Docket Number 64463

In the

SUPREME COURT

For the

STATE OF NEVADA

Electronically Filed
Apr 18 2014 09:02 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

ANGELA DECHAMBEAU AND JEAN-PAUL DECHAMBEAU, BOTH INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF NEIL DECHAMBEAU

Appellants,

v.

STEPHEN C. BALKENBUSH, ESQ.; AND THORNDAHL ARMSTRONG DELK BALKENBUSH & EISINGER, A NEVADA PROFESSIONAL CORPORATION

Respondents

Appeal from a Decision of the Second Judicial District of the State of Nevada,
Washoe County, Court Case No. CV12-00571

APPELLANT'S OPENING BRIEF

Charles R. Kozak, Esq.
Nevada State Bar # 11179
3100 Mill Street, Suite 115
Reno, Nevada 89502
(775) 322-1239
chuck@kozaklawfirm.com
Attorney for the Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Appellants ANGELA DECHAMBEAU and JEAN-PAUL DECHAMBEAU (the "DeChambeaus") hereby certify that they are individual persons and therefore no corporate disclosure statement is necessary.

As to the DeChambeaus' roles as special administrators of the Estate of Neil DeChambeau, there is no corporate entity involved.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

NEVADA CASES

FEDERAL AND OUT OF STATE CASES

NEVADA STATUTES AND RULES

I. STATEMENT OF JURISDICTION

The DeChambeaus submit the following NRAP 28(A)(4) statement of jurisdiction. The Second Judicial District of the State of Nevada Court, Washoe County, (the "Trial Court") had personal jurisdiction over this action against Plaintiff JACC pursuant to NRS 17.76. The DeChambeaus are individuals who, at all material times, including at the time of the incidents set forth in their Complaint, resided in Reno, Nevada. Appellee Stephen C. Balkenbush, Esq. ("Balkenbush") is and was, at all material times, an adult resident of Reno, Nevada and is licensed to practice law in the State of Nevada. Appellee Thorndal, Armstrong, Delk, Balkenbush and Eisinger (the "Law Firm") is and was, at all material times, a Reno, Nevada law firm and resident with offices located in Reno, Nevada and engaged in the practice of law in Nevada.

The Trial Court entered final judgment on October 17, 2013 via its Order granting the Appellees' Motion for Summary Judgment. The Trial Court's judgment constitutes a final judgment as to all issues and parties. NRAP 3A(b)(1). This appeal is timely because the DeChambeaus filed their Notice of Appeal on November 14, 2013 which was within 30 days of service of notice of entry of the judgment/order. NRAP 4(a)(1).

II. STATEMENT OF THE ISSUES

Does a triable issue of material fact remain with respect to whether, in the underlying medical malpractice action, Dr. Smith was negligent by failing to timely perform a pericardiocentesis on the deceased Neil DeChambeau?

Does a triable issue of material fact remain with respect to whether, in the instant legal malpractice action, Appellant Stephen Balkenbush, Esq. ("Balkenbush") was negligent in failing to prosecute the medical malpractice lawsuit given strong evidence in the record that Dr. Smith failed to meet the standard of care?

Is it Nevada law that in order to sustain a legal malpractice action arising out of an underlying medical malpractice claim, that the plaintiff client must first prove that she would have prevailed in the underlying medical malpractice action but for the attorney's negligence?

III. REVIEWABILITY AND STANDARD OF REVIEW

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026, 1029 (2005).

"Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, indicates there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. If a

reasonable jury could find for the non-moving party, summary judgment is inappropriate. Furthermore, a district court cannot make findings concerning the credibility of witnesses or weight of evidence in order to resolve a motion for summary judgment." *Borgerson v. Scanlon*, 117 Nev. 216, 19 P.3d 236, 238 (2001).

IV. STATEMENT OF THE CASE AND RELEVANT FACTS

The DeChambeaus' Complaint states claims for legal malpractice against Balkenbush and the Law Firm for (1) dismissing the defendants of DeChambeaus' underlying medical malpractice case without informing the DeChambeaus or obtaining their permission, (2) failing to conduct necessary written discovery or take the depositions of key witnesses, and (3) failing to identify and litigate the critical issue in the medical malpractice case, among other breaches of the attorney-client relationship. (Joint Appendix, Vol. I, Ex. 2 at pp. 3-9.) The Trial Court dismissed the DeChambeaus' Complaint with prejudice, finding that:

- The factual dispute in the underlying medical malpractice action was "speculative and immaterial in light of the failure of the DeChambeaus to demonstrate causation in the legal malpractice case." (Joint Appendix, Vol. II, Ex. 9 at p. 262.)
- The DeChambeaus did not establish the proximate cause element for legal malpractice because "there was no evidence that Mr. Balkenbush

lacked any necessary skill, prudence or diligence." (Joint Appendix, Vol. II, Ex. 9 at p. 262.)

- The DeChambeaus' expert couldn't "point to any action or inaction on the part of Mr. Balkenbush which caused damages to Plaintiffs." (Joint Appendix, Vol. II, Ex. 9 at p. 262.)
- The DeChambeaus waived punitive damages. (Joint Appendix, Vol. II, Ex. 9 at p. 262.)

The DeChambeaus appeal these findings on grounds that multiple triable issues of material fact arose out of the following events.

A. Record of Events Leading up to and Causing the Death of Neil DeChambeau

On September 6, 2006, Neil DeChambeau presented for a cardiac ablation procedure at Washoe Medical Center (n/k/a Renown Regional Medical Center) under the care of Dr. David Smith ("Dr. Smith"). (Joint Appendix, Vol. I, Ex. 8 at p. 200.) The Code Notes reflect the following sequence of events between 12:39 p.m. and 12:54 p.m. (Joint Appendix, Vol I, Ex. 8 at pp. 191, 192.)

- 12:39 p.m.: Neil DeChambeau went into cardiac arrest and a "Code Blue" was noted in the record. (Joint Appendix, Vol. I, Ex. 8 at p. 200.)

- 12:44 p.m.: A transthoracic echo cardiogram (ECHO) machine was hooked up at Neil DeChambeau's bedside. (Joint Appendix, Vol. I, Ex. 8 at p. 200.)
- 12:49 p.m.: Dr. Smith observed a large pericardial effusion through the stat echo machine confirming the existence of a cardiac tamponade (puncture of the atrium wall). (Joint Appendix, Vol. I, Ex. 8 at p. 200.)
- 12:54 p.m. and 53 seconds: Neil DeChambeau's pulse was detected. (Joint Appendix, Vol. I, Ex. 8 at p. 200.)

Neil DeChambeau died of anoxia (lack of oxygen to the brain) because his pulse was not restored for approximately 15 minutes. (See Joint Appendix, Vol. I, Ex. 8 at p. 200.) This was Dr. Smith's first experience with a patient undergoing cardiac arrest during an atrial fibrillation ablation procedure. (Joint Appendix, Vol I, Ex. 8 at p. 198.)

B. Conflicting Evidence and Material Facts in Dispute Regarding Whether and When a Pericardiocentesis Was Timely Performed

The standard of care for an electrophysiologist performing a cardiac ablation procedure when the patient goes into cardiac arrest is to immediately perform a pericardiocentesis to restore the patient's pulse within a few minutes of the arrest. Exhibit B, Smith Depo. at P26 L3 – P 27 L3.] (Joint Appendix, Vol. I, Ex. 8 at pp. 181, 182, 193, 194.)

Dr. Smith testified that he immediately performed a pericardiocentesis. (Joint Appendix, Vol. I, Ex. 8 at pp. 193, 194, 196.) He testified that the pericardiocentesis was not difficult and that it was completed. (Joint Appendix, Vol. I, Ex. 8 at pp. 196, 197.) Yet, as described above, there is no record of when the pericardiocentesis was done. (See also Joint Appendix, Vol. I, Ex. 8 at p. 185.) The code was from 12:39 p.m. to 12:54 p.m., but no timing for the pericardiocentesis appears on the Code Note. (See Joint Appendix, Vol. I, Ex. 8 at pp. 195, 200 .)

Dr. Smith's testimony regarding the timeliness of the pericardiocentesis contradicts the medical record. [Exhibit A, Seifert Depo at P27 L12-20, P62 L14 – P63 L21.] (Joint Appendix, Vol. I, Ex. 8 at pp. 184, 186, 187.) Absent unusual complications which were not present in this case, a pericardiocentesis procedure will restore a cardio ablation patient's pulse immediately. (Joint Appendix, Vol. I, Ex. 8 at pp. 181, 241, 242.) Dr. Mark Siefert testified that "one can reasonably infer that the pulse was restored immediately following pericardiocentesis." (Joint Appendix, Vol. I, Ex. 8 at p. 181.) The patient will respond immediately or he is "dead." (Joint Appendix, Vol. I, Ex. 8 at p. 183.) Therefore, to a reasonable degree of medical certainty, the pulse was restored when the pericardiocentesis was done. (Joint Appendix, Vol. I, Ex. 8 at pp. 185.) Both Plaintiffs' expert witnesses and the medical records show a 15 minute gap in time between cardiac

arrest and pulse restoration. This means that had Dr. Smith immediately performed a pericardiocentesis, the decedent's pulse would have been restored much sooner.

Moreover, Dr. Smith was not the only person present in the operating room. Dr. Kang, the anesthesiologist in the operating room at the time of the cardiac arrest, had never worked with Dr. Smith before (Joint Appendix, Vol. I, Ex. 8 at p. 190.), and would have testified contrary to Dr. Smith's testimony.[1] Dr. Smith's recall of the sequence of events also differs from those of designated expert witnesses Drs. Doshi, Mezzei, Seifert and Morady. (See e.g., Joint Appendix, Vol. I, Ex. 8 at pp. 236, 237.)

C. Material Facts in Dispute Regarding Whether Balkenbush Committed Legal Malpractice while Handling the DeChambeaus' Medical Malpractice Lawsuit

1. Balkenbush's Failure to Conduct Necessary Discovery

Balkenbush filed a medical malpractice complaint on behalf of Plaintiffs on or about September 5, 2007. [Complaint at P3 L8.] (Joint Appendix, Vol. I., Ex. 2 at p. 3.) This was his first medical malpractice case in which he represented a plaintiff. (Joint Appendix, Vol. I., Ex. 8 at pp. 203, 204.)

From the time Balkenbush filed the complaint, up until he filed a dismissal of the case on May 5, 2010, he did not issue any formal written discovery or take

[1] The subject of Dr. Kang's anticipated testimony appears *infra* at Section IV.C.3. of this Opening Brief.

the depositions of any experts or percipient witnesses. (Joint Appendix, Vol. I., Ex. 8 at pp. 211, 213.) He did not propound interrogatories regarding the sequence of events in the operating room. (Joint Appendix, Vol. I., Ex. 8 at p. 213.) He did obtain the medical records from Washoe Medical Center. (Joint Appendix, Vol. I., Ex. 8 at p. 204.)

Balkenbush did not take the deposition of Dr. David E. Smith, the defendant physician in the underlying matter. (Joint Appendix, Vol. I., Ex. 8 at p. 212.) He also failed to take the deposition of percipient witness Dr. Kang. (Joint Appendix, Vol. I., Ex. 8 at pp. 229, 230.) These percipient witness depositions were needed early on in the case to identify the players. (Joint Appendix, Vol. I., Ex. 8 at p. 232.) Taking no percipient witness depositions is beneath the standard of care because experts don't have the information necessary for accurate reports. (Joint Appendix, Vol. I., Ex. 8 at p. 235.) Expert witness depositions are required where experts differ on timelines or where percipient witnesses are not deposed. (Joint Appendix, Vol. I., Ex. 8 at pp. 233, 234.) Taking expert depositions after Dr. Morady's review of the EPS tape would not be timely and was beneath the standard of care. (Joint Appendix, Vol. I., Ex. 8 at p. 234.)

Balkenbush admitted that he doesn't know the standard of care in ablation procedures – he left this to his experts. (Joint Appendix, Vol. I., Ex. 8 at p. 208.) He understood that Drs. Mazzei and Morady opined that Drs. Kang and Smith did

not perform a pericardiocentesis "within minutes" of cardiac arrest, and that this was negligence. (Joint Appendix, Vol. I., Ex. 8 at p. 205.) Nevertheless, Balkenbush never made any effort to reconcile the differences in the sequence of events in the various medical records. (Joint Appendix, Vol. I., Ex. 8 at pp. 206, 207.)

2. Balkenbush's Failure to Prosecute while in Search of Red Herring Evidence

Balkenbush testified at deposition that he did not conduct discovery in the case because he was waiting to have Dr. Fred Morady review a "PRUCKA" electronic recording (EPS tape) of the events in the operating room that took place on September 6, 2006. (Joint Appendix, Vol. I., Ex. 8 at p. 212.) Balkenbush got the tape for Dr. Morady in late March 2010, (Joint Appendix, Vol. I., Ex. 8 at p. 210.), even though he'd known about it as early as mid-2007. (Joint Appendix, Vol. I., Ex. 8 at pp. 209, 228.)

The DeChambeaus dispute Balkenbush's testimony that the EPS tape needed to be obtained before Balkenbush could conduct discovery. (Joint Appendix, Vol. I., Ex. 8 at p. 212.) The PRUCKA or EPS tape only revealed that there was no "ventricular tachycardia" present at 12:22 p.m., such that Dr. Smith was within the standard of care in proceeding with the operation. (Joint Appendix, Vol. I., Ex. 8 at pp. 214, 215) The PRUCKA tape has nothing to do with pericardial effusion and did not show the pericardiocentesis (i.e., when it occurred). (Joint Appendix,

Vol. I., Ex. 8 at pp. 194, 219, 220.) The PRUCKA tape was nothing more than a "red herring" which provided no further relevant information with regards to the issue of Dr. Smith's failure to meet the standard of care on September 6, 2006. [Exhibit 8.F, Navratil Depo. at P50 L23 – P51 L8; Exhibit 8.E, Gillock Depo. at P35 L14-21.] (Joint Appendix, Vol. I., Ex. 8 at pp. ___; Joint Appendix, Vol, I. Ex. 8 at pp. 231.) And, it was not a justifiable excuse for nearly three years of Balkenbush's failure to prosecute the underlying action. (See Trial Court Docket.)

3. Balkenbush's Knowledge of Adverse Percipient Witness Testimony

On April 21, 2010, attorney Michael Navrotil sent a letter via facsimile to Mr. Balkenbush stating that his client, Dr. Kang, would testify under oath to the following based upon his recollection and review of the chart, if called as a witness: [Exhibit F, Navratil Depo. at P28 L11 – P30 L13; Exhibit G, Letter from Mr. Navratil to Mr. Balkenbush dated April 21, 2010.] (Joint Appendix, Vol. I., Ex. 8 at pp. ___; Joint Appendix, Vol. I., Ex. 8 at pp. 241, 242.)

- At 12:39 p.m., Dr. Kang called an arrest. (Joint Appendix, Vol. I, Ex. 8 at pp. 241.)
- Dr. Kang recalled the nurses and staff responding immediately and started CPR. (Joint Appendix, Vol. I, Ex. 8 at pp. 241.)

- While proceeding with resuscitation, Dr. Smith called for a STAT echo by placing a call to the echo technician. (Joint Appendix, Vol. I, Ex. 8 at pp. 241.)
- While waiting for the ECHO machine to arrive, the patient was receiving chest compressions and continue to receive vasoactive drugs. (Joint Appendix, Vol. I, Ex. 8 at pp. 241.)
- Again, plus or minus a minute or so, at around 12:48 p.m., the echo technician arrived and performed the transthoracic ECHO. (Joint Appendix, Vol. I, Ex. 8 at pp. 241.)
- By 12:54, Dr. Smith had successfully cannulated the pericardium and had withdrawn 300 cc of blood. (Joint Appendix, Vol. I, Ex. 8 at pp. 241.)
- The heart immediately became pulsatile with the return of the peripheral pulses by palpitation. (Joint Appendix, Vol. I, Ex. 8 at pp. 241.)
- If Dr. Kang were to have testified, he would have said that Dr. Smith was "preparing" to do the pericardiocentesis as the stat echo was arriving and had completed it by 12:54 p.m. (Joint Appendix, Vol. I, Ex. 8 at pp. 241, 242.)

4. Balkenbush's Dismissal of the DeChambeaus' Claims

On April 26, 2010, Balkenbush advised appellant Angela DeChambeau to dismiss her case against Dr. Smith because Dr. Morady had withdrawn as an expert on her behalf. (Joint Appendix, Vol. I, Ex. 8 at pp. 221, 223.) Balkenbush did not offer to seek a continuance of the trial set for July of 2010. (Joint Appendix, Vol. I, Ex. 8 at pp. 224, 225.) He did not offer to attempt to obtain another expert on his client's behalf; nor did he consider getting another expert. (Joint Appendix, Vol. I, Ex. 8 at pp. 217, 224.) On May 5, 2010, Balkenbush filed a notice of dismissal with prejudice of the DeChambeaus' case against Dr. Smith. (Joint Appendix, Vol. I, Ex. 2 at p. 5.)

V. SUMMARY OF ARGUMENT

Balkenbush and the Law Firm are of the position that there can be no legal malpractice claim without causation in the underlying medical malpractice claim. They rely on the actions and opinions of their medical expert, Dr. Morady – the DeChambeaus' former medical expert witness – who bowed out of the medical malpractice case after a sudden and mysterious change in opinion. The Appellees also rely on out of state cases such as *Amfac Distribution Corp. v. Miller*, 673 P.2d 795, 796 (Ariz. App. 1983) and *Schulthesis v. Franke*, 658 N.E.2d 932, 939 (Ind. App. 1995) for their argument that the elements of the underlying medical malpractice claim must be proved before the DeChambeaus could have a chance at

their legal malpractice claim. This reasoning is flawed because an attorney may breach the attorney-client relationship outside of whether or not he or she lost a case. An attorney may also breach the attorney-client relationship in transactional matters that are never litigated.

So, why then limit causation in legal malpractice actions to slam dunk cases where the attorney should have won?

The Appellees and the Trial Court both appear to be persuaded by the out of state case law; the former in developing their argument in the absence of Nevada law holding the same, and the latter in deciding not that the out of state law was correct or adopted by Nevada, but to characterize conflicting facts as a case built on "the gossamer threads of whimsy, speculation or conjecture." (Joint Appendix, Vol. II., Ex. 9 at p. 261 citing *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713-14, 57 P.3d 82 (2002)). If the medical records in the underlying action were as much of a mess as the Appellees and Trial Court seem to think they were, then that's all the more reason why Balkenbush should have been diligent in discovery for purposes of following up on why there was a gap in time in the code notes and why expert Dr. Morady changed his opinion. This would have required substantive written discovery to the other side as well as the depositions of Drs. Smith and Kang in the underlying action, but this discovery was not done and the percipient witness depositions were never taken.

VI. ARGUMENT

The DeChambeaus raise two triable issues of fact. The first material issue of fact is whether Dr. Smith performed the pericardiocentisis before or after he ordered the stat echo. This issue speaks to whether Dr. Smith acted below the standard of care by failing to timely perform a pericardiocentesis. The second material issue of fact is whether Balkenbush met acceptable standards of legal services given the weight of evidence that existed against Dr. Smith: namely, that the doctor did not perform the pericardiocentesis immediately after the cardiac arrest as he said he did.

A. A Triable Issue of Fact Remains With Respect to Whether Dr. Smith Timely Performed a Pericardiocentesis

The DeChambeaus anticipate that Appellees will attempt to argue that the facts set forth by the DeChambeaus are neither genuine nor material – that the sequence of events supported by the code notes is nothing but smoke and mirrors. However, the factual disputes are both necessary and relevant to causation in the underlying action because they highlight that a standard medical procedure, a pericardiocentesis, was not timely done. "Pericardiocentesis consists of inserting a needle into the patient's chest to determine if fluid in the pericardial sac is present. If so, the needle would be used to continue withdrawing fluid, thereby relieving the

cardiac tamponade." *Holston v. Sisters of Third Order of St. Francis*, 165 Ill.2d 150, 159, 209 Ill.Dec. 12 (Ill., 1995).[2]

Dr. Smith stated that he performed a pericardiocentesis immediately. (Joint Appendix, Vol. I., Ex. 8 at pp. 193, 194, 196.) However, the fatal sequence of events that transpired during the decedent's ablation procedure tells a different story.

The medical record indicates that cardiac arrest began at 12:39 p.m., and that a pulse was not detected until 12:54 p.m. and 53 seconds. (Joint Appendix, Vol. I., Ex. 8 at p. 200.) The DeChambeaus' expert witness, Dr. Mark Siefert, testified that "one can reasonably infer that the pulse was restored immediately following pericardiocentesis." Joint Appendix, Vol. I., Ex. 8 at p. 181.) Dr. Smith could not have immediately performed a pericardiocentesis as he said he did. This is because the decedent's pulse was not restored until 15 minutes after cardiac arrest. (Joint Appendix, Vol. I., Ex. 8 at p. 200.) Had the preicardiocentesis been performed immediately, then there would not have been this 15 minute gap in time. This is an essential fact issue that cannot be resolved as a matter of law and which directly bears on the elements of causation and standard of care regarding medical malpractice.

[2] Plaintiffs cite to out of state cases as illustrative and persuasive authority where Nevada law is lacking in relevant controlling authority.

Balkenbush and the Law Firm seek to eliminate this very important issue by focusing on Dr. Morady's change in opinion with regards to Dr. Smith's liability after having reviewed the EPS tape. Their defense reeks of "red herring" and has no bearing on causation or medical standard of care. The EPS or "PRUCKA" tape had no influence on the underlying medical malpractice lawsuit. [Exhibit 8.F, Navrotil Depo. at P50 L23-P51 L8.] (Joint Appendix, Vol. I., Ex. 8 at pp. ___.) The EPS tape shows only that ventricular tachycardia was not present. (Joint Appendix, Vol. I. Ex. 8 at pp. 214, 215.) It was irrelevant to whether Dr. Smith's actions met the standard of care because the EPS tape does not show how long after cardiac arrest the pericardiocentesis was performed. (Joint Appendix, Vol. I. Ex. 8 at pp. 194, 219, 220.)

B. A Triable Issue of Fact Remains With Respect to Whether Balkenbush and the Law Firm Mishandled the Medical Malpractice Case

The elements for establishing a legal malpractice claim are (1) the existence of an attorney-client relationship, (2) a duty from the attorney to the client to "use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake," (3) breach of duty, (4) proximate cause and (5) damages or loss. *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996).

It is the Appellees' position that the DeChambeaus need to prove that they would have prevailed in the medical malpractice case to satisfy Balkenbush's "but

for" breach of duty under the attorney-client relationship. As discussed above, Balkenbush and the Law Firm rely on out of state cases for their argument that underlying action must first be resolved *and* that the damages be certain; that otherwise, there can be no legal malpractice claim. They also appear to misinterpret the Nevada case law which states that "In the context of litigation malpractice, that is, legal malpractice committed in the representation of a party to a lawsuit, damages do not begin to accrue until the underlying legal action has been resolved." *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345, 348 (2002). This just refers to a malpractice action not accruing "while an appeal from the adverse ruling is pending." *Id.* It does not prevent a plaintiff from litigating against his or her attorney where there was no trial verdict. Here, the underlying medical malpractice claim was resolved by dismissal. Damages could not be certain because the underlying case did not have the opportunity to go to trial. This should not mean that the DeChambeaus lose their day in court against their counsel for legal malpractice.

Moreover, there are multiple items of malpractice for which the DeChambeaus bring their claims. Primarily, Balkenbush should have recognized the irrelevance of the EPS tape and not wasted almost three years for his expert Dr. Morady to review irrelevant evidence. In the meantime, he should have immediately deposed Dr. Kang who had relevant testimony with respect to the

pericardiocentesis having not been timely performed. Balkenbush failed to identify that the timing of the pericardiocentesis was the key issue and pursue discovery on this issue. Even at his most recent deposition, Balkenbush seemed confused as to the importance of this issue. At the very least, Balkenbush should have been on notice when he received Mr. Navrotil's April 21, 2010 letter explaining what Dr. Kang's testimony against Dr. Smith would be and which clearly contradicts Dr. Smith's testimony as to the issue of the timing of the pericardiocentesis. Apparently he did not communicate this vital information to Dr. Morady the next day on April 22, 2010. Had Dr. Morady been aware that Dr. Kang had witnessed Dr. Smith perform the pericardiocentesis at 12:54 p.m. he would undoubtedly not have withdrawn as an expert.

Despite all of this, Balkenbush did not continue the trial date scheduled for July 2010. Instead, he filed a notice of dismissal two weeks later.

Rather than evaluating the facts and issues of his own case, Balkenbush excessively relied on the opinions of one particular medical expert, his esteemed Dr. Morady. Appellees cite no law or authority for what can be best described as their "world-class preeminent expert" defense, a defense which they seem to believe relieves attorneys from liability for misconduct in law practice simply because their renowned expert witness unexpectedly had a change of opinion for which he refused to give any logical explanation. As discussed above, Dr.

Morady's change in opinion was based on irrelevant evidence from the EPS tape. This was apparently "good enough" for Balkenbush who admitted he never elicited from Dr. Morady specifically what in the records caused him to change his opinion other than the EPS tape and who made no efforts to ascertain why Dr. Morady backed out. (Joint Appendix, Vol. I. Ex. 8 at pp. 216, 217, 230.)

It was counsel's duty to prosecute the DeChambeaus' lawsuit given strong evidence in the record that Dr. Smith failed to meet the standard of care. If Balkenbush was unable to do this, then the Law Firm should have transferred the case to an attorney more familiar with plaintiffs' lawsuits involving the type of medicine in this case. Instead, Balkenbush's failures to identify the key item of Dr. Smith's medical malpractice and to conduct the necessary discovery early on in the case deprived the DeChambeaus from a successful trial or settlement of their lawsuit. Balkenbush did not need Dr. Morady's opinion in order to diligently conduct discovery needed to reconcile inconsistencies in the medical records. He did not need to wait for Dr. Morady's review of the EPS tape in order to take the depositions of percipient witnesses, such as Dr. Kang, who possessed crucial information as to the sequence of events and timing of the pericardiocentesis. By letting years pass by without identifying the issues and working up his case, Balkenbush breached his duty to the DeChambeaus to "use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and

performing the tasks which they undertake." *Mainor v. Nault*, 120 Nev. 750, 774, 101 P.3d 308 (2004).

The DeChambeaus anticipate that Balkenbush and the Law Firm will argue that additional discovery was not necessary. Yet it was. Had Balkenbush deposed Dr. Kang, he would have had confirmation on the timing of the pericardiocentesis – that it was not done immediately as Dr. Smith said it was. Additional written discovery propounded upon Dr. Smith, along with his deposition, would have elicited more information about the discrepancy. Without this discovery, the DeChambeaus were left to rely on Dr. Morady to fill in the blanks without a complete record. The medical record in this case, alone, was not enough, and it was to the DeChambeaus' detriment that Balkenbush did not see that.

VII. CONCLUSION AND SUMMARY OF REQUESTED RELIEF

The DeChambeaus respectfully request that this Court vacate the Trial Court's summary judgment rulings so that the issues may be tried.

VIII. CERTIFICATE OF COMPLIANCE

I certify that I have read this opening brief, and that 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, including NRAP 28(e), which requires every assertion 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 that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6) and the type-volume limitation set forth in NRAP 32(a)(7). This brief uses a proportional typeface and 14-point font, contains 5,331 words and does not exceed 30 pages.

Pursuant to NRS 239B.030 the undersigned certifies no Social Security numbers are contained in this document.

DATED: April 17, 2014

Respectfully Submitted
By: */s/ Charles R. Kozak*
Charles R. Kozak, Esq.
Attorney for Appellants
ANGELA DECHAMBEAU AND JEAN-PAUL DECHAMBEAU, BOTH INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF NEIL DECHAMBEAU

CERTIFICATE OF SERVICE

I, Nan Adams, certify that I served the above-captioned **Appellant's Opening Brief and Appellant's Joint Index of Exhibits** in the Supreme Court for the State

of Nevada, Docket Number 64463 to:

Margo Piscevich, Esq.
Mark J. Lenz, Esq.
PISCEVICH & FENNER
499 West Plumb Lane, Suite 201
Reno, Nevada 89509

by Electronic Filing on the 17th day of April 2014.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 17th day of April 2014.

/s/ Nan Adams
Nan Adams
3100 Mill Street, Suite 115
Reno, Nevada 89502