IN THE SUPREME COURT OF THE STATE OF NEVADA

FCHI, LLC, a Nevada Limited Liability Company, fka Fiesta Palms LLC, a Nevada Limited Liability Company dba The Palms Casino Resort;

Appellant,

vs.

ENRIQUE RODRIGUEZ, an Individual,

Respondent.

_____/

No. 59630

RESPONDENT'S PETITION FOR REHEARING

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I. INTRODUCTION

Nevada Rule of Appellate Procedure 40 allows for a petition for rehearing where the court has overlooked or misapprehended a material fact or a material question of law. Respondent Rodriguez seeks petition for rehearing upon two bases. First, this Court overturned the trial court's decision based upon the exclusion of the Palms' expert witnesses. This Court has misapprehended material facts and law supporting the trial court's decision. Second, and only if one assumes this case should be overturned, this Court provided additional instruction to the trial court regarding the testimony of Rodriguez's treating physicians. This Court misapprehended material questions of law and the 2012 amendments to Nevada Rule of Civil Procedure 16.1(2)(B) which addresses when a treating physician must provide an expert report. This Court should simply direct the trial court and parties to comply with NRCP 16.1(2)(B) as amended in 2012.

II. ARGUMENT

A. The Court Misapprehended/Overlooked Material Questions of Law and Fact When It Overturned the Trial Court's Finding of Negligence.

This Court reversed the trial court based upon its decision to strike Dr. Franklin's testimony. The Court concluded that "inasmuch as it is probable that but for this erroneous ruling a different result might have been reached on the issue of the Palm's breach, a new trial is warranted." (Opinion, at 10, citing to *Cook v. Sunrise Hosp. & Med Ctr., L.L.C*, 124 Nev 997, 1009 194 P.2d 1214, 1221 (2008)). A judgment should be reversed based on an erroneous instruction (in this matter a holding by the bench) only if the "error has resulted in a miscarriage of

justice." *Carver v. El-Sabawi*, 121 Nev. 11, 15, 107 P.3d 1283, 1285 (2005); see also *Mainor v. Nault*, 120 Nev. 750, 768, 101 P.3d 308 (2004) (defining error as that which does not affect a party's substantial rights). The standard is met when the complaining party provides sufficient-record evidence showing it is probable a different result might have been reached. *Cook v. Sunrise Hosp. & Med Ctr., L.L.C*, 124 Nev at 1006, citations omitted.

This Court misapprehended material facts presented to the trial court and its specific findings. The director of marketing for the Palms established unreasonable conduct. She testified that when the Monday Night Football event was moved into the smaller forum of the sportsbook, no items were to be thrown into the crowd because such behavior "creates chaos". 8 App 1412. She testified that such activity could lead to foreseeable harm. 8 App 1414. She testified that Rodriguez' injury was precisely the type she was trying to prevent. 8 App 1418.

Furthermore, *Cook*, the case cited as support for overturning the trial court's decision, was overturned on the basis of the lower court's "mere happening" instruction. It was held that this instruction could have confused the jury because "the instruction failed to inform the jury it could consider all of the circumstances leading to the Plaintiff's injury." *Cook,* at 198. In the case at bar, Franklin gave no testimony as to "the circumstances" leading to the Plaintiff's injury, and no confusion as to the same is contained in the record.

Rather, the trial court made a specific finding that:

> "[r]egardless, this court determined both liability and damages independent [sic] of striking the testimony of Defendants two expert witnesses aforesaid, and determined the same upon the basis and weight of Plaintiff's economics and vocational expert, Mr. Dineen, Plaintiff's

testimony, and the testimony of Defendant's employees called in Plaintiff's case-in-chief." 4 App. 853.

This Court misapprehended the significance of the trial court's specific finding that it decided the case **independently of striking Franklin's testimony**. The liability finding was based on the testimony of the witnesses including Defendant's employees. The omission of Franklin's testimony did not influence the outcome of the liability case. Clearly, no "miscarriage of justice has occurred herein. Respectfully, rehearing should therefore be granted.

B. The Court Misapprehended Material Questions of Law When It Provided Additional Instruction Regarding Testimony by Treating Physicians.

This Court noted, "The district court judge also admitted and considered inadmissible testimony by Rodriguez's treating physicians." (Opinion, at 11). This Court cited to *Goodman v. Staples the Office Superstore, L.L.C.*, 644 F.3d 817 (9th Cir. 2011). In *Goodman*, the Ninth Circuit held that a treating physician is exempt from FRCP 26(a)(2)(B) if the treating physician's opinions were formed during the course of treatment. A report is required only to the extent a treating physician forms additional opinions outside the scope of his/her treatment. *Id.*, 644 F.3d at 826. In *Goodman*, the Ninth Circuit found that the trial court did not err when it found that portions of certain treating physician's opinion were outside scope of opinions formed during their treatment. For example, Goodman's attorney communicated directly with treating physician providing unidentified medical records and reports from defense experts. *Id.* at n. 2.

The Ninth Circuit noted that the question of whether an expert report is required of a treating physician on matters outside of the scope of his/her

treatment was an unsettled question of law. As such, the Ninth Circuit did not limit the expert testimony but allowed Goodman to cure the error by disclosing a report:

> While we do not fault the district court for its ruling limiting Goodman's physicians' testimony, we think that fairness counsels in favor of applying our newly-clarified rule regarding hybrid experts prospectively. Under the circumstances, it would be unjust to allow Goodman's mistake about a previously unsettled point of law to be the *coup de grâce* to her case.
>
> Because we hold, as a matter of discretion, that Goodman should be allowed to rectify her error by disclosing reports for her treating physicians, we reverse the district court's summary judgment ruling on causation.

Id., at 826.

As in *Goodman*, Respondent Rodriguez should be given an opportunity to comply with NRCP 16.1(a)(2)(B) as amended in 2012.

In its additional instructions to the trial court, this Court has misapprehended material questions of law, including the 2012 amendments to NRCP 16.1(a)(2)(B), which provides for when a treating physician must provide an expert report. Respondent Rodriguez submits the appropriate instruction upon remand is to direct the trial judge and parties to comply with NRCP 16.1(a)(2)(B) as amended in 2012.

First, this Court fails to address that, at the time of the Rodriguez trial, whether and in what context a report was required from a treating physician was an unsettled area of law. After the Rodriguez trial, the 2012 amendments to NRCP 16.1(a)(2)(B) were adopted. The 2012 amendments provide clarity to the question of whether and in what context an expert report from a treating physician is required. However, if its additional instructions to the trial court are left to

stand, this Court will create uncertainty in the context of when a treating physician is required to provide an expert report. Rather than creating uncertainty, this Court should instruct the trial court to require the parties to comply with NRCP 16.1(a)(2)(B) as amended in 2012.

There is no prejudice to either party. For example, Palms has already heard Dr. Schifini's trial testimony, and, upon remand, it will receive an expert report. By allowing Dr. Schifini to testify consistent with an expert report and prior testimony, this Court will not prejudice the Palms.

Second, this Court writes, "Moreover, even if Dr. Schifini reviewed records from other providers in the course of his treatment of Rodriguez and not in order to form the opinions he proffered, he could only properly testify as to those opinions he formed based on the documents he disclosed to Palms." (Opinion, at 13). It cites to NRCP 16.1 drafter's note to the 2012 amendment to support its conclusion. (*Id.*). However, this Court misapprehended a material fact and question of law by failing to consider that NRCP 16.1's 2012 amendments were adopted after the trial. It would be unfair to hold Rodriguez to standards that did not exist at the time of the first trial.

Following the 2012 amendments, NRCP 16.1(a)(2)(B) provides in pertinent part:

> Unless otherwise stipulated or ordered by the Court, if the witness is not required to provide a written report, the initial disclosure must state the subject matter on which the witness is expected to present evidence under NRS 50.275, 50.285 and 50.305; a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness to present evidence under NRS 50.275, 50.285 and 50.305 which may be satisfied by the production of a resume or curriculum vitae and the compensation of the witness for

> providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

Upon remand, this Court should instruct the trial court and parties to comply with NRCP 16.1(a)(2)(B) as amended in 2012.

Third, as to Drs. Kidwell and Shannon, this Court noted, "Allowing Dr. Kidwell and Dr. Shannon to so testify without requiring them to disclose expert reports was also an abuse of the district court's discretion—once they opined as to the cause of Rodriguez's condition and treatments they testified as experts and should have been subject to the expert witness standards." (Opinion, at 14). To support its conclusion, this Court cited to *Brooks v. Union Pac. R. Co.*, 620 F.3d 896 (8th Cir. 2010). In citing to *Brooks* this Court misapprehended a material question of law as: (1) *Brooks* is inconsistent with the standard adopted in *Goodman*, the case relied upon by this Court to find that the trial court should not have considered Dr. Schifini's testimony because he did not write an expert report; (2) *Brooks* is inconsistent with the 2012 amendments to NRCP 16.1(a)(2)(B) and which were cited to by this Court with respect to Dr. Schifini's testimony; and (3) *Brooks* is no longer good law because of the 2010 amendments to FRCP 26.[1]

This Court relied upon the *Goodman* standard to find that treating physicians may testify as to causation without disclosing an expert report as long as the opinions were formed during the course of his/her treatment. (Opinion at 11) By citing to *Brooks* with respect to the testimony of Drs. Kidwell and Shannon, this

[1] *Brooks* was based upon FRCP 26(b)(2) as it existed in 2009. *Id.* 620 F.3d at 898.

Court fails to consider that in *Goodman*, the Ninth Circuit rejected the *Brooks* standard.

Brooks is a case out of the Eighth Circuit. In *Goodman*, the Ninth Circuit discussed the state of the law from the Sixth Circuit, the Seventh Circuit and the Eighth Circuit. The Ninth Circuit noted that the Sixth Circuit and Seventh Circuit required expert opinions on causation only when the opinions were not reached during the course of the treatment. By contrast, the Eighth Circuit, under *Brooks*, required a report any time a treating physician testifies about causation. *Goodman,* 644 F.3d at 825, citing to *Fielden v. CSX Transportation, Inc.*, 482 F.3d 866 (6th Cir. 2007) *Meyers v. Nat'l R.R. Passenger Corp,* 619 F.3d 729 (7th Cir. 2010), *Brooks v. Union Pac. R.R. Co.,* 620 F.3d at 900. The Ninth Circuit then held:

> Today we join those circuits that have addressed the issue and hold 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. at 826.

In *Goodman*, the Ninth Circuit rejected the Eighth Circuit standard and instead joined the standard adopted by the Sixth Circuit and Seventh Circuit. By citing to *Brooks* in discussing the testimony Drs. Kidwell and Shannon, this Court has created uncertainty where none should exist. This Court should vacate its citation to *Brooks*. The additional instruction directed to the trial judge should be to require compliance with NRCP 16.1(a)(2)(B) as amended in 2012.

This Court has also failed to consider the 2012 amendments to NRCP 16.1(a)(2)(B). The drafters of the 2012 NRCP 16.1 amendments rejected the *Brooks* standard.

The drafters noted:

> Subdivision (a)(2)(B) specifies the information that must be included in a disclosure of expert witnesses who are not otherwise required to provide detailed written resorts. A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment. These comments may be applied to other types of non-retained experts by analogy. In the context of a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider. *A treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment*. However any opinions and any facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B).

NRCP 16.1(a)(2)(B), drafter notes to 2012 amendments, *emphasis added*.

Under the current NRCP 16.1(a)(2)(B), a report is <u>not</u> required from a treating physician merely because he opines on "diagnosis, prognosis, or causation of the patient's injuries..."[2] By citing to *Brooks* as part of the additional instructions to the trial court, this Court has misapprehended a material question of law by leaving open the suggestion that a treating physician testifying about causation must always provide an expert report. The solution is to vacate the citation to *Brooks*. Upon remand, this Court should simply direct the trial judge and the parties to comply with NRCP 16.1(a)(2)(B).

Finally, this Court fails to consider that in *Brooks* the court did not interpret the 2010 amendments to FRCP 26(b)(2). The 2010 amendments are similar to the

[2]It is reasonable to conclude that the drafters of the 2012 amendments also refused to go as far as *Goodman*. As according to the drafters, a treating physician is not a retained expert merely because he reviews information outside of his medical chart for the purpose of defending his treatment. This would allow a treating physician to rebut a defense medical review without incurring the significant costs and inconvenience associated with expert reports.

2012 amendments to NRCP 16.1. See Fed. R. Civ. Proc. 26(b)(2)(A) & (B) compared to NRCP 16.1(b)(2). The commentators to the amendment note:

> Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have. This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B). *A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C)*. The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

FRCP 26, comments to 2010 amendments, *emphasis added*.

In light of the 2010 amendments to FRCP 26(b)(2), *Brooks* is likely no longer good law. See *Marks v. Union Pac. R.R. Co.*, 2013 U.S. Dist. LEXIS 134095 at n. 2 (E.D. AR September 18, 2013) (a district court out of the Eighth Circuit noting that *Brooks* is no longer good law). By citing to *Brooks* as part of the additional instructions to the trial court, this Court is creating future confusion about the testimony of treating physicians where none should exist. This Court should vacate the citation to *Brooks* and direct the trial judge and the parties to comply with NRCP 16.1(a)(2)(B) as amended in 2012.

III. CONCLUSION

This Court should grant Respondent Rodriguez's Petition for Rehearing. First, regarding its decision to overturn the trial court's decision based upon the exclusion of Palms' expert witnesses, this Court has misapprehended/overlooked material facts and law supporting the trial court's decision, specifically the testimony of Palms' employees and the lower Court's specific findings regarding the striking of Franklin. Second and only if one assumes this case should be overturned, in providing additional instruction to the trial court regarding the testimony of Rodriguez's treating physicians, this Court misapprehended material questions of law and the 2012 amendments to NRCP 16.1(2)(B) which provides for when a treating physician must provide an expert report. This Court can cure the confusion by directing the trial court and parties to comply with NRCP 16.1(2)(B) as amended in 2012.

RESPECTFULLY SUBMITTED this 3rd day of July, 2014.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Petition for Rehearing 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 Word Perfect in Time New Roman font, 14 points.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is it is proportionately spaced, has a typeface of 14 points or more, and contains 2,950 words and does not exceed 10 pages.

DATED this 3rd day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court of the 3rd day of July, 2014. Electronic service of the foregoing document shall be made in accordance with the Master List as follows:

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I further certify that on this date I served copies of this Petition via the U.S. Postage Service, addressed to:

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