle, Belaustegui & Robb*, 106 Nev. 477, 480 (Nev. 1990). "[T]o prove the right to damages without proving the amount, entitles a plaintiff to nominal damages only." *Id.* Thus, Plaintiff must prove the amount of damages to be awarded by substantial evidence. Any lesser standard opens the door to conjecture and unjust awards.

2. *Plaintiff Must Prove the Amount of Damages With Reasonable Certainty.*

Plaintiff must prove the "amount" of damages "to a reasonable certainty" that is "not arrived at by mere conjecture but through substantial evidence." *All Nite Garage v. A. A. A. Towing*, 85 Nev. 193, 199 (Nev. 1969). While the amount "need not be met with mathematical

exactitude," and "some uncertainty in the amount is allowed," there "must be an evidentiary basis for determining a *reasonably accurate amount* of damages." *Mort Wallin*, 105 Nev. at 857. The Restatement (Second) of Torts permits the plaintiff to recover damages "if, and only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit." Rest. (2d) Torts § 912.

Plaintiff must provide a reasonable method for determining the amount of damages. "[I]f ... a reasonable method for ascertaining the extent of damage is offered through testimony," it will be "sufficient if the evidence adduced will permit the jury to make a fair and reasonable approximation." *Bader v. Cerri*, 96 Nev. 352, 358 (Nev. 1980) (citation omitted) (overruled on other grounds, *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 608 (2000).)

In *Mort Wallin*, plaintiff sought damages for diminution in the value of a store caused by defendant's breach of contract, put on evidence of the fact of diminution, but did not provide evidence of the value of the store had defendant performed as promised and its value as a result of its actual performance. 105 Nev. at 857. The Supreme Court held plaintiff "failed to carry its burden to reasonably establish the amount of the diminution in property value" and vacated the diminution-in-value damages award.

Under Nevada case law, if the evidence a plaintiff provides is not substantial and does not permit the fact-finder to determine the amount of damages with reasonable accuracy, he has not carried his burden. Rather, plaintiff must put on evidence of the amount of damages that permits the fact finder to make a reasonably accurate award of damages based on a reasonable method.

Plaintiff claims that he is a real estate investor/developer and has had his own real estate business for over fifteen years. Plaintiff claims lost earnings resulting from injuries he attributes to the subject accident. Because Plaintiff is in business for himself through his professional corporation, his lost earnings may be measured by the lost profits of his business. *Strauss v. Continental Airlines*, 67 S.W.3d 428, 437-438 (Tex. App. 2002).

3. *Plaintiff Cannot Prove that the Accident Caused Specified Losses.*

Proof that the accident caused Plaintiff specified losses is essential:

> There is no automatic award for loss of income due to partial disability. The disability must result in a loss of income for it to be compensable. In this case, the plaintiff is a professional, whose earnings depend upon his training and professional skills, **which are more mental than physical. Therefore, a curtailment of his physical activities does not necessarily translate into a diminution in his earning capacity**.
>
> *Nobile v. New Orleans Public Service, Inc.*, 419 So.2d 35, 39 (La. App. 1982) (emphasis added).

The evidence here has shown that, similar to *Nobile,* Plaintiff's earnings from his real estate endeavors are the result more of his mental abilities and professional skills than physical capacities. Therefore, loss of earnings is not an inevitable result of physical injury. Plaintiff contends that, as a result of his injuries, he lost the ability to purchase and "flip" residential real estate, and thus lost profits. He must provide evidence that he lost business as a result of the injury, and not from other causes such as bad investments on his part or indeed the recent crash in the real estate market. For example, Plaintiff must provide evidence that he was unable to buy and sell real estate because of his injuries. He did not do so. Without such evidence, an award would be based on conjecture.

The *Strauss* case involved similarly insufficient evidence. There, an attorney sued the airline for lost profits caused by personal injuries suffered while boarding a flight. 67 S.W.3d at 432, 433. After trial, the court granted defendant's motion for judgment notwithstanding the verdict on the jury's $1 million award of lost past profits. *Id.* at 434. The attorney argued that he lost profits as a result of his injuries because he could no longer travel to a particular small town in Mississippi and thus solicit personal injury cases from that town's sympathetic population, made up of persons working in and related to the maritime offshore oil industry. 67 S.W.3d at 439.

The *Strauss* plaintiff, however, did not provide what the court called the "**presumably available evidence**" of "the **numbers of cases he had represented** [in that town] or the **net earnings he made on each case prior to the injury**." *Id.* (emphasis added). The court held, "in the **absence of additional available evidence**, and the **absence of any explanation as to why it was not provided**," the evidence that was provided "is not sufficient." *Id.* (emphasis added). In

addition, the attorney did not attempt to "segregate the fees earned from similar cases [to those from that town] from fees earned from other types of cases," with the result, "there is nothing from which a jury could determine the number of maritime cases from Kosciusko that Strauss might have obtained[.]" *Id.* The court held that the attorney did not demonstrate his damages "to the degree of proof to which they were susceptible." *Id.*

Mr. Rodriguez's proof of damages here was like the attorney in the *Strauss* case. The only evidence Plaintiff has produced to support his lost earnings claims are his individual tax returns from 1999, 2001 and 2004, none of which were completed in any of those years, e.g., the 2004 tax return was signed in 2009. These three tax returns, none of which were completed contemporaneously, by themselves, are wholly insufficient to support Plaintiff's $400,000 per year lost earnings claim. Plaintiff failed to produce any other evidence in support of his lost earnings claim during discovery.

4. *Plaintiff Has Failed to Provide Substantial Evidence of Revenues and Expenses to Prove Lost Profits.*

To determine his lost earnings, Plaintiff may not rely on his business's gross revenues. "Gross fees," the *Strauss* court held, "are not an appropriate basis" for determining lost earnings. *Id.* at 440. He must provide evidence of "expenses." *Id.* "Net earnings ... must include a deduction for expenses incurred[,]" such as "office expenses, court fees, copy costs and the myriad other expenses associated with a case[.]" *Id.* In *Strauss*, the attorney failed to provide such evidence, and the court held the evidence insufficient to support an award of lost profits. *Id.* at 442.

To prove lost profits, Plaintiff must have, in addition to proving that the accident caused him to lose opportunities and sales, provided evidence of the gross revenues the sales reasonably would have generated, his expenses for the sales and the expenses of his professional corporation allocable to those sales, and ultimately estimated net revenues. Plaintiff failed to produce any such evidence during discovery or at trial.

5. *Plaintiff Has Failed to Provide Evidence of Lost Earnings to Support an Award of Damages for Lost Earning Capacity.*

Nevada has not expressly recognized loss of earning capacity as a recoverable loss distinct

from lost future earnings. Nevada cases addressing lost earning capacity treat it as the same as lost future earnings. *e.g., Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 311-312, 774 P.2d 1044, 1046 (1989) ("the jury was adequately instructed on the recovery for lost wages and future lost wages (reduced earning capacity)").

Loss of earning capacity has been distinguished from loss of earnings. Loss of earnings is "actual loss of income due to an inability to perform a specific job a party held from the time of injury to the date of trial." *Strauss*, 67 S.W.3d at 435; *Johnson v. International of United Bhd. of C. & J.*, 54 Nev. 332, 336 (1932) ("loss of what plaintiff would otherwise have earned in his calling, and has been deprived of earning by the wrongful act"). Loss of earning capacity is diminished "ability and fitness to work in gainful employment" caused by the accident. *Id.* at 435 & n.2.

The issue of lost earning capacity is clearly presented when the injured plaintiff is a child who never held a job. *Id.* at 436. The distinction between lost earning capacity and lost future earnings largely disappears for injured plaintiffs, like Plaintiff, who has avowed a commitment to a particular profession. *Id.*

To recover for lost earning capacity, Plaintiff must have presented evidence that his earnings and earning capacity have been harmed by the accident. In *City of Fairbanks v. Nesbett*, 432 P.2d 607, 617 (Alaska 1967), the Alaska Supreme Court held, in a case involving an attorney, "In determining the extent of impairment of an attorney's earning capacity and the measurement of loss therefrom, we hold that there must be evidence presented to the jury concerning the extent of impairment." The attorney did not place any evidence in the record of the effect of his ankle injury on his earning capacity. The court held, "it was error to submit this issue to the jury since they could only have speculated as to the extent of any impairment of appellee's capacity to earn money and the resulting monetary loss therefrom." *Id.*

As previously stated, the only evidence Plaintiff has produced in an effort to support his lost earnings claim are his individual tax returns from 1999, 2001 and 2004, which were created in response to his expert's request for them, and during this litigation, and his own self-serving anecdotal testimony. Plaintiff testified he had a business, Mary Star Enterprises, which he

operated further to his real estate investments. He has produced no income/earnings records or profit and loss statements for this company. Plaintiff has failed to produce, other than these three individual tax returns, any evidence of his lost earnings. Indeed, his own expert, Terrance Dinneen, simply took a six-year average of the three tax returns provided (add the three incomes and divide by six). There is no evidence of lost earnings or profits.

6. *Plaintiff Did Not Prove Lost Earnings or Lost Earnings Capacity.*

To recover lost earnings, and to prove that he has suffered a loss of earning capacity as a result of the accident, Plaintiff must have provided substantial evidence that the accident, and no other cause such as the crash in the real estate market, is the cause of lost earnings. Besides three years of tax returns, Plaintiff elected not to provide any of the other evidence he presumably has (or could have collected) all of which is necessary to make this showing.

Plaintiff claims to have had his own real estate business, Mary Star Enterprises, for over fifteen years. That business presumably has records, including business tax returns, profit and loss statements, and other indicia of legitimacy. Plaintiff certainly has information or access to information about key facts necessary to prove lost earnings and lost earning capacity. He knows or should know the number of sales he had for the 15 years preceding the subject accident. It was his business. He knows or should know his expenses attributed to such sales. He knows or has information about the revenues various types of sales generate. Plaintiff, however, failed to provide any such evidence at deposition or in discovery or at trial.

Plaintiff has not shown that his alleged injuries have had any effect on his ability to do the mental and professional work of a real estate flipper. On this record, Plaintiff has failed to provide substantial evidence in support of a reasonably certain an award of damages. Thus, it was against the law for the Court to award any lost earnings or loss of earning capacity in this case.

E. Finally, the Court Was in Error When It Granted Plaintiff's Motion to Strike the Palms' Experts' Opinions.

Plaintiff filed a Motion to Strike Trial Testimony as to the Palms' experts, Mr. Franklin and Dr. Cargill, and against the Palms' opposition, the Court granted the Motion. The Palms

produced hospitality safety/security expert, Forrest Franklin as a witness at trial. Mr. Franklin testified that: (1) throwing memorabilia as a promotional effort into crowds is not a substandard protocol; (2) it is not unsafe to throw things into crowds; and (3) it is within the standard of care to throw promotional items into crowds. (November 3, 2010 Trial Testimony, 14: 6-8, 31: 17-21, 33: 7-13, Exhibit N to the Ward Decl.)

Mr. Franklin addressed whether throwing promotional items into a crowd was within the standard of care in the casino/hospitality industry, and indeed opined that the activity was within the standard of care, notwithstanding the fact that the Palms had an internal procedure in place forbidding throwing items. Mr. Franklin's testimony was clearly relevant because his opinions made it more probable that the Palms did not act negligently in allowing items to be thrown. Mr. Franklin's testimony was thus helpful to the trier of fact.

In this case, Mr. Franklin's testimony was reliable per NRS 50.275, and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As he testified, Mr. Franklin has had extensive experience as a security officer dealing with persons throwing objects into crowds. (November 3, 2010 Trial Testimony, 13: 14-21, Exhibit N to Ward Decl.) Before offering an opinion, he visited the area of the Palms where the accident occurred, reviewed the relevant deposition testimony and the Palms security manual. (*Id.*, 13:22-25; 15:16-18.) These "facts and data" are reliable and are sufficient bases upon which a qualified expert like Mr. Franklin may offer an opinion.

Dr. Cargill, an economist, testified as to Plaintiff's wage earning history and damages. He commented on the reports prepared by Plaintiff's expert Mr. Dinneen, and rebutted Mr. Dinneen's opinions. Dr. Cargill specifically testified that: (1) it was inappropriate to use an average of plaintiff's earnings over the period from 1999 to 2004 to predict future earnings; and (2) using current interest rates to calculate future wage loss is improper. (November 9, 2010 Trial Testimony, 22: 6-25, 55: 15-20, Exhibit O to the Ward Decl.)

Dr. Cargill offered two opinions, both of which survive the *Daubert* "relevancy and reliability" standard for admissibility of expert testimony. First, Dr. Cargill testified that plaintiff's projected future income was derived through a flawed method of calculation of past

income. (*Id.* at 16: 4-8). He testified that averaging just three tax returns over a perhaps 6-year period does not accurately estimate past earnings and thus likewise is unreliable for forecasting future earnings. It was inappropriate to average these three tax returns (1999, 2001, 2004, all of which were prepared several years after the tax liabilities were incurred) in the context of an artificially inflated real estate bubble. (*Id.* at 29: 7-12.) This testimony makes a fact of consequence—whether Mr. Dinneen's wage loss estimates are reliable—less probable than without the Cargill testimony. Therefore, the testimony is relevant and helpful to the trier of fact.

Second, Dr. Cargill offered the opinion that using current interest rates to project future lost income did not make economic sense because it did not take into account rates of inflation in the future. This testimony was relevant because it makes a fact of consequence, whether Mr. Dinneen's computation of damages is accurate, less probable than without it. It is relevant to total damages and does "assist the trier of fact to understand the evidence or to determine a fact in issue."

Dr. Cargill's technique is also reliable and generally accepted in the field of forensic economics. Under *Daubert,* the Court must determine whether the reasoning and methodology underlying the proposed expert's testimony is valid. In making this inquiry, *Daubert* offers four non-exclusive factors: (1) whether the concept has been tested, (2) whether the concept has been subject to peer review, (3) what the known rate of error is, and (4) whether the concept is generally accepted by the community. *Shaffer v. Amada Am., Inc.*, 335 F. Supp. 2d 992, 995 (E.D. Mo. 2003), citing *Daubert*, 509 U.S. at 593-95.

Here, Dr. Cargill offers testimony based on sound, proven economic theory. In fact, Dr. Cargill performed his calculations by using a rate that is used by the U.S. Congressional Budget Office and the trustees of the Social Security Administration. (*Id.* at 48:17-18.) Thus, the technique utilized by Dr. Cargill has attained "widespread acceptance." The evidence serves an important function in this case because it presents contrary evidence to Mr. Dinneen. Accordingly, the Court should have denied, and not granted, Plaintiff's motion to strike certain expert testimony because the evidence meets the "assistance" requirement of NRS 50.275, FRE 702, *Daubert*, and *Hallmark*.

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By erroneously granting Plaintiff's motion, the Court made it virtually impossible for the
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Palms to rebut Plaintiff's expert's opinions.
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IV.
CONCLUSION

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For all of the reasons set forth above, the Palms respectfully submits that the Court must
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vacate the verdict and order a new trial.
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Dated: March 22, 2011

ARCHER NORRIS

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[signature]

Kenneth C. Ward
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Keith R. Gillette
Attorneys for Defendant
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FIESTA PALMS, LLC, a Nevada Limited
Liability Compay, d/b/a THE PALMS
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CASINO RESORT

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Nov 28 2011 11:23 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

INDICATE FULL CAPTION:

FIESTA PALMS, LLC, A NEVADA LIMITED
LIABILITY COMPANY D/B/A THE PALMS
CASINO RESORT,

Appellant(s),

vs.

ENRIQUE RODRIGUEZ, AN INDIVIDUAL

Respondent(s),

Cross-Appellant(s),

vs.

Cross-Respondent(s),

No. 59630

DOCKETING STATEMENT

CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. Id. Failure to attach documents as requested in this statement, completely fill out the statement, or to fail to file it in a timely manner, will constitute grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See Moran v. Bonneville Square Assocs.*, 117 Nev. 525, 25 P.3d 898 (2001); *KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District *Eighth* Department *X* County *Clark*
Judge *Jessie Walsh* District Court Docket No. *A531538*

2. **Attorney filing this docket statement**:

Attorney: *Robert L. Eisenberg* Telephone: *775-786-6868*
Firm *Lemons, Grundy & Eisenberg*
Address *6005 Plumas Street, Third Floor*
Reno, Nevada 89519
Client(s) *Appellant - Fiesta Palms LLC d/b/a The Palms Casino Resort*

If this is a joint statement completed on behalf of multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. **Attorney(s) representing respondent(s):**

Attorney *Steven M. Baker* Telephone: *702-228-2600*
Firm *Benson, Bertoldo, Baker & Carter, Chtd.*
Address *7408 W. Sahara Avenue*
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Client(s) *Enrique Rodriguez*

Attorney *Michael K. Wall* Telephone: 702-385-2500
Firm *Hutchison & Steffen, LLC*
Address *10800 W. Alta Drive, #200*
Las Vegas, Nevada 89145
Client(s) *Enrique Rodriguez*

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

X Judgment after bench trial
☐ Judgment after jury verdict
☐ Summary judgment
☐ Default Judgment
☐ Dismissal
  ☐ Lack of jurisdiction
  ☐ Failure to state a claim
  ☐ Failure to prosecute
  ☐ Other (specify)________

☐ Grant/Denial of NRCP 60(b) relief
☐ Grant/Denial of injunction
☐ Grant/Denial of declaratory relief
☐ Review of agency determination
☐ Divorce decree:
  ☐ Original ☐ Modification
☐ Other disposition (specify)________

5. Does this appeal raise issues concerning any of the following: *Not Applicable*

☐ Child custody
☐ Venue
☐ Adoption
☐ Termination of parental rights
☐ Grant/Denial of injunction or TRO
☐ Juvenile matters

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal: *None*

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition: *None*

8. Nature of the action. Briefly describe the nature of the action, including a list of the causes of action pleaded, and the result below: *Personal injury action arising out of incident on appellant's premises; bench trial; judge ruled in favor of plaintiff/respondent and awarded $6,051,589.38 in damages.*

9. Issues on appeal. State concisely the principal issue(s) in this appeal:

(1) Error in allowing admission of medical records not previously disclosed;
(2) Error regarding admission and scope of plaintiff's expert medical witness testimony;
(3) Error in exclusion of defense expert opinions;
(4) Sufficiency of evidence and excessiveness of damages award;
(5) Error regarding award of plaintiff's costs

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:

None

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A ___*X*___ Yes ______ No ______

If not, explain ____________________

12. Other issues. Does this appeal involve any of the following issues? *Not Applicable*

- ☐ Reversal of well-settled Nevada precedent (on an attachment, identify the cases(s))
- ☐ An issue arising under the United States and/or Nevada Constitutions
- ☐ A substantial issue of first-impression
- ☐ An issue of public policy
- ☐ An issue where an banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain ____________________

13. Trial. If this action proceeded to trial, how many days did the trial last? *Twelve*

Was it a bench or jury trial? *Bench*

14. Judicial disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. If so, which Justice? *Not Applicable*

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from. ____________________.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

April 12, 2011: Judgment on the Verdict

April 21, 2011: Findings of Fact and Conclusions of Law in Support of Verdict

September 29, 2011: Findings of Fact, Conclusions of Law , and Order Denying Defendant's Motion for New Trial

16. Date written notice of entry of judgment or order served *See Attachment*

Was service by delivery ____________ or by mail ____________ (specify).

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59),

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

Motion		Date served	By delivery	or by mail	Date of filing
NRCP 50(b)					
NRCP 52(b)	*X*	5/4/11		X	*5/2/11*
NRCP 59	*X*	4/4/11		X	*3/28/11*

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration do not toll the time for filing a notice of appeal.

(b) Date of entry of written order resolving tolling motion *Order denying motion for new trial entered on September 29, 2011; Order granting motion to amend entered on September 19, 2011* .

(c) Date written notice of entry of order resolving motion served. *Notice of entry of order on Motion to Amend served by mail on September 22, 2011; Notice of entry of order denying motion for new trial served by mail on October 4, 2011.* .

(i) Was service by delivery ____________ or by mail ____________ (specify).

18. Date notice of appeal was filed *November 4, 2011 - See Attachment* .

If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal:

19. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a), NRS 155.190, or other:

NRAP 4(a)(4)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

NRAP 3A(b)(1)___*X*___NRS 155.190______________(specify subsection)______________________________

NRAP 3A(b)(2)___*X*___NRS 38.205 ______________(specify subsection)______________________________

NRAP 3A(b)(3)________NRS 703.376______________

Other (specify)____

(b) Explain how each authority provides a basis for appeal from the judgment or order:

Appeal from final judgment and order denying new trial

21. List all parties involved in the action in the district court:

(a) Parties:

Enrique Rodriguez, Plaintiff
Fiesta Palms, LLC, Defendant
Brandy L. Beavers, Defendant

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other: *Judgment was entered against Ms. Beavers, but she has not appealed.*

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the trial court's disposition of each claim, and how each claim was resolved (i. e., order, judgment, stipulation), and the date of disposition of each claim.

Complaint against defendants was based upon claim for negligence; all claims resolved in judgment

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action below:

Yes___*X*______ No ___________

24. If you answered "No" to question 23, complete the following: *Not Applicable*

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b):

Yes__________ No_________

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment:

Yes__________ No___________

25. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)): *Not Applicable*

26. Attach file-stamped copies of the following documents:

(1) The latest-filed complaint, counterclaims, cross-claims, and third-party claims
(2) Any tolling motions(s) and order(s) resolving tolling motions
(3) Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
(4) Any other order challenged on appeal
(5) Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement .

FIESTA PALMS, LLC
Name of Appellant

ROBERT L. EISENBERG
Name of counsel of record

Nov. 28, 2011
Date

[signature]
Signature of counsel of record

Washoe County, NV
State and county where signed

ATTACHMENT TO DOCKETING STATEMENT

FIESTA PALMS v. RODRIGUEZ
Supreme Court No. 59630

16. *Notice of entry of the April 12, 2011 judgment was served by mail on April 15, 2011; notice of entry of the April 21, 2011 judgment was served by mail on April 27, 2011; and Notice of Entry of the September 29, 2011 order was served by mail on October 4, 2011.*

18. *Although this case was tried without a jury, the district court signed and filed a "verdict" on March 14, 2011. Plaintiff's counsel served notice of entry of the "verdict" on March 17, 2011. Shortly thereafter, appellant's counsel requested the district court to enter findings of fact, conclusions of law and a judgment.*

On April 12, 2011, the district court entered a "Judgment on the Verdict," and plaintiff's counsel served notice of entry on April 15, 2011. A few days later, the district court entered formal findings of fact and conclusions of law "in support verdict," and plaintiff's counsel served notice of entry of this new document on April 27, 2011.

In the meantime, defendant/appellant filed a motion for a new trial and a motion to amend the judgment. The district court denied the motion for a new trial, but she granted the motion to amend the judgment. The amendment related to the calculation of interest.

Appellant's attorneys believe the order granting the motion to amend contemplated entry of an actual amended judgment containing the new interest calculation. Because notices of entry of orders on the post-trial motions were served, appellant's counsel was uncertain as to whether the time for the appeal would commence upon notice of entry of the post-trial orders, or whether the time to appeal would commence upon notice of entry of an amended judgment. Consequently, appellant's counsel filed a protective notice of appeal, as indicated in footnote 1 in the notice of appeal.

CERTIFICATE OF SERVICE

I certify that on the 28 day of Nov., 2011, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

X By mailing it by first class mail with sufficient postage prepaid to the following address(es):

Kenneth C. Ward
Keith R. Gillette
ARCHER NORRIS
A Professional Law Corporation
2033 North Main Street, Suite 800
P.O. Box 8035
Walnut Creek, California 94596-3728

Adam S. Davis
Moran Law Firm
630 S. Fourth Street
Las Vegas, Nevada 89101

Ara Shirinian (Settlement Judge)
10651 Capesthorne Way
Las Vegas, Nevada 89135

and that this **Docketing Statement** was filed electronically on this date with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Steven Baker
John Naylor
Jeffery Bendavid
Marsha Stephenson
Michael Wall

Dated this 28 day of Nov., 2011

[signature]
Signature

Attached Documents required by Question 26

1. Complaint (Filed 11/15/06)

2. Amended Complaint (Filed 7/8/09)

3. Defendant Fiesta Palms' Notice of Motion and Motion for New Trial (Filed 3/28/11)

4. Defendant Fiesta Palms' Memorandum of Points and Authorities in Support of its Motion for New Trial (Filed 3/28/11)

5. Judgment on the Verdict (Filed 4/12/11)

6. Notice of Entry of Judgment on the Verdict (Filed 4/15/11)

7. Findings of Fact and Conclusions of Law in Support of the Verdict (Filed 4/21/11)

8. Notice of Entry of Findings of Fact and Conclusions of Law in Support of Verdict (Filed 4/27/11)

9. Notice of Motion and Motion to Amend Judgment on the Verdict (Filed 5/2/11)

10. Findings of Fact, Conclusions of Law, and Order (Filed 9/19/11)

11. Notice of Entry of Order on 9/19/11 Findings of Fact (Filed 9/22/11)

12. Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion for New Trial (Filed 9/29/11)

13. Notice of Entry of Order on 9/29/11 Findings of Fact (signed 10/4/11)

No. 1

No. 1

ORIGINAL

9

COMP
W. JONATHAN WEBER, ESQ.
Nevada Bar No. 7554
BENSON, BERTOLDO, BAKER & CARTER, CHTD.
7408 W. Sahara Avenue
Las Vegas, Nevada 89117
(702) 228-2600
Attorneys for Plaintiff

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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual;

Plaintiffs

vs.

FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT; DOES I through X, inclusive; and ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

CASE NO.: A531538
DEPT. NO.: X

COMPLAINT

COMES NOW Plaintiff ENRIQUE RODRIGUEZ, by and through his attorney of record W. JONATHAN WEBER, ESQ., of the law firm of BENSON, BERTOLDO, BAKER & CARTER, CHTD., and for his claims of relief against the Defendants, and each of them, alleges and complains as follows:

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1.

That Plaintiff, ENRIQUE RODRIGUEZ, was at the time of the Incident, a resident of Riverside County, State of California.

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1 2.
2 That at all times herein mentioned, Defendant, FIESTA PALMS, L.L.C., d/b/a PALMS
3 CASINO RESORT (hereinafter, collectively referred to as "PALMS RESORT") was, and still
4 is, a Nevada Limited Liability Company duly authorized and regularly conducting business
5 within Clark County, State of Nevada.
6
7 3.
8 That at all times herein mentioned Defendant JANE DOE #1, as designated hereinafter,
9 was, and still is, a resident of the State of Nevada, County of Clark.
10 4.
11 That at all times herein mentioned, Defendant ROE BUSINESS ENTITY #1, as
12 designated hereinafter was, and still is, a business entity regularly conducting business in the
13 State of Nevada, County of Clark.
14
15 5.
16 That the true names and capacities of the Defendants DOES I through X, inclusive, and
17 ROE BUSINESS ENTITIES I through X, inclusive, and each of them, are unknown to Plaintiffs,
18 who, therefore, sue said Defendants by said fictitious names. Defendants designated as DOES I
19 through X are individuals who, as herein alleged, were participating in the events described
20 herein as either a PALM GIRL, a patron of the subject Sports Book/Sports Bar, and/or are
21 individuals responsible for training, supervising, and/or controlling the subject premises, the
22 conduct of the PALM GIRLS, and/or the activities occurring at the time and place alleged
23 herein. Plaintiff is informed, believes and thereon alleges that each of the Defendants designated
24 as DOE is in some manner negligently and/or statutorily responsible for the events and
25 happenings referred to and caused damages proximately to Plaintiff ENRIQUE RODRIGUEZ as
26 herein alleged. Plaintiff will ask leave of the Court to amend his Complaint to insert the true
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names of such Defendants when the same have been ascertained.

6.

That the true names and capacities of the Defendants ROE BUSINESS ENTITIES I through X, inclusive, are unknown to Plaintiff, who, therefore sues said Defendants by said fictitious names. Defendants designated as ROE BUSINESS ENTITIES I through X are owners, operators, agents, employers, employees, assigns, maintainers, inspectors, predecessors and/or successors in interest, contractors, subcontractors, political subdivisions, governmental bodies, insurers or entities otherwise in possession and/or control of the persons and/or premises mentioned herein and/or are agencies, corporations and/or business interests employing, training, contracting, and/or otherwise responsible for the services of the PALM GIRLS and/or the activities occurring on the subject premises at the time and place alleged herein. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated as a ROE BUSINESS ENTITY is in some manner negligently, vicariously, statutorily, contractually, jointly and/or severally or otherwise responsible for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged. Plaintiff will ask leave of the Court to amend his Complaint to insert the true names of such Defendants when the same has been ascertained.

7.

That at all times pertinent hereto, and particularly on or about November 22, 2004, Defendant PALMS RESORT owned, operated, maintained and controlled a sports bar/book open to the public, located within the PALMS RESORT, 4321 West Flamingo Road, Las Vegas, Nevada 89103.

8.

That on or about November 22, 2004, Plaintiff, ENRIQUE RODRIGUEZ, was on the

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1 premises of PALMS RESORT as a patron at the PALMS RESORT.

2 9.

3 That on November 22, 2004, Plaintiff ENRIQUE RODRIGUEZ went to the Palms'
4 sports bar/book to watch a football game. During half-time, agents, employees, and/or assigns of
5 the PALMS (hereinafter known as the "PALMS GIRLS") were participating in a promotion
6 wherein they were throwing souvenirs to Sports Book/Sports Bar patrons while blindfolded.

7 10.

8 That the agents, employees, and/or assigns of the PALMS RESORT known as the
9 PALM GIRLS were contracted from, supplied by, and/or otherwise provided by an agency,
10 company, and/or other business entity hereby designated as ROE BUSINESS ENTITY #1.

11 11.

12 In response to an unknown PALMS GIRL (hereby designated as "JANE DOE #1")
13 throwing souvenirs in the Sports Book/Sports Bar while blind-folded, a customer within the
14 Sports Book/Sports Bar dove for a thrown souvenir and hit Plaintiff's extended and stationary
15 left knee. Plaintiff then struck the person next to him, hitting the left side of his head, then falling
16 down, thereby sustaining the injuries and damages alleged herein.

17 **FIRST CAUSE OF ACTION**

18 **(Defendants JANE DOE #1, individually; ROE BUSINESS ENTITY #1; PALMS RESORT: Negligence)**

19 12.

20 That on or about November 22, 2004, Defendant JANE DOE #1 negligently, carelessly,
21 and recklessly threw souvenirs into the crowd at the PALMS RESORT sport book while
22 blindfolded, thereby creating a frenzy among the patrons of said Sports Book/Sports Bar, thereby
23 causing an unknown patron of the Sports Book/Sports Bar to impact with Plaintiff ENRIQUE
24 RODRIGUEZ' knee, thereby causing the injuries and damages complained of herein.

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13.

That on or about November 22, 2004, Defendant, PALMS RESORT, and/or its employees, agents or assigns, negligently, carelessly and recklessly caused, allowed, and permitted Defendant JANE DOE #1 to throw said souvenirs while blindfolded, causing a frenzy among customers, resulting in a situation that Defendant PALMS RESORT, knew, or should have known, was unreasonably dangerous to patrons of the Sports Book/Sports Bar, in particular to Plaintiff ENRIQUE RODRIGUEZ, thereby causing the injuries and damages alleged herein.

14.

That on or about November 22, 2004, Defendant, ROE BUSINESS ENTITY #1, and/or its employees, agents or assigns, negligently, carelessly and recklessly caused, allowed, and permitted Defendant "JANE DOE #1 to throw said souvenirs, causing a frenzy among patrons of the Sports Book/Sports Bar, resulting in a situation that Defendant PALMS RESORT, knew, or should have known, was unreasonably dangerous to patrons of the Sports Book/Sports Bar, in particular to Plaintiff ENRIQUE RODRIGUEZ, thereby causing the injuries and damages alleged herein.

15.

That the aforesaid acts of Defendants, PALMS RESORT, JANE DOE #1, and/or ROE BUSINESS ENTITY #1, and/or their employees, agents or assigns were breaches of the duty of reasonable care owed by said Defendants to Sports Book/Sports Bar patrons, and in particular to Plaintiff ENRIQUE RODRIGUEZ.

16.

That all acts and omissions alleged with respect to Defendant JANE DOE #I occurred while said defendant was acting within the scope and course of her agency, employment and or

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assignment with Defendant PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them. Defendants PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them, are therefore vicariously, contractually, statutorily and/or otherwise liable for the negligence, carelessness and recklessness of Defendant JANE DOE #1 as alleged herein.

17.

As a direct and proximate result of the negligence, carelessness and recklessness of Defendants, PALMS RESORT, JANE DOE #1, and/or ROE BUSINESS ENTITY #1, and/or their employees, agents or assigns, and each of them, Plaintiff, ENRIQUE RODRIGUEZ, was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.

18.

That as a direct and proximate result of the negligence, carelessness and recklessness of Defendants PALMS RESORT, JANE DOE #1, and/or ROE BUSINESS ENTITY #1, and/or their employees, agents or assigns, and each of them, Plaintiff, ENRIQUE RODRIGUEZ, has incurred and continues to incur medical expenses, economic losses, possible future medical expenses and economic losses, and loss of enjoyment of life, all to Plaintiff's damages in an amount in excess of TEN THOUSAND DOLLARS ($10,000).

SECOND CAUSE OF ACTION

(PALMS RESORT; ROE BUSINESS ENTITY #1: Negligent Employee Hiring, Training, Retention and Supervision)

19.

Plaintiff realleges and reasserts each and every statement contained in the above Paragraphs, inclusive. Plaintiff further alleges as follows:

20.

At all time relevant hereto, Defendant PALMS RESORT and/or ROE BUSINESS ENTITY #1, and each of them, was the employer of and/or otherwise in control of Defendant, JANE DOE #1.

21.

At and before the time of the subject incident, Defendants PALM RESORT and ROE BUSINESS ENTITY #1, and each of them, had a duty to adequately and reasonably hire, train, and supervise Defendant JANE DOE #1, and a related duty to effectuate and implement adequate and reasonable policies and procedures with respect to the conduct of their, and each of their, employees.

22.

At all times pertinent hereto, Defendants PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them, negligently and carelessly breached said standard of care by, but not limited to, failing to ascertain said Defendants qualifications and ability to responsibly perform her duties, failing to instruct said Defendant regarding safe and reasonable methods of distributing souvenirs to a crowd, failing to instruct said Defendant in safe and reasonable methods of crowd control, instructing and allowing for the distribution of souvenirs while blindfolded, failing to create and disseminate clear and concise written and/or verbal protocols with respect to the same, and/or by retaining said Defendant when it was known, or should have been known, that she was incapable of safely performing her work activities.

23.

That as a direct and proximate result of the negligent and careless hiring, training, supervision and retention of Defendant JANE DOE #1 by Defendants PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them, Plaintiff, ENRIQUE RODRIGUEZ, was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.

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24.

That as a direct and proximate result of the negligent and careless hiring, training, supervision and retention of Defendant JANE DOE #1 by Defendants PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them, Plaintiff ENRIQUE RODRIGUEZ, sustained personal injuries and has incurred, and continues to incur, medical expenses, loss of income, loss of earning capacity, disability, property damage and loss of enjoyment of life, all to Plaintiff's special and general damages in an amount in excess of TEN THOUSAND DOLLARS ($10,000).

THIRD CAUSE OF ACTION:

(PALMS RESORT: Punitive Damages)

25.

Plaintiff reaffirms and realleges all of the allegations contained in the paragraphs above as though fully set herein. Plaintiff further alleges as follows:

26.

The aforesaid actions and omissions of Defendants PALMS RESORT, ROE BUSINESS ENTITIY #1, JANE DOE #1, were malicious, intentional, oppressive and/or in conscious and reckless disregard of the consequences to PALMS RESORT patrons, and in particular to Plaintiff ENRIQUE RODRIGUEZ.

27.

As a direct and proximate result of the aforesaid malicious, intentional, oppressive or consciously and recklessly disregarded actions of said Defendants, and each of them, Plaintiff ENRIQUE RODRIGUEZ, was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.

28.

That as a direct and proximate result of aforesaid malicious, intentional, oppressive or recklessly disregarded actions and omissions of Defendants, and each of them, Plaintiff ENRIQUE RODRIGUEZ, sustained personal injuries and has incurred, and continues to incur, medical expenses, loss of income, loss of earning capacity, disability, property damage and loss of enjoyment of life, all to Plaintiff's special and general damages in an amount in excess of TEN THOUSAND DOLLARS ($10,000).

WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them, as follows:

FIRST CAUSE OF ACTION

1. For general damages and loss in an amount in excess of TEN THOUSAND DOLLARS ($10,000);

2. For special damages in an amount to be determined at time of trial;

3. For loss of income and earning capacity in an amount as yet undetermined;

4. For reasonable attorneys fees, pre and post-judgment interest, and costs of suit; and

5. For such other and further relief as the Court may deem just andproper.

SECOND CAUSE OF ACTION

1. For general damages and loss in an amount in excess of TEN THOUSAND DOLLARS ($10,000);

2. For special damages in an amount to be determined at time of trial;

3. For loss of income and earning capacity in an amount as yet undetermined;

4. For reasonable attorneys fees, pre and post-judgment interest, and costs of suit; and

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5. For such other and further relief as the Court may deem just and proper.

THIRD CAUSE OF ACTION

1. For general damages and loss in an amount in excess of TEN THOUSAND DOLLARS ($10,000);

2. For special damages in an amount to be determined at time of trial;

3. For punitive damages in an amount to be determined at trial;

4. For loss of income and earning capacity in an amount as yet undetermined;

5. For reasonable attorneys fees, pre and post-judgment interest, and costs of suit; and

6. For such other and further relief as the Court may deem just and proper.

DATED this 13th ~~day of~~ November, 2006.

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

By: ______________________
W. JONATHAN WEBER, ESQ.
Nevada Bar No. 7554
7408 W. Sahara Avenue
Las Vegas, Nevada 89117
Attorneys for Plaintiff

No. 2

No. 2

ORIGINAL

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STEVEN M. BAKER
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ENRIQUE RODRIGUEZ, an individual, Plaintiff, vs. FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO: A531538 DEPT NO: 10 **AMENDED COMPLAINT**

COMES NOW the Plaintiff ENRIQUE RODRIGUEZ, by and through his attorney of record Steven M. Baker, Esq., of the law firm of BENSON, BERTOLDO, BAKER & CARTER, and for his claims of relief against the Defendants, and each of them, alleges and complains as follows:

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1.

That Plaintiff, ENRIQUE RODRIGUEZ was at the time of the incident, a resident of Riverside County, State of California.

2.

That at all times herein mentioned, Defendant, Fiesta Palms, L.L.C., d/b/a The Palms Casino Resort (hereinafter, collectively referred to as "PALMS RESORT") was, and still is, a

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Nevada Limited Liability Company duly authorized and regularly conducting business within Clark County, State of Nevada.

3.

That at all times herein mentioned, Defendant BRANDY L. BEAVERS was and is a resident of Clark County or the State of Nevada, now residing in the State of Arizona.

4.

That the true names and capacities of the Defendants Does I through X, inclusive, and Roe Business Entities I through X, inclusive, and each of them, are unknown to Plaintiffs, who, therefore, sues said Defendants by said fictitious names. Defendants designated as Does I through X are individuals who, as herein alleged, were participating in the events described herein as either as Palm Girl, a patron of the subject Sports Book/Sports Bar, and/or are individuals responsible for training, supervising, and/or controlling the subject premises, the conduct of the Palm Girls, and/or the activities occurring at the time and place alleged herein. Plaintiff is informed, believes and thereon alleges that each of the Defendants designated as Doe is in some manner negligently and/or statutorily responsible for the events and happenings referred to and caused damages proximately to Plaintiff Enrique Rodriguez as herein alleged. Plaintiff will ask leave of the Court to amend his Complaint to insert the true names of such Defendants when the same have been ascertained.

5.

That the true names and capacities of the Defendants Roe Business Entities I through X, inclusive, are unknown to Plaintiff, who, therefore sues said Defendants by said fictitious names. Defendants designated as Roe Business Entities I through X are owners, operators, agents, employers, employees, assigns, maintainers, inspectors, predecessors and/or successors in interest, contractors, subcontractors, political subdivisions, governmental bodies, insurers or entities otherwise in possession and/or control of the persons and/or premises mentioned herein and/or are agencies, corporations and/or business interests employing, training, contracting, and/or otherwise responsible for the services of the Palm Girls and/or the activities occurring on

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1 the subject premises at the time and place alleged herein. Plaintiff is informed and believes and
2 thereon alleges that each of the Defendants designated as a Roe Business Entity is in some
3 manner negligently, vicariously, statutorily, contractually, jointly and/or severally or otherwise
4 responsible for the events and happenings referred to and caused damages proximately to
5 Plaintiff as herein alleged. Plaintiff will ask leave of the Court to amend his Complaint to insert
6 the true names of such Defendants when the same has been ascertained.

7 6.

8 That at all times pertinent hereto, and particularly on or about November 22, 2004,
9 Defendant Palms Resort owned, operated, maintained and controlled a sports bar/book open to
10 the public, located within the Palms Resort, 4321 West Flamingo Road, Las Vegas, Nevada
11 89103.

12 7.

13 That on or about November 22, 2004, Plaintiff, ENRIQUE RODRIGUEZ was on the
14 premises of Defendant PALMS RESORT as a patron thereof.

15 8.

16 That on November 22, 2004, Plaintiff ENRIQUE RODRIGHUZ went to the Palms'
17 sports bar/book to watch a football game. During half-time, agents, employees, and/or assigns of
18 the Palms and, in particular, Defendant BRANDY L. BEAVERS were participating in a
19 promotion wherein they were throwing souvenirs to Sports Book/Sports Bar patrons while
20 blindfolded.

21 9.

22 That the agents, employees, and/or assigns of the Palms Resort known as the Palm Girls
23 were contracted from, supplied by, and/or otherwise provided by an agency, company, and/or
24 other business entity hereby designated as Roe Business Entity.

25 10.

26 In response to Palm Girl BRANDY L. BEAVERS throwing souvenirs in the Sports
27 Book/Sports Bar while blind-folded, a customer within the Sports Book/Sports Bar dove for a
28

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thrown souvenir and hit Plaintiff's extended and stationary left knee. Plaintiff then struck the person next to him, hitting the left side of his head, then falling down, thereby sustaining the injuries and damages alleged herein.

FIRST CAUSE OF ACTION
(Negligence of BRANDY L. BEAVERS and PALMS RESORT)

11.

That on or about November 22, 2004, Defendant BRANDY L. BEAVERS negligently, carelessly, and recklessly threw souvenirs into the crowd at the Palms Resort sport book while blindfolded,, thereby causing an unknown patron of the Sports Book/Sports Bar to impact with Plaintiff Enrique Rodriguez's knee, thereby causing the injuries and damages complained of herein.

12.

That on or about November 22, 2004, Defendant, PALMS RESORT, and/or its employees, agents or assigns, negligently, carelessly and recklessly caused, allowed, and permitted Defendant BRANDY L. BEAVERS to throw said souvenirs while blindfolded, thereby causing an unknown patron of the Sports Book/Sports Bar to impact with Plaintiff Enrique Rodriguez's knee, thereby causing the injuries and damages alleged herein.

13.

That on or about November 22, 2004, Defendant PALMS RESORT, Roe Business Entity, and/or its employees, agents or assigns, negligently, carelessly and recklessly caused, allowed, and permitted Defendant BRANDY L. BEAVERS to throw said souvenirs, thereby causing an unknown patron of the Sports Book/Sports Bar to impact with Plaintiff Enrique Rodriguez's knee, thereby causing the injuries and damages alleged herein.

14.

That the aforesaid acts of Defendants PALMS RESORT, BRANDY L. BEAVERS and/or Roe Business Entity, and/or their employees, agents or assigns were breaches of the duty of reasonable care owed by said Defendants to Sports Book/Sports Bar patrons, and in particular to Plaintiff ENRIQUE RODRIGUEZ.

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15.

That all acts and omissions alleged with respect to Defendant BRANDY L. BEAVERS occurred while said Defendant was acting within the scope and course of her agency, employment and or assignment with Defendant PALMS RESORT and Roe Business Entity, and each of them. Defendants PALMS RESORT and Roe Business Entity, and each of them, are therefore vicariously, contractually, statutorily and/or otherwise liable for the negligence, carelessness and recklessness of Defendant BRANDY L. BEAVERS as alleged herein.

16.

As a direct and proximate result of the negligence, carelessness and recklessness of Defendants PALMS RESORT, BRANDY L. BEAVERS and/or Roe Business Entity, and/or their employees, agents or assigns, and each of them, Plaintiff, ENRIQUE RODRIGUEZ, was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.

17.

That as a direct and proximate result of the negligence, carelessness and recklessness of Defendants PALMS RESORT, BRANDY L. BEAVERS, and/or Roe Business Entity, and/or their employees, agents or assigns, and each of them, Plaintiff ENRIQUE RODRIGUEZ has incurred and continues to incur medical expenses, economic losses, possible future medical expenses and economic losses, and loss of enjoyment of life, all to Plaintiff's damages in an amount in excess of Ten Thousand Dollars ($10,000).

SECOND CAUSE OF ACTION
(PALMS RESORT and ROE BUSINESS ENTITY
Negligent Employee Hiring, Training, Retention, and Supervision)

18.

Plaintiff repleads and realleges each and every statement contained in the preceding paragraphs as though fully set forth herein.

19.

At all time relevant hereto, Defendants PALMS RESORT and/or Roe Business Entity, and each of them, was the employer of and/or otherwise in control of Defendant BRANDY L. BEAVERS.

20.

At and before the time of the subject incident, Defendants PALMS RESORT and Roe Business Entity, and each of them, had a duty to adequately and reasonably hire, train, and supervise Defendant BRANDY L. BEAVERS and a related duty to effectuate and implement adequate and reasonable policies and procedures with respect to the conduct of their, and each of their, agents and/or employees.

21.

At all times pertinent hereto, Defendants PALMS RESORT and Roe Business Entity, and each of them, negligently and carelessly breached said standard of care by, but not limited to, failing to ascertain said Defendant BRANDY L. BEAVERS', qualifications and ability to responsibly perform her duties, failing to instruct said Defendant regarding safe and reasonable methods of distributing souvenirs to a crowd, failing to instruct said Defendant in safe and reasonable methods of crowd control, failing to create and disseminate clear and concise written and/or verbal protocols with respect to the same, and/or by retaining said Defendant when it was known, or should have been known, that she was incapable of safely performing her work activities.

22.

That as a direct and proximate result of the negligent and careless hiring, training, supervision and retention of Defendant BRANDY L. BEAVERS by Defendants PALMS RESORT and Roe Business Entity, and each of them, Plaintiff, ENRIQUE RODRIGUEZ was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.

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23.

That as a direct and proximate result of the negligent and careless hiring, training, supervision and retention of Defendant BRANDY L. BEAVERS by Defendants PALMS RESORT and Roe Business Entity, and each of them, Plaintiff ENRIQUE RODRIGUEZ sustained personal injuries and has incurred, and continues to incur, medical expenses, loss of income, loss of earning capacity, disability, property damage and loss of enjoyment of life, all to Plaintiff's special and general damages in an amount in excess of Ten Thousand Dollars ($10,000).

THIRD CAUSE OF ACTION
(PALMS RESORT AND BRANDY L. BEAVERS – Punitive Damages)

24.

Plaintiff repleads and realleges each and every statement contained in the preceding paragraphs as though fully set forth herein.

25.

The aforesaid actions and omissions of Defendants PALMS RESORT, BRANDY L. BEAVERS, and Roe Business Entity, were malicious, intentional, oppressive and/or in conscious and reckless disregard of the consequences to patrons of Defendant PALMS RESORT, and, in particular, to Plaintiff ENRIQUE RODRIGUEZ.

26.

As a direct and proximate result of the aforesaid malicious, intentional, oppressive or consciously and recklessly disregarded actions of said Defendants, and each of them, Plaintiff ENRIQUE RODRIGUEZ was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.

27.

That as a direct and proximate result of aforesaid malicious, intentional, oppressive or recklessly disregarded actions and omissions of said Defendants, and each of them, Plaintiff ENRIQUE RODRIGUEZ sustained personal injuries and has incurred, and continues to incur,

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medical expenses, loss of income, loss of earning capacity, disability, and loss of enjoyment of life, all to Plaintiff's special and general damages in an amount in excess of Ten Thousand Dollars ($10,000).

WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them, as follows:

FIRST CAUSE OF ACTION

1. For general damages and loss in an amount in excess of Ten Thousand Dollars ($10,000);
2. For special damages in an amount to be determined at time of trial;
3. For loss of income and earning capacity in an amount as yet undetermined;
4. For reasonable attorney's fees, pre and post-judgment interest, and cost of suit; and
5. For such other and further relief as the Court may deem just and proper.

SECOND CAUSE OF ACTION

1. For general damages and loss in an amount in excess of Ten Thousand Dollars ($10,000);
2. For special damages in an amount to be determined at time of trial;
3. For loss of income and earning capacity in an amount as yet undetermined;
4. For reasonable attorneys fees, pre and post-judgment interest, and cost of suit; and
5. For such other and further relief as the Court may deem just and proper.

THIRD CAUSE OF ACTION

1. For general damages and loss in an amount in excess of Ten Thousand Dollars ($10,000);
2. For special damages in an amount to be determined at time of trial;
3. For punitive damages in an amount to be determined at trial;
4. For loss of income and earning capacity in an amount as yet undetermined;

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5. For reasonable attorneys fees, pre and post-judgment interest, and cost of suit; and

6. For such other and further relief as the Court may deem just and proper.

DATED: July 6, 2009

BENSON, BERTOLDO, BAKER & CARTER

By:____________________

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of BENSON, BERTOLDO, BAKER & CARTER and that on the 8th day of July, 2009, I served a true and correct copy of the above and foregoing Amended Complaint on the parties as shown below:

X Via U.S. Mail by placing said document in a sealed envelope, with postage prepaid [N.R.C.P. 5(b)]

_____ *Via* facsimile [E.D.C.R. 7.26(a)]

_____ *Via U.S.* Mail [N.R.C.P. 5(b)] and *via* facsimile [E.D.C.R. 7.26(a)]

addressed as follows:

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By: Susan C. Rhodes
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