IN THE SUPREME COURT OF THE STATE OF NEVADA

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FCH1, LLC, A NEVADA LIMITED LIABILITY COMPANY F/K/A FIESTA PALMS, LLC, D/B/A THE PALMS CASINO RESORT,

Appellant,

vs.

No. 59630

ENRIQUE RODRIGUEZ, AN INDIVIDUAL,

Respondent.

______________________________________/

**APPEAL FROM JUDGMENT AFTER BENCH TRIAL
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA
HONORABLE JESSIE WALSH, DISTRICT JUDGE**

****

APPELLANT'S OPENING BRIEF

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Docket 59630 Document 2012-25541

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

FCH1, LLC, A NEVADA LIMITED
LIABILITY COMPANY F/K/A FIESTA
PALMS, LLC, D/B/A THE PALMS
CASINO RESORT,

Appellant,

vs. No. 59630

ENRIQUE RODRIGUEZ, AN
INDIVIDUAL,

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_______________________________________/

NRAP 26.1 DISCLOSURE

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

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

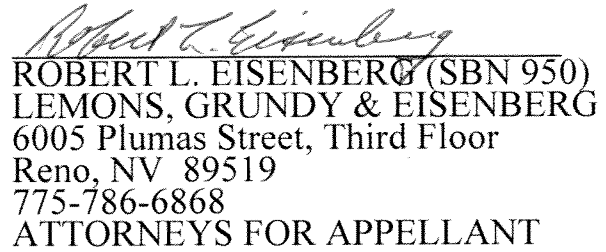
2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg
Archer Norris
Lionel Sawyer & Collins
Stephenson & Dickinson, P.C.
Moran Law Firm, LLC

////

3. If litigant is using a pseudonym, the litigant's true name: None

DATED: July 17, 2012.



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JURISDICTIONAL STATEMENT

On February 15, 2012, the district court entered an "Amended Judgment On The Verdict" (6 App. 1279). Fiesta Palms believes this is the final judgment, which is appealable. NRAP 3A(b)(1). The appeal was timely because no written notice of entry was served; in any event, the notice of appeal was filed within 30 days after entry of the Amended Judgment. 6 App. 1282. The Palms previously filed a notice of appeal from an order denying a motion for new trial. 6 App. 1225-26. The order was appealable [NRAP 3A(b)(2)]; the appeal was timely, because it was filed on November 4, 2011 [6 App. 1225], which was within 30 days after notice of entry.

STATEMENT OF ISSUES

1. Whether there was sufficient evidence and an appropriate legal basis to support the judge's decision on liability.

2. Whether the district court erred by allowing four treating physicians to render expert opinions at trial, over objection, far beyond the scope of their treatment, when their opinions had not been previously disclosed to defense counsel; and whether the district court erred by allowing these same doctors to speculate regarding the opinions of other doctors who did not testify.

3. Whether the district court erred by admitting testimony of plaintiff's economist, who speculated and had no foundation for his testimony.

4. Whether the district court erred by striking the testimony of two defense experts.

STATEMENT OF CASE

Respondent Enrique Rodriguez (plaintiff) filed a complaint alleging that he was injured on November 22, 2004, while watching a televised football game at the sports book at the Palms in Las Vegas. 1 App. 3-4. He alleged that a "Palms Girl" tossed a promotional souvenir item to the crowd at half time; another customer dove

for the souvenir and bumped into plaintiff's left knee; and plaintiff was injured as a result of the incident. 1 App. 3-4.

Judge Jessie Walsh held a bench trial in 2010. She granted plaintiff's motion for judgment as a matter of law (JMOL) on liability; and the judge issued a "verdict" awarding damages totaling $6,051,589. 2 App. 265-68a (JMOL), 273-74 (verdict). After various post-trial motions, the judge eventually entered a final judgment in the amount of $6,627,763, including prejudgment interest and recoverable costs. 6 App. 1279-81. This appeal followed.

STATEMENT OF FACTS

On November 22, 2004, plaintiff and his wife were staying at Harrah's hotel in Las Vegas. 8 App. 1459. Plaintiff left his wife at Harrah's, and he went to the sports book at the Palms to watch a Monday Night Football game. 8 App. 1461-62. When he arrived at the sports book, he saw women dressed as cheerleaders, whom he believed to be Palms employees, tossing souvenirs to the audience, such as t-shirts, souvenir footballs and water bottles.[1] 8 App. 1464-66. When the cheerleaders threw items to the audience, plaintiff could see people jumping, putting their hands in the air, moving, and "going wherever items went." 8 App. 1467. Plaintiff stood at an entrance to the sports book watching the televised football game for more than an hour as the cheerleaders occasionally threw souvenirs to the audience. 8 App. 1465-66. He saw cheerleaders throw souvenirs to the audience at least six times, and he did not think this was a dangerous activity. 8 App. 1465-66, 1534. If he had thought it was dangerous, he would have left the premises. *Id.*

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[1] The water bottle souvenirs were light-weight empty plastic bottles, not bottles full of water. 8 App. 1529.

While plaintiff was standing near the sports bar entrance observing the evening's activities, an empty bottle landed on the floor nearby. 8 App. 1468, 1535. Another patron suddenly leaped out of her chair, turned around, and ran toward where plaintiff was standing. 8 App. 1468. She took "a total dive, body dive," apparently attempting to retrieve the souvenir, and she bumped into plaintiff's knee. *Id.* Plaintiff testified that the female customer's action was "absolutely" very unusual. 8 App. 1534. Plaintiff did not know the other patron was going to react in that manner, and it did not appear that anybody else knew she was going to do that. 8 App. 1534. Plaintiff testified:

> Q Right. So, someone tossed a water bottle. It landed on the floor. It was already on the floor. And after it landed on the floor, this woman that you hadn't noticed before, got out of her chair and ran over and jumped for the water bottle, right?
>
> A Correct.
>
> Q And a complete surprise to you?
>
> A Absolutely.
>
> Q And as best as you can tell, a complete surprise to everybody else who was there?
>
> A Correct.
>
> Q She wasn't racing to get a water bottle that was flying through the air; was she?
>
> A No.
>
> Q Because the water bottle was already on the ground?
>
> A Correct.

8 App. 1535.

The cheerleader who tossed the souvenir to the audience was Brandy Beavers, who was a defendant in this lawsuit, but who was defaulted when she did not answer. 3 App. 719:25. The patron who bumped into plaintiff's knee was never identified.

Plaintiff sued the Palms for negligence. 1 App. 1. After a 12-day bench trial, Judge Jesse Walsh granted plaintiff's motion for judgment as a matter of law on the issue of liability. 2 App. 265-68(a). Based upon testimony of two Palms employees, who expressed their personal opinions that promotional items should not be tossed to spectators at a sports book, the judge found liability against the Palms, as a matter of law. *Id.* The judge's finding of liability did not identify the theory or cause of action on which liability was imposed. In fact, the entire order, which was prepared by plaintiff's counsel, did not even mention the words "negligent" or "negligence." *Id.* A few days later, the judge entered a "verdict," awarding approximately $6 million in damages. 2 App. 273-74.

SUMMARY OF ARGUMENT

The activity at the Palms -- tossing souvenirs to an audience -- is something that occurs virtually every day at sporting events and other entertainment venues around the country. Plaintiff observed this activity at least six times, for more than an hour at the Palms sports book, as he watched the football game and the cheerleaders. Nobody could have reasonably anticipated that another spectator would suddenly jump out of her chair, run toward a souvenir on the floor at plaintiff's feet, then "take a total dive, body dive" into plaintiff's knee. 8 App. 1468:11-12. Even plaintiff himself conceded, based on his personal observations, that the Palms' activity of tossing souvenirs to the audience was not dangerous, and that the other spectator's behavior was highly unusual and a complete surprise to everyone who was there. 8 App. 1535. There was insufficient evidence and no appropriate legal basis to support the judge's decision on liability -- a decision that, if affirmed, would detrimentally change entertainment at sporting and other events everywhere in this state.

Plaintiff disclosed dozens of medical providers before trial, identifying all of the doctors as "treating" doctors, and failing to provide any medical expert witness disclosures. The judge allowed plaintiff to use four of these doctors as witnesses at trial, to testify regarding opinions contained in all of the other doctors' records, and to express opinions far beyond opinions that were formed during the testifying doctors' treatment of plaintiff. These important medical opinions were never disclosed to the Palms before trial. This was contrary to Nevada discovery rules, resulting in severe prejudice to the defense. The district court also erred by allowing the testifying doctors to speculate as to what other non-testifying doctors would opine if the non-testifying doctors were provided with certain information.

The district court also erred by admitting speculative testimony of plaintiff's economist, who relied upon woefully inadequate information and back-dated tax returns prepared after the litigation was initiated (long after the tax years of the returns).

Two important defense experts expressed their opinions at trial, without objection. After they finished their testimony and were gone, plaintiff's counsel moved to strike their testimony because they did not use the phrase "reasonable degree of probability" in expressing their opinions. The judge erred by granting the motion and striking the testimony, because the use of such phrases by experts is not required.

ARGUMENT

A. No liability as a matter of law

Standard of review: In a negligence case, whether a duty exists is a question of law reviewed de novo. *Turner v. Mandalay Sports Entertainment,* 124 Nev. 213, 220-21, 180 P.3d 1172, 1177 (2008). Lack of liability, based upon undisputed facts, can also be determined de novo. E.g. *Turner, supra*; see *American Sterling Bank v.*

Johnny Management LV, Inc., 126 Nev. __, 245 P.3d 535, 538 (2010) (when facts are undisputed, effect of application of facts and law is reviewed de novo).

1. Lack of negligence by the Palms

Negligence is the failure to use the care that a reasonable, prudent person would exercise under the same circumstances. *Sherburne v. Miller,* 94 Nev. 585, 590, 583 P.2d 1090, 1093 (1978) (Batjer, C.J., dissenting); *Driscoll v. Erreguible,* 87 Nev. 97, 101, 482 P.2d 291, 294 (1971) ("Negligence is failure to exercise that degree of care in a given situation which a reasonable man in similar circumstances would exercise.").

Here, the cheerleaders were not throwing dangerous objects, such as knives, to an unsuspecting crowd. They were merely tossing souvenirs to customers during a televised football game at a casino sports book. Plaintiff watched the cheerleaders toss souvenirs to the audience at least six times, for more than an hour. He could have easily left the Palms and gone back to his own hotel if he thought there was any danger. But he perceived no danger in the activities at the sports book.

Plaintiff never called an expert witness to testify that the activity at the Palms was dangerous or below the standard of care for hotel/casinos, or that it was reasonably foreseeable that another patron would leap to her feet and make a "total body dive" for a souvenir. In fact, plaintiff conceded that the other patron's conduct came as a complete surprise to him and everyone else.

The defense expert, Forrest Franklin, testified that tossing promotional items to an audience is a regularly-accepted and common occurrence at a wide variety of events, including sports, conventions and entertainment events.[2] There was no

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[2] The district court granted a motion to strike Franklin's opinion that the Palms did not violate the standard of care for such businesses. This ruling (continued)

evidence that any other spectator had ever been injured at the Palms sports bar--or, for that matter, at any other hotel/casino sports bar--as a result of tossing harmless souvenirs to patrons during a live or televised sporting event. 8 App. 1442:15-23.

This situation is similar to *Turner, supra*, where a spectator was hit by a foul ball as she sat in a baseball stadium's concession area. The spectator sued the stadium owner, contending that the owner was negligent by not placing a protective screen around the concession area. The district court granted summary judgment to the owner, and the plaintiff appealed. This court affirmed, holding that the stadium owner satisfied its duty to customers by providing protection in the most dangerous parts of the stadium (such as directly behind home plate), and providing some protected areas for other spectators. *Id.* at 217-18, 180 P.3d at 1175-76. Having done so, the owner "simply has no remaining duty to protect spectators from foul balls, which are a known, obvious, and unavoidable part of all baseball games." *Id.* The *Turner* court recognized that limiting a stadium owner's duty limits litigation, that might "signal the demise or substantial alteration of the game of baseball as a spectator sport." *Id.*

Applying the limited duty rule in *Turner,* the court noted that the plaintiff chose to sit in an unprotected seating area of the stadium, and that this area was not a dangerous area that posed "an unduly high risk of injury" from foul balls. *Id.* at 219, 180 P.3d at 1176. The court noted that foul balls occasionally flew into this area, but the risk of an occasional foul ball "does not amount to an unduly high risk of injury." *Id.* The court also noted that the plaintiff "has conspicuously failed to demonstrate

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(continued) will be discussed below. Even if the district court did not err by striking Franklin's opinion, the undisputed fact remains that tossing promotional items to an audience is a common and accepted occurrence at a wide variety of events, including sports, conventions and entertainment events.

that any other spectator suffered injuries as a result of errant balls landing in the [area where plaintiff was seated]." *Id.* Thus, the stadium owner was entitled to judgment as a matter of law.[3] *Id.*

In rejecting liability, *Turner* cited an A.L.R. annotation dealing with liability to spectators. 124 Nev. at 218, fn. 8, citing *James L. Rigelhaupt, Jr.,* Annotation, *Liability to Spectator at Baseball Game Who Is Hit by Ball or Injured as Result of Other Hazards of Game,* 91 A.L.R.3d 24 (1979) (electronically updated as of 2008). The annotation cited *Loughran v. The Phillies,* 888 A.2d 872 (Pa. Super. 2005), where an outfielder intentionally threw a baseball to fans after the last out of an inning. The ball hit the plaintiff's face, causing severe injuries. He sued the stadium owner for negligence. The trial court granted summary judgment for the defendant.

The *Loughran* court affirmed, applying the rule that there is no duty for injuries arising out of activities that are common, frequent or expected parts of the game of baseball. The real issue, however, was whether intentionally throwing a baseball to fans is a customary or expected part of the game. The court held that this is a customary part of the game. Determining what is a customary part of the game is not limited to the actual game itself. Instead, the court considered "the actual everyday goings on that occur both on and off the baseball diamond." *Id.* at 875. A court "must consider as 'customary' those activities that although not specifically sanctioned by baseball authorities, have become as integral a part of attending a game as hot dogs, crackerjack, and seventh inning stretches." *Id.*

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[3] The duty analysis includes primary implied assumption of the risk, which arises when the plaintiff impliedly assumes risks that are inherent in a particular activity. *Turner,* 124 Nev. at 220-21, 180 P.3d at 1177. Here, plaintiff watched cheerleaders toss souvenirs to the audience at least six times, and he remained at the premises. Surely he impliedly assumed the risk of the activity, just like the plaintiff in *Turner.*

The court observed that fans "routinely arrive early for batting practice in hopes of retrieving an errant baseball as a souvenir, and fans routinely clamor to retrieve baseballs landing in the stands via home runs or foul balls." *Id.* Although these activities are not technically part of the game, these activities "have become inextricably intertwined with a fan's baseball experience, and must be considered a customary part of the game." *Id.* at 876. "Similarly, both outfielders and infielders routinely toss caught balls to fans at the end of an inning." *Id.*

The *Loughran* court also noted that balls had been tossed to fans by players before the plaintiff's injury. *Id.* The plaintiff had attended baseball games in the past, and he had witnessed balls being tossed into the stands. *Id.* "Even a casual baseball spectator would concede it was not uncommon for a player to toss a memento from the game to nearby fans." Thus, the injuries the plaintiff received "constituted an inherent risk of the game." *Id.* The court concluded that the plaintiff failed to establish that the defendants "deviated from the common and expected practices of the game of baseball." *Id.* at 877.

The case of *Pira v. Sterling Equities, Inc.*, 790 N.Y.S.2d 551 (N.Y. App. Div. 2005) was also cited in the annotation relied upon by *Turner*. The *Pira* plaintiff was struck by a baseball that had been tossed to fans as a souvenir by a pitcher after his pre-game warmup. The fan sued the stadium operator, and the trial court granted summary judgment for the defendant. The appellate court affirmed, noting that "it is not unusual for a player to toss a ball into the stands." *Id.* at 551.

Liability has also been denied in other cases where the injury resulted from the defendant's activity that was not directly part of the game itself. For example, in *Harting v. Dayton Dragons*, 870 N.E.2d 766 (Ohio App. 2007), referenced in the annotation cited in *Turner*, the plaintiff was hit by a baseball. She alleged that her attention was distracted by the antics of a mascot providing entertainment during the

game. The plaintiff argued, in essence, that the stadium should have provided additional safety measures for the fans, because of the intended distraction of the mascot. The appellate court affirmed summary judgment in favor of the defendants, noting that the plaintiff had knowledge of the danger and acquiesced in it. *Id.* at 768.

The plaintiff in *Harting* argued that the mascot's antics created a danger that was not an inherent risk of a baseball game. The court rejected this argument. "This argument ignores the fact that team mascots and their antics are common phenomena and the mascots are normally present during the entire course of the game." *Id.* at 770. In many cases "the team mascots are more popular than the team itself." *Id.* The distraction caused by the mascot did not create liability by increasing the dangers of attending the baseball game. *Id.* The plaintiff understood the risks associated with being a spectator at the baseball game, including her distraction by the antics of the mascot, and liability was therefore precluded. *Id.* at 770-71.

In the present case, plaintiff attended a televised football game at a hotel/casino sports book. He spent more than an hour watching the football game and the cheerleaders. He saw the cheerleaders toss souvenirs to the audience at least six times before the incident in question. He and his wife had a room at another hotel. He could have simply left the Palms if he thought there was even the slightest danger created by souvenirs being tossed to the audience. He perceived no danger, so he stayed to watched the activities. And as he expressly conceded at trial, it was a complete surprise, to him and everyone else, that another patron would jump up from her seat and take a "total body dive" for a souvenir water container that landed on the floor nearby.

Additionally, only one expert witness testified on liability, and his testimony pointed out the obvious: tossing souvenirs to audiences at sporting events and other entertainment venues is a very common, well-accepted activity. 12 App. 2353-54,

59-60, 70-71. In fact, the expert testified that tossing promotional items to an audience is an activity that is done even at the convention of the world's largest organization of security professionals. 12 App. 2353-54.

Plaintiff's counsel elicited testimony that an injury resulting from tossing a souvenir to a crowd is a "foreseeable" risk of the activity. 8 App. 1412:18-20, 1414:2-5. But such a risk is only "foreseeable" in the sense that an injury is theoretically possible. 8 App. 1412:18-20 (it is foreseeable that somebody could "possibly" get injured), 1414:2-5 (foreseeable that somebody "might" be hurt). Injuries are theoretically possible from virtually every activity, and the mere remote possibility of an injury does not create a duty by a premises owner. There is only a duty to safeguard against risks and injuries that are "reasonably foreseeable." *Butler v. Bayer,* 123 Nev. 450, 464, 168 P.3d 1055, 1065 (2007).

Pursuant to NRS 651.015, a hotel owner is not liable for injury to a patron caused by a non-employee of the owner, unless the wrongful act which caused the injury was foreseeable. This statute applies to hotel/casinos. <u>See</u> *Estate of Smith v. Mahoney's Silver Nuggett,* 127 Nev.___, 265 P.3d 688 (2011). In *Smith*, a patron was fatally shot by another patron at a casino bar. In a wrongful death action, the district court granted summary judgment for the defendant casino. This court affirmed, applying NRS 651.015, and holding that "foreseeability" requires consideration of "evidence of prior similar acts." *Id.* at ___, 265 P.3d at 690. The shooting in *Smith* was <u>not</u> foreseeable, primarily because there were no prior similar acts, despite the fact that such a shooting was theoretically possible. *Id.* at ___, 265 P.3d at 691-93.

In determining liability here, this court should consider public policy. *Turner* recognized that the imposition of tort liability on a baseball stadium owner "might signal the demise or substantial alteration of the game of baseball as a spectator sport." 124 Nev. at 218, 180 P.3d at 1176. A similar concern, i.e., that courts should be careful in rendering tort decisions that will fundamentally change the nature of

entertainment, was expressed in *Gilson v. Metropolitan Opera,* 788 N.Y.S.2d 342 (N.Y. App. Div. 2005), where an opera house allowed a patron to be seated after the house lights went down. He fell into another patron, causing injuries. The injured patron's lawsuit alleged that the premises owner was negligent by allowing the other patron to be seated after the theater was darkened. The *Gilson* court rejected liability, holding that the premises owner's conduct was not negligent, as a matter of law. *Id.* at 343-45. The court recognized that imposition of liability "could also lead to a new and heightened standard of care for all theatrical venues in which audience members sometimes take their seats after the house lights are turned down, such as movie theaters, concert halls and other arenas." *Id.* at 345. The court declined to impose such a sweeping change for entertainment venues. *Id.*

It is common knowledge that objects are tossed to spectators at sports venues virtually every day. Baseball players toss balls to spectators, and vendors toss bags of peanuts. Cheerleaders at basketball games toss t-shirts to the crowd. Mascots at football games use launching devices to distribute souvenirs to spectators. Professional golfers sometimes toss a ball to spectators after finishing a hole. The list is endless. These activities have become common parts of the experience of watching sports, as much as the sport itself. Spectators want and expect these activities, whether at live sports contests or at venues where sports are televised. In the present case, the district court's imposition of liability, if affirmed by this court, would drastically change the landscape of sports and entertainment, not just at sports venues that show televised events, but at live sporting and entertainment events. If affirmed, the district court's decision would essentially prohibit activities that spectators want, activities that are customary and expected parts of the sports events themselves.

2. Alleged violation of internal rule

The Palms had no written internal policy prohibiting souvenirs from being tossed to the audience during televised sporting events. 8 App. 1415, 1422. Nevertheless, plaintiff elicited testimony from two Palms employees who expressed their own personal opinions that it is inappropriate to throw promotional items to an audience. Sheri Long, the director of marketing, testified that she believed it was "inappropriate" to throw items to an audience. 8 App. 1412. She had a staff meeting, in which she expressed her belief to other employees. 8 App. 1411-12. She never generated a memorandum, guideline or policy on this issue; and she did not make her opinion part of any security manual or procedure guide. 8 App. 1410, 1415, 1422. Although Long believed the activity was inappropriate, she did not believe it was "unreasonable." 8 App. 1412:14-16.

Another witness, Vikki Kooinga, was an employee in the security department in November 2004. 8 App. 1435. She testified that there was no written policy or manual prohibiting promotional items from being tossed to the audience at promotional events. 8 App. 1437-38. Nonetheless, she testified as to her personal opinion that it is "inappropriate" to throw promotional items at a promotional event. 8 App. 1439:10-12. On cross-examination, Kooinga testified that there were no prior incidents at the Palms in which someone was injured as a result of an item being thrown to people at a promotional event. 8 App. 1442:15-23.

Based solely upon the testimony of Long and Kooinga, the district court granted judgment as a matter of law against the Palms. 2 App. 265-68. The district court determined that the testimony by Long and Kooinga somehow established a "safety procedure" and a "policy" against tossing items to patrons, and that this testimony "conclusively established" liability. 2 App. 267-68.

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There were two fatal flaws in the district court's ruling. First, the testimony of Long and Kooinga did not establish any company "policy." Although Long did express her personal opinion at a staff meeting, apparently instructing her underlings not to allow promotional items to be tossed to patrons, there was no evidence that Long's opinion was ever adopted as official Palms policy. It was only her personal point of view. The opinions of Long and Kooinga did not constitute binding judicial admissions against the Palms, for plaintiff's motion for JMOL. *Reyburn Lawn v. Plaster Development Co.*, 127 Nev. __, 255 P.3d 268, 276-77 (2011)(business owner's testimony could not be used as judicial admission of liability for JMOL).

Second, even if Long's opinion can be deemed a "policy" of the Palms, a violation of the policy did not equate to negligence. Negligence is the failure to exercise reasonable care. *Driscoll, supra*, 87 Nev. at 101, 482 P.2d at 294. A company policy might establish a higher standard. If liability were imposed due to a violation of a company's higher standard, the company would be required to pay damages even if the company's conduct was not negligent under the usual negligence standard of reasonable care. Indeed, in the present case the district court's four-page order, which found against the Palms on the issue of "liability," as a matter of law, did not discuss the standard of care for negligence. The words "negligent" and "negligence" are nowhere in the order. 2 App. 265-68. Although plaintiff's complaint was based upon negligence, the district court's order ignored the standard of care for negligence, and instead, the district court focused solely upon the concept of "liability," relying only on the testimony of Long and Kooinga.

In *Gilson, supra,* the court analyzed whether an internal rule should be used as a basis for negligence. The opera house allowed a patron to be seated after the lights went down, in violation of a house rule. The court held that the internal rule could not be used to impose liability, because the internal rule was "a standard that

transcends reasonable care." 788 N.Y.S.2d at 344. The court held that if liability were imposed on the opera house, based upon the internal guideline, the court would be punishing the defendant for attempting to ensure an exceptional level of conduct. *Id.* at 345. A defendant should not be punished for adopting an internal standard that raises the safety standard to a level higher than the usual standard of care for negligence. To do so would deter companies from adopting higher safety standards.

This court has recognized that a company's internal manual is admissible in evidence, to assist the trier of fact in determining the reasonableness of the company's behavior. *K-Mart Corp. v. Washington,* 109 Nev. 1180, 1188-89, 866 P.2d 274, 279-80 (1993). Nonetheless, *K-Mart* certainly does not stand for the proposition that a company's violation of its internal policy conclusively establishes liability, as the district court found in the present case.

Accordingly, the district court erred by determining that the personal beliefs of Long and Kooinga established a company policy for the Palms; and the district court erred by concluding that if such a policy existed, its violation conclusively established liability. The district court never did conclude that the Palms was negligent.[4]

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[4] The district court's order granting plaintiff's motion for judgment as a matter of law on the issue of liability did not find that the Palms was negligent, only that the Palms was "liable" based upon the testimony on Long and Kooinga. 2 App. 265-68. The district court then entered a "verdict," which found the Palms to be at "fault," but which did not make a finding of negligence. 2 App. 273-74. The district court then entered findings of fact and conclusions of law in support of the verdict. 3 App. 722-24. Again, the district court found "liability" against the Palms, without ever finding that the Palms was negligent. *Id.*

B. Plaintiff's improper medical testimony

Standard of review: Plenary review applies to arguments on whether the trial court applied the proper legal standard in admitting expert testimony. *Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 505-06 (2007).

1. Plaintiff's pretrial disclosures

Plaintiff's counsel served mandatory discovery disclosures, including a witness list with 28 treating doctors and medical facilities, but no retained medical experts. 1 App. 20-27. Plaintiff gave only a vague, generic description of expected testimony, indicating that each witness would testify "as to Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby." *Id.* Plaintiff's witness disclosures gave no indication that any treating doctors would testify regarding matters beyond the scope of their own treatment rendered to plaintiff. 1 App. 20-28.

Plaintiff filed a fifth supplemental disclosure, adding six new treating medical providers; a sixth supplement, identifying one new treating doctor; and a seventh supplement, identifying nine additional treating medical witnesses. 1 App. 31-34, 36-37, 40-42. All of these disclosures gave only general statements that the witnesses would testify as to their knowledge of their treatment of plaintiff. *Id.* Plaintiff's supplemental disclosures gave no indication that any treating doctors had opinions regarding medical services provided by <u>other</u> doctors.

Plaintiff's counsel served numerous additional supplemental disclosures (the eighth, ninth, tenth, thirteenth and fourteenth supplemental disclosures), disclosing 21 treating medical providers. 1 App. 46-47, 51-52, 56-57, 64-65, 69-70. Like the previous disclosures, plaintiff simply indicated that each witness was "expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff,

and to the authenticity of the medical and billing records provided." *Id.* And like the previous disclosures, plaintiff gave no indication that any of these treating doctors had opinions beyond the scope of their own individual treatment rendered to plaintiff. *Id.*

Plaintiff did not disclose any retained medical expert who testified at trial. The only medical witnesses disclosed by plaintiff were treating physicians, with nothing more than the vague, generic descriptions of their testimony.[5] Plaintiff disclosed at least 28 such treating physicians and medical facilities. 1 App. 132. Shortly before trial, plaintiff filed a Pretrial Memorandum, in which he identified 17 witnesses to testify at trial. 1 App. 143. He did not identify any expert medical witnesses, other than four of his treating physicians. *Id.* And he never disclosed that any of these treating doctors would express opinions beyond the narrow scope of their own individual treatment rendered to plaintiff.

2. Testimony at trial

At trial, plaintiff's four treating doctors, to whom plaintiff's counsel had given copies of medical records from other doctors, offered expert opinions far beyond the scope of their treatment of plaintiff, despite the fact that their new expanded opinions were never disclosed to defense counsel. This issue was raised at a pretrial hearing, where the Palms objected, and where plaintiff's counsel argued that treating doctors can provide expert testimony regardless of whether they have been disclosed as expert witnesses. 1 App. 166. The district court admitted this testimony, over objection; the district court allowed defense counsel to have a continuing or standing objection based upon hearsay and relevance, and regarding the use of treating doctors

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[5] Plaintiff's supplemental expert disclosure mentioned a Dr. Mashood, but plaintiff apparently abandoned any reliance on this doctor, who was not called as a witness at trial. 2 App. 351.

to express opinions of non-testifying doctors. *Id.*; 10 App.1821; 11 App. 2046. The district court also allowed a continuing objection on the ground that the experts were not disclosed properly and they did not issue expert reports, pursuant to NRCP 16 and 26. 1 App. 166-67.

a. Dr. Schifini

At trial, the "treating" doctors gave expert opinions as to all of the other two dozen non-testifying health care providers. 1 App. 163-64 (chart). For example, Dr. Schifini had been retained by plaintiff's counsel as an expert medical witness on three other previous cases. 10 App. 1953. In this case, however, plaintiff's counsel characterized Dr. Schifini as a treating doctor. 10 App. 1814. He first saw plaintiff three years after the Palms incident. 10 App. 1817. He was later provided with "thousands of pages" of medical records from "many, many providers," which he reviewed, and on which he formed opinions. 10 App. 2021. He never spoke with Dr. Ferrante, a doctor at UCLA who saw plaintiff in 2006, and who performed a medical examination at the request of plaintiff's attorney. 10 App. 1819, 1956-57. The district court allowed Dr. Schifini to testify regarding Dr. Ferrante's qualifications and background, regarding Dr. Ferrante's diagnosis, and regarding whether Dr. Ferrante's treatment was necessary (i.e., resulting from the Palms incident). 10 App. 1819-25. The district court even allowed Dr. Schifini to speculate as to different opinions and conclusions that Dr. Ferrante "would come to" if Dr. Ferrante were to review additional records generated after his one visit with plaintiff in 2006. 10 App. 2032-34.

Dr. Schifini was also allowed to testify extensively regarding treatment by Dr. Larry Miller, a Los Angeles doctor. The district court allowed Dr. Schifini to testify regarding Dr. Miller's diagnosis, and regarding whether Dr. Miller's treatments were medically necessary and related to the Palms accident. 10 App. 1832-34. Dr. Schifini

gave similar testimony regarding at least five other medical providers. 1 App. 164-65 (summary).

Plaintiff's counsel had disclosed a life-care planning expert witness before trial, for opinions regarding the cost of future care, along with a detailed report and backup materials consisting of 40 pages. 2 App. 346 (Kathleen Hartmann disclosed), 423-63 (Hartmann's life-care plan). Plaintiff's counsel did not call this expert at trial. 10 App. 1945-47. Instead, the district court allowed plaintiff's counsel to present future medical expenses regarding the life-care plan through Dr. Schifini; the district court allowed Dr. Schifini to express never-disclosed opinions regarding the life-care plan; and, amazingly, the district court even allowed Dr. Schifini to express a new opinion at trial that the life-care plan that plaintiff's counsel had disclosed to defense counsel before trial was "probably one of the worst life care plans I've ever seen." 10 App. 2014:17-19.

In allowing Dr. Schifini to express previously-undisclosed criticisms of the life-care plan prepared by plaintiff's own expert (Hartmann), the judge allowed the doctor to express his opinion that expenses listed in Hartmann's life-care plan were too low by hundreds of thousands of dollars, and that Hartmann "just doesn't know what she's talking about." 10 App. 2015:25-2016:2. Dr. Schifini's new opinions regarding the life-care plan and the much higher future medical expenses were disclosed to defense counsel for the first time at trial. 1 App. 165; 10 App. 1945-48.

For example, Hartmann's life-care plan included $294,000 for a spine stimulator, but the district court allowed testimony from Dr. Schifini that this number was too low, and the number should have been $720,000. 3 App. 526; 10 App. 1886. Hartmann's life care plan also called for zero medical expenses for a future back fusion, and $80,000 to $160,000 for knee replacements. But the judge allowed Dr. Schifini to testify that these expenses should have been $686,000. 3 App. 526. Thus,

Dr. Schifini's previously-undisclosed numbers totaled nearly one million dollars more than Hartmann's numbers. Plaintiff's counsel himself contended that his own life-care planning expert, Hartmann, "had a bad day" and "got it wrong" in her report disclosed to defense counsel before trial. 16 App. 3145. Of course, plaintiff's counsel never bothered to tell defense counsel about Hartmann's huge mistakes or Dr. Schifini's much higher numbers. The judge awarded $1,854,738 in future medical expenses, obviously rejecting Hartmann's lower numbers and relying on Dr. Schifini's much higher numbers revealed to the Palms for the first time at trial. 2 App. 274:8.

b. Dr. Kidwell

One of plaintiff's other trial witnesses was Dr. Kidwell, who was proffered only as a treating doctor. He testified extensively regarding the treatment and opinions of an orthopedic surgeon in Los Angeles (Dr. Thalgott), who had not seen plaintiff for more than three years before trial. There were at least six entries in Dr. Thalgott's medical records indicating his opinion that plaintiff was <u>not</u> a surgical candidate. 2 App. 327:2-3; 14 App. 2845-46, Nonetheless, the district judge allowed Dr. Kidwell to testify, in essence, that if Dr. Thalgott knew what had transpired during the last three years since he saw plaintiff, he would change his opinion regarding whether plaintiff is a surgical candidate. 1 App. 166; 14 App. 2875-79.

c. Dr. Shannon

Another trial witness was Dr. Shannon, a treating doctor to whom plaintiff was referred by his lawyers. 8 App. 1554-55. Defense counsel objected to any opinions beyond the doctor's own treatment of plaintiff. 9 App. 1586-87. Plaintiff's counsel responded that "particularly I intend to use her to speak about other doctors." 9 App. 1588:1-2. The district court allowed the testimony, and Dr. Shannon proceeded to

testify extensively regarding plaintiff's treatment with a Los Angeles doctor named Dr. Nork, although Dr. Shannon did not know Dr. Nork and had never talked to him. 9 App. 1602. Dr. Shannon was allowed to testify as to what Dr. Nork meant when he made certain entries in his notes, what Dr. Nork's purpose was in taking certain treatment steps (e.g., referrals), and whether Dr. Nork's treatment of plaintiff was causally related to the Palms accident. 9 App. 1598-1610. Dr. Nork never testified.

* * * * *

In short, plaintiff's counsel was able to use an "expert by proxy" approach to the trial, using only four trial witness to admit evidence of the expert opinions of approximately 28 different medical providers. Counsel used a few testifying doctors to express the opinions that all of the medical care rendered by the non-testifying medical providers was reasonable and necessarily related to the Palms accident, despite the fact that none of the testifying doctors had been identified as experts, and none of them disclosed their additional opinions. 2 App. 304:6 to 305:2.

3. Expert opinions not disclosed before trial

a. Case law requiring disclosures

Discovery takes the surprise out of trials, so that all relevant facts and information pertaining to the case may be ascertained by both sides in advance of trial. *Washoe County Board of School Trustees v. Pirhala,* 84 Nev. 1, 5, 435 P.2d 756, 758 (1968). Effective cross-examination of an expert witness requires advance preparation, and a defendant can be prejudiced by a plaintiff's expert medical testimony that is not disclosed before trial. See *Otis Elevator Co. v. Reid,* 101 Nev. 515, 523, 706 P.2d 1378, 1383 (1985) citing *Smith v. Ford Motor Co.,* 626 F.2d 784 (10th Cir. 1980). Inadequate disclosures by expert witnesses produce the very evils that discovery has been created to prevent. *Smith,* 626 F.2d at 793.

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A party must disclose expert witnesses who have been retained or specially employed to provide expert testimony. NRCP 16.1(a)(2). This rule requires such experts to provide written reports containing all opinions to be expressed at trial, with the bases and reasons for the opinions.

A medical doctor is an "expert witness" if the doctor will be rendering medical opinions, even as a treating doctor. See NRS 50.275 (witness with scientific, technical or other specialized knowledge may testify as expert). Treating physicians, however, constitute a class of expert witnesses who are excused from the disclosure requirements of Rule 16.1, if such doctors will be testifying about their own treatment of the plaintiff. This makes sense, because treating doctors should not be burdened with preparing separate expert reports and providing detailed expert information, if they will only be giving limited testimony regarding their own treatment rendered to their patients. Treating doctors giving such limited testimony are essentially percipient witnesses, not retained experts.

From the defendant's standpoint, a treating doctor's failure to provide expert witness disclosures will usually not be prejudicial, because presumably the doctor's relevant medical opinions in the case will be contained in the doctor's records. Thus, defense counsel can obtain and review a treating doctor's records, to determine whether the doctor's deposition is necessary. But prejudice to the defendant becomes manifest when the treating doctor is allowed to express opinions at trial beyond those formed as part of treatment for the plaintiff, if such opinions are not disclosed to defense counsel.

The distinction between treating physicians and retained experts was evaluated in *Goodman v. Staples,* 644 F.3d 817 (9th Cir. 2011), a personal injury case in which the plaintiff's discovery disclosures identified her treating doctors, but she did not provide any written expert reports by the doctors. In pretrial proceedings, the

plaintiff sought permission to present testimony from her treating doctors beyond the opinions formed during their treatment. The trial judge limited the treating doctors to opinions actually developed during the course of their treatment of the plaintiff, as evidenced by their office notes, hospital records and consultation reports in their records. 644 F.3d at 820-22.

The Ninth Circuit upheld the limitations imposed by the trial judge, holding that applicable federal discovery rules (which are nearly identical to Nevada's rules) require a retained or specially employed expert to make a complete expert disclosure. *Id.* at 824. A treating doctor is generally not considered a "retained or specially employed" expert, because "a treating physician is a percipient witness of the treatment he rendered." *Id.* But if a treating doctor will provide medical opinions that were not made in the doctor's course of providing treatment, the doctor must submit an expert report. *Id.* at 825. A treating doctor "is only exempt from [the rule's] written report requirement to the extent that his opinions were formed during the course of treatment." *Id.* at 826.

The *Goodman* court noted that the plaintiff's lawyer asked the treating doctors to render expert opinions beyond the scope of the treatment rendered, and to review records provided by the plaintiff's attorney that the doctors had not reviewed during the course of treatment. *Id.* Therefore, the opinions of these doctors fell outside the scope of the "treating physician" exception to expert disclosure requirements; expert disclosure reports regarding the new opinions were therefore required. *Id.*

Goodman was followed by the Nevada federal district court in *Ghiorzi v. Whitewater Pools,* 2011 WL 5190804 (D. Nevada 2011), where a personal injury plaintiff offered the testimony of Dr. Joseph Schifini (the same Dr. Schifini who treated plaintiff and then testified for plaintiff in the present case). The plaintiff in *Ghiorzi* disclosed Dr. Schifini as a treating physician, without fully complying with

expert disclosure requirements. The defendant moved to strike Dr. Schifini's testimony, to the extent that his testimony was outside his role as a treating physician.

The *Ghiorzi* court granted the motion and struck Dr. Schifini's testimony. Relying on *Goodman,* the court held that although an expert report is not normally required from a treating physician, a report is required "when a treating physician morphs into a witness hired to render opinions that go beyond the usual scope of a treating physician's testimony." *Id.* at *3. Expert reports are required in order to eliminate unfair surprise to the opposing party. *Id.* at *5. The court held that although Dr. Schifini was initially a treating physician, the plaintiff's counsel also retained Dr. Schifini to provide expert opinion testimony beyond the scope of opinions formed during the course of his treatment of the plaintiff. *Id.* at *8. Indeed, Dr. Schifini had received records from the plaintiff's counsel for review, and the doctor was asked to express new opinions following his review of those records. *Id.* After reviewing the records provided by plaintiff's counsel, Dr. Schifini formulated several opinions and conclusions which "were not formed during the course of treatment of the Plaintiff." *Id.* Rather, the opinions "were clearly formed for the purpose of providing medical legal causation testimony," and for the purpose of providing testimony regarding "the care, appropriateness of care, necessity of care and relatedness of care" provided to the plaintiff, including reference to treatment by other medical providers. *Id.* at *8-9. Under these circumstances, the court held that "Dr. Schifini was clearly specially retained to provide expert testimony," for which full expert disclosures were required. *Id.* at *9. Therefore, Dr. Schifini's trial testimony in *Ghiorzi* was limited to opinions formed as a result of his single examination of the plaintiff. *Id.*

Goodman was applied in another Nevada federal case, *Wilson v. Biomat USA, Inc.,* 201 WL 4916550 (D. Nevada 2011), where the defendant asked the court to

limit testimony by three doctors who were identified as treating physicians, but who were not disclosed as experts. Applying *Goodman,* the court held: "A treating physician's testimony is limited to facts and opinions developed during the course of the doctor's treatment of the plaintiff." *Id.* at *2. And citing another recent Ninth Circuit opinion, the court held that "a treating physician is not allowed to offer opinion testimony on the issue of causation because causation is a hypothetical question designated for expert witnesses." *Id.* at *2.

In addition to federal courts, state courts have also recognized the unfairness of allowing treating physicians to give trial opinions beyond the scope of their treatment, without providing adequate pretrial disclosures to defense counsel. California applied this approach in *Dozier v. Shapiro*, 133 Cal. Rptr. 3d 142 (Ct. App. 2011), where the plaintiff offered testimony of his treating physician. The treating physician was deposed, and before trial the plaintiff did not disclose any medical opinions beyond those formulated as part of his treatment (discussed at his deposition). As trial approached, the plaintiff served a witness list indicating that the treating physician would testify regarding liability, causation and damages, including the need for future surgeries. The defendant moved to limit the doctor's testimony to the opinion rendered at his deposition. The trial court granted the motion.

The *Dozier* court affirmed, relying upon the distinction between treating physicians and retained experts. The court noted that the very purpose of the expert witness discovery requirement is to give fair notice of what an expert will say at trial. *Id.* at 150. When an expert is permitted to testify at trial on an undisclosed subject area, the opposing party lacks a fair opportunity to prepare for cross-examination or rebuttal. *Id.* at 150-51. A treating physician is not consulted for litigation purposes, but rather is qualified to testify about the plaintiff's injuries because of the physician's expertise and his or her physician/patient relationship with the plaintiff.

Id. at 151. A retained expert, on the other hand, is consulted for the purpose of formulating and expressing opinions in anticipation of the litigation, based in part on information obtained outside the patient/physician relationship, for the purpose of the litigation rather than the patient's treatment. *Id.* at 151-52.

The *Dozier* court concluded that when the treating physician received additional materials from the plaintiff's counsel, to enable him to testify as to opinions he had not formed as part of his physician-patient relationship with the plaintiff, the doctor's role "was not that of a treating physician, but became that of a retained expert." *Id.* at 152. "[The plaintiff's] counsel transformed Dr. Zeegen, a treating physician, into a retained expert, by giving him additional information and asking him to testify at trial to opinions formed on the basis of that additional information." *Id.* Because these "later formulated opinions" were based upon information the doctor was provided by the plaintiff's counsel, full expert witness disclosures were required. *Id.* at 152-53. See also *Cox v. Jones,* 470 N.W.2d 23, 25-26 (Iowa 1991) (treating physician cannot testify as an expert unless the plaintiff has made full expert disclosures).

b. Cases relied upon by plaintiff

At trial in the present case, plaintiff relied on *Prabhu v. Levine,* 112 Nev. 1538, 930 P.2d 103 (1996), arguing that *Prabhu* stands for the proposition that a treating doctor "is an expert for any purpose." 9 App. 1587 (emphasis added). *Prabhu* is not nearly this broad, and *Prabhu* is easily distinguishable from the present case. *Prabhu* was a medical malpractice case in which the plaintiff's discovery disclosures included a treating physician who performed five surgeries on the plaintiff after her treatment by the defendant doctor. Defense counsel took the treating doctor's deposition, questioning him regarding the pertinent standard of care and causation. The district court then allowed the deposition to be read into the record at trial. The defendant

appealed from a judgment in favor of the plaintiff. This court affirmed, primarily relying upon NRS 50.275, which deals with expert testimony generally. The *Prabhu* per curiam opinion provided virtually no analysis of the interplay between treating physicians and expert witnesses, or regarding the need for adequate disclosures of a treating physician's opinions that are beyond the scope of the physician's treatment of the plaintiff. Instead, the court merely held that the doctor's testimony was admissible; and the court relied upon the fact that the treating physician's deposition had eliminated any prejudice resulting from the plaintiff's failure to provide full expert witness disclosures.

Prabhu in no way stands for the broad proposition asserted by plaintiff's counsel here, i.e., that a treating doctor can testify "for any purpose," without limitation, on any subject, based upon information provided to the doctor by the patient's lawyer, regarding subjects beyond the scope of the doctor's treatment of the patient--and all without any prior disclosure to defense counsel regarding the new forensic opinions.

In arguing that the treating doctors could provide opinions outside the scope of their treatment of plaintiff in the present case--without any prior disclosures of the opinions--plaintiff's counsel also relied on *Fernandez v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992). 9 App. 1587. Counsel argued that *Fernandez* stands for the rule that "once a physician is qualified to be expert, they can speak in any area of their expertise." *Id.* Again, counsel's interpretation of *Fernandez* is far broader than the actual holding. *Fernandez* had nothing to do with whether the medical witnesses in that case were subject to expert witness disclosures. *Fernandez* was a medical malpractice case in which the primary issue was whether two doctors were qualified to testify regarding the standard of care rendered by an internal medicine specialist. *Fernandez* dealt with the qualification of medical doctors to testify regarding various

fields of medicine, not whether treating physicians can testify beyond the scope of their treatment without prior disclosures of their new forensic opinions.

c. Application of legal principles in this case

Here, plaintiff disclosed at least 28 healthcare providers, including numerous treating physicians. His discovery disclosures provided only cursory, generic information suggesting that the treating doctors would only be testifying with regard to their own treatment rendered to plaintiff. The disclosures did not even whisper to defense counsel that plaintiff would be providing the treating doctors with voluminous records from other doctors, that the treating doctors would be asked to express opinions regarding treatment by the other doctors, or that plaintiff's counsel intended to ask the treating doctors to render opinions far beyond the scope of their own treatment rendered to plaintiff.

Then, at trial, defense counsel learned that plaintiff's counsel had provided the testifying doctors with medical records from numerous other doctors, and plaintiff's counsel had requested the testifying doctors to form and express a wide variety of new opinions, for purposes of plaintiff's lawsuit, regarding the treatment rendered by these other doctors. This was litigation sandbagging at its worst. Defense counsel was completely blind-sided, having received no advance notice that the treating physicians would be asked to express opinions beyond the limited scope of their treatment to plaintiff. Defense counsel was thereby prohibited from conducting effective cross-examination.

For example, as discussed above, the district court allowed Dr. Schifini to testify regarding opinions far beyond his treatment rendered to plaintiff--opinions that were never disclosed to defense counsel before trial. This included Dr. Schifini's recitation of the opinions of several other doctors, Dr. Schifini's opinion that the treatment rendered by other doctors was related to the Palms accident, and Dr.

Schifini's opinion that other doctors would change their previously-stated opinions if they knew what Dr. Schifini knew.

The judge also allowed Dr. Schifini to offer his new opinion that the life-care plan expenses previously disclosed to defense counsel were too low by nearly one million dollars. As defense counsel explained at trial, he did not depose plaintiff's treating doctors regarding expenses in the life-care plan, because he was presuming that, at trial, plaintiff's claim for medical expenses would be the same as the amounts in the life care plan disclosed before trial. 13 App. 2466:14-16. Judge Walsh expressed her view of this situation as follows: "Well, you know, frankly, I guess you take your chances if you don't depose a witness, and then you don't know what he's going to testify at trial." 13 App. 2466:17-19. The judge's view was wrong. A trial attorney's decision on whether to depose the other party's witnesses is largely based on discovery disclosures. If a plaintiff discloses dozens of treating doctors, but never discloses that one of them will be expressing an expert opinion at trial that expenses in the life-care plan compiled by the plaintiff's own life-care expert are too low by nearly one million dollars, defense counsel would have no hint that the doctor would give such an opinion at trial. Consequently, defense counsel would perceive no need to depose the numerous doctors on this subject. Judge Walsh's view that "you take your chances if you don't depose a witness" would have required the Palms' counsel to take the deposition of every medical witness disclosed by plaintiff--essentially to engage in a fishing expedition to find out if any of the witnesses had any undisclosed opinions. No law supports this view.

Similarly, doctors Kidwell, Shannon and Shah were all allowed to summarize opinions by other doctors who did not testify, and to testify that the treatment rendered by these other doctors was necessarily incurred as a result of the Palms incident. This was also error, for the reasons discussed above.

When plaintiff's counsel provided the treating physicians with additional records outside the scope of the treating doctors' relationship with plaintiff, and when counsel requested the doctors to give opinions for purposes of the litigation, the doctors were transformed from treating physicians into retained expert witnesses. By not requiring the new expert opinions to be disclosed to defense counsel prior to trial, the district court allowed the Palms to be blind-sided at trial, resulting in undeniable prejudice. Fundamental fairness and discovery disclosure rules mandate that the testimony of these doctors should have been limited.[6]

4. Doctors' testimony about other doctors' treatment

In forming an expert opinion, an expert may rely upon facts or data that is not admissible in evidence. NRS 50.285. This statute imposes two fundamental requirements. First, the facts or data must actually be relied upon by the expert in forming his or her opinion; and second, the facts or data must be a type reasonably relied upon by such experts. An expert may rely upon hearsay statements to form opinions that the expert presents at trial, if those opinions are the type of evidence relied upon by such experts; but the witness may not be used as a mere conduit to introduce the statements of non-testifying individuals. See *Estes v. State,* 122 Nev. 1123, 1126, 146 P.3d 1114, 1140-41 (2006) (allowing doctor to testify as to opinions

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[6] Although the district judge did not require any expert medical disclosures by plaintiff, the judge strictly construed expert disclosure requirements against the Palms. For example, the judge refused to allow rebuttal defense medical testimony dealing with the new opinions of plaintiff's medical witnesses, because the defense doctor (Dr. Becker) had not included rebuttal opinions in his report. 1 App. 185:23-27. Of course, it would have been impossible for Dr. Becker to include rebuttal opinions in his pretrial report. He had nothing to rebut at that time, because plaintiff's counsel never disclosed the new opinions of the so-called "treating" doctors.

of other doctors "was likely erroneous"); *McCathern v. Toyota Motor Corp.,* 23 P.3d 320, 327 (Or. 2001) (although experts may rely upon hearsay in forming their opinions, that "does not render otherwise admissible evidence admissible merely because it was the basis for the expert's opinion").

In *Ramirez v. State,* 114 Nev. 550, 958 P.2d 724 (1998), one witness testified regarding the contents of a medical report received from a doctor who did not testify at trial. This court held that the report was inadmissible hearsay. *Id.* at 557-61, 958 P.2d at 728-31. The *Ramirez* court relied upon *United States v. Tran Trong Cuong,* 18 F.3d 1132, 1135 (4th Cir. 1994), where the prosecution called an expert medical witness who testified regarding another doctor's report. The testifying doctor vouched for the other doctor's qualifications, and he testified that the other doctor's conclusions and findings were similar to his own. The other doctor did not testify at trial. As *Ramirez* observed, the Fourth Circuit reversed the conviction, holding that the testifying doctor "served as an improper conduit" for the other doctor's opinions. 114 Nev. at 558-59, 958 P.2d at 729.

In *Whitfield v. Roth,* 519 P.2d 588 (Cal. 1974), the trial court permitted two doctors to testify regarding the assessments of 54 other doctors. The Supreme Court of California held that the trial court committed error. The opinions of the non-testifying doctors were not used by the testifying doctors in the course of treatment or diagnosis of the plaintiff. Although doctors can testify as to the bases of their opinions, this rule "is not intended to be a channel by which testifying doctors can place the opinion of innumerable out-of-court doctors before the jury." *Id.* at 603. To avoid a flood of out-of-court medical opinions pouring in through the limited admissibility channel of the hearsay exception, the exception only applies where the out-of-court doctor's opinion is truly part of the patient's history, given to the

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testifying doctor as part of the information used by the testifying doctor in diagnosis and treatment. *Id.* at fn. 26.

In *People v. Campos,* 38 Cal. Rptr. 2d 113, 114-15 (Ct. App. 1995), the trial court allowed one doctor to testify regarding reports and opinions rendered by other doctors who did not testify. The court recognized that expert witnesses are entitled to rely upon hearsay, including statements of other treating professionals. Nevertheless, an expert witness may not, on direct examination, reveal the contents of reports prepared or opinions expressed by non-testifying experts. *Id.* at 114. The court held that "the reason for this is obvious," because the opposing party is denied the opportunity of cross-examining the other doctors as to the bases for their opinions. *Id.* at 114-15. See also *Pophal v. Siverhus,* 484 N.W. 2d, 555, 560-61 (Wis. App. 1992) (no error in excluding doctor's testimony regarding opinions of non-testifying doctors).

Here, plaintiff used the testimony of four doctors as a conduit for opinions of dozens of other doctors and medical providers. The testifying doctors were designated as "treating" doctors; but they were provided with medical records from plaintiff's counsel, and they testified regarding treatment and opinions of numerous non-testifying doctors, although the testifying doctors did not rely upon the other doctors' opinions in forming their own opinions during the course of their treatment of plaintiff. By allowing the four doctors to summarize treatment and opinions of numerous non-testifying medical professionals, the district court allowed such testimony as a conduit to the non-testifying doctors' opinions. This deprived the Palms of its right to cross-examine the non-testifying doctors. The testimony constituted inadmissible hearsay, without any foundation for the hearsay exception for expert witnesses (NRS 50.285).

5. Speculation and mind-reading

Medical experts cannot engage in speculation or conjecture. *Williams v. District Court*, 127 Nev. __, 262 P.3d 360, 369 (2011). Admission of expert medical testimony based upon speculation and conjecture is reversible error. *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157-59, 111 P.3d 1112, 1115-16 (2005); see also *Gordon v. Hurtado*, 91 Nev. 641, 643-44, 541 P.2d 533, 534-35 (1975) (reversible error to admit speculative testimony by accident reconstruction expert).

An expert engages in speculation when the expert attempts to testify regarding what other people would have believed or would have done in certain circumstances. E.g. *Byrne v. Wood, Herron & Evans, LLP*, 2010 WL 3394678 (E.D. Ky. 2010)(expert patent attorney could not opine as to what patent examiner would have done or what the examiner was thinking) vacated on other grounds in *Byrne v. Wood, Herron & Evans, LLP*, 450 Fed. Appx. 956 (Fed. Cir. 2011).

In *American Medical Systems, Inc. v. Laser Peripherals, LLC*, 712 F.Supp. 885, 904 (D.Minn. 2010), an expert was precluded from testifying about what someone else would have believed or would have done with additional information, because such testimony would have been speculative. Similarly, in *Applied Materials, Inc. v. Advanced Semiconductor Materials*, 1995 WL 261407 at *2-3 (N.D.Cal. 1995), the court held that an expert was prohibited from testifying as to what a patent examiner would have done "if the examiner had different information," because the expert's testimony was "irrelevant speculation."

Courts have uniformly excluded expert speculation as to what someone else would have done or would have thought in a given situation. E.g. *Demitropoulos v. Bank One* Milwaukee, 953 F.Supp. 974, 986 (N.D.Ill. 1997)(expert's testimony regarding what bank personnel would have done in a given situation was "rank speculation"); *In re Trasylol Products Liability Litigation*, 2010 WL 4259332 at *8

(S.D.Fla. 2010)(expert testimony as to what FDA would have done in hypothetical circumstances excluded as speculative); *Blaue v. Kissinger*, 2006 WL 2092380 at *6 (N.D.Ill. 2006)(expert testimony as to what driver would have done with more information was "based purely on speculation and conjecture").

In the present case, the district court erred by allowing three doctors to engage in speculative mind reading. Dr. Schifini was allowed to testify as to opinions Dr. Ferrante "would come to" if Dr. Ferrante were to review additional records generated after his visit with plaintiff more than three years before trial. 10 App. 2032-34. Dr. Kidwell was allowed to testify that Dr. Thalgott, whose records contained six entries indicating his opinion that plaintiff was <u>not</u> a surgical candidate, would change his opinion if he knew what had transpired during the three years since he examined plaintiff. 1 App. 166; 2 App. 327:2-3; 14 App. 2845-46, 2875-79. And Dr. Shannon was allowed to testify as to what Dr. Nork meant when he made certain entries in his notes, and what Dr. Nork's purpose was in taking certain treatment steps (e.g., referrals). 9 App. 1598-1610. All of this testimony was rank speculation that should have been excluded.

C. Error regarding plaintiff's economist

Standard of review: Whether the district court applied the proper legal standard in admitting expert testimony is subject to plenary review. *Staccato, supra.*

A plaintiff has the burden of proving both the fact of damages and the amount thereof. *Mort Wallin v. Commercial Cabinets,* 105 Nev. 855, 857, 784 P.2d 954, 955 (1989). There must be an evidentiary basis for determining a reasonably accurate amount of damages. *Id.* The law does not permit arriving at an amount of damages by conjecture. *Alper v. Stillings,* 80 Nev. 84, 86-87, 389 P.2d 239, 240 (1964).

Plaintiff contended that he was a successful self-employed professional real estate investor for more than 15 years. 8 App. 1453-54. His alleged profession was

purchasing property, fixing it up, then selling it at a profit. *Id.* The rule prohibiting speculative damages is particularly applicable in this situation, where the plaintiff is a professional whose earnings depend upon his training and professional skills, which may be more mental than physical. In such a case, curtailment of physical activities does not necessarily translate into a diminution of earning capacity. *Nobile v. New Orleans Public Service, Inc.*, 419 So. 2d 35, 39 (La. App. 1982). In *Nobile*, the plaintiff was an architect who argued that his disability caused a diminution in his activities, and thereby produced a loss of earnings. The court rejected the plaintiff's simplistic argument, concluding that he "voluntarily regulated his income by his own actions." *Id.*

In *Strauss v. Continental Airlines, Inc.*, 67 S.W.3d 428 (Tex. App. 2002), the plaintiff was an attorney who sued an airline for personal injuries. The plaintiff underwent two major surgeries on his low back, and he was unable to work full-time. The jury awarded approximately $1 million for past lost earnings. *Id.* at 432-33. The attorney argued that his lost profits from his law practice were a result of the fact that he could no longer travel to a particular small town in Mississippi, where he typically got personal injury cases. The trial court granted the airline's motion for JNOV on the damages award. *Id.* at 433. The *Strauss* court affirmed, holding that the attorney's evidence was insufficient to support the verdict. He did not provide available evidence regarding his net earnings history, such as evidence showing how many cases he obtained from the Mississippi town, and the amount of earnings he made on each case prior to his injury. *Id.* at 439. Not only did the plaintiff fail to provide this available evidence, he failed to explain why it was not provided. *Id.* Moreover, the attorney did not present evidence showing the number of cases he might have been able to obtain from the small town, if not for his inability to travel.

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Id. Under these circumstances, the attorney did not prove his damages to the degree of proof to which they were susceptible. *Id.*

Here, plaintiff's claim for lost income was presented through his expert economist, Terrance Dinneen. 13 App. 2427. Plaintiff claimed that he worked for many years in the real estate market, flipping homes and making a steady profit. He presumably had business records showing the number of homes he bought and sold each year, his gross earnings, his expenses, his net profit, and other financial information from which reliable calculations of his earnings loss could be made.

Rather than providing this information, and without explaining why it was not provided, plaintiff gave Dinneen three tax returns, which were for the years 1999, 2001 and 2004 (the year of the Palms incident). 13 App. 2444:18-19. The 1999 and 2004 returns were not prepared until 2009, <u>five years after the Palms incident</u>, and three years into the litigation. 13 App. 2498-99. The 2001 return was prepared in 2004. *Id.* Dinneen had requested information from plaintiff, to evaluate plaintiff's income. 13 App. 2499. For example, Dinneen asked plaintiff to provide Social Security statements, which are provided by the federal government to all taxpayers each year, and which provide yearly income histories; but plaintiff did not provide these statements to Dinneen. 13 App. 2499-2504. Nor did plaintiff provide Dinneen with self-employment tax records or other earnings records. 13 App. 2499-2506. Thus, Dinneen was required to rely almost entirely on grossly incomplete information consisting of only three tax returns, two of which were created years after the Palms incident.

Even the information for the three tax returns was insufficient. For example, the only home that plaintiff sold in 2004 was his own personal home (8 App. 1542), which he sold in February of 2004, nine months before the Palms incident; plaintiff

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was not working during the nine-month time frame between the sale of his home and the Palms incident. 8 App. 1545-46, 1569.

Plaintiff presumably had all of his business records, including profit and loss statements, sales records, expense records, and other documentation showing his alleged extensive history of flipping homes. Yet he and his expert relied on three back-dated tax returns. This evidence was insufficient to support the district judge's award of $711,703 in past and future lost income.[7] 2 App. 274.

D. Improperly striking defense experts

Standard of review: Application of the correct testimonial standard for an expert appears to be subject to a mixed standard of review. E.g., *Brown v. Capanna,* 105 Nev. 665, 672, 782 P.2d 1299, 1304 (1989) (this court established standard, de novo; but district court abused discretion by requiring different standard).

1. Forrest Franklin

Forrest Franklin is an expert in security and crowd control. 12 App. 2344-50. He evaluated the Palms incident, and he formed opinions regarding security and throwing promotional items into an audience. 12 App. 2353. On direct examination, he testified, without objection: "That throwing memorabilia as a promotional effort into crowds is not a substandard protocol." 12 App. 2353:7-8. In fact, he has personally initiated processes where items were thrown into crowds, in various organizational settings. *Id.* For example, he attends an annual conference of "the largest security organization on the planet," with 30,000 to 50,000 security professionals. 12 App. 2353-54. At the conferences, exhibitors regularly throw promotional items to the audience, including mints, hand sanitizers, basketballs and

[7] Dinneen admitted that, based upon the information he obtained from plaintiff in this case, plaintiff had not worked at full-time employment for essentially 20 years. 13 App. 2538.

even hockey pucks. 12 App. 2354. The organization has a reference book containing several thousand pages of "virtually every security protocol known to man." 12 App. 2359:12-15. Nothing in the manual prohibits throwing promotional items into a crowd, or in any way suggests that this activity should not be done. 12 App. 2359.

Franklin further testified that he is familiar with casinos that allow throwing promotional items into crowds. 12 App. 2359-60. Without objection, Franklin testified:

> Q Okay. With respect to the safety, is it your opinion as a security expert and a crowd control expert that it is unsafe to throw things into crowds?
>
> A It's my opinion it's not unsafe to throw things into crowds.

12 App. 2370:17-21.

Franklin was asked to opine regarding whether tossing promotional items into crowds presents a foreseeable possibility of injury. Without objection, he answered in the negative. 12 App. 2371. He offered examples of organizations that regularly engage in this activity, including his work as the safety coordinator for a charitable entity that conducts a bicycle riding event attended by more than 2,000 riders, many of whom are physically disabled. 12 App. 2371. Promoters of this event throw memorabilia into the bicycle crowd, including food bars, special drinks and water bottles. *Id.*

Franklin agreed that it is possible for someone to get hurt during such an activity, because "you can get hurt doing anything." 12 App. 2371(a):6. Franklin was then asked whether it is below a standard of care to throw promotional items into crowds, and he answered "I know of no such standard, sir." 12 App. 2371(a):10. He was then asked whether it is appropriate to throw things into crowds, and he answered: "To throw things into -- I don't find it inappropriate at all." 12 App. 2371(a):12-13. Franklin was then asked whether, as a security and crowd control

expert, he would advise clients not to throw things into crowds. Franklin answered that "I would not tell anybody not to throw things into crowds." 12 App. 2371(a):23-24. All of these answers were given without objection by plaintiff's counsel.

2. Dr. Thomas Cargill

Dr. Thomas Cargill, an economist, has a bachelor of science degree, a master's degree, and a PhD, all in economics. 15 App. 3009. He has been a professor of economics at UNR for nearly 40 years. 15 App. 3010. Cargill used his expertise to calculate what plaintiff would have earned had he continued to work after the accident. 15 App. 3012. *Id.* Dr. Cargill also expressed his opinion, without objection, that it was not appropriate for Dinneen to use averaged earnings in calculating income loss. 15 App. 3026-27. Dr. Cargill also testified extensively regarding correct interest rates that should be used in calculating a wage loss claim. 15 App. 3056-59.

3. Plaintiff's motion to strike

After Franklin and Cargill had already testified and were excused, plaintiff filed a motion to strike their testimony. 1 App. 146. The motion was based upon the ground that "Nevada law requires expert opinions to be given to a reasonable degree of medical, professional and/or economic probability," and Dr. Cargill and Mr. Franklin did not express their opinions to a reasonable degree of professional or economic probability. 1 App. 149. The Palms opposed plaintiff's motion, pointing out that the use of "magic words" is not a foundational requirement for expert testimony. 1 App. 151-52. The Palms noted that testimony by Cargill and Franklin was based upon their extensive expert qualifications; plaintiff had stipulated to the fact that Franklin and Cargill were qualified as experts; and the testimony of both experts was consistent with Nevada requirements for experts. 1 App. 152-55.

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The district court found that neither expert gave opinions "to a reasonable degree of professional probability as required under Nevada law." 2 App. 269:28 through 270:1, 11-12, 18. Based upon the district court's view that an expert must express an opinion to a reasonable degree of professional probability, the court found that Cargill and Franklin failed to satisfy the "assistance" requirement for expert testimony. 2 App. 271. Thus, the judge struck the testimony of both experts.[8] 2 App. 270-71.

4. Argument

Plaintiff's motion to strike relied primarily upon *Hallmark v. Eldridge,* 124 Nev. 492, 189 P.3d 646 (2008). 1 App. 148-50. Plaintiff argued: "Nevada law requires expert opinions to be given to a reasonable degree of medical, professional and/or economic probability." 1 App. 149:11-12 (citing *Hallmark*). The district court seems to have accepted plaintiff's argument. 2 App. 271:9-14 (finding that although the defense experts were properly qualified, the record does not reflect whether their opinions were rendered on a standard lower than "a reasonable degree of professional probability").

Hallmark is not nearly as broad as the district court seems to have found. *Hallmark* adopted an analysis for expert testimony, but nothing in *Hallmark* supports the proposition that an expert's opinion is inadmissible unless the expert states that the opinion is rendered to a reasonable degree of professional probability. The problem with the expert's opinion in *Hallmark* was not his failure to articulate the extent of his certainty in his opinions. The problem was his lack of a demonstrable methodology and reliable foundation for his opinion. 124 Nev. at 504, 189 P.3d 654.

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[8] Plaintiff's motion to strike the testimony of Cargill and Franklin did not contend that pretrial defense expert disclosures for these witnesses were inadequate in any way.

Hallmark was explained in *Higgs v. State,* 126 Nev.___, 222 P.3d 648 (2010). The *Higgs* court thoroughly reviewed expert witness admissibility, never once suggesting that experts must always qualify or quantify their opinions using a "reasonable degree of professional probability" standard. 126 Nev. at ___, 222 P.3d at 655-60.

This court has never required experts to utter talismanic phrases such as "reasonable degree of probability." Indeed, this court has rejected the proposition that expert testimony must always be based upon a reasonable degree of probability. The case of *Brown v. Capanna,* 105 Nev. 665, 782 P.2d 1299 (1989), is similar to the present case. *Brown* was a medical malpractice case arising out of a surgery. The plaintiff contended that the defendant doctor did not adequately obtain the patient's informed consent. Plaintiff offered an expert, Dr. Fox, to express an opinion that the defendant doctor did not conform to customary disclosure practices in the relevant medical community, and regarding what a reasonable physician would disclose. The defendant sought to exclude Dr. Fox's testimony, because his opinion was not based upon a reasonable degree of medical probability. The trial court agreed, excluding the testimony.

This court reversed, rejecting the proposition that Dr. Fox's expert testimony needed to be based upon a reasonable degree of medical probability. The court recognized that a medical expert is normally expected to testify only as to matters that conform to the reasonable degree of medical probability standard. 105 Nev. at 671-72, 782 P.2d 1304. This standard did not apply, however, because "Dr. Fox was not being asked his expert opinion on the cause of [the patient's] death or on some other factor of causation." *Id.* at 672, 782 P.2d at 1304. The relevant inquiry on the medical malpractice claim was whether the defendant doctor conformed to the customary disclosure practice, or to the standard of what a reasonable physician

would disclose in similar circumstances. *Id.* "There are no medical probabilities in this inquiry." *Id.* The court concluded: "Therefore, to require that Dr. Fox's testimony be to a reasonable degree of medical probability was an abuse of the district court's discretion." *Id.*

In *Williams v. District Court,* 127 Nev.___, 262 P.3d 360 (2011), this court rejected the proposition that the "reasonable degree of probability" standard is always required. *Williams* was a product liability action. The plaintiffs moved to exclude defense expert testimony, because the defense experts would testify only regarding alternative possible causes of the plaintiffs' injuries. The district court denied the plaintiffs' motion, and the plaintiffs filed a writ petition. This court held that the defense expert opinions, based upon "possible" causes of the plaintiffs' injuries, were admissible. Although medical expert testimony regarding causation must usually satisfy the "reasonable degree of medical probability" standard, the court held that defense experts, whose testimony is offered for the purpose of contradicting the plaintiffs' expert or furnishing reasonable alternative causes to those offered by the plaintiff, do not need to meet the "medical probability standard." *Id.* at ___, 262 P.3d at 367-68. *Id.* Where a defense expert is controverting a key element of the plaintiffs' *prima facie* case, and where the expert's alternative causation theories are competent, "they need not be stated as being more likely than not." *Id.* at ___, 262 P.3d at 368. *Williams* adopted a First Circuit opinion, which held that "requiring a defense expert to identify a specific cause to a medical probability standard when rebutting the plaintiff's *prima facie* case would improperly shift the burden to the defendant." *Id.* at ___, 262 P.3d at 368-39. Thus, "defense experts may offer several alternative causes to rebut the plaintiff's theory of cause with less than 50 percent certainty." *Id.*

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Williams recognized that in *Morsicato v. Sav-On-Drug Stores, Inc.,* 121 Nev. 153, 111 P.3d 1112 (2005), the court held that the "reasonable degree of medical probability" standard applies to medical causation opinions. 127 Nev. at ___, 262 P.3d at 362. But *Williams* also recognized that "the *Morsicato* standard is not meant to preclude a defendant from undermining the plaintiff's *prima facie* case with relevant, medically competent expert testimony on alternative causation theories so long as the defense expert's testimony is being used to controvert the plaintiff's theory." 127 Nev. at ___,262 P.3d at 369.

In the present case, defense witness Franklin was an expert in the fields of security and crowd control. His expert opinion was, in essence, that the activity of tossing souvenirs to the audience at the Palms sports book was not unreasonably dangerous and was not below the applicable standard of care. This was similar to the expert in *Brown*, who testified that the defendant doctor's disclosure practice did not conform to the relevant standard in the community. *Brown's* holding, that the expert did not need to express his testimony to a reasonable degree of probability, is applicable to witness Franklin's testimony in the present case.

A similar result applies to Cargill, an economist, who did not testify regarding any medical issues. His expert opinions criticized interest rates and averaging methods used by plaintiff's expert. As in *Williams*, there was simply no need to require Cargill to recite the phrase "reasonable degree of economic probability," or any similar phrase, in his testimony.

Even if this court concludes that the "reasonable degree of professional probability" standard does somehow apply to non-medical expert witnesses Franklin and Cargill, there is no rule requiring the recitation of talismanic phrases as part of an expert's testimony. There is no reason why the "reasonable probability" standard

cannot be implied or inferred in an expert's testimony, even if the expert does not recite those words.

In the present case, Franklin testified regarding his extensive experience in the fields of security and crowd control. 12 App. 2343-50. He was asked to "render an opinion with respect to the standard of care as it relates to throwing objects, memorabilia, promotional articles into crowds." 12 App. 2352:10-13. In addition to explaining his own personal experience on these matters, he described the information upon which he relied. 12 App. 2352-53. He prepared a report containing his opinion, and he expressed his opinion at trial:

> Q Okay. And what opinion did you come to?
>
> A That throwing memorabilia as a promotional effort into crowds is not a substandard protocol.

12 App. 2353:6-8.

Plaintiff's counsel did not object to this opinion. *Id.* By failing to object while the witness was testifying, on the basis that the opinion was not stated in conformity with a "reasonable probability" standard, plaintiff should be deemed to have waived the objection. See *Bostic v. State,* 104 Nev. 367, 372, 760 P.2d 1241, 1244 (1988) (objection to witness examination waived, because no contemporaneous objection made at time of testimony).

Franklin then further explained his extensive experience with organizations and spectator events, at which promotional items are tossed to audiences. 12 App. 2353-54, 2360. Under these circumstances, there is no doubt that Franklin's testimony was meant to comply with any standard requiring reasonable probability in his opinions.

Similarly, Dr. Cargill is an extremely qualified economist and professor of economics, with extensive experience testifying as an expert. 15 App. 3009-11. He reviewed reports that had been offered by plaintiff's economist, Dinneen. 15 App.

3012-13. Cargill testified that he was using his expertise to calculate plaintiff's wage loss, and that he had performed such an evaluation many times previously. 15 App. 3013-14. He expressed various opinions, primarily rebutting Dinneen's opinions. Although plaintiff's counsel objected to some opinions, counsel's objections were not based upon the ground that Cargill's opinions failed to comply with a "reasonable probability" standard. E.g., 15 App. 3030-31. Cargill was firm in his opinions, and he was obviously reasonably certain in his opinions.

A party should not be allowed to lay in wait during an expert's testimony, fail to make an objection based upon the standard for the testimony, wait until the witness has been excused, then raise the issue for the first time in a motion to strike the expert's testimony. This is exactly what occurred here. Even if plaintiff's delayed-objection litigation strategy is approved, the "reasonable probability" standard was simply not applicable to the testimony of Franklin and Cargill. And even if this standard did apply, the standard can be reasonably inferred in the testimony of the two experts. The district court erred by striking their testimony.

E. Evidentiary errors were prejudicial and reversible

There can be little doubt that the district court's multiple evidentiary errors affected her determinations of liability and damages. The district court improperly struck the testimony of defense liability witness Franklin, a highly qualified expert in security and crowd control. As noted above, Franklin's had testified that the Palms' conduct was not substandard; and promotional items are routinely tossed to audiences at a wide variety of sporting and entertainment events. Plaintiff had no expert testimony to the contrary.

The district court also improperly struck the testimony of defense economist Thomas Cargill, PhD., whose opinions persuasively rebutted those of plaintiff's expert Dinneen; and the district court allowed Dinnen to give dubious opinions based

upon an insufficient foundation. The judge's determination of $711,703 in lost income was unjustified with these errors.

The district court's other evidentiary errors were prejudicial because they dealt with medical opinions in a hotly contested damages case. Plaintiff claimed severe injuries, but defense evidence showed that after the incident, plaintiff walked around the Palms until he located a security podium. 8 App. 1471-73. The security officer called for an ambulance, but when the ambulance attendants arrived, plaintiff told them to leave. 8 App. 1535-36. After they left, he changed his mind and asked the security officer to call for the ambulance again. 8 App. 1477. The ambulance returned, and plaintiff was transported to a hospital. 8 App. 1477-78.

Plaintiff only had knee pain during the first two or three months after the incident. 13 App. 2587-2608. Nearly three months after the incident, he complained of numbness and tingling in his right hand and fingers. 13 App. 2608-09. He subsequently complained of neck pain, back pain, ankle swelling, carpal tunnel syndrome pain, sleep apnea, reflex sympathetic dystrophy symptoms, low energy levels, depression, sexual dysfunction, emotional issues, an ingrown toenail, and a fungus on his foot. 2 App. 425, 430-31; 8 App. 1506, 1512-13, 1517, 1526. Plaintiff attributed all of these problems to the Palms incident, and he sought compensation for everything. 2 App. 425-63.

During the lawsuit, a defense independent medical examination was performed by Dr. George Becker, an orthopedic surgeon and psychiatrist. 13 App. 2549, 2552-54, 2567. Dr. Becker agreed that plaintiff injured the meniscus in his left knee in the Palms incident. 13 App. 2582. Plaintiff's other problems, however, were not caused by the Palms incident. 13 App. 2632-47. Dr. Becker opined that this case involves emotional and psychological issues impacting plaintiff's complaints of physical symptoms. 13 App. 2667-72. Plaintiff had "symptom proliferation," where

plaintiff's knee pain proliferated into numerous other complaints. 13 App. 2669-70. Dr. Becker's opinions were supported by medical records from plaintiff's doctors, showing no explanations for some symptoms; a severity and duration of symptoms disproportionate to the reported injury; elusive pain; pain complaints that did not correlate with the history; and psychological testing that revealed evidence of symptom exaggeration, symptom embellishment, and credibility issues in plaintiff's historical presentation. 13 App. 2672-75. The psychological testing in plaintiff's medical records had a "fake bad scale," which measures the likelihood of conscious symptom misrepresentations. 13 App. 2675-76. A score of 29 indicates a 99 percent likelihood of conscious symptom misrepresentation by the patient. 13 App. 2676. Plaintiff's score was 36, which is "very rare," and which is so high it was "alarming." 13 App. 2676; 14 App. 2677.

In short, plaintiff's alleged injuries were highly suspect and hotly contested. After making the errors at trial, the district court awarded approximately $6 million in damages. The errors were highly prejudicial, and if not for the district court's evidentiary errors regarding medical testimony, surely the award would have been significantly lower.

F. The case should be remanded to a different judge.

When a case is remanded, assignment to a different judge is appropriate where the first judge has formed and expressed opinions regarding the merits of the case. See *Levin v. Wheatherstone Condo. Corp., Inc.*, 106 Nev. 307, 310, 791 P.2d 450, 451 (1990) (new judge should be assigned "because district court has expressed herself in the premises"). A different judge should be assigned in the interests of avoiding a potential appearance of impropriety. See *Wolzinger v. District Court,* 105 Nev. 160, 168, 773 P.2d 335, 340 (1989).

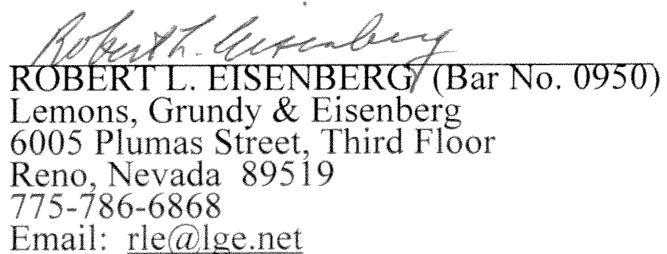
The present case was a 12-day bench trial. The district judge already formed and expressed her opinions concerning liability and damages. This appeal contends, among other things, that the judge erred by admitting improper and prejudicial evidence at trial, primarily consisting of inadmissible opinions by plaintiff's doctors (including opinions as to what other doctors would opine if given additional information). A remand for a new trial would require Judge Walsh to "unring the bell," and to ignore (or forget) all the inadmissible evidence she heard at the first trial, particularly if she refuses to allow a jury trial upon remand.

Under these circumstances, the Palms respectfully contends that the case should be assigned to a different judge upon remand, in the interests of avoiding an appearance of impropriety.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and remanded. If the court concludes that there was neither a factual nor legal basis for liability, the district court should be ordered to enter judgment in favor of the Palms. If the court reverses on any of the other grounds established in this brief, the case should be remanded for a new trial with a different judge.

DATED: July 17, 2017



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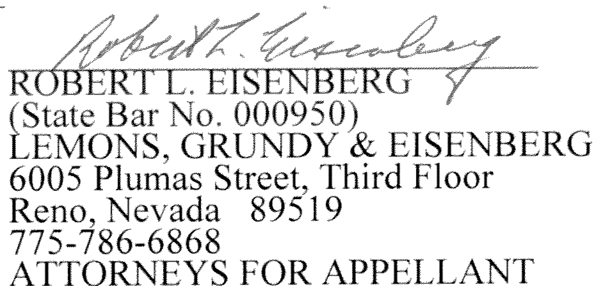
CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using WordPerfect version X5 in 14 point Times New Roman type style.

2. This opening brief is governed by the type-volume limitation in NRAP 32(a)(7)(A)(ii) [14,000 words]. Appellant is filing a motion seeking permission to file this brief in excess of the word limitation. If granted, this brief will comply with the rule because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it will contain the number of words allowed by the court, i.e., 14,852 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate rferences to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: July 17, 2012



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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellant's **Opening Brief** was filed electronically 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
Marsha Stephenson
Michael Wall

I further certify that on this date I served copies of this **Opening Brief** by U.S. mail to:

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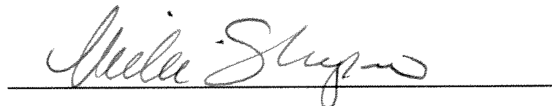
In addition, **Appellant's Appendix - Volumes 1 through 16** were hand delivered to the court for filing and a disk was mailed to all counsel listed above.

DATED this 19 day of July, 2012.



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