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. ENRIQUE RODRIGUEZ, Respondent.	Supreme Court No. 59630 District Case No. A531538

RESPONDENT ENRIQUE RODRIGUEZ' ANSWERING BRIEF

HUTCHISON & STEFFEN, LLC
Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
mwall@hutchlegal.com

Attorneys for Respondent Enrique Rodriguez

TABLE OF CONTENTS

AUTHORITIES CITED
RULES AND STATUTES

CASE LAW

JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is incomplete, to say the least. From that statement, the lack of dates, and the lack of citations to the record, this Court cannot determine whether its jurisdiction has been properly invoked.

It is, nevertheless, respondent's belief that this Court's appellate jurisdiction has been properly invoked. Respondent is therefore generally satisfied with appellant's jurisdictional statement. NRAP 28(b)(1).

Respondent notes, however, that the amended judgment entered on February 15, 2012, is not the final judgment in this case. 6 App. 1279. Instead, the final judgment in this case was entered on April 12, 2011. 3 App. 706. The amended judgment entered on February 15, 2012, was a post-judgment order addressing only an issue regarding and correcting the interest rate imposed in the final judgment. Confusingly, rather than simply entering an order resolving the long-post-judgment issue regarding interest, the district court reiterated the prior final judgment. 6 App. 1279. Appellant has challenged the final judgment generally, but has raised no issue relevant to the issue addressed in the amended judgment.

Written notice of entry of the amended judgment was served on March 9, 2012 (not included in the appendix). The two notices of appeal, filed on November 4, 2011, 6 App. 1225, and March 13, 2012, 6 App. 1282, respectively, appear to cover all appealable orders. The jurisdiction of this Court has been properly invoked.

STATEMENT OF THE CASE

This is an appeal from a judgment on a verdict following a bench trial, and from an order denying a motion for a new trial. 6 App. 1225. It is also an appeal from an "amended judgment." 6 App. 1282. Eighth Judicial District Court, Department X, Clark County, the Honorable Jesse Walsh, District Judge. 5 App. 990. Appellant has raised no issue with respect to the amended judgment

or the order denying the motion for a new trial.[1] Therefore, this appeal should be dismissed as to those two orders.

INTRODUCTION

It is easy if one ignores eighty percent of the record to construct an argument that sounds good and justifies a predetermined result. That is what appellant's opening brief does. Knowing it cannot possibly win any kind of substantial evidence review, appellant ("the Palms") has constructed in a vacuum "legal" arguments, hoping to mislead this Court into reversing the judgment in favor of respondent Enrique Rodriguez. But that verdict is sound both as a matter of law and based on the evidence presented, which establishes without doubt that Enrique suffered serious injuries directly and proximately the result of an accident for which the Palms is legally responsible.

Appellant's statements of the case and the facts in the opening brief are deficient. Rather than fairly setting forth the facts of Enrique's accident, injury and medical treatment, appellant gives a cursory statement regarding the facts, relying almost exclusively on a single exchange between Enrique and defense counsel during cross-examination to both minimize the facts of the accident and underrate the severity of Enrique's injuries.

Indeed, the Palms does not address Enrique's injuries or treatment, not stating but hoping this Court will reach the incorrect inference from the many

---

[1]Appellant may protest that the issues raised in the motion for a new trial are the same issues raised in this appeal, so the motion for a new trial appeal has not been abandoned. But the opening brief does not address the issues raised in the motion for a new trial, nor does it discuss the standard of review for a motion for a new trial. It does not specifically challenge the district court's denial of that motion, and does not set forth any procedural history or any statement of any but the most rudimentary facts, ignoring that the facts must be construed in favor of respondent. It is too late in the reply brief to argue that the district court erred in denying appellant's motion for a new trial.

insinuations in the brief that the incident was unremarkable, the injuries minor, and the verdict excessive. Such inferences are neither warranted nor supported by the record.

The trial testimony regarding the severity of Enrique's injuries and the appropriateness of his extensive treatment, including multiple surgeries and extreme pain and suffering over a period of years—pain that will to a reasonable degree of medical probability continue throughout the remainder of his life—is overwhelming in support of the verdict, and largely unrefuted. I qualify this statement as "largely unrefuted," because the Palms did present one expert witness who opined that Enrique is a malingerer who magnifies his symptoms. The district court, as the trier of both fact and law, weighed and rejected that evidence.

STATEMENT OF FACTS

A. The Accident.

The only witness who testified at trial regarding the facts of the incident was Enrique.[2] 8 App. 1448.[3] On the day of the accident, Enrique and his girl friend of 28 years were in Las Vegas celebrating a successful medical procedure

---

[2]The Palms has neglected to include in the appendix any of the exhibits that were admitted at trial. Among other things, these include eye witness statements and medical records. This Court should presume the missing documents support the judgment and verdict. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

[3]I will not summarize Enrique's testimony regarding his lifestyle before and after the accident, or the terrible toll the accident has caused Enrique to pay, because the Palms has not raised any issue regarding the sufficiency of the evidence to support the verdict. Suffice it to say that overwhelming testimony was presented, from plaintiff and others, regarding the effect the accident had on his life, and from the medical providers, justifying the verdict.

endured by the friend. 8 App. 1457-59. While his friend slept, because she was tired and on medication, 8 App. 1460, Enrique visited the Palms. 8 App. 1461. When he arrived at the Palms, Enrique went directly to the Sportsbook area to watch Monday Night Football. 8 App. 1462-63. Enrique observed three girls dressed as cheerleaders throwing objects to the crowd. 8 App. 1464. They were not doing this in a sedate fashion. They were blindfolding each other, spinning each other around, and throwing the objects in a "crazy" fashion. *Id.* Enrique stood near the entrance and watched the game for a little over an hour. 8 App. 1465. During this time, he saw the girls throw things into the crowd about six times. 8 App. 1466. Enrique testified that the purpose of throwing the objects was "to motivate the audience . . . [and] to entice the audience. It was to get a response." 8 App. 1467. It worked. Enrique testified: "Well, people jumping. People putting their hands in the air [demonstrating]. People moving. People going wherever items went. People basically going where the items were thrown. . . . There was movement . . . it made movement. It made people respond. There was impact." *Id.*

Regarding how the accident happened, Enrique testified: "Well, what happened to me is a water bottle was thrown in my direction. And it happened so fast . . . . I'm standing there, watching the big screen TV. And when the ball's in flight hands move in the air [demonstrating] and this lady, for whatever reason, she decided to get up out of her chair, turn around, and run. I mean literally run towards where I'm standing and just take a total dive, body dive. And while I'm standing, she lands right on my knee." 8 App. 1468.

In a statement given to a Palms security officer at the time of the accident, Enrique described the incident as follows:

During commercial breaks the casino Palms' girls were throwing gifts out to us and they threw in the air a water bottle. . . . The guy next to me standing was thrown one, but he fumbled it. And when it hit his hands there was a lady

sitting directly in front of me that got up and ran, and then she dove for the water bottle and her shoulder hit my left knee. She tackled my knee for a water bottle." 8 App. 1419.

An independent witness described the accident as follows: "The MC threw a Palms' water bottle at me and it bounced onto the ground. The woman in front of me, in a green [hat or coat?] and blonde hair jumped out of a chair to get the bottle. I leaned down to grab it, and she ran into the man next to me because she was going for the bottle also. I grabbed it and she kept going for it." 8 App. 1421.

On cross-examination, as set forth in the opening brief at page 3, Enrique admitted that the bottle was on the ground when the woman dove for it. The Palms bases their entire factual argument on this single exchange taken out of context, and on the premise that the woman's body-dive for the bottle was a complete surprise to everyone. The Palms suggests aberrant and unforeseeable behavior on the part of the woman, but this characterization of the record is not accurate. In fact, the record supports only one inference: The woman went for a bottle as it was thrown in precisely the manner the Palms anticipated, intended and expected. *Id.*

To further illustrate that the injury to Enrique was not only foreseeable, it was foreseen, plaintiff called Sherri Long. Long was the Vice President of Marketing for the Palms. 8 App. 1409. At the time of the accident, she was the Director of Marketing, which meant she was directly in charge of "special events and promotions," including the Monday Night Football promotion in 2004. *Id.* Long testified that the Monday Night Football promotion had originally been held in the Key West Room before it was moved to the Sportsbook. 8 App. 1410. The Key West Room was far larger and more open than the Sportsbook. allowing for better crowd control and moving around without entangling themselves with others. *Id.* Before the promotion was moved to the Sportsbook area, Long

learned that some individuals were throwing promotional items into the crowd. 8 App. 1411. She met with her staff and instructed them not to allow anyone to throw promotional items into a crowd. She did this because she thought it was inappropriate to throw things into a crowd, because somebody could get hurt. 8 App. 1412. She testified that such behavior "creates chaos" *id.*, and that it was fair to say that "it was foreseeable . . . that if promotional items were thrown into the crowd, somebody might get hurt." 8 App 1414. She further testified that if anyone told Brandy Beavers, the girl who threw the bottle that resulted in Enrique's injury in this case, that it was OK to throw promotional items into the crowd, she would have considered that inappropriate and against her instructions, because someone might get injured. *Id.* She further testified that she was aware of Enrique's claim, and this was precisely the type of injury she was afraid could occur as a result of throwing promotional items into a crowd. 8 App. 1417. Indeed, it was precisely this type of injury she was trying to prevent when she told her staff that it was foreseeable somebody could get hurt if a bottle was thrown into a crowd. 8 App. 1418. Long reiterated her belief that injury was the foreseeable result of throwing promotional items into a crowd in a casino setting a number of times during the remainder of her testimony. *Id.* at 1418-24.

Thus, it is specious for the Palms to assert in their brief, over and over again, that there is nothing dangerous about throwing items into a crowd in a casino environment, and that the injury in this case was the result of the unforeseeable act of a crazy woman diving for a water bottle that was lying on the floor.

Vikki Kooinga, risk manager for the Palms, then testified. 8 App. 1434. At the time of the accident, she was second in command in the Palms' security department. 8 App. 1436. She testified that despite the fact that the Monday Night Football promotion involved girls energizing the crowd, no security guard was assigned to that promotional event at the time the accident occurred.

8 App. 1437. She testified that the Palms had no security policy, written or otherwise, regarding what activities were appropriate at promotional events. 8 App. 1438. She thought it was inappropriate to throw items into a crowd at a promotional event because of the foreseeability of injury, and she testified that if she or any other Palms security guard witnessed items being thrown into a crowd, she would expect that they would stop that activity. 8 App. 1439. Kooinga testified that in her opinion it would be below the standard of care for a security guard to allow the throwing of items to continue, and that she was aware of testimony that a security guard was present in the Sportsbook while items were being thrown. 8 App. 1440. She believed, because the Sportsbook was open to the casino, that multiple security guards witnessed and were aware that items were being thrown into the crowd, and she would have anticipated that if this was being done at every commercial break, a security guard should have stepped in to stop it, because it was below the standard of care, and because of the danger of injury. 8 App. 1441.

Thus, the facts and testimony before the district court provide a solid basis for a conclusion that throwing promotional items into a crowd in a casino setting falls below the standard of reasonable care, and that injury is not only foreseeable, it is expected.

B. The Medical Treatment.

Although the Palms has not raised as an issue the sufficiency of the medical evidence to support the verdict, the medical evidence is relevant because of appellant's unspoken but loudly implied theme that Enrique's injuries are minor and the verdict excessive. There was no credible evidence that plaintiff's injuries are not real, serious and proximately caused by the accident. The speculative testimony of the Palms' medical expert that Enrique is a malingerer can only be put into perspective with reference to the overwhelming medical evidence establishing the serious nature of Enrique's injuries.

Dr. Nathan Heaps, M.D., was the emergency room doctor who first examined and treated Enrique on the night of the accident. His deposition testimony was read into the record. 7 App. 1355. He testified that at the time of the accident, Enrique complained of left knee pain, and he noted hyperextension of the knee. 7 App. 1368. Dr. Heaps gave Enrique a fairly thorough examination, and did not note any immediate problems other than the injured knee. 7 App. 1378-85. This fact became the theme of the defense; that the injuries to other parts of Enrique's body were not noted on the first examination. But even Dr. Heaps acknowledged that later complications can occur from such an injury, and stated that he would defer to the doctors who treated him for his later injuries. 7 App. 1395-96.

Dr. MaryAnn Shannon, M.D., an orthopedic surgeon, testified regarding her treatment of Enrique beginning at 9 App. 1584. Her qualifications are beyond dispute. 9 App. 1584-87.

At 9 App. 1592-1612, Dr. Shannon reviewed and commented on the treatment and diagnoses Enrique received from Dr. Heaps and Dr. Nork, the specialist Enrique first treated with in Los Angeles. This testimony includes a diversion of multiple pages where defense counsel argued with Dr. Shannon regarding the definition of the word "contusion" and ultimately objected that Dr. Shannon was not qualified to testify as to the meaning of that word as used in one of Dr. Nork's notes. 9 App. 1600-04. The purpose of this testimony was to explain that prior, conservative treatment—which Dr. Shannon reviewed at the time she first saw Enrique—had not resolved Enrique's ongoing knee pain. The failure of conservative care was primary in Dr. Shannon's conclusion that knee surgery was indicated. *Id.*

During her initial treatment of Enrique, based on her examination and her personal reading of an MRI, Dr. Shannon noted that Enrique had "an increased Q angle" which is the alignment of the kneecap to the patellar tendon, mild

crepitation, medial and lateral joint line discomfort, and "one plus synovitis," which is swelling from inflamation in the joint lining. 9 App. 1613. Despite continued therapy and conservative treatment, his condition worsened. 9 App. 1614.

Eventually, when conservative treatment failed, Dr. Shannon concluded that Enrique had a medial meniscal tear, a strained anterior cruciate ligament, and injury to the patella femoral joint with lateral patellar compression syndrom. 9 App. 1631. She testified that surgery was indicated, as follows:

> Q. Now if [it] was suggested that you ran off and performed a surgery on Mr. Rodriguez's left knee without sufficient MRI or diagnostic evidence, how would you respond to that?
>
> A. He'd had failure of conservative management. He had an MRI which was to say the least, lowest accuracy type of test, and a clinical examination that said there was still something ongoing that had not responded to what the original – the original diagnosis was contusion, sprain/strain.
>
> Contusion, sprain/strain should get better within six weeks. He continued to have the same – similar symptomology going over many, many months. In fact, I didn't operate on him until October of 2005, which is not quite a year before the – the year after the accident and he had the same persisting symptoms. At that point in time, he didn't have an injury, and you know, with – and we didn't have sprain/strain, persisting symptoms with a clinical examination indicating potential meniscus problems, on a clinical basis he meets all the criteria for surgery.

9 App. 1631-32.

Regarding the surgery performed by Dr. Shannon, Dr. Becker, M.D., the Palms' expert orthopedist, testified that photographs from Dr. Shannon's surgery showed that there was "indeed a torn meniscus." 13 App. 2575. He stated that

Dr. Shannon "did a really good job. Trimmed it [the meniscus] very nicely." *Id.* He further testified that the torn meniscus was, to a reasonable degree of medical probability, caused by the accident at the Palms, and was consistent with the original examination of Enrique at the emergency room. 13 App. 2582-83; 2656. Dr. Becker also testified that a torn meniscus cannot heal itself because it has no blood supply. It must be surgically repaired or excised. 13 App. 2621. Dr. Becker testified that Enrique's carpel tunnel syndrome was caused by his use of crutches after the accident, and was causally related to the accident. 14 App. 2687. Candidly, Dr. Becker believed the carpel tunnel syndrome would have healed itself after Enrique stopped using the crutches. *Id.*

Enrique did not get relief from the surgery; instead, his condition worsened, and a second knee surgery was required. That surgery was performed by Dr. Jacob Tauber, M.D., an orthopedic surgeon. 14 App. 2749-56. Dr. Becker, defendant's expert, testified that this second surgery was caused by and related to the accident at the Palms. 14 App. 2692; 2694. Most importantly, Dr. Tauber suspected that Enrique was suffering from reflex sympathetic dystrophy ("RSD"), and referred him for evaluation. 14 App. 2757.

Dr. Joseph Schifini, M.D., testified principally regarding Enrique's condition known as RSD, regional pain syndrome. Dr. Schifini is an anesthesiologist who specializes in diagnosis and treatment of complex painful conditions, including neurologically mediated diseases such as RSD and complex regional pain syndrome ("CRPS") . 10 App. 1814-15. These conditions are explained in detail beginning at 10 App. 1822.

Dr. Schifini testified shortly regarding the findings of Dr. Ferrante, the Chairman of the Anesthesia Department at UCLA. 10 App. 1819. Specifically, Dr. Schifini referred to and explained a single medical report of Dr. Ferrante, on which Dr. Schifini relied in his own treatment of Enrique, in which Dr. Ferrante opined that it was possible Enrique was suffering from CRPS or RSD, but did not

feel he had sufficient objective information from which to make a definitive diagnosis. 10 App. 1821. Dr. Ferrante suggested that further tests, including a bone scan and lumbar sympathetic blocks, be conducted. *Id.* That was the extent of Dr. Shifini's testimony on direct examination regarding the treatment Enrique received from Dr. Ferrante.[4]

Dr. Schifini then described in detail all of the things that combined to lead him to believe that Enrique was suffering originally from RSD and then later from CPRS, 10 App. 1827-65. Enrique did undergo a bone scan, which was negative (this fact was of little concern to Dr. Schifini in light of all of the other tests and examination results, 10 App. 1852), sympathetic nerve blocks, examinations and other procedures, some of which were performed by other doctors. Dr. Schifini testified regarding what the records of these other treating physicians showed, always in the context of how he interpreted them in reaching his diagnosis and treating Enrique. *Id.* It was "pretty clear" to Dr. Schifini that Enrique was and is still suffering from RSD. 10 App. 1853-54.

Another sympathetic block was performed, and Enrique did not get any pain relief from it. Therefore, Dr. Schifini concluded that Enrique was no longer suffering from sympathetically mediated pain, but Dr. Schifini was convinced that Enrique was still suffering from a neurologically meditated pain syndrom. 10 App. 1860-66. This testimony goes on at great length. Dr. Schifini addressed all of Enrique's conditions and related them all to the accident at the Palms. 10 App. 1866 and following. The point that is important is that Dr. Schifini, relying on his own expertise and judgment and on the tests and opinions of other treating physicians, diagnosed Enrique as suffering from RSD and CPRS and related physical conditions that are likely to continue to cause him severe,

---

[4]On cross, defense counsel asked Dr. Schifini many questions regarding Dr. Ferrante's opinions. Appellant cannot complain about testimony elicited on cross-examination.

debilitating pain throughout the remainder of his life. *Id.* His reliance on the records and opinions of other doctors is precisely what doctors do in diagnosing and treating their patients.

Dr. Schifini recommended a spinal cord stimulator to relieve some of Enrique's pain. 10 App. 1867. After describing how a spinal cord stimulator works, Dr. Schifini testified that a temporary spinal cord stimulator had been placed in Enrique on a trial basis, and it had relieved 80 percent of his knee pain. 10 App. 1869-72. Dr. Schifini testified from his own knowledge to the need for and cost of placing a permanent spinal cord stimulator and maintaining it over the remainder of Enrique's life. 10 App. 1880-87. He testified this is medically necessary to a reasonable degree of medical probability. 10 App. 1910.

Dr. Schifini testified at some length to the related pain and suffering Enrique has endured and will endure in the future related to this accident. Enrique has neck and lower back issues, carpel tunnel syndrome, and other conditions all related to the fact that the pain he suffers in his knee has caused him to walk with an antalgic gait, has caused weight gain, and has in other ways put stress on his body. Dr. Schifini related all of these conditions "overwhelmingly" to the accident at the Palms. 10 App. 1917-19.

Dr. Schifini testified that in his opinion, Enrique's ongoing pain, antalgic gait and ambulating with the use of assistive devices would lead to additional injective therapy and ultimately back surgery, either a laminectomy or discectomy, and the instability in his spine would lead to more surgeries. 10 App. 1918. At this point, the Palms objected on the basis that Dr. Schifini is an anesthesiologist, not an orthopedic or neurosurgeon. 10 App. 1919. Plaintiff laid a foundation for Dr. Schifini's qualification to render an opinion regarding the likelihood of future spine surgery including, but not limited to, the fact that Dr. Schifini has treated many patients with antalgic gait, and many patients with postural changes to their lumbar spines. He has sent many of those patients to

surgeons, has consulted with those surgeons as part of the surgical/pain management team, and is able to anticipate with accuracy which of those patients will require surgery. 10 App. 1919-21. Just because he does not perform the surgery does not mean he is not expertly qualified to opine that surgery is a medical probability for his patient. *Id.*

Dr. Russell Shah, M.D.,[5] a neurologist, testified regarding Enrique's ongoing neurological conditions beginning at 11 App. 2042. He was admitted to testify as a treating physician and as an expert in neurologically mediated diseases, and related matters. 11 App. 2045. Dr. Shah testified to the diagnoses and treatments Enrique received from Drs. Ferrante and Miller from their records, 1 App. 2047, particularly that they conducted tests and concluded that Enrique was suffering from RSD. He stated there is no lab test you can take to diagnose RSD, it is a clinical diagnosis based on examination and a number of factors. *Id.* Dr. Shah testified regarding the records of Enrique's prior treating physicians, not to provide their opinions to the trier of fact, but to support his diagnosis as Enrique's most recent treating physician. That diagnosis was based on Dr. Shah's review of Enrique's prior treatment, prior medical records and his own examination and evaluation, to which Dr. Shah testified at length, beginning at 11 App. 2048-58.

Dr. Shah also testified regarding the positive result Enrique experienced with the temporary spinal cord stimulator, which gave Enrique 100% relief from the pain in his knee, and 80% relief of his back pain, although Dr. Shah acknowledged that the relief from the back pain would be temporary. 11 App. 2059-60. When asked how Dr. Shah would respond to the defense expert's opinion that Enrique is not suffering from RSD, Dr. Shah stated: "I'd be

---

[5]In the opening brief, appellant had not raised any issue regarding the testimony of Dr. Shah.

surprised if there was a guy like that that wants to come and tell you that. This was the first thing I saw from four feet, five feet away from this guy. It was obvious he was suffering from RSD." 1 App. 2061. The statement may be somewhat hyperbolic, but it expresses the reality of this case.

Dr. Shah testified to the cascade effect of Enrique's knee injury and subsequent development of RSD, which led to derivative injuries. 11 App. 2069. Lack of mobility and use of assistive devices led to weight gain, carpal tunnel syndrom, an abnormal gait because of pain over a period of years, neck and lower back stresses and pain and other discomforts. 11 App. 2069-74. Dr. Shah testified regarding Enrique's back and neck problems, how they were diagnosed and are being treated, and the prognosis for the future, including how the condition has progressed and that it is common for persons with chronic knee pain to develop back pain based on an antalgic gait and the resulting atrophy of key muscles. 11 App. 2081-86. After a solid foundation for his expertise and experience was laid, Dr. Shah was properly allowed to opine that Enrique faces one or more lumbar surgeries in the future. 11 App. 2089-94. Dr. Shah ended his direct testimony by setting forth at length his prognosis for Enrique's future care and treatment over the remainder of his life. 11 App. 2118-2124.

Defense counsel and their expert made much of the allegation that Enrique's scores on some standardized tests conducted by Dr. Louis Mortillaro, Ph.D., a renowned clinical psychologist with eminent qualifications, 15 App. 2900, demonstrated that he is a malingerer who aggrandized his complaints. CITE. But Dr. Mortillaro did not agree. He testified strongly that neither the tests nor his clinical examination and treatment of Enrique indicated that Enrique's were exaggerated or misrepresented, nor was there any indication of malingering or factitious disorder (misrepresentation of symptoms for any number of external reasons). 11 App. 2910. Dr. Mortillaro's testimony was entirely consistent with and corroborated the conclusions of all of his treating

physicians.

Defense counsel scoffs at Enrique's whole-body suffering as a result of the accident at the Palms, pointing out that originally only his knee was badly injured, but the medical evidence was consistent that the knee injury that refused to heal and led to neurological dysfunction also eventually led to Enrique's other problems. The testimony set forth in this brief barely scratches the surface of the medical testimony that was presented, firmly establishing both the severity of Enrique's injuries and their direct causal relationship to the accident at the Palms. Even the defense expert acknowledged that both knee surgeries and the carpel tunnel problems were directly caused by the accident. It is not difficult to see how these injuries led to Enrique's unfortunate whole-body pain and dysfunction as testified to by all of his treating physicians. The district court, as trier of fact, found this testimony compelling.

SUMMARY OF ARGUMENT

Enrique suffered a serious injury and has treated for it, and will continue to treat for it for the remainder of his life. The evidence regarding liability and damages is not just sufficient, it is overwhelming. The district court committed no error or abuse of discretion. The judgment should be affirmed.

DISCUSSION

I. The District Court's Liability Determination is Correct as a Matter of Law and Fact.

The Palms argues that the district court erred in determining that the Palms breached a duty of care by throwing promotional items to a crowd in a Sportsbook area open to a casino. The Palms argument is twofold. First, the Palms argues that the district court based its legal conclusion that a duty existed solely on the testimony of the Palms own employees that throwing items into a crowd is below the standard of care; and second, it argues that as a matter of law, throwing items into a crowd is not below the standard of care. Both arguments

lack merit.

The existence and determination of the extent of a duty is a question of law; the question of whether the duty was breached is generally a question of fact. *Turner v. Mandalay Sports Entertainment*, 124 Nev 213, 180 P.2d 1172 (2008); *Butler v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007). In this case, the duty owed by the Palms to Enrique is established in Nevada.

In order to prevail on the issue of negligence, a plaintiff must show: (1) that the defendant owed a duty of care to the plaintiff; (2) that the defendant breached his or her duty of care; (3) that the defendant's breach was the actual cause of the plaintiff's damages; (4) that the plaintiff suffered damages as a result of the defendant's breach; and (5) that the defendant's breach was the proximate cause of the plaintiff's damages. *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 4, 805 P.2d 589, 590-591 (1996).

Nevada's controlling law on premises liability can be found in *Moody v. Manny's Auto Repair*, 110 Nev. 320, 871 P.2d 935 (1994) (an owner or occupier of land is held to the duty of reasonable care when another is injured on that land), and *Harrington v. Syufy Enterprises*, 113 Nev. 246, 250, 931 P.2d 1378, 1381 (1997) ("even where a danger is obvious, a defendant may be negligent in having created the peril or in subjecting the plaintiff to the peril.") Although these cases involve slips and falls, the law in these cases applies here by analogy because the concerns for protecting against injury are the same. Generally, determinations of liability primarily depend on whether the owner or occupier of land acted reasonably under the circumstances. *Moody v. Manny's Auto Repair.*

Also, a landowner is generally liable for foreseeable injuries occurring on the premises. In *Estate of Smith v. Mahoney's Silver Nugget*, 127 Nev. ___, 265 P.3d 688 (2011), construing a landowner's liability for the wrongful acts of third persons, this Court drew a distinction between foreseeability as it relates to duty and foreseeability as it relates to causation. This Court further stated that "[t]he

preliminary inquiry in any case involving innkeeper liability is whether '[t]he wrongful act which caused the death or injury was foreseeable,' and thus, whether a duty of care was owed to the plaintiff." *Id.* at ___, 265 P.3d at 691 (second alteration in original; quoting NRS 651.015). Additionally, the determination regarding foreseeability as it relates to duty "must be made by the district court as a matter of law." *Id.* Although again, this is an interpretation of a statute and involves landlord liability for a third-party act, the concept is the same. If a landowner creates a dangerous situation and a particular injury is foreseeable, the landowner should be held liable for the damages.

In this case, a third-party hired by the Palms negligently injured Enrique. The conduct that caused the injury was not approved by the Palms because it specifically foresaw the danger, but its agents who had knowledge the activity was going on failed to intervene. The Palms had a duty because it created a peril, subjected Enrique to the peril, and the injury was not only foreseeable, it was foreseen.

The Palms argues that the district court based its determination of liability entirely on the testimony of the two witnesses who were Palms employees, and applied a higher standard of care because the Palms had adopted a policy higher than the ordinary standard of care. The Palms insists that it should only be held to the actual standard of care, not a higher standard of care, and relies solely on the testimony of its own so-called security expert to support its argument that throwing objects into a crowd never falls below the standard of care.

The Palms is wrong. The district court did not hold it to any higher standard of care based on the Palms' adoption of a higher standard. The Palms' employees' testimony regarding the Palms' unwritten policy was presented to establish the elements of the ordinary standard of care for negligence, that being that the Palms, as a property owner, created an unreasonable risk of foreseeable harm. The district court relied on the law and the duty evidence presented,

discounted the Palms' expert because he had no basis for his testimony, and concluded that the Palms' actions fell below the applicable standard of care as a matter of law. The district court set forth in detail its finding of liability, at no time suggesting it was imposing a higher standard of care. Instead, the district court stated "the known safety procedure was admissible as relevant to the issue of liability," and "Defendant's policy and the breach thereof both aided this Court, as the finder of fact, in determining the issue of liability." 2 App. 268. Thus, the Palms argument that the district court imposed the wrong standard of care lacks foundation.

Having so concluded, the district court granted Enrique's post-trial motion pursuant to NRCP 52(c) for a determination of liability as a matter of law, setting forth facts that established the creation of the peril, the danger of the peril, and the foreseeability of the injury. 2 App. 265-68. This reading of the district court's order is more consistent with the language of the order than is the Palms' assertion that the district court based its determination of liability solely on the policy of the Palms or on any heightened duty of care standard.

The Palms puts much weight on the fact that the district court did not use the word negligence in its order resolving liability, but that fact is not dispositive of any issue in this case. The district court accepted the testimony of the Palms' own security employees that it was unsafe to throw items into a crowd in a casino environment specifically because it was foreseeable that injury would follow; not just injury, but precisely the type of injury that actually occurred in this case. Having so concluded, the district court correctly applied the premises liability law of this state, and concluded that the land owner had allowed dangerous activity to promote its own commercial interests knowing that such conduct was dangerous and that injury was foreseeable. This determination is supported by the law and by the evidence.

It is true that Enrique argued below that the good Samaritan rule was

applicable to help establish breach. Enrique does not argue on appeal that the good Samaritan rule has application to this case. More importantly, the district court did not rely on the good Samaritan rule in finding liability. 2 App. 265-68.

Other than the testimony of its own expert, Mr. Franklin, who did not even visit the location where the incident happened until the day before he testified, 12 App. 2355-56, and did not evaluate the safety of the specific venue in question, *id.*, the Palms presented no evidence that its conduct was safe and did not fall below the standard of care. Mr. Franklin's testimony, which was very brief, can be summarized in a single sentence: He believes because he has been to many events where promotional items were thrown into a crowd that throwing items into a crowd is never dangerous anywhere or under any conditions. 12 App. 2353-54. The district court properly rejected this testimony both on the level of being incompetent as expert testimony and as being insufficient to establish the proper standard of care in the particular casino setting at issue here. The multiple repetitions in the opening brief of Mr. Franklin's lone opinion does not make his opinion the standard of care as a matter of law.

With no evidentiary support for its position that throwing promotional items into a crowd never falls below the standard of care, the Palms turns to a litany of baseball cases to support its theme that Enrique allegedly assumed the risk of injury by being in the Casino and observing the conduct without withdrawing. The Palms cites absolutely no authority for the proposition that Enrique had a duty to withdraw when he saw items being thrown, nor has the Palms suggested why even if Enrique recognized the danger he would not still be entitled to comparative damages if the conduct amounted to negligence. It is not difficult to discern why the Palms eschewed any discussion of this issue; comparative fault was not pleaded as a defense, 1 App. 15-17 (affirmative defenses), nor did the Palms ever suggest during the trial that plaintiff was

comparatively negligent.[6] Whether or not Enrique considered the conduct dangerous, the Palms knew it was dangerous, did not officially condone it, knew it was ongoing, and foresaw potential injury. Those facts establish liability.

But the Palms argues that being a spectator at a baseball game has inherent risks. The Palms relies primarily on *Turner v. Mandalay Sports Entertainment*, 124 Nev 213, 180 P.2d 1172 (2008). In *Turner*, a spectator was hit by a foul ball as she sat in a baseball stadium's concession area. The issue was whether the stadium owner had provided sufficient precautions against foreseeable injury, and this Court affirmed the district court's determination that it had. *Id.* at 217, 180 P.3d. at 1175. How *Turner* is analogous to this case is a mystery. Foul balls are an unavoidable and inherent part of baseball. Spectators know this when they attend the games. And the owner in *Turner* was protected from liability *because it had taken significant precautions to protect the spectators.*

In this case, throwing promotional items into a frenzied crowd in a casino setting is not part of any sport. It was part of a party hosted by the Casino for the purpose of gathering a crowd in an enclosed space and increasing betting revenues. Further, there is no evidence in this case that the Palms took any precautions to make this dangerous condition safe. In fact, the evidence was to the contrary. The girls did not throw the items at a controlled time in a controlled manner to avoid injury. Indeed, they wore cheerleader outfits, blindfolded themselves, turned each other in circles and wildly threw objects for the express purpose of creating a party atmosphere. 8 App. 1464-67.

The fact that a sporting event was being aired on the TVs does not transform this party into a sporting event, nor does it transform the casino Sportsbook into a sporting venue. Nor is this party, with drinking and gambling,

---

[6]I cannot cite to the record for this negative, but a review of the transcript reveals that the issue of comparative negligence was never discussed.

analogous to a convention. Mr. Franklin testified that items are thrown into crowds routinely at sporting events, in sporting venues and at conferences, and he considered this activity safe. 12 App. 2353-54. But the Palms' top level security employees testified that they considered it dangerous to throw promotional items into a crowd in a casino party setting, because it can bring the crowd to a frenzy and result in injury. Neither *Turner* nor any of the other baseball and sporting venue cases cited by the Palms addresses the standard of care at issue in this case. Simply stated, throwing promotional items into a crowd is not analogous to a foul ball. Nor is it analogous to a mascot at a baseball game or to a player throwing a ball to the fans. This was a casino party put on to attract a casino crowd and conducted in violation of the Casino's own unwritten policy because the Casino foresaw that in such an environment such conduct is dangerous.

A case more analogous is *Stewart v. Gibson Products Co. of Natchitoches Parish Louisiana*, 300 So.2d 870, 878-79 (La.App., 1974). There, a store owner, to promote business, advertised an airplane drop of ping pong balls onto a parking lot, some of which were redeemable for merchandise. The plaintiff, a shopper who had seen the advertisement and was specifically present at the time of the drop in anticipation of the drop, was injured when another person attempted to retrieve one of the balls. Arguments that she was voluntarily present, knew the danger and chose to participate did not move the Louisiana Court. Indeed, that court found liability even though it found that the danger was not foreseeable, but appeared only in hindsight. The Court stated: "[a] risk is within the duty owed to plaintiff if the event that caused the harm in hindsight appears to have been normal, not unusual, and closely related to the danger created by defendant's original conduct, even though, strictly speaking, it would not have been expected by a reasonable man in defendant's shoes. Moreover, an activity is an unreasonable risk against which the law affords protection if the

magnitude of the risk outweighs the social utility of the complained of conduct." *Id.* In addressing the utility of the store owner's conduct, the court weighed it against alternative, less dangerous courses of action and noted that "the Only probable risk involved in a ping-pong drop was that the ardor of the participants who desired to 'capture' the balls would incline them to be impatient, hasty, and careless in their movements at the time of the drop. This gave rise to the risk of harming themselves or others and it was this very risk which caused Mrs. Stewart's injuries." *Id.* The court went on to note that

> [T]he choice in this case is not commerce versus no commerce or crowds versus no crowds, as defendants seem to argue. Rather the issue concerns the proper means by which commerce should be conducted and crowds assembled, giving due regard to public safety. Relevant to this inquiry is an examination of the conduct the crowd is expected to exhibit once assembled and a distinction should be drawn between a crowd of Spectators as in *Bennett* and a crowd of Participants as is here involved. There is, for example, no negligence Per se in sponsoring a football game to be attended by 80,000 spectators; however, the same may not be said for a promotion where ping-pong balls redeemable for merchandise are dropped on the playing field at half-time with an invitation to the assembled crowd to try to 'capture' one or more balls.
>
> Alternative, equally effective, means of advertising were available to defendant-merchants, which involved less risk of harm to their patrons. We find defendants' conduct, viewed in its most favorable light, to have been of marginal social utility. No investigation was conducted by defendants to determine the safety of a drop nor was advance preparation made for the large crowd defendants expected to attend. Had a safety investigation been made, defendants may well have discovered that not only was it likely that participants in the drop could be injured by enthusiastic and careless crowd movement, but also that injury received in an airplane drop had been the subject of litigation in another state. *See Hicks v. M.H.A., Inc.*, 107 Ga.App. 290, 129 S.E.2d 817 (1963). There is no manifest error in the finding that the totality of the storeowners' conduct breached the duty of reasonable care owed to its business invitees. The resulting harm suffered by plaintiff is within the scope of protection offered by this rule of law.

Id. This reasoning applies to this case. The Palms builds a house of cards on the testimony of Enrique on cross-examination that no one expected the woman who injured him to jump from her seat and go for a bottle that was thrown to the crowd, but what Enrique clearly meant is that *he* did not expect that particular

woman to jump at that particular time. The Palms clearly expected and foresaw that people would be enthusiastic and careless in their attempt to retrieve the prizes, and that injury was likely. There was no social utility in throwing a wild party, and the choice to frenzy the crowd was the Palms'. A safety determination had been made and injury was foreseen, but the Palms elected nevertheless to allow the party to proceed. The anticipated danger was realized. Liability has been established.

II. The District Court Did Not Err in Admitting Medical Testimony.

A. Nevada Law Allows Treating Physicians to Testify Regarding Their Treatment of a Plaintiff, and Regarding Other Matters Within their Professional Expertise.

The Palms sets forth the proposition that if a plaintiff has forty treating physicians, that plaintiff must call all forty to testify in order to recover for an injury and course of medical treatment. Enrique suggests that a right of recovery may be established on the testimony of a few, well qualified expert treating physicians who are called to testify based on their own treatment of the patient and their expertise regarding the full panoply of treatment received by the plaintiff as a result of the accident.

The threshold test for admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine any fact in issue. NRS 50.275; *Prabhu v. Levine*, 112 Nev. 1538, 930 P.2d 103 (1996). In *Prabhu*, Dr. Levine(not the party), although not designated as an expert witness, was allowed by the district court to testify as to his treatment of the patient, and as to a number of expert medical issues, including but not limited to causation. This Court affirmed, stating, "[t]he district court determined that Dr. Levine's testimony should be admitted, and we conclude that the district court did not abuse its discretion in so ruling." *Id.* at 1547, 930 P.2d at 110. This is the law in Nevada. A treating physician need not be designated as a retained expert, and need not produce a

report, but is allowed to testify to the treatment of the patient and as a medical expert as to diagnosis, prognosis and future treatment. It is not necessary to look outside of Nevada for this law.

The Palms attempts to distinguish *Prabhu*, arguing that all this Court did was to affirm that it was alright to receive Dr. Levine's testimony in the form of a deposition. But this Court's ruling was not based on the fact that Dr. Levine's deposition was read at trial. That fact merely established that the defendant had an opportunity to cross-examine Dr. Levine. This Court addressed the matters required to be established by expert testimony in a medical malpractice case, relied on Dr. Levine's testimony as establishing those expert matters, and upheld the admission of the evidence without expert disclosure and reporting. The fact that the testimony was presented in a deposition forms no part of this Court substantive reasoning as to what a treating physician may testify.

The Palms notes that this Court did not discuss in *Prabhu* the distinction between treating physicians and expert witnesses, seeking to draw the conclusion that the case does not decide that issue. But the lack of direct discussion of that issue cuts against the Palms' position. This Court noted that expert testimony was required, that Dr. Levine had not been disclosed as an expert, but nonetheless affirmed the admission of Dr. Levine's expert opinions without discussion of any suggested distinction between expert treating evidence and other expert medical opinions. This suggests that the distinction the Palms is now promoting was not important to this Court's analysis, not that this distinction exists but was somehow overlooked by this Court, as suggested by the Palms. The treating physician was allowed to testify to causation and other medical expert matters without being required to provide a report or be disclosed as a retained expert. The holding of *Prahbu* is directly adverse to the position the Palms now invites this Court to accept.

In addition, this Court had previously held in *Fernandez v. Amirand*, 108

Nev. 963, 969, 843 P.2d 354, 358 (1992):

> Once a physician is qualified as an expert, he or she may testify to all matters within his or her experience or training, and the expert is generally given reasonably wide latitude in the opinions and conclusions he or she can state, being subject only to the general exercise of discretion by the district court concerning whether the expert is truly qualified to render such testimony.

The Palms complains that Enrique's counsel's argument at trial regarding *Fernandez* was too broad, but counsel quoted the case almost verbatim. 9 App. 1587. The Palms tries to distinguish *Fernandez*, and argues that it had nothing to do with whether a treating physician is subject to expert witness disclosures. AOB 27. The Palms is right on that narrow point. *Prabhu* establishes that a treating physician is not required to provide expert witness disclosures but nonetheless is allowed to testify as an expert; *Fernandez* establishes that once a doctor—retained or un-retained—is qualified as an expert, that doctor may testify to all matters within his or her experience and training, and should be given wide latitude.

All of Enrique's treating physicians were qualified by the district court as experts without objection to their qualifications. Each is imminently qualified to testify regarding all of the opinions given. The Palms has not challenged the qualification of any doctor as an expert in this appeal. Instead, the Palms objected below only on the basis that the treaters were not disclosed as experts, and argues on appeal that the testimony of treating physicians should be limited in a manner not previously recognized in Nevada law. The Palms' argument should fail.

B. Enrique's Doctors Did Not Testify to Matters Beyond Their Own Treatment and Expertise.

The Palms argues that Enrique's treating physicians should not have been allowed to testify to matters beyond their own treatment or to offer any expert medical opinions. These arguments fail primarily because the Palms has failed to provide a factual predicate for its argument that any of the treating doctors who

testified in this case went beyond the proper scope of a treating physician.

Although it is true the doctors testified as to their professional opinions as to the appropriateness of the treatment and care received by Enrique, they did so in the context of their own treatment of Enrique, which included review of Enrique's past, present and ongoing treatment, and the diagnoses of his conditions and prognosis for the future. These doctors, as part of their treatment of the patient, necessarily reviewed and relied on the medical records of other treating doctors. They were qualified to opine as to the necessity and appropriateness of all of the treatment, including the causal connection between the accident and the injury. Causation would not have been more convincingly established if every treating physician had been required to testify, nor has this Court required that a retained expert establish medical causation in every case. This Court has allowed expert, non-retained medical treating physicians to testify to such matters.

The second reason these arguments fail is because they are belied by Nevada law. It is not surprising that in making this argument the Palms first sets forth a laundry list of questionably relevant cases from other jurisdictions before turning to the Nevada authority that is on point, and attempting to rationalize it away. The Nevada law relied on by the district court establishes both that treating physicians need not provide reports and are allowed to testify as experts. The narrow myopic view the Palms advocates would swamp the courts in cumulative testimony from treating experts and other required experts, and would mire this Court in the impossible task of delineating on a case by case basis which expert opinion a treating expert is allowed to express, and which expert opinions must be disclosed in a formal report.

And all for what? To save defendants the expense of deposing medical treating experts? Disclosure is not the reason medical treaters are exempted from the report requirement. Treating physicians produce medical records which are

sufficient to put the plaintiff on notice of the doctors' opinions, and depositions may be conducted regarding known treatment issues. This is not analogous to an expert who intends to present opinions based on matters otherwise unknown and unknowable to the defense. In this case, the Palms has failed to identify a single document or matter that was presented of which the Palms did not have advance notice.

The doctors did not testify regarding medical literature or opinions outside of the treatment of Enrique in this case, not did they rely on or interpret any medical record not specific to this case and provided to the defense in discovery. That the Palms did not depose the doctors and discover their explanation of their treatment and opinions as to future treatments is not the fault of non-disclosure. Treating physicians in Nevada have no obligation to provide expert reports but are nonetheless expected and allowed to testify regarding the future care and treatment of their patients.

There is no indication in the record that any of Enrique's doctors obtained or commented on any documents solely for litigation purposes. Instead, each doctor testified regarding medical records that were important to, and informed their own treatment of Enrique. Other than broad allegations and mischaracterizations, the opening brief is devoid of any specific example of testimony that does not fit squarely within the rubric of treatment.

The Palms represents that the doctors testified beyond their designation as treating experts, but I have personally read the transcript, and it is my impression the doctors were careful not to testify beyond their treatment and professional expertise. Without a concrete example of improper testimony, this Court should be slow to credit the Palms' complaints, and even slower to second guess the district court's perceptions and rulings regarding the admission of the evidence as it was offered and presented.

///

C. The Palms Has Not Demonstrated a Factual Basis to Support Its Argument that the Treating Physicians Testified Improperly.

At pages 18-21 of the opening brief, the Palms sets forth its factual assertions regarding the allegedly improper testimony offered by Enriques doctors. The factual assertions are belied by the record, and are insufficient to support the Palms' contentions.

The Palms states that Dr. Kidwell "was proffered only as a treating doctor." But Dr. Kidwell, who specializes in interventional pain management, 14 App. 2781, was admitted without objection "as a treating physician of Enrique Rodriguez and as an expert in the field of pain management and anesthesiology." 14 App. 2782. The Palm's only complaint about Dr. Kidwell is that he was allowed to testify regarding the opinions of Dr. Thalgott, an orthepedic surgeon who did not testify at trial. The Palms states: "[T]he 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."[7]

The district court allowed no such thing and Dr. Kidwell offered no such testimony.

One will search the direct testimony of Dr. Kidwell for the name Dr. Thalgott in vain. Dr. Kidwell did not render any opinion on direct regarding Dr. Thalgott 14 App. 2180-2817.[8]

On cross-examination, defense counsel brought up Dr. Thalgott. Almost

---

[7]To support this statement, the Palms cites to its own post-trial brief, where it made the same argument. 1 App. 166. Repetition of the statement lends it no additional credibility.

[8]Dr. Kidwell did testify that he agreed with the opinions of Drs. Schifini and Shah, given at trial, that Enrique will require multiple back surgeries in the future, 14 App. 2813-14.

immediately, defense counsel asked Dr. Kidwell about Dr. Thalgott's qualifications as an orthopedic surgeon and began reviewing Dr. Thalgott's records with Dr. Kidwell. 14 App. 2819. Defense counsel pursued this line of questioning at length to impeach Dr. Kidwell because defense counsel considered Dr. Thalgott's opinions to be at odds with Dr. Kidwell's.[9] See 14 App. 2841 and following. The questioning went through redirect and re-cross multiple times. Each time, defense counsel tried to emphasize that Dr. Thalgott's opinion was different from Dr. Kidwell's. Dr. Kidwell emphasized that Dr. Thalgott's opinion was that Enrique was not a candidate for surgery "at that time." 14 App. 2873. During the final cross-examination, defense counsel was still pounding the "Dr. Thalgott disagrees with you" pulpit, to which Dr. Kidwell responded: ""what you should be asking me is why do I think he's a potential surgical candidate. That's what you're not asking here." 14 App. 2874. Defense counsel was not interested in asking that question, so on the final redirect examination of Dr. Kidwell, the following important exchange took place:

> Q Did you want to respond to the question why do you believe he's going to require a lumbar surgery?
>
> A Yes, I mean I think that's the crux of the whole thing, why.
>
> Q Give it to us.
>
> A A surgeon will say they're not a surgical candidate at this point and time. He doesn't feel he's appropriate for surgery at this point and time. There is incomplete data, simply incomplete data.
>
> The hypothesis is that he has internal disc disruption in the lumbar spine. There are two basic structures that cause this kind of pain in the low back, discs and facet joints. Neither one of them have been explored as far as a potential pain generator.
>
> The symptoms are most consistent with discogenic pain. It could be facet pain, but most consistently with discogenic or perhaps both. The way to prove or disprove the hypothesis is to do a

---

[9]Dr. Kidwell did not read Dr. Thalgott's medical records to suggest that back surgery would never be indicated for Enrique; he read those records as indicating that back surgery was not a viable option at the time Dr. Thalgott was treating Enrique. 14 App. 2873.

discogram.

. . . . [long discussion about discogram deleted]

Dr. Thalgott doesn't have any more information than I do. He's an excellent surgeon and I understand him completely. At that point and time, he's not a surgical candidate. He also has the specter of his knee problem, not a surgical candidate.

However, let's say he didn't have a knee problem and I did a discogram showing that he had maybe one or two levels positive. I guarantee he'd be a surgical candidate. And based by multiple reputable spine surgeons in this town.

Q And he –

A Now, I am not a spine surgeon. I admit it, but I sure work with them a lot.

Q And can I ask you to turn –

MR. WARD: Wait, I want to voice an objection. I object to the last response and I move to strike on the basis that it's speculative. He's talking about things that Dr. Thalgott might have done or would have done. Dr. Thalgott has not been here to testify. Dr. Thalgott hasn't seen the patient for several years. This gentleman hasn't seen the patient for several years. It is all speculative.

14 App. 2875-78. So it was defense counsel, not Dr. Kidwell, who suggested that Dr. Thalgott would or would not do. Dr. Kidwell's testimony contains no suggestion as to Dr. Thalgott's opinion, past or future, other than as expressly set forth in Dr. Thalgott's records in response to questions by the defense. Dr. Kidwell simply explained his own opinion, and to the extent that opinion was different from Dr. Thalgott's, he expressly disagreed with Dr. Thalgott, and explained possible reasons for the disagreement. *Id.* Defense counsel set up his own version of the testimony in his objection, which was not reflective of the testimony and was overruled. Now the Palms showcases on appeal the testimony that defense counsel gave, falsely attributing it to Dr. Kidwell.

Similarly, the Palms complains that Dr. Schifini was allowed to testify as both a treating physician and as an expert medical witness. AOB at 18. The Palms notes that Enrique's counsel had called Dr. Schifini in other completely

unrelated cases as an expert, but elected to call him as a treating physician in this case, suggesting some nefarious plan and knowledge on the part of counsel that Dr. Schifini should have been disclosed as an expert in this case. The Palms complains that Dr. Schifini was provided with "thousands of pages of medical records," and was allowed to testify regarding the content of those records, including the opinions and treatment of other medical providers. The Palms is most exercised that Dr. Schifini was allowed to testify regarding the treatment provided by other medical treaters, and whether those treatments were medically necessary and related to the accident. The Palms finishes with the coup de grace that "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." AOB 18. These arguments lack merit.

Dr. Ferrante saw Enrique once. He opined but did not conclude that Enrique might be suffering from RSD, indicating that additional testing should be conducted. 10 App. 2025. The Palms' would have this Court rule as a matter of law that no treating doctor could testify regarding Dr. Ferrante's single visit except Dr. Ferrante, even if that doctor had reviewed and expressly relied on Dr. Ferrante's record in his own treatment of the patient. In the Palms view, Enrique was required by law to have every one of his treating physicians testify, a proposition that would make every complex injury case involving multiple treating physicians impossible to try. This Court has never imposed such a requirement, and the Palms has failed to cite any law supporting such an unreasonable burden of proof.

The Palms is upset that Dr. Schifini reviewed thousands of pages of medical records, but that is precisely what a treating physician does in treating a patient with complex symptomology. And explaining the basis of the ongoing treatment will necessarily entail explanation of the history of prior treatment and

how it informs the ongoing treatment. This Court will find no suggestion in the transcript of the testimony of Dr. Schifini that he testified to matters outside of his treatment of Enrique.

The allegation that the district court allowed Dr. Schifini to speculate as to the opinions of Dr. Ferrante is specious. In response to questions posed by defense counsel, Dr. Schifini acknowledged that Dr. Ferrante had not reached a final diagnosis because he did not have "the totallity of the medical records" that Dr. Schifini had. 10 App. 2033. He opined after having been pressed on the point multiple times by defense counsel that "Dr. Foranti was dealing with his one piece of information and had not completed his thought yet. He wanted and requested additional diagnostic testing to be done which was ultimately performed by Dr. Miller. So he had not yet formulated all of his thoughts and if given the opportunity to review this, I am confident that Dr. Foranti would come to the same conclusion that I have." *Id.* To characterize this testimony in the way it is characterized in the opening brief is simply an attempt to create an issue that does not exist, and is misleading, at best.

Finally with respect to Dr. Schifini, the Palms complains that he was allowed to testify to a life care plan that was different from the life care plan disclosed by plaintiff's life care planning expert, who was not called at trial. The Palms is upset that Dr. Schifini was allowed to "express previously-undisclosed criticisms of the life care plan" of plaintiff's expert. AOB at 19. It is true that Dr. Schifini testified regarding Enrique's future medical needs, and was critical of the life care plan he believed would not provide Enrique with the care he actually will need. 10 App. 2015. But the rest of appellant's argument is sophistry. The Palms chose not to depose Dr. Schifini. Had it done so, the defense would have discovered his opinions regarding Enrique's future care needs. Labeling Dr. Schifini's opinions "previously-undisclosed" adds nothing to the inquiry unless Enrique had an affirmative legal obligation to disclose those

specific opinions. So the argument merely begs the question.

There is no case law suggesting that a plaintiff who has identified an expert life care planner must call that expert at trial, or is not allowed to present further evidence that may contradict the life care planner's opinion. There is no law that says a defendant has a right to rely on a disclosed life care plan and to assume that properly disclosed treating medical experts will not offer opinions different frm the life care planner's. The Palms scoffs at the district court's reliance on the fact that it did not depose Dr. Schifini, but Dr. Schifini was disclosed as a treating physician who would testify regarding his treatment of Enrique. 1 App. 52. The Palms should have deposed Dr. Schifini to discover the opinions he would present regarding Enrique's prognosis and future medical treatment needs. The Palms should not be heard to complain of surprise when it did not seek Dr. Schifini's opinion in preparation for trial.

Finally, the Palms complains that Dr. Shannon was allowed to testify regarding the treatment Enrique received from other doctors, but provides only one example of Dr. Shannon's testimony regarding Dr. Nork. The Palms complains that Dr. Shannon testified "extensively" about Dr. Nork's treatment and as to what Dr. Nork meant when he made certain entries in his notes. But a fair reading of Dr. Shannon's testimony regarding Dr. Nork's treatment of Enrique belies the Palms' argument. Dr. Shannon did not testify extensively regarding Dr. Nork, and she did not testify at all regarding Dr. Nork's treatment of Enrique. Instead, Dr. Shannon testified that Dr. Nork had noted in a single medical record that his examination of Enrique about 10 days after the accident showed a contusion on his knee, and this was exactly what Dr. Shannon would have anticipated that many days following the accident. 9 App. 1604. This testimony not only formed a direct predicate for Dr. Shannon's treatment of Enrique (it indicated to her a possible medial tear in the meniscus), but it was within her medical expertise to interpret this record.

When Dr. Shannon described a contusion as a bruise, 9 App. 1600, defense counsel took Dr. Shannon on voir dire and had a ridiculous argument with her about the definition of the word contusion. This diversion went on for pages, and constitutes most of Dr. Shannon's "extensive" testimony about the meaning of Dr. Nork's medical record. 9 App. 1600-04. At no time did Dr. Shannon testify or opine regarding Dr. Nork's treatment or opinions, other than in the context of her own treatment of Enrique based on his past medical history and continued pain. It is amazing in light of degree of the Palms' appellate reliance on the allegedly improper medical testimony at trial, that in all of Dr. Shannon's extensive and important testimony, the Palms has only been able to identify this minor, almost inconsequential exchange on which to factually base their argument. This exchange, that so squarely fits into Dr. Shannon's role as Enrique's treating surgeon.

D. Enrique's Treating Physicians Did Not Present the Opinions of Non-Testifying Doctors.

The Palms' complains that Enrique's treating physicians were allowed to present the opinions of other doctors, but the record demonstrates otherwise. An example (one of many that could have been selected) that illustrates how the Palms has misconstrued the testimony of the treating doctors as offering the opinions of other doctors can be found at 9 App. 1624. There, Dr. Shannon was testifying regarding the medical reasons she concluded surgery was warranted, and was asked concerning the reading of an MRI by an undisclosed DC. The following exchange occurred:

Q. And this MRI was read by a DC; is that correct?

A. Yes

Q. And could [you] discuss the impressions with the Court?

A. The impression sections reads:

> "Thickening, some degree of thickening, intermediate single change and equivocal

> redundancy/laxity of the anterior cruciate ligament, consistent with a partial tear and/or early mucoid degeneration."
>
> That means he felt, when he reviewed it, that anterior cruciate ligament was not completely normal, that there -- the conclusion of these types of changes in signal, is that, it either is degenerative of that cruciate ligament, or an injury had occurred and there's an attempt at healing of it.
>
> Q. I'm more interested in the healing.
>
> MR. WARD: I want to object . . . .
>
> I would object on the basis that she's offering an opinion as to what he [the DC] thought and that's speculative. There's no foundation that she's ever talked to him. There's no foundation that she knows him and she's offering her interpretation of what he thought when he wrote this and I object to that.

9 App. 1624-25.

This objection was specious. Dr. Shannon did not testify to the thought processes of the DC. She interpreted the medical record according to her experience and expertise in the course of explaining her reliance on that record in her treatment of Enrique. Other than vague accusations that the treating doctors testified as to the opinions of non-testifying doctors, the Palms has not provided this Court with a single specific example from the transcripts of improper testimony. Instead, in its rush to get on to its legal argument, the Palms sets forth only generalized assertions of fact, and invites this Court to search the record for factual support for its argument. I have searched the record, and I found no such support.

E. The Case Law Does Not Support The Palms' Arguments Regarding Retained vs. Non-Retained Experts.

Appellant argues that a treating physician is not generally considered a retained expert because he or she is considered a percipient witness, AOB at 23, and Enrique agrees. Appellant then argues that when a treating physician crosses the line from offering opinions regarding treatment into offering expert opinions

related to that treatment, the treating physician must be disclosed as an expert. This position is supported by foreign rather than Nevada law. *Id.*[10]

In *Goodman v. Staples*, 644 F.3d 817 (9th Cir. 2011), applying federal law, the Ninth Circuit concluded that treating physicians who, "after the treatment was concluded, [] were provided with additional information by plaintiff's counsel and were asked to opine on matters outside the scope of the treatment they rendered" had to be disclosed as retained experts. *Id.*[11] The information provided to these treating doctors was not clearly identified in the opinion, but it did disclose that the treating physicians "reviewed information provided by Goodman's attorney that they hadn't reviewed during the course of treatment." *Id* at. 826. The Ninth Circuit joined other circuits that had held that "a treating physician is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment." *Id.*

The Palms' complains that the treating doctors testified to matters outside the scope of actual treatment, but the Ninth Circuit did not limit the scope of a treating physician's expert opinions; the Ninth Circuit only limited the testimony to opinions formed during treatment. The Ninth Circuit did not limit a treating physician to his or her own medical records; the Ninth Circuit approved of a treating doctor testifying to the contents of medical records of other treaters on which the doctor relied. *Id.* at 825. In this case, the treating physicians testified

---

[10]Certainly, at some point a treating physician may be required to be disclosed as an expert if the expert testimony is not going to be related to the treatment of the patient, but Nevada law is adequate to establish when the testimony is outside the scope of treatment. This Court need not look to foreign law to resolve this issue.

[11]Notably, because the law as to the scope of a treating physician's testimony had not previously been clearly defined, and treating experts had not been required to be disclosed as experts in the past, the Ninth Circuit applied its holding in Goodman prospectively. *Id.* If this Court is inclined to change what has been the clear law of Nevada, it should do so prospectively.

only to their treatment of Enrique, including testimony regarding his prior treatment as reflected in his past medical records, always in the context of how those medical records informed Enrique's ongoing diagnoses, treatment and prognosis. In the course of such testimony, the treating doctors offered various medical opinions clearly within their medical expertise.[12] They testified as to his future medical needs based on his present condition and their ongoing treatment, which will continue into the future. There is no indication in the record that they testified regarding documents created after their treatment ended.

Appellants rely on *Ghiorzi v. Whitewater Pools*, 2011 WL 5190804 (D. Nev. 2011), an unpublished decision by Judge Peggy A. Leen, Nevada Federal Magistrate, primarily because it involved Dr. Schifini, who also testified in this case. That case is no different from *Goodman* because, as correctly stated by the Palms in its brief, "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" and offered new opinions which "were not formed during the course of treatment of the Plaintiff." AOB at 24. In this case, Enrique's treating physicians expressed no opinions that were formed after their treatment of Enrique ended, or were based on documents provided to them by counsel but were not relied on by them in Enrique's treatment. Instead, they expressed opinions related to "causation, future treatment, extent of disability, and the like," all opinions that have been declared by Nevada Federal Magistrate Judge Robert J. Johnston to be "part of the ordinary care of a patient [to which] a treating physician may testify [] without being subject to the extensive reporting requirements of Rule 26(a)(2)(B)." *Eglas v. Colorado Bell Corp.*, 179 F.R.D.

---

[12]The Palms argued that some of the doctors offered opinions outside their expertise, because for example, the doctors were anesthesiologist, not orthopedic surgeons. But these doctors all provided ample foundation for their expertise and opinions, and the weight to be given to the opinions is left to the trier of fact.

296 (D. Nev. 1998).

The Palms' reliance on *Dozier v. Shapiro*, 199 Cal.App.4th 1509, 133 Cal.Rptr.3d 142 (Cal.App. 2 Dist., 2011), is equally unavailing. There, a treating doctor who was deposed offered additional opinions at trial that had not been expressed at the deposition. The doctor attempted to offer testimony based on documents that were provided to him after he was deposed. These formed no part of his treatment of the patient. *Id.* at 1514. Obviously, the concerns in such a case are foreign to the issues presented here. The Palms never deposed Enrique's treating physicians, and they never testified to documents provided to them by counsel that were unrelated to treatment.

The Palms next argues and cites a number of cases for the proposition that one doctor may not testify as to the opinions of another if the opinion of the other doctor is not admissible. In the words of the Palms, one doctor cannot become the conduit to introduce statements of non-testifying individuals. AOB at 30. The Palms relies for this argument on *Estes v. State*, 122 Nev. 1123, 1141, 146 P.3d 1114, 1126 (2006), a criminal case of doubtful application. The entirety of this Court's discussion in *Estes*, on this subject was:

> We conclude that Dr. Neighbors' testimony as to the opinions of other doctors was likely erroneous, in that such testimony constituted inadmissible hearsay. NRS 50.285, however, allows experts to base their opinions on facts or data that are otherwise inadmissible, if such information is of a type reasonably relied upon by experts in that field. Thus, Dr. Neighbors' reasonable reliance upon the opinions of her colleagues in forming her own diagnosis was marginally appropriate.

There is no indication in this case that any of the evidence that came in through any of Enrique's treating physicians was inadmissable as hearsay or for any other reason; each treating expert testified only to his or her interpretation of medical records as those informed his or her treatment of Enrique. This argument is a red herring, because the Palms has not identified a single instance of a doctor in this case testifying to the opinions of a non-testifying doctor, nor

has the Palms identified any inadmissible evidence that was introduced circuitously through a testifying doctor. Careful examination of the record in this case reveals why the Palms has not identified any such specific improper testimony. Each testifying doctor testified to his or her own opinions only, and referred to the conclusions of other doctors as reflected in their medical records only as relevant to explaining their own treatments, diagnosis and medical opinions.

In *Ramirez v. State*, 114 Nev. 550, 958 P.2d 724 (1998), another case relied on by the Palms, a police officer testified to the alleged statement of a doctor that was clearly hearsay and was not arguably subject to any exception to the hearsay rule. The district court then exacerbated the situation by giving the jury an improper instruction about that hearsay statement. The issue was whether these facts created a confrontation clause violation, and they obviously did. Any application of this holding to this case is dubious, at best.

Similarly, the foreign case law relied on by the Palms is unavailing. In *People v. Campos*, 32 Cal.App.4th 304, 38 Cal.Rptr.2d 113 (Cal.App. 1995), a criminal case, an expert witness revealed the content of a report prepared by non-testifying experts. The concerns arose under the confrontation clause, which is not relevant here. Further, in this case, no one revealed the contents of an expert report or expert opinion expressed by a non-testifying expert. Instead, Enrique's treating physicians were questioned regarding the medical records of other treating physicians, and explained their own conclusions, treatments and opinions based on their reliance on those medical records.

In *McCathern v. Toyota Motor Corp.*, 23 P.3d 320, 327 (Or. 2001), the court noted that inadmissible evidence does not become admissible simply because it is relied on by an expert. Nevertheless, the appellate court held that the trial court did not err in admitting evidence through an expert that otherwise would have been hearsay).

U.S. v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994), was a criminal prosecution of a doctor for improper prescription of certain drugs. An expert doctor (not a treating doctor) was allowed to testify that the opinions of another, non-testifying doctor regarding whether the prescriptions were proper were the same as his. Neither doctor, the one whose testimony was considered improper nor the one who did not testify, was a treating physician. Both doctors had conducted extensive examination of the records of many patients to determine whether the defendant was improperly prescribing medication, not for the purpose of treatment of any patient. They had also reviewed many other records and documents from the grand jury investigation that had nothing to do with medical treatment. The non-testifying doctor had prepared a report that was hearsay and was not admissible in evidence for that and other reasons. By referring to and relating the contents of the inadmissible report, the second doctor brought inadmissible evidence before the jury. Further, the testifying doctor was allowed to bolster his own opinion by testifying that the non-testifying doctor was a general surgeon, a close friend of his, a lawyer, well thought of in the medical community, and the president of the medical society. *Id.* 1135. How the holding that this testimony was improper in the criminal context in which it was given is relevant to any of the testimony given by the treating physicians in this case is a mystery.

In *Whitfield v. Roth*, 10 Cal.3d 874, 519 P.2d 588 (Cal. 1974), years after relevant x-rays were taken and in anticipation of testifying as an expert at trial, one doctor showed the x-rays to two other doctors, and another named expert doctor allegedly discussed the x-rays and possibly showed them to a bunch of "students, staff and faculty doctors," estimated at in excess of fifty, at a school where the doctor worked, and none allegedly found the x-rays to be abnormal. Allowing this kind of hearsay to bolster the expert doctor's opinions was obvious error, albeit harmless error in the estimation of the California Supreme Court.

This is not arguably similar to this case.

Thus, the case law relied on by the Palms does not support its arguments.

III. Sufficient Evidence Supports Enrique's Claim of Lost Future Earning Capacity.

The Palms complains that the evidence of Enrique's lost future earning capacity was speculative. The Palms argues that because Enrique's income is derived from buying and selling real property, there should be some sort of presumption against Enrique. The Palms relies on two cases where professionals failed to prove that their injuries translated into a diminution of earning capacity.

In *Nobile v. New Orleans Public Service, Inc.*, 419 So.2d 35, (La. App. 1882), the trial court as trier of fact concluded that an architect who claimed his injuries from an automobile accident resulted in a diminution in his earning capacity had failed to prove his lost income, and the appellate court affirmed. In *Strauss v. Continental Airlines, Inc.*, 67 S.W.3d 428 (Tex.App., 2002), a jury denied any recovery to a lawyer for future loss of income but awarded a substantial amount for past loss. The trial court granted a JNOV, concluding the lawyer had presented no evidence that he was incapable of working or did not work in the past, but instead based his claim on speculation that he could have found more work if he had not been injured. The appellate court upheld the district court's evidentiary finding. *Id.* at 434. Both cases stand for the proposition that the evidence must be sufficient to support the verdict.

Enrique believes this Court will find ample evidence in the record to support his claim of lost ability to earn income in the future. Each of his doctors testified that he was disabled and incapable of working, and he and his girl friend (life-partner) both testified that he cannot do the work he did in the past.

Indeed, the Palms has not challenged Enrique's disability (making *Strauss* and *Nobile* irrelevant), but instead challenges the sufficiency of the expert evidence to establish a basis for the district court's award. The Palms speculates

that Enrique had income records he did not produce—("he presumably had business records showing the number of homes he bought and sold each year" AOB at 36)—and complains that Enrique's expert, Mr. Dinneen, relied on income tax returns it considers to be insufficient. The Palms further speculates, because Mr. Dinneen testified that he would have requested certain documents and did not receive them, that Enrique withheld documents. But the correct inference is that Enrique did not have the documents because, as he testified, he spent his life after high school working for himself in buying and selling properties.

If there was a discovery dispute, the Palms should have pursued it pretrial. If any requests for information from the Palms went unanswered, the Palms should have moved to compel. What the Palms should not be allowed to do is to speculate on appeal that other documents must have existed and that Enrique should have provided them to his expert. The issue in this case is whether the expert's testimony regarding Enrique's loss of future earning capacity, combined with the overwhelming evidence of Enrique's disability, is sufficient to support the district court's verdict. *See Gibellini v. Klindt*, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994) ("A district court's findings will not be disturbed unless they are clearly erroneous and are not based on substantial evidence."). Enrique submits the testimony is more than sufficient to support the verdict.

IV. The District Court Did Not Err in Striking Appellant's Experts.

The Palms complains that the district court erred in striking the testimony of two of his experts. The Palms admits that neither expert expressed any opinion to a reasonable degree of professional probability, but argues that there are cases where a defense expert need not express an opinion to that standard.

As previously stated, Mr. Franklin's expert testimony can be summed up in the statement that he believes throwing items into a crowd is never dangerous anywhere under any condition. 12 App. 2353-54. The basis for this testimony is

that he has been to many events where items were thrown. He conducted no tests, did no scientific analysis and had no basis for expressing a legal opinion. *Id.* The testimony of Franklin was questionable at best.

Franklin did not testify, as the Palms suggests, to causation, to reasonable alternative causation theories, to contradict a plaintiff's expert, or to controvert a key element of Enrique's *prima facie* case. Thus, the Palms' reliance on *Brown v. Capanna*, 105 Nev 665, 782 P.2d 1299 (1989), and *Williams v. District Court*, 127 Nev. ___, 262 P.3d 360 (2011), allowing defense experts to offer opinions on these matters without doing so to a reasonable degree of professional probability, is misplaced.

Franklin testified he has seen things thrown in the past so it must be OK, but he did not express any opinion on any subject to any degree of probability. He did not even visit the location where the accident happened or base any opinion on anything specific to a casino crowd in a prize scrambling setting. 12 App. 2353. He simply opined based on his experience at sports venues and conferences that throwing objects into a crowd, any crowd, is fine. With no basis to present a legal conclusion and no statement to any particular degree of probability as to any fact necessary for the district court to determine a legal standard of care, the testimony was not helpful to the district court and was properly stricken. *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008) (to be admissible, expert testimony must be sufficiently reliable and scientifically based so that it will assist the trier of fact).

With respect to Dr. Thomas Cargill, the Palms' expert economist, the Palms asserts in the opening brief that he "used his expertise to calculate what plaintiff would have earned had he continued to work after the accident." AOB 39. Dr. Cargill did no such thing, either at trial or in his expert report. 15

App. 3009 and following.[13] The opening brief states that Dr. Cargill testified without objection that it was not appropriate for Mr. Dinneen to average Enrique's earnings over the years 1999 to 2004 to calculate future income loss in light of the collapse in the economy. AOB 39. Dr. Cargill did so testify, but he also admitted that Mr. Dinneen did not average the income over that period, and he was mistaken at the time he did his report. 15 App. 3026. The opening brief states that Dr. Cargill "testified extensively regarding the correct interest rates," but all Dr. Cargill testified to with respect to interest rates is that they are irrelevant to any future loss of income calculation. 15 App. 3056-59.

Dr. Cargill's testimony was limited to the effect the market crash had on Enrique's future income, and was general in nature. Dr. Cargill repeatedly attempted to offer testimony that Enrique had not provided sufficient documentation from which to calculate lost income and that it was improper to average income from the tax returns provided, but repeated objections to this testimony were sustained by the district court because Dr. Cargill did not opine on these subjects in his report. 15 App. 3019 through 3036. Now on appeal the Palms relies exclusively with regard to Dr. Cargill on the testimony that was excluded at trial, not on any testimony that was excluded after trial based on Enrique's motion to strike. AOB 39.

In its order striking Dr. Cargill, the district court noted that Dr. Cargill testified as to two things: that Enrique would have made less money in the current financial market than back in 2004 and that the discount rates used by Enrique's expert were inappropriate. 2 App. 270. To express opinions on the market and on the correct method of calculating lost income, Dr. Cargill had to do so to a reasonable degree of professional probability. *Hallmark v. Eldridge*,

---

[13]The report is not contained in the appendix, but it is apparent from the testimony given at trial that Dr. Cargill did not offer an opinion as to the amount of Enrique's lost income capacity.

124 Nev. 492, 189 P.3d 646 (2008). This he did not do, failing the assistance requirement of NRS 50.275.

In any event, even if this Court were to conclude that the district court abused its discretion in granting the post-trial motion to strike the testimony of the Palms' two experts as incompetent and not stated to any degree of reliability, that error was harmless. The district court specifically stated in denying the Palms' motion for a new trial, after concluding that the testimony did not satisfy the assistance prong of NRS 50.275 because it was speculative and not stated to any degree of probability, that "[r]egardless, this Court determined both liability and damages independent [sic] of striking the testimony of Defendant's two expert witnesses aforesaid, and determined the same upon the basis and weight of Plaintiff's economics and vocational expert, Mr. Dinneen, Plaintiff's testimony, and the testimony of Defendant's employees called in Plaintiff's case-in-chief." 4 App. 853. Therefore, even if the Palms' two witnesses had testified to their opinions to a reasonable degree of professional probability, the district court, which heard the testimony and only struck it after the trial concluded, would have discounted that testimony and would have reached the same conclusion.

Although not clearly stated, when read in the light most favorable to Enrique, the record shows that the district court discounted the testimony of the Palms' experts not just because they did not use the magic language, but because in its view the testimony was speculative and unreliable. The verdict, which is supported by far more than substantial evidence as the district court noted, should not be disturbed based on this semantic argument.

///

///

///

///

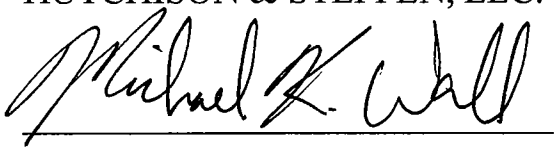
///

CONCLUSION

This Court should dismiss this appeal.

DATED this 31 day of October, 2012.

HUTCHISON & STEFFEN, LLC.



Michael K. Wall (2098)
Peccole Professional Park
10080 West Alta, Suite 200
Las Vegas, Nevada 89145
Attorneys for Respondent

ATTORNEY'S CERTIFICATE

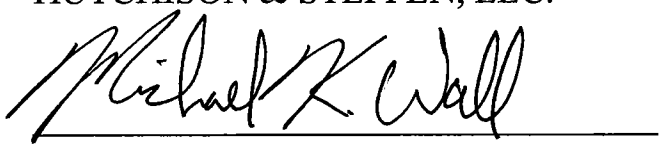
1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief does not fully comply with the type-volume limitations of NRAP 32(a)(7). It is proportionately spaced and has a typeface of 14 points. However, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the brief contains 15,211 words, which is in excess of the number of words allowed. A motion for permission to file the brief as an extra-length brief is being filed contemporaneously herewith.

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

DATED this 31 day of October, 2012.

HUTCHISON & STEFFEN, LLC.



Michael K. Wall (2098)
Peccole Professional Park
10800 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that **RESPONDENT ENRIQUE RODRIGUEZ' ANSWERING BRIEF** was filed electronically with the Clerk of the court 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
Robert Eisenberg

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

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

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

J. Randall Jones
Jennifer C. Dorsey
3800 Howard Hughes Pkwy., 17th Floor
Las Vegas, NV 89169

DATED this 31st day of October, 2012.

An employee of Hutchison & Steffen, LLC