

AFFIDAVIT

STATE OF MICHIGAN)
 :
COUNTY OF WASHTENAW)

FRED MORADY, M.D., being first duly sworn, deposes and says, under penalty of perjury as follows:

1. I am a physician licensed to practice medicine in the State of California (1976) and the State of Michigan (1984). Since August, 1987, I have been a Professor of Internal Medicine, Department of Internal Medicine, Division of Cardiology, University of Michigan. Since April, 2003, I have been the McKay Professor of Cardiovascular Disease, Department of Internal Medicine, Division of Cardiology, University of Michigan. From July, 1984 to July, 2004, I was Director of the Electrophysiology Laboratory at the University of Michigan. From August 2004 to December 2006, I was the Director, Clinical Electrophysiology Service, Department of Internal Medicine, Division of Cardiology, University of Michigan. My curriculum vitae is attached to this Affidavit.

2. I am familiar with the standard of care for clinical cardiac electrophysiologists. I have experience, training, and familiarity with the techniques of atrial fibrillation ablation. I am also familiar with the legal concepts of ordinary care and negligence.

3. I have been asked to address in this Affidavit issues relating to the medical care provided by David Smith, M.D. to patient Neil DeChambeau. Following a review of medical records, I have determined that Neil DeChambeau was under the care of Reno Heart Physicians since on or about December 28, 2005 and David Smith, M.D., since on or about May 15, 2006. The standard of care upon which I rely in support of this Affidavit would apply with equal force to Dr. Smith's practice as to my own.



4. On May 15, 2006 Neil DeChambeau had an electrophysiology consultation with David Smith, M.D., who determined that Neil DeChambeau exhibited recurrent paroxysmal atrial fibrillation. Neil DeChambeau was again diagnosed with paroxysmal atrial fibrillation by David Smith, M.D., on July 12, 2006, and a catheter ablation procedure was discussed with him. On September 7, 2006, Neil DeChambeau was a 57 year old male in good physical health who underwent an atrial fibrillation ablation procedure to address a previously diagnosed paroxysmal atrial fibrillation. Radiofrequency energy delivery in the left atrium commenced at or about 10:19 a.m. on September 7, 2006.

5. At or about 12:22 p.m. Neil DeChambeau experienced ventricular tachycardia. Neil DeChambeau underwent transthoracic cardioversion to terminate the ventricular tachycardia. No cause of the ventricular tachycardia arrhythmia was ever determined, and yet the atrial fibrillation ablation procedure continued after the ventricular tachycardia was corrected.

6. At or about 12:35 p.m. on September 7, 2006, Neil DeChambeau's blood pressure became unmeasurable. Despite the absence of a pulse, a surgeon was not immediately summoned. A surgeon was not present in the electrophysiology lab until approximately 1:16 p.m.

7. A transthoracic echocardiogram was not ordered until 12:44 p.m. on September 7, 2006. The transthoracic echocardiogram machine did not arrive until at or about 12:49 p.m. on September 7, 2006.

8. Although Neil DeChambeau was provided cardio-pulmonary resuscitation (CPR) from 12:39 p.m. until approximately 12:50 p.m., CPR was of no medical benefit to him because he was experiencing cardiac tamponade.

9. The anesthesia record indicates that the cardiac tamponade

experienced by Neil DeChambeau was not diagnosed until approximately 1:00 p.m. on September 7, 2006. This same record indicates that a pericardiocentesis procedure used to address the cardiac tamponade event did not occur until after 1:00 p.m.

10. I believe to a reasonable degree of probability that the care provided by David Smith, M.D. was negligent and breached the standard of care owed to Neil DeChambeau in the following particulars:

- a) David Smith, M.D., failed to timely diagnosis that Neil DeChambeau was experiencing cardiac tamponade.
 - b) David Smith, M.D., failed to timely perform a pericardiocentesis procedure on Neil DeChambeau.
 - c) After Neil Dechambeau experienced ventricular tachycardia on September 7, 2006 at approximately 12:22 p.m., the cause of ventricular tachycardia should have been determined before any additional radiofrequency ablation was performed.
 - d) At the time David Smith, M.D., observed Neil DeChambeau to exhibit no pulse, he should have immediately requested a surgeon to review the condition of Neil DeChambeau but failed to do so.
 - e) A transthoracic echocardiogram was not ordered until approximately 12:44 p.m. on September 7, 2006 and did not arrive until approximately 12:49 p.m. The transthoracic echocardiogram was performed too late to benefit Neil DeChambeau.
- All of the aforementioned conduct of David Smith, M.D. caused Neil DeChambeau to suffer irreversible brain damage and death.

11. I reserve the right to amend and supplement my opinions in the future as additional information is provided.

HISTORY AND PHYSICAL

ROOM:

Electronically signed by:

DAVID E SMITH, M.D. 09/12/2006 08:42

DAVID E SMITH, M.D.

TR: mdq
DD: 09/06/2006 5:13 P
DT: 09/06/2006 6:15 P
D#: 2970006 Job #:000028506

cc: DAVID E SMITH, M.D.

WASHOE MEDICAL CENTER

77 Pringle Way
Reno, NV 89502-1474
775-982-5660

PATIENT NAME: DECHAMBEAU, NEIL

PHYSICIAN: DAVID E SMITH, M.D.
ADMIT DATE: 09/06/2006
MEDREC #: 000003-08-07-93
BILLING NO.: 002102061914
PAGE: Page 3 of 3

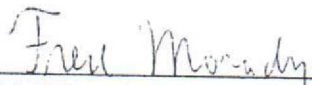
HISTORY AND PHYSICAL

SB01486

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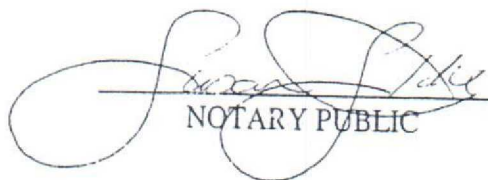
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12. All of the opinions expressed in this Affidavit are my opinions to a reasonable degree of medical probability.


FRED MORADY, M.D.

SUBSCRIBED and SWORN to before me

this 29th day of August, 2007.


NOTARY PUBLIC

SUSAN STOKES
Notary Public, State of Michigan
County of Washtenaw
My Commission Expires 06-20-2011
Acting in the county of Washtenaw

FILED

Electronically

08-14-2013:09:46:11 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3921386

EXHIBIT "2"

EXHIBIT "2"

1 \$1425
2 Stephen C. Balkenbush, Esq.
3 Nevada Bar No. 1814
4 Thorndal, Armstrong, Delk, Balkenbush & Eisinger
5 6590 S. McCarran Blvd., Suite B
6 Reno, NV 89509
7 (775) 786-2882
8 Attorney for Plaintiffs

2007 SEP -5 PM 1:45
ROSALE ... JR.
BY D. Jaramillo

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

9 ANGELA DECHAMBEAU, individually,
10 JEAN-PAUL DECHAMBEAU and
11 ANGELA DECHAMBEAU as Special
12 Administrator of the Estate of Neil
13 DeChambeau,

Case No.

CV07 02028

Dept. No.

4

12 Plaintiffs,

13 v.

14 DAVID SMITH, M.D., BERNDT,
15 CHANEY-ROBERTS, DAVEE,
16 GANCHAN, ICHINO, JUNEAU,
17 NOBLE, SEHER, SMITH,
18 SWACKHAMER, THOMPSON,
19 WILLIAMSON, and ZEBRACK, LTD., a
20 Nevada professional corporation, DAVID
21 KANG, M.D., RINEHART, LTD., a
22 Nevada professional corporation, and
23 DOES 1-10,

19 Defendants.

SB00280

21 COMPLAINT

22 COMES NOW, PLAINTIFFS ANGELA DECHAMBEAU, JEAN-PAUL
23 DECHAMBEAU, AND THE ESTATE OF NEIL DECHAMBEAU by and through their
24 Attorneys THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER and for their
25 Complaint hereby allege as follows:

26 1. At all relevant times, Angela DeChambeau and Jean-Paul DeChambeau were adult,
27 competent residents of Reno, Nevada at the time of the incident set forth in this Complaint.

28 2. At all relevant times, Angela DeChambeau was the wife of Neil DeChambeau.

1 || 3. At all relevant times, Jean-Paul DeChambeau was the son of Neil DeChambeau.

2 || 4. On September 8, 2006, Neil DeChambeau died.

3 5. On December 26, 2006, Angela DeChambeau was appointed special administrator
4 of the Estate of Neil DeChambeau.

6. On information and belief, Defendant David Smith, M.D. was at all times relevant hereto a physician licensed in the State of Nevada and practicing in the area of cardiology.

7 7. On information and belief, at all relevant times herein Defendant Berndt, Chaney-
8 Roberts, Davee, Ganchan, Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson,
9 Williamson, and Zebrack, Ltd., was a Nevada professional corporation organized and existing
10 under the laws of the State of Nevada and operating in Reno, Nevada as an office for heart care.
11 Upon information and belief, Defendant David Smith was an employee of Defendant Berndt,
12 Chaney-Roberts, Davee, Ganchan, Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson,
13 Williamson, and Zebrack, Ltd. at all relevant times herein.

14 8. On information and belief, David Kang, M.D. was at all times relevant hereto a
15 physician licensed in the State of Nevada and practicing in the area of anesthesia.

16 9. On information and belief, at all relevant times herein, Rinehart, Ltd., a Nevada
17 professional corporation located in Reno, Nevada was corporation organized and existing under
18 the law of the State of Nevada and operating in Reno, Nevada as an office providing anesthesia
19 care. Upon information and belief, Defendant David Kang, M.D. was an employee of Rinehart,
20 Ltd., at all relevant times herein.

10. Plaintiffs do not know the true names or capacities of those other Defendants named herein as DOES 1-10 and therefore, Plaintiffs sue said Defendants by said fictitious names. Plaintiffs are informed and believe and thereon allege that each of said Defendants are legally responsible under the claims for relief plead herein for the events and happenings herein referred to and proximately caused damages to Plaintiffs as alleged herein. Plaintiffs pray that when the true names of said Defendants are ascertained, Plaintiffs may insert the names herein with the appropriate allegations.

SB00281

1 11. That at all times mentioned, Defendants were the agents, servants and/or employees
2 of the other Defendants and were acting with permission and consent within the course and scope
3 of their agency and employment; that all such Defendants were responsible in some manner for
4 the events and happenings referred to herein and proximately caused damages to Plaintiffs as
5 alleged herein.

6 12. At all relevant times herein, Defendant Berndt, Chaney-Roberts, Davee, Ganchan,
7 Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson, Williamson, and Zebrack, Ltd.
8 in connection with its activities, employed or otherwise retained or procured the services of
9 technicians and other professional employees, including but not limited to Defendant David Smith,
10 M.D. and held them out and warranted them to the public as competent, careful, and experienced
11 in the care and treatment of patients such as Neil DeChambeau.

12 13. At all relevant times herein, Defendant David Smith, M.D. individually and as an
13 agent, servant and/or employee of Berndt, Chaney-Roberts, Davee, Ganchan, Ichino, Juneau,
14 Noble, Seher, Smith, Swackhamer, Thompson, Williamson, and Zebrack, Ltd. held himself out
15 to Plaintiffs in particular and the public in general as being an able and skilled physician in the
16 area of cardiology possessing the same or higher level of skill and training as other members in
17 his profession and that he was able to render proper and adequate care and treatment to Neil
18 DeChambeau.

19 14. At all relevant times herein, Defendant Rinehart, Ltd. in connection with its
20 activities, employed or otherwise retained or procured the services of technicians and other
21 professional employees including but not limited to Defendant David Kang, M.D., and held them
22 out and warranted them to the public as competent, careful, and experienced in the care and
23 treatment of patients such as Neil DeChambeau.

SB00282

24 15. At all relevant times herein, Defendant David Kang, M.D. individually and as an
25 agent, servant and/or employee of his medical entity and/or Berndt, Chaney-Roberts, Davee,
26 Ganchan, Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson, Williamson, and
27 Zebrack, Ltd. held himself out to Plaintiffs in particular and the public in general as being an able
28 and skilled physician in the area of anesthesia possessing the same or higher level of skill and

1 training as other members in his profession that he was able to render proper and adequate care
2 and treatment to Neil DeChambeau.

3 16. All incidents and actions complained of herein occurred in Reno, Washoe County,
4 Nevada.

5 17. The requisites of NRS 41A.100 are fully and timely complied with by the
6 attachment herein of the Affidavit of Fred Morady, M.D. attached hereto as Exhibit "A" and the
7 Affidavit of William J. Mazzei, M.D. attached hereto as Exhibit "B."

8 18. This action is governed by the provisions of NRS 41A and is thus exempt from any
9 court annexed arbitration program.

10 **FIRST CLAIM FOR RELIEF**

11 **(Negligence)**

12 19. Plaintiffs incorporate herein by reference as if fully set forth herein at length the
13 allegations contained in paragraphs 1-18 of Plaintiffs' Complaint.

14 20. On September 7, 2006, Neil DeChambeau was 57 year old male in good physical
15 health who was admitted to Washoe Medical Center to undergo an atrial fibrillation ablation
16 procedure to address a previously diagnosed paroxysmal atrial fibrillation.

17 21. On the morning of September 7, 2006, Neil DeChambeau was brought to the cath
18 lab at Washoe Medical Center where David Kang, M.D. induced anesthesia. Neil DeChambeau
19 was intubated and anesthesia was maintained throughout the atrial fibrillation ablation procedure.

20 22. At or about 12:39 p.m., Neil DeChambeau suddenly developed cardiac arrest. In
21 response to the cardiac arrest advance cardio pulmonary resuscitation was instituted on Neil
22 DeChambeau and multiple doses of vasoactive drugs were administered as chest compressions
23 were performed.

24 23. At or about 1:00 p.m., an echo-cardiogram of the heart showed a cardiac
25 tamponade.

26 24. At or about 1:00 p.m., a pericardiocentesis was performed and approximately 300
27 ccs of blood were removed from Neil DeChambeau's pericardial sac.

SB00283

1 25. David Smith, M.D. failed to timely diagnose that Neil DeChambeau experienced
2 a cardiac tamponade.

3 26. David Smith, M.D. failed to timely perform a pericardiocentesis procedure on Neil
4 DeChambeau.

5 27. David Kang, M.D. failed to timely diagnose that Neil DeChambeau experienced
6 a cardiac tamponade.

7 28. David Kang, M.D. failed to timely recommend to David Smith, M.D. that he
8 perform a pericardiocentesis on Neil DeChambeau.

9 29. David Kang, M.D. failed to timely perform a pericardiocentesis on Neil
10 DeChambeau.

11 30. The conduct of David Smith, M.D. set forth in paragraphs 25 and 26 fell below the
12 standard of care owed by David Smith, M.D. to Neil DeChambeau and caused Neil DeChambeau
13 to suffer irreversible brain damage and death.

14 31. The conduct of David Kang, M.D. set forth in paragraphs 27, 28, and 29 fell below
15 the standard of care owed by David Kang, M.D. to Neil DeChambeau and caused Neil
16 DeChambeau to suffer irreversible brain damage and death.

17 32. As the direct and proximate result of the negligence of Defendants, Plaintiff Angela
18 DeChambeau and Plaintiff Jean-Paul DeChambeau suffer and will continue to suffer grief, loss
19 of probable support, companionship, society, comfort and consortium of Neil DeChambeau.

20 33. As a direct and proximate result of the negligence of Defendants, Plaintiff Estate
21 of Neil DeChambeau has sustained special damages including medical expenses which Neil
22 DeChambeau incurred or sustained prior to his death and funeral expenses.

23 34. As a direct and proximate result of the negligence of the Defendants, Plaintiff
24 Angela DeChambeau and Plaintiff Jean-Paul DeChambeau sustained damages for pain, suffering
25 or disfigurement of Neil DeChambeau.

SB00284

26 35. Plaintiffs have been required to employ the services of legal counsel to prosecute
27 action and to expend monies for the presentation of this claim in accordance with statutory
28 requisites. Plaintiffs are entitled to attorney's fees and costs of suit including such costs and

1 expenditures to employ medical experts for the presentation of this claim.

2 WHEREFORE, Plaintiffs Angela DeChambeau and Jean-Paul DeChambeau pray for relief
3 against Defendants and each of them as follows:

- 4 1. For general damages including damages for pain, suffering and disfigurement of
5 the decedent in an amount to be proven at trial.
6 2. For special damages, pecuniary damages for grief, loss of probable support,
7 companionship, society, comfort and consortium in an amount to be proven at trial.

8 WHEREFORE, Plaintiff the Estate of Neil DeChambeau prays for relief against
9 Defendants and each of them as follows:

- 10 1. For special damages including medical expenses which the decedent incurred or
11 sustained before his death and funeral expenses.

12 WHEREFORE, all Plaintiffs pray for relief against Defendants and each of them as
13 follows:

- 14 1. For attorneys fees and costs to be incurred in prosecuting this action and for such
15 further relief as to this Court as appears just and equitable.

16 DATED this 4th day of September, 2007.

17 THORNDAL, ARMSTRONG,
18 DELK, BALKENBUSH & EISINGER

19 By: Stephen C. Balkenbush
20 Stephen C. Balkenbush, Esq.
21 State Bar No. 1814
22 6590 S. McCarran Blvd., Suite B
23 Reno, Nevada 89509
24 (775) 786-2882

25 Attorneys for Plaintiffs
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27
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SB00285

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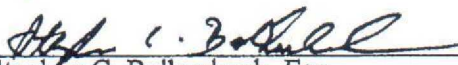
AFFIRMATION

Pursuant to NRS 239B.030

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 4th day of September, 2007.

THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER

By: 
Stephen C. Balkenbush, Esq.
State Bar No. 1814
6590 S. McCarran Blvd., Suite B
Reno, Nevada 89509
(775) 786-2882

Attorneys for Plaintiffs

SB00286

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1 Q. And then it looks like from your notes that
2 the patient had some problems coming out of the
3 anesthesia, is that correct?
4 A. Correct.
5 Q. And can you explain what occurred?
6 A. When the anesthesia was reversed, we were not
7 getting meaningful neurologic response from the patient,
8 as per the anesthesiologist.
9 Q. And when would this occur? What I'm getting
10 at, would this be at the end of the code, that you would
11 bring him out of the anesthesia?
12 A. Correct.
13 Q. And you said that he "was not breathing over
14 the vent." What do you mean by that?
15 A. If somebody has -- you know, a reasonable
16 neurologic response off of anesthesia, you'd hope for
17 them to breathe at a faster rate than what the ventilator
18 is going at.
19 Q. And he was not?
20 A. Correct.
21 Q. Do you know who placed the long sheaths, et
22 cetera? It says long sheaths were then placed in the
23 femoral region, switched over to 8-French short sheaths.
24 Do you know who did that?
25 A. That would be me.

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1 Q. And what was the reason for doing that?
2 A. The long sheaths go into the heart. So we
3 wanted something shorter that wouldn't cause clots within
4 the heart.
5 Q. And you indicated that there was a
6 pericardiocentesis catheter sewn in place. Why was that
7 done?
8 A. That's the tube that went into the pericardial
9 space to drain the fluid. And that was left there, so
10 that if he had recurrent bleeding that it would drain.
11 Q. Now I'm just curious what you mean at the
12 bottom of this, "The total fluoroscopy time was 64
13 minutes." Is that when the radiation was going so you
14 could see what was occurring?
15 A. That's X-ray time for the code and also the
16 ablation procedure.
17 Q. So it's the X-ray time for the procedure, as
18 well as the code?
19 A. Yes.
20 Q. And that's 64 minutes?
21 A. Yes.
22 Q. And then it says the total number of ablations
23 was 157.
24 A. Yes.
25 Q. This was my naivety; I thought an ablation was

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1 like, you know, one kind of zap or whatever you want to
2 call it. So how does an ablation actually work?
3 A. For atrial fibrillation there's multiple
4 circuits causing the A-fib, so you have to do a lot of
5 ablations to reduce the circuits that maintain the A-fib.
6 That's why the procedure is much harder than an SVT
7 ablation. That's why the quoted success is 50 to 60
8 percent, as opposed to 95 percent.
9 For SVT it's a single spot you're burning; for
10 A-fib it's multiple spots that you're burning.
11 Q. So when you say the total number of ablations
12 was 157 --
13 A. Each one is for about 20 or 30 seconds.
14 Q. And --
15 A. Then you move to the next spot.
16 Q. That's what I was going to get at. So you had
17 to go along various little circuits in the heart to try
18 to complete this procedure?
19 A. Yes.
20 Q. And then it says, "Total ablation time was
21 3199 seconds." I did not divide that out, but is each
22 ablation then kind of counted on some kind of machine?
23 How do you know that, I guess is what I'm asking?
24 A. It's counted on the Prucka machine.
25 Q. So it gives you the result at the end?

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1 A. Gives you the total number of ablations and
2 the total time of ablations.
3 Q. And now once the code was called, I assume the
4 ablations were all done?
5 A. We had just finished the right side of
6 ablation. That was towards the end of the procedure.
7 The left side of the ablations had been completed.
8 Q. Did you have any more to do, to your
9 knowledge?
10 A. I wouldn't have done any more anyhow after the
11 code, but there was probably not much else to do, from
12 ablation standpoint.
13 Q. So it was almost completely done?
14 A. Yes.
15 Q. Once this lawsuit was filed naming you and
16 Dr. Kang, I know that Mr. Balkenbush had the case
17 reviewed by Dr. Morady. Had you ever heard of him before
18 this case?
19 A. Yes.
20 Q. And how had you heard of Dr. Morady?
21 A. He's in charge of electrophysiology at the
22 University of Michigan.
23 Q. And does he have a reputation as sort of known
24 in that particular specialty?
25 A. He's a very well-known electrophysiologist.

1 He does a lot of atrial fibrillation ablations.
 2 Q. And when you read his affidavit indicating
 3 that there was a V-tach, is that what sent you to look at
 4 the tapes?
 5 A. I was going to look at the tapes anyhow, but
 6 that certainly opened up my eyes. But I didn't know
 7 Dr. Kang had written down that there was a VT on his
 8 anesthesia note. So I went back and looked at that. I
 9 hadn't recalled there was VT during the case. If I had
 10 thought there was VT during the case, I would have put it
 11 in my dictation.
 12 Q. And when you went back and looked at the --
 13 was it the EKGs that you looked at?
 14 A. EKG and the intracardiac electrocardiograms.
 15 Q. There was no VT, is that correct?
 16 A. Correct.
 17 Q. I know that there was a very long time lapse
 18 and that Mr. Balkenbush as well as Mr. Lemons was trying
 19 to get this -- I'm going to call it the disk or the CD of
 20 the procedure from GE. Once that happened, did you ever
 21 actually review the data at the time?
 22 A. I don't understand the question. I'm sorry.
 23 Q. There's some kind of disk that GE printed off.
 24 And that took place sometime later in the case, because
 25 what I understand is Dr. Morady and Mr. Lemons were both

1 trying to get that evidence. And it's my understanding
 2 that Renown somehow provided that disk.
 3 A. Okay.
 4 Q. Did you ever review that particular disk?
 5 A. I don't know which one I reviewed. I reviewed
 6 a disk, which was the complete disk of the case. I don't
 7 know if --
 8 Q. That's the one I'm talking about.
 9 A. Yeah.
 10 Q. What do we call the disk of the case? Just
 11 the disk, the CD?
 12 A. I call it the Prucka disk. That's what I call
 13 it from a -- but, see if I asked somebody to get me
 14 the -- back then, I asked for the Prucka disk. I don't
 15 know what the formal name is.
 16 Q. And when you reviewed that disk, you saw no
 17 VT, is that correct?
 18 A. Correct.
 19 Q. When you reviewed that disk, does that disk
 20 show you sort off the timing of the events? I mean does
 21 it show the pericardiocentesis?
 22 A. It does not.
 23 Q. Okay. What does it basically show then?
 24 A. It shows the EKGs from beat to beat, it shows
 25 you the intracardiac recordings from the catheters beat

1 to beat. The disk will also have some notations put in
 2 by whoever is working the system.
 3 Q. Do you recall after this procedure having any
 4 conversations with Mrs. DeChambeau?
 5 A. I do.
 6 Q. And what do you recall about those
 7 conversations? Can you tell me the gist of what you
 8 recall? I mean I'm not asking word for word, just
 9 generally what occurred after this procedure.
 10 A. I remember going out and talking to her and
 11 telling her that there was a complication; that he had a
 12 bleed around the heart, we drained it. Right now his
 13 blood pressure was fine, and we have to see how he does
 14 neurologically. We don't know yet. That's what I -- but
 15 I can't say for sure that's exactly what I said.
 16 I had a conversation with her after the case,
 17 after the case and the complication, and I'm sure I had
 18 conversations with her up in the intensive care unit.
 19 Q. And once the patient was stabilized after the
 20 cath procedure, I take it he was transferred to ICU?
 21 A. Yes.
 22 Q. And do you recall what type of specialist you
 23 called in to evaluate him?
 24 A. A pulmonologist and a neurologist.
 25 Q. And once the pulmonologist and the neurologist

1 had done their evaluations, what was your understanding
 2 of Mr. DeChambeau's status?
 3 A. The first evaluation, I think they didn't know
 4 exactly how he was going to do neurologically. That was
 5 the first. After somebody has a cardiac arrest, it takes
 6 24 to 48 hours to determine how a patient will do.
 7 Q. Before I go further along that line; during
 8 the procedure in the cath lab, did you have any
 9 criticisms of any of the Renown employees, I guess at
 10 that time they would have been Washoe Med employees, and
 11 the way they handled themselves?
 12 A. I did not.
 13 Q. Did you believe that there was any type of
 14 malpractice that should be asserted against Washoe Med,
 15 now known as Renown?
 16 A. I'd never thought about it, but I don't
 17 believe so.
 18 Q. And then you said once the patient was
 19 transferred, it takes 24 to 48 hours to see how well the
 20 patient is going to do. I take it --
 21 A. I'm sorry. Go ahead.
 22 Q. I take it that you're talking about the lack
 23 of oxygenation to the brain?
 24 A. Neurologic, how a patient will respond after a
 25 code situation. That -- how they will do neurologically,

Deposition of David E. Smith, M.D., 5/20/2013

<p style="text-align: right;">Page 41</p> <p>1 it takes 24 to 48 hours to determine after an arrest</p> <p>2 whether they're going to get a meaningful recovery.</p> <p>3 Q. Do you have any estimate of how long this</p> <p>4 arrest was?</p> <p>5 A. I can only go back to the code note. I know</p> <p>6 the reps start at 12:39, and it says that a blood</p> <p>7 pressure was obtained by 12:54. I can't say that</p> <p>8 12:54 was the first time that the pulse was found, that's</p> <p>9 just what was documented. It doesn't have the timing of</p> <p>10 the pericardiocentesis on the code note.</p> <p>11 Q. And when a person has had an arrest for</p> <p>12 approximately 10 to 15 minutes, what does the outcome</p> <p>13 generally mean?</p> <p>14 A. It varies. I'm not a neurologist. I mean, it</p> <p>15 varies.</p> <p>16 Q. And in Mr. DeChambeau's case what was his</p> <p>17 status after 24 to 48 hours?</p> <p>18 A. As per the neurologist, they didn't think he</p> <p>19 would make meaningful recovery. At least that's what I</p> <p>20 read. I wasn't part of those meetings.</p> <p>21 Q. Now, I know that you talked with</p> <p>22 Mrs. DeChambeau to let her know about the complications</p> <p>23 and what had occurred. Do you recall any other</p> <p>24 conversations with her?</p> <p>25 A. I recall the conversation after the -- in the</p>	<p style="text-align: right;">Page 43</p> <p>1 It said that "Dr. Smith violated the standard</p> <p>2 of care by failing to restore Neil DeChambeau's pulse</p> <p>3 within an almost four to five minutes of the time he</p> <p>4 underwent a cardiac arrest at 12:39 p.m. on September 7,</p> <p>5 2006."</p> <p>6 Do you know anything about this timing of four</p> <p>7 to five minutes and if this is close to what occurred?</p> <p>8 A. I have no idea about that. And a lot of it</p> <p>9 depends on if the patient is getting CPR at the time</p> <p>10 also.</p> <p>11 Q. Said, "Dr. Smith should have assumed the worst</p> <p>12 (cardiac tamponade) and responded to the emergency by</p> <p>13 immediately inserting a needle and drain the pericardial</p> <p>14 sac surrounding the heart through one of several</p> <p>15 approaches, followed by a pericardiocentesis, removal of</p> <p>16 the accumulated blood in the sac immediately upon onset</p> <p>17 of cardiac arrest and loss of blood pressure."</p> <p>18 I'm going to kind of break this down. Did you</p> <p>19 assume the worst, cardiac tamponade?</p> <p>20 A. I did.</p> <p>21 Q. And how did you respond to this?</p> <p>22 A. I did a pericardiocentesis.</p> <p>23 Q. And once you assumed it, how long does it take</p> <p>24 to do a pericardiocentesis?</p> <p>25 A. It varies. I mean some are difficult and some</p>
<p style="text-align: right;">Page 42</p> <p>1 cath lab waiting room, and I recall maybe a conversation</p> <p>2 that evening, but I don't remember the content of it.</p> <p>3 Q. Did you ever say anything to her like he's</p> <p>4 lost oxygen to the brain or he may not -- you know, he</p> <p>5 may not make it or anything like that?</p> <p>6 A. I don't know.</p> <p>7 Q. Just don't recall the specifics?</p> <p>8 A. I don't remember.</p> <p>9 Q. Did you ever talk with their son, by any</p> <p>10 chance?</p> <p>11 A. I don't know. I do believe he came by once in</p> <p>12 the coronary care unit, but I don't remember whether I</p> <p>13 had talked to him.</p> <p>14 Q. Doctor, I'm going to represent to you that I</p> <p>15 received a letter from Mr. Kozak indicating that he</p> <p>16 retained a Dr. Mark Seifert, the director of</p> <p>17 electrophysiology at John C. Lincoln Hospital in Phoenix.</p> <p>18 Do you know him?</p> <p>19 A. I don't.</p> <p>20 Q. I can represent to you that when these</p> <p>21 opinions were given, the doctor had not yet reviewed the</p> <p>22 Prucka disk, so it was based on the records. It says</p> <p>23 that Mr. -- Mr. Kozak is representing to me what</p> <p>24 Dr. Seifert is saying. So I don't know the accuracy of</p> <p>25 these statements, I'm just going to read them to you.</p>	<p style="text-align: right;">Page 44</p> <p>1 aren't difficult.</p> <p>2 Q. Do you recall in this case --</p> <p>3 A. I don't remember it being difficult. But to</p> <p>4 get all the fluid out, you have to drain it. So it</p> <p>5 depends -- to complete the procedure, it depends on how</p> <p>6 much blood is in the sac. If you only had 30 or 40 CCs</p> <p>7 it would be quicker than if you had 300 CCs.</p> <p>8 Q. So you have to take out the 300 CCs to</p> <p>9 complete the pericardiocentesis?</p> <p>10 A. Correct.</p> <p>11 Q. So you inserted the needle and drained the</p> <p>12 pericardial sac, is that correct?</p> <p>13 A. Yes.</p> <p>14 Q. And then it was followed by a</p> <p>15 pericardiocentesis, is that correct?</p> <p>16 A. That's all a part of the same thing.</p> <p>17 Q. Oh, it's the same?</p> <p>18 A. Um-hum.</p> <p>19 Q. Okay. And it says, "Confirmation of cardiac</p> <p>20 tamponade using transthoracic echo prior to the</p> <p>21 pericardiocentesis resulted in an unnecessary harmful</p> <p>22 delay in treatment."</p> <p>23 First of all, did you use the echo prior to</p> <p>24 doing the pericardiocentesis?</p> <p>25 A. No.</p>

<p style="text-align: right;">Page 45</p> <p>1 Q. In your opinion was there any unnecessary 2 delay? 3 A. No. 4 Q. And it said, "He not only ordered an 5 echocardiogram, but commenced CPR. CPR was ineffective 6 because of compression of the heart by the accumulated 7 pericardial blood preventing it from pumping." Do you 8 agree with that statement? 9 A. I mean you have to get rid of the pericardial 10 fluid, but it's standard therapy to do CPR while you're 11 doing a pericardiocentesis. 12 I don't know if that's 100 percent accurate. 13 Q. And you would do CPR -- 14 A. Of course you would do CPR at the same time. 15 Q. And it says, "Waiting for the echo machine to 16 arrive and getting it hooked up wasted time needed to 17 perform the procedures." Did that occur? 18 A. Did not. 19 Q. And he says, "By the time Dr. Smith got around 20 to doing what was demanded by the prevailing standard of 21 care, 15 minutes had elapsed without oxygen to Neil's 22 brain." Did you stand around for 15 minutes? 23 A. Absolutely not. It's a code situation. 24 Q. And to your knowledge, was there any delay of 25 15 minutes?</p>	<p style="text-align: right;">Page 47</p> <p>1 A. I wasn't doing anything on the left ventricle. 2 Q. You weren't involved in the left ventricle at 3 all in the ablation procedure? 4 A. No. I was involved in the left atrium. 5 Q. Okay. Is that a little more complicated when 6 you're dealing with the left atrium as well as the right? 7 A. It's a higher-risk procedure. 8 Q. Did you explain that to Mr. DeChambeau? 9 A. Yes. 10 Q. And how many of those procedures do you do 11 that involve the left atrium at that time per year? 12 A. I don't know the exact numbers. 13 Q. Do you know an approximate number? 14 A. I don't. It would be just speculation. 15 Q. Prior to this procedure on Neil DeChambeau, 16 had you ever had a cardiac arrest occur during the 17 performance of your ablation procedure? 18 A. An A-fib ablation, no. 19 Q. So this is the first time this has happened to 20 you? 21 A. An A-fib ablation with cardiac arrest, yes. 22 Q. And what was your understanding of the 23 standard of care when that happens; what's the first 24 thing you should do? 25 A. I don't understand. What are you asking?</p>
<p style="text-align: right;">Page 46</p> <p>1 A. No. 2 Q. Sounds like to me he believes that you waited 3 for a technician and a transthoracic echo machine before 4 you did the procedure. Did that occur? 5 A. No. 6 Q. Go through my little outline here, and I think 7 we're pretty close to being done, Doctor. 8 MS. PISCEVICH: I don't think I have any other 9 questions. Thank you, Doctor. 10 EXAMINATION 11 BY MR. KOZAK: 12 Q. Dr. Smith, I'm Chuck Kozak and I'm 13 representing the DeChambeau family. I just have a few 14 questions. 15 First of all, around the time that you were 16 doing this procedure on Neil DeChambeau, how many of 17 these procedures were you doing a year? 18 A. I don't know. 19 Q. Have any idea? 20 A. I don't have an exact number. 21 Q. Could you give us an approximate number? 22 A. I'm not sure it will be accurate. 23 Q. Okay. Now doing the procedure on the left 24 ventricle is a little bit more complicated and tricky 25 than doing it on the right ventricle, isn't that true?</p>	<p style="text-align: right;">Page 48</p> <p>1 Q. When you have a cardiac arrest and you're 2 doing an ablation procedure, is there a standard of care 3 in your profession as to what you need to do as the 4 physician in charge, the first thing you need to do? 5 MR. LEMONS: Objection, incomplete 6 hypothetical. 7 THE WITNESS: I don't know -- I don't know how 8 to answer that question. I'm sorry. 9 BY MR. KOZAK: 10 Q. Well, what is the first thing you did when the 11 patient went into cardiac arrest at 12:39? 12 A. I did CPR and presumed it was pericardial 13 fluid and did a pericardiocentesis. 14 Q. What came first, the CPR or the 15 pericardiocentesis? 16 A. I don't know. Usually it's both simultaneous. 17 Q. And who did the CPR? 18 A. The techs, the nurse; not me. 19 Q. You don't disagree, do you, with the records 20 which show that the pulse stopped at 12:39 and that it 21 started again at 12:54? 22 A. I don't disagree with the pulse stopping at 23 12:39. In regards to 12:54, I don't know whether that's 24 completely accurate, because I'm in the middle of doing 25 the pericardiocentesis. Somebody has to be checking the</p>

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1 pulse constantly. So I don't know whether it started
 2 back at 52, 49 or 48.
 3 Q. Well, do you have any reason to disagree with
 4 the record that said it started at 12:54?
 5 A. I don't really understand. I don't know. I
 6 mean, it certainly could have started back at 12:54. I
 7 think the code started at 12:39.
 8 MR. KOZAK: Could we have this marked next in
 9 order.
 10 (Exhibit 8 was marked for identification.)
 11 BY MR. KOZAK:
 12 Q. I'm going to show you Dr. Morady's affidavit.
 13 I think you've seen this before. Referring you to
 14 paragraph ten. I think it's on page three. Dr. Morady
 15 states, "I believe to a reasonable degree of probability
 16 that the care provided by David Smith, M.D., was
 17 negligent and breached the standard of care owed to Neil
 18 DeChambeau in the following particulars: a) David
 19 Smith, M.D., failed to timely diagnose that Neil
 20 DeChambeau was experiencing cardiac tamponade." And, "b)
 21 David Smith, M.D., failed to timely perform a
 22 pericardiocentesis procedure on Neil DeChambeau." Do you
 23 see that?
 24 A. I do see that.
 25 Q. Okay. Do you disagree with Dr. Morady's

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1 statement there in his affidavit?
 2 MS. PISCEVICH: Just before you answer, I'm
 3 going to insert an objection, because he's relying on
 4 paragraph nine of the anesthesia record, which I just
 5 wanted to point that out.
 6 So feel free to answer the question, Doctor.
 7 It's an incomplete hypothetical.
 8 THE WITNESS: When Dr. Morady reviewed the
 9 records, he looked at anesthesia record, he didn't see
 10 the code note. The code note stated that the code
 11 started at 12:39 and blood pressure pulse was back by
 12 12:54. He was looking at the anesthesia record, from
 13 what I hear.
 14 MS. PISCEVICH: Well it states it in paragraph
 15 nine, Doctor.
 16 THE WITNESS: Does it?
 17 MS. PISCEVICH: Yes. If you look at the
 18 preceding paragraph.
 19 THE WITNESS: Anesthesia record. That's not
 20 the formal record. The formal record is the code note.
 21 BY MR. KOZAK:
 22 Q. So it's your contention then, that if the
 23 pulse was not restored until 12:54, that was within the
 24 standard of care, as far as restoring a pulse to a
 25 patient who has undergone a cardiac arrest?

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1 A. I don't know if there's a standard of care.
 2 When you're in the middle of a code situation, you're
 3 doing everything you can to restore the patient's blood
 4 pressure, pulse. I don't think you're going to find
 5 something that's going to be written or published that
 6 has to be done within 15 minutes or 10 minutes or 5
 7 minutes or 2 minutes. You just do your best, which is --
 8 in the code situation.
 9 Q. And under these circumstances;
 10 Mr. DeChambeau's brain was actually deprived of oxygen
 11 for long enough to basically lead to his demise, isn't
 12 that true?
 13 MR. LEMONS: He can answer that, except to the
 14 extent that you're asking for the expert opinion of a
 15 neurologist or a neurosurgeon, which, as he said earlier,
 16 he's not.
 17 THE WITNESS: I'm not a neurologist. He did
 18 pass away.
 19 BY MR. KOZAK:
 20 Q. So as you sit here today, you do not know how
 21 long Neil DeChambeau's brain was deprived of oxygen, is
 22 that correct?
 23 A. I don't know the exact time.
 24 Q. Were the materials in the operating room
 25 available to you to do the pericardiocentesis --

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1 A. Yes.
 2 Q. -- as soon as he went into cardiac arrest?
 3 A. Yes.
 4 Q. Were there cameras placed in the atrium at the
 5 time of the cardiac arrest?
 6 A. There's no camera in the atrium.
 7 Q. So there was no way you could visualize what
 8 was going on?
 9 A. No.
 10 Q. When Mr. DeChambeau was brought out of the
 11 operating room, was he on a gurney and brought out in
 12 front of Mrs. DeChambeau?
 13 A. I don't know. He would have been brought out
 14 on a gurney; I don't know if he was brought out in front
 15 of Mrs. DeChambeau.
 16 Q. Do you know if he was hooked up to any tubes
 17 or anything when he came out of the operating room to go
 18 up to ICU?
 19 A. I'm assuming he was still on the ventilator,
 20 so he definitely was hooked up to the ventilator.
 21 Q. Anything else?
 22 A. He had a tube in the pericardial space to
 23 prevent recollection of the blood and he had some IV
 24 catheters. There could have been something else. He
 25 might have had a catheter in the bladder, too.

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1 Q. Was there an investigation done of this
2 particular procedure by the hospital or by any entity
3 that you know of?
4 A. I don't know.
5 Q. You're not aware of any?
6 A. From the hospital, no.
7 Q. Or any entity. Not only the hospital, but
8 anybody was doing an investigation of what happened in
9 the operating room?
10 MR. LEMONS: Well, we had a lawsuit. And to
11 the extent that we examined what occurred, that would all
12 be privileged.
13 BY MR. KOZAK:
14 Q. I'm not talking about the lawsuit. I'm
15 talking about the hospital or somebody doing an
16 independent investigation, apart from your discovery or
17 investigation.
18 A. I don't know.
19 Q. Have you ever had a fatality prior to this
20 procedure in 2006 as a result of one of your cardiac
21 ablation procedures?
22 MR. LEMONS: I'm just going to object. That's
23 vague. I don't understand what you're --
24 THE WITNESS: You mean by a fatality, somebody
25 died two weeks later or three weeks later?

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1 BY MR. KOZAK:
2 Q. No. Before.
3 A. On the table?
4 Q. Yes. Like Neil DeChambeau.
5 MS. PISCEVICH: I'm going to object. He
6 didn't die on the table.
7 BY MR. KOZAK:
8 Q. Well, that he suffered substantial injury on
9 the table?
10 A. I don't know. I can't recall.
11 Q. You can't recall?
12 A. I can't recall that ever happening, except --
13 Q. Prior to Mr. DeChambeau's demise?
14 A. Correct, but I've been practicing for 20 years.
15 MR. KOZAK: Okay. I think that's all the
16 questions I have.
17 THE WITNESS: Thank you.
18 MS. PISCEVICH: With respect to the original,
19 why don't you go ahead and send it to me and send a copy
20 to Mr. Lemons with the original correction page and
21 signature page. And I will do my normal order with the
22 exhibits.
23 MR. KOZAK: Just regular copy is fine.
24 (Whereupon the deposition concluded at 5:15 p.m.)
25 --oOo--

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1 --oOo--
2
3 CERTIFICATE OF WITNESS
4
5 I hereby certify under penalty of perjury,
6 that I have read the foregoing deposition, made the
7 changes and corrections that I deem necessary, and
8 approve the same as now true and correct.
9
10 DATED: At _____,
11 (City) (State)
12
13 This ____ day of _____, 2013.
14
15 _____
16 DAVID E. SMITH, M.D.
17
18
19
20
21
22
23
24
25

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1 STATE OF NEVADA)
2) ss.
3 COUNTY OF WASHOE)
4
5 I, EVELYN J. STUBBS, a Certified Court Reporter
6 in and for the County of Washoe, State of Nevada, do
7 hereby certify:
8 That on Tuesday, the 7th day of May, 2013, at
9 the hour of 2:04 p.m. of said day, at the offices of
10 Lemons, Grundy and Eisenberg, Attorneys at Law, 6005
11 Plumas Street, Third Floor, Reno, Nevada, personally
12 appeared DAVID E. SMITH, M.D., who was duly sworn by me,
13 and thereupon was deposed in the matter entitled herein;
14 That said deposition was taken in stenotype
15 notes by me, a Certified Court Reporter, and thereafter
16 transcribed into typewriting as herein appears;
17 That the foregoing transcript, consisting of
18 pages 1 through 54, is a full, true and correct
19 transcript of my stenotype notes of said deposition to
20 the best of my knowledge, skill and ability.
21 DATED: At Reno, Nevada, this 20th day of May,
22 2013.
23 _____
24 EVELYN J. STUBBS, CCR#366
25

Deposition of David E. Smith, M.D., 5/20/2013

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1	CHANGES/CORRECTIONS/NOTES		
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15 (Page 57)

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Joey Orduna Hastings

Clerk of the Court

Transaction # 3921386

EXHIBIT "2"

EXHIBIT "2"

1 \$1425
2 Stephen C. Balkenbush, Esq.
3 Nevada Bar No. 1814
4 Thorndal, Armstrong, Delk, Balkenbush & Eisinger
5 6590 S. McCarran Blvd., Suite B
6 Reno, NV 89509
7 (775) 786-2882
8 Attorney for Plaintiffs

2007 SEP -5 PM 1:45

RECEIVED ... J.R.

BY D. Jaramillo

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

9 ANGELA DECHAMBEAU, individually,
10 JEAN-PAUL DECHAMBEAU and
11 ANGELA DECHAMBEAU as Special
12 Administrator of the Estate of Neil
13 DeChambeau,

Case No.

CV07 02028

Dept. No.

4

12 Plaintiffs,

13 v.

14 DAVID SMITH, M.D., BERNDT,
15 CHANEY-ROBERTS, DAVEE,
16 GANCHAN, ICHINO, JUNEAU,
17 NOBLE, SEHER, SMITH,
18 SWACKHAMER, THOMPSON,
19 WILLIAMSON, and ZEBRACK, LTD., a
20 Nevada professional corporation, DAVID
21 KANG, M.D., RINEHART, LTD., a
22 Nevada professional corporation, and
23 DOES 1-10,

19 Defendants.

SB00280

21 COMPLAINT

22 COMES NOW, PLAINTIFFS ANGELA DECHAMBEAU, JEAN-PAUL
23 DECHAMBEAU, AND THE ESTATE OF NEIL DECHAMBEAU by and through their
24 Attorneys THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER and for their
25 Complaint hereby allege as follows:

- 26 1. At all relevant times, Angela DeChambeau and Jean-Paul DeChambeau were adult,
27 competent residents of Reno, Nevada at the time of the incident set forth in this Complaint.
28 2. At all relevant times, Angela DeChambeau was the wife of Neil DeChambeau.

1 || 3. At all relevant times, Jean-Paul DeChambeau was the son of Neil DeChambeau.

2 | 4. On September 8, 2006, Neil DeChambeau died.

3 5. On December 26, 2006, Angela DeChambeau was appointed special administrator
4 of the Estate of Neil DeChambeau.

6. On information and belief, Defendant David Smith, M.D. was at all times relevant hereto a physician licensed in the State of Nevada and practicing in the area of cardiology.

7 7. On information and belief, at all relevant times herein Defendant Berndt, Chaney-
8 Roberts, Davee, Ganchan, Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson,
9 Williamson, and Zebrack, Ltd., was a Nevada professional corporation organized and existing
10 under the laws of the State of Nevada and operating in Reno, Nevada as an office for heart care.
11 Upon information and belief, Defendant David Smith was an employee of Defendant Berndt,
12 Chaney-Roberts, Davee, Ganchan, Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson,
13 Williamson, and Zebrack, Ltd. at all relevant times herein.

14 8. On information and belief, David Kang, M.D. was at all times relevant hereto a
15 physician licensed in the State of Nevada and practicing in the area of anesthesia.

16 9. On information and belief, at all relevant times herein, Rinehart, Ltd., a Nevada
17 professional corporation located in Reno, Nevada was corporation organized and existing under
18 the law of the State of Nevada and operating in Reno, Nevada as an office providing anesthesia
19 care. Upon information and belief, Defendant David Kang, M.D. was an employee of Rinehart,
20 Ltd., at all relevant times herein.

10. Plaintiffs do not know the true names or capacities of those other Defendants named herein as DOES 1-10 and therefore, Plaintiffs sue said Defendants by said fictitious names. Plaintiffs are informed and believe and thereon allege that each of said Defendants are legally responsible under the claims for relief plead herein for the events and happenings herein referred to and proximately caused damages to Plaintiffs as alleged herein. Plaintiffs pray that when the true names of said Defendants are ascertained, Plaintiffs may insert the names herein with the appropriate allegations.

SB00281

1 11. That at all times mentioned, Defendants were the agents, servants and/or employees
2 of the other Defendants and were acting with permission and consent within the course and scope
3 of their agency and employment; that all such Defendants were responsible in some manner for
4 the events and happenings referred to herein and proximately caused damages to Plaintiffs as
5 alleged herein.

6 12. At all relevant times herein, Defendant Berndt, Chaney-Roberts, Davee, Ganchan,
7 Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson, Williamson, and Zebrack, Ltd.
8 in connection with its activities, employed or otherwise retained or procured the services of
9 technicians and other professional employees, including but not limited to Defendant David Smith,
10 M.D. and held them out and warranted them to the public as competent, careful, and experienced
11 in the care and treatment of patients such as Neil DeChambeau.

12 13. At all relevant times herein, Defendant David Smith, M.D. individually and as an
13 agent, servant and/or employee of Berndt, Chaney-Roberts, Davee, Ganchan, Ichino, Juneau,
14 Noble, Seher, Smith, Swackhamer, Thompson, Williamson, and Zebrack, Ltd. held himself out
15 to Plaintiffs in particular and the public in general as being an able and skilled physician in the
16 area of cardiology possessing the same or higher level of skill and training as other members in
17 his profession and that he was able to render proper and adequate care and treatment to Neil
18 DeChambeau.

19 14. At all relevant times herein, Defendant Rinehart, Ltd. in connection with its
20 activities, employed or otherwise retained or procured the services of technicians and other
21 professional employees including but not limited to Defendant David Kang, M.D., and held them
22 out and warranted them to the public as competent, careful, and experienced in the care and
23 treatment of patients such as Neil DeChambeau.

SB00282

24 15. At all relevant times herein, Defendant David Kang, M.D. individually and as an
25 agent, servant and/or employee of his medical entity and/or Berndt, Chaney-Roberts, Davee,
26 Ganchan, Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson, Williamson, and
27 Zebrack, Ltd. held himself out to Plaintiffs in particular and the public in general as being an able
28 and skilled physician in the area of anesthesia possessing the same or higher level of skill and

1 training as other members in his profession that he was able to render proper and adequate care
2 and treatment to Neil DeChambeau.

3 16. All incidents and actions complained of herein occurred in Reno, Washoe County,
4 Nevada.

5 17. The requisites of NRS 41A.100 are fully and timely complied with by the
6 attachment herein of the Affidavit of Fred Morady, M.D. attached hereto as Exhibit "A" and the
7 Affidavit of William J. Mazzei, M.D. attached hereto as Exhibit "B."

8 18. This action is governed by the provisions of NRS 41A and is thus exempt from any
9 court annexed arbitration program.

10 **FIRST CLAIM FOR RELIEF**

11 **(Negligence)**

12 19. Plaintiffs incorporate herein by reference as if fully set forth herein at length the
13 allegations contained in paragraphs 1-18 of Plaintiffs' Complaint.

14 20. On September 7, 2006, Neil DeChambeau was 57 year old male in good physical
15 health who was admitted to Washoe Medical Center to undergo an atrial fibrillation ablation
16 procedure to address a previously diagnosed paroxysmal atrial fibrillation.

17 21. On the morning of September 7, 2006, Neil DeChambeau was brought to the cath
18 lab at Washoe Medical Center where David Kang, M.D. induced anesthesia. Neil DeChambeau
19 was intubated and anesthesia was maintained throughout the atrial fibrillation ablation procedure.

20 22. At or about 12:39 p.m., Neil DeChambeau suddenly developed cardiac arrest. In
21 response to the cardiac arrest advance cardio pulmonary resuscitation was instituted on Neil
22 DeChambeau and multiple doses of vasoactive drugs were administered as chest compressions
23 were performed.

24 23. At or about 1:00 p.m., an echo-cardiogram of the heart showed a cardiac
25 tamponade.

26 24. At or about 1:00 p.m., a pericardiocentesis was performed and approximately 300
27 ccs of blood were removed from Neil DeChambeau's pericardial sac.

28 **SB00283**

25. David Smith, M.D. failed to timely diagnose that Neil DeChambeau experienced a cardiac tamponade.

26. David Smith, M.D. failed to timely perform a pericardiocentesis procedure on Neil DeChambeau.

27. David Kang, M.D. failed to timely diagnose that Neil DeChambeau experienced a cardiac tamponade.

28. David Kang, M.D. failed to timely recommend to David Smith, M.D. that he perform a pericardiocentesis on Neil DeChambeau.

29. David Kang, M.D. failed to timely perform a pericardiocentesis on Neil DeChambeau.

30. The conduct of David Smith, M.D. set forth in paragraphs 25 and 26 fell below the standard of care owed by David Smith, M.D. to Neil DeChambeau and caused Neil DeChambeau to suffer irreversible brain damage and death.

31. The conduct of David Kang, M.D. set forth in paragraphs 27, 28, and 29 fell below the standard of care owed by David Kang, M.D. to Neil DeChambeau and caused Neil DeChambeau to suffer irreversible brain damage and death.

32. As the direct and proximate result of the negligence of Defendants, Plaintiff Angela DeChambeau and Plaintiff Jean-Paul DeChambeau suffer and will continue to suffer grief, loss of probable support, companionship, society, comfort and consortium of Neil DeChambeau.

33. As a direct and proximate result of the negligence of Defendants, Plaintiff Estate of Neil DeChambeau has sustained special damages including medical expenses which Neil DeChambeau incurred or sustained prior to his death and funeral expenses.

34. As a direct and proximate result of the negligence of the Defendants, Plaintiff Angela DeChambeau and Plaintiff Jean-Paul DeChambeau sustained damages for pain, suffering or disfigurement of Neil DeChambeau.

SB00284

35. Plaintiffs have been required to employ the services of legal counsel to prosecute action and to expend monies for the presentation of this claim in accordance with statutory requisites. Plaintiffs are entitled to attorney's fees and costs of suit including such costs and

1 expenditures to employ medical experts for the presentation of this claim.

2 WHEREFORE, Plaintiffs Angela DeChambeau and Jean-Paul DeChambeau pray for relief
3 against Defendants and each of them as follows:

- 4 1. For general damages including damages for pain, suffering and disfigurement of
5 the decedent in an amount to be proven at trial.
6 2. For special damages, pecuniary damages for grief, loss of probable support,
7 companionship, society, comfort and consortium in an amount to be proven at trial.

8 WHEREFORE, Plaintiff the Estate of Neil DeChambeau prays for relief against
9 Defendants and each of them as follows:

- 10 1. For special damages including medical expenses which the decedent incurred or
11 sustained before his death and funeral expenses.

12 WHEREFORE, all Plaintiffs pray for relief against Defendants and each of them as
13 follows:

- 14 1. For attorneys fees and costs to be incurred in prosecuting this action and for such
15 further relief as to this Court as appears just and equitable.

16 DATED this 4th day of September, 2007.

17 THORNDAL, ARMSTRONG,
18 DELK, BALKENBUSH & EISINGER

19 By: Stephen C. Balkenbush
20 Stephen C. Balkenbush, Esq.
21 State Bar No. 1814
22 6590 S. McCarran Blvd., Suite B
23 Reno, Nevada 89509
24 (775) 786-2882

25 Attorneys for Plaintiffs

26
27 SB00285

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 4th day of September, 2007.

THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER

By: Stephen C. Balkenbush
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SB00286

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Joey Orduna Hastings

Clerk of the Court

Transaction # 3921386

EXHIBIT "1"

EXHIBIT "1"

Deposition of David E. Smith, M.D., 5/20/2013

Page 1	Page 3
<p>1 IN THE SECOND JUDICIAL DISTRICT COURT 2 OF THE STATE OF NEVADA 3 IN AND FOR THE COUNTY OF WASHOE 4 --oOo-- 5 6 ANGELA DECHAMBEAU and Case No. CV12-00571 7 JEAN-PAUL DECHAMBEAU, both 8 Individually and as SPECIAL Dept. No. 7 9 ADMINISTRATORS of the ESTATE 10 OF NEIL DECHAMBEAU, 11 Plaintiffs, 12 vs. 13 14 STEPHEN C. BALKENBUSH, ESQ., 15 THORNDAL, ARMSTRONG, DELK, 16 BALKENBUSH and EISINGER, a 17 Nevada Professional Corporation; 18 and DOES I through X, inclusive, 19 20 Defendants. 21 22 DEPOSITION OF DAVID E. SMITH, M.D. 23 Tuesday, May 7, 2013 24 Reno, Nevada 25 26 Reported by: EVELYN J. STUBBS, CCR #356 27 MOLEZZO REPORTERS 28 (775) 322-3334</p>	<p>1 INDEX 2 THE WITNESS: DAVID E. SMITH, M.D. 3 EXAMINATION PAGE 4 By Ms. Piscevich 4 5 By Mr. Kozak 46 6 7 8 * * * 9 INDEX OF EXHIBITS 10 NUMBER: MARKED: 11 1 - Anesthesia Record 8 12 Renown-CathLab0002-0003 13 14 2 - Code Blue Record 10 15 Renown-CathLab0001 16 3 - History and Physical for 19 17 Electrophysiology Study 18 and Catheter Ablation 19 4 - Procedure Report Dated 22 20 September 7, 2006 21 22 5 - Affidavit of Fred Morady, M.D. 49 23 24 25</p>
Page 2	Page 4
<p>1 APPEARANCES OF COUNSEL: 2 For the Plaintiff: 3 CHARLES R. KOZAK, ESQ. 4 Attorney at Law 5 1225 Tarleton Way 6 Reno, Nevada 89523 7 775.622.0711 8 kozak131@charter.net 9 10 For the Defendants: 11 12 PISCEVICH & FENNER 13 Attorneys at Law 14 By: Margo Piscevich, Esq. 15 499 West Plumb Lane, Suite 201 16 Reno, Nevada 89509 17 775.329.0958 18 lawfirm@pf-reno.com 19 20 For David E. Smith, M.D.: 21 22 LEMONS, GRUNDY & EISENBERG 23 Attorneys at Law 24 By: Edward J. Lemons, Esq. 25 6008 Plumas Street Third Floor Reno, Nevada 89519 775.786.6868 ejl@lge.net Also Present: Angela DeChambeau Jean-Paul DeChambeau</p>	<p>1 PURSUANT TO NOTICE, and on Tuesday, the 7th 2 day of May, 2013, at the hour of 2:04 p.m. of said day, 3 at the offices of Lemons, Grundy and Eisenberg, Attorneys 4 at Law, 6008 Plumas Street, Third Floor, Reno, Nevada, 5 before me, Evelyn J. Stubbs, personally appeared DAVID E. 6 SMITH, M.D. 7 8 DAVID E. SMITH, M.D., 9 called as a witness by the defendants herein, 10 being first duly sworn, 11 was examined and testified as follows: 12 13 EXAMINATION 14 BY MS. PISCEVICH: 15 Q. Dr. Smith, I think we've met before, but my 16 name is Margo Piscevich, and I represent Steven 17 Balkenbush in an action that has been brought against him 18 for legal malpractice by Mrs. DeChambeau and her son. 19 This arises out of a practice lawsuit that Mr. Balkenbush 20 filed on their behalf against you and Dr. Kang. 21 The first question is, obviously, would you 22 please state your full name for the record. 23 A. I'm David Smith. 24 Q. And what is your profession or occupation? 25 A. I'm a cardiologist.</p>

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1 Q. And, Dr. Smith, where is your office currently
2 located?
3 A. 343 Elm Street, Reno, Nevada.
4 Q. And would you briefly go through your
5 educational background, starting with medical school.
6 And I'd like the institution and the year.
7 A. I graduated from NYU Medical School in 1988,
8 U.C. San Diego for medicine in 1991, Harbor-UCLA, for
9 cardiology in 2005, Stanford for electrophysiology in --
10 I got that wrong. Sorry. So let me write it down.
11 Q. I could have brought you an exhibit from
12 Mr. Lemon's office. I mean from his deposition that I
13 think I had your CV on it.
14 A. So '88 to '91 for U.C.S.D.; '92 to '95,
15 Harbor-UCLA; and '96, Stanford for electrophysiology.
16 Sorry.
17 Q. So is the Stanford electrophysiology a
18 fellowship?
19 A. It is.
20 Q. And for the record, what is a fellowship?
21 A. It's a specialty in arrhythmia medicine.
22 Q. And then once you obtained your fellowship,
23 then what did you do?
24 A. I went into practice here.
25 Q. In Reno?

Page 6

1 A. Um-hum.
2 Q. Is that a "yes"?
3 A. Yes.
4 Q. And --
5 A. Sorry.
6 Q. It's all right. I may remind you.
7 And was that with Reno Heart Physicians?
8 A. Correct.
9 Q. And so you would have started in approximately
10 1996, 1997 to date?
11 A. Correct. Correct.
12 Q. And in layman's terms, what is your specialty?
13 A. I deal with heart rhythm problems, pacemakers,
14 defibrillators, arrhythmias.
15 Q. Do you have any independent recollection of
16 the patient Mr. DeChambeau?
17 A. I remember certainly a lot about the case.
18 Q. I'm going to ask you a couple of questions
19 with respect to the underlying malpractice case where you
20 were named as a party. Did you ever consent to
21 settlement?
22 A. No.
23 Q. And why not?
24 A. I didn't think I did anything wrong.
25 Q. What do you recall specifically about the case

Page 7

1 that's not in the records, because we will be going over
2 the records?
3 A. Excuse me. I don't understand the question.
4 Q. Do you recall anything about the underlying
5 case that is not contained in the records? I mean
6 something separate, like maybe you had talks during or
7 after this event or something like that.
8 A. Not really.
9 Q. Okay. From a review of the records, then, do
10 you have a recollection of the case?
11 A. I do.
12 Q. And did you bring those records with you
13 today?
14 A. I did.
15 Q. And I brought a copy too, so I don't intend to
16 attach them to this deposition.
17 A. Okay.
18 Q. You indicated that you didn't believe that you
19 did anything wrong. Can you just say in general terms
20 why you believe that the underlying case was one that was
21 defensible on your behalf.
22 A. Well, we did an atrial fibrillation ablation.
23 There was a complication, which involved pericardial
24 tamponade, which I diagnosed, treated; outcome was not
25 good, but it was done in a rapid manner, just kind of to

Page 8

1 what would be standard care of a complication that's
2 known with this procedure.
3 Q. Are you familiar with Dr. Kang?
4 A. I am.
5 Q. And how do you know Dr. Kang?
6 A. Colleague, does anesthesia for some of my
7 cases.
8 Q. And I take it you had hadn't worked with him
9 before this event occurred in --
10 A. I believe so.
11 Q. Okay. And was there ever a VT in this case?
12 A. There was not.
13 Q. Okay. And I'm talking about a ventricular
14 tachycardia when I use VT.
15 A. Right.
16 Q. For the record, what is that?
17 A. It's a life-threatening arrhythmia that comes
18 from the bottom chamber from the ventricle of the heart.
19 Q. Are you familiar with his anesthesia record?
20 And I do have a copy of it here we can mark as a separate
21 exhibit. And start as Exhibit No. 1.
22 (Exhibit 1 was marked for identification.)
23 BY MS. PISCEVICH:
24 Q. Take a minute, and I'm sure you've seen this
25 before.

Deposition of David E. Smith, M.D., 5/20/2013

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1 A. I have.

2 Q. You'll note on the second page at 1222, I

3 think this says, "Defibrillate with 120 joules for

4 v-tach"?

5 A. Correct.

6 Q. And you indicated that the patient never had v

7 a-tach, is that correct?

8 A. Correct.

9 Q. What occurred during this approximate time of

10 1222?

11 A. Following ablation on the left side, we

12 attempt to reinduce atrial fibrillation, which I did

13 reinduce atrial fibrillation. Atrial fibrillation had a

14 rapid tach. It was rapid. Patient was -- atrial

15 fibrillation also had both aberrancy and nonaberrancy.

16 Aberrancy is when the QRS gets a little bit

17 wide and it can kind of look like VT, but isn't VT. But

18 the printout that I looked at at the time of the

19 cardioversion was narrow. So it was definitely A-fib

20 with rapid ventricular response. And he had had

21 aberrancy before when he went fast in A-fib, where he had

22 this thing that was called a left bundle branch block or

23 something that could be confused with VT. But he did not

24 have VT.

25 Q. And could you tell that on which test that you

Page 10

1 looked at?

2 A. On the Prucka disk, when you print out the

3 EKGs, all those things are kind of saved on that stuff.

4 I went back and looked at it again and it was definitely

5 A-fib with a narrow complex, not VT.

6 Q. There was some information in the file that

7 Dr. Kang had a different timing for the

8 pericardiocentesis. Is that a correct statement that he

9 was wrong on that as well?

10 A. He's definitely wrong, because the code had

11 already finished by then. And the accurate records for

12 the code note are the code note. The anesthesiologist is

13 there helping with the code, he's not there as a scribe.

14 The person that's supposed to be the describe is the

15 person doing the code note. So the code had already

16 stopped by 12:54. He said the echo came at 1:00 or

17 something. I'd have to look at exhibit.

18 MS. PISCEVICH: Would you please mark

19 Exhibit No. 2.

20 (Exhibit 2 was marked for identification.)

21 BY MS. PISCEVICH:

22 Q. Is Exhibit 2 a copy of the code note?

23 A. Correct.

24 Q. Is what you're referring to is what on this

25 exhibit?

Page 11

1 A. The beginning of the code was at 1239, which

2 is on the top of the code note on 9-7 of 2006. And

3 patient pulse detected by 1254.

4 Q. I believe Dr. Kang in his notes indicated

5 1:00 o'clock or something to that effect?

6 A. Correct.

7 Q. Other than the notation that there was a VT

8 when there wasn't and the timing of the

9 pericardiocentesis, do you recall any other notations by

10 Dr. Kang that you thought might be inaccurate?

11 A. I have to look at the -- oh, you mean on his

12 anesthesia record?

13 Q. Yes.

14 A. Well, the timing of the cardiac arrest on the

15 charts says 1250. So that's not accurate. It says the

16 transthoracic echo was at 1300. That's not accurate.

17 Maybe it was accurate to his phone or whatever he was

18 using, but it wasn't accurate -- the code note is

19 accurate. That's what the scribe does. All they do

20 during the code is write down accurate information.

21 Q. When the code happens and somebody comes in to

22 do this, do they actually yell out, you know, what

23 happened at this time or something to that effect, so

24 everybody in the room is sort of aware of what's going

25 on?

Page 12

1 A. A lot of times when you push drugs, you say,

2 "Epinephrine is pushed." Then the person that is writing

3 down the code stuff will document that and then basically

4 put the time down.

5 Q. Were you ever critical of the conduct of

6 Dr. Kang in the underlying case?

7 A. No.

8 Q. Were you ever during this procedure?

9 A. No.

10 Q. Do you know if Dr. Kang had privileges that

11 allowed him to do a pericardiocentesis?

12 A. He should not have privileges for that. I

13 don't know for sure, but that would not be a standard

14 privilege for an anesthesiologist.

15 Q. I want to backtrack now to Mr. DeChambeau and

16 talk to you a little bit about the records at Reno Heart.

17 If I'm correct, he first came in in December 2005. Is

18 that correct?

19 A. He saw my partner at first, I think

20 Dr. Berndt. I don't know the exact dates.

21 Q. I have different page numbers, but I show the

22 first consultation on December 28, 2005, with Dr. Berndt.

23 A. 12-28-2005, correct.

24 Q. And just in layman's terms, why did he come in

25 to see Dr. Berndt?

<p style="text-align: right;">Page 13</p> <p>1 A. Recurrent palpitations, unknown etiology. Had 2 been going on for some time. At least that's what he 3 documented. 4 Q. And it looks like the next visit was 5 January 18th of 2006, and he was seen by Dr. Grinsell. 6 Is that another partner in the group? 7 A. Correct. 8 Q. And what did Dr. Grinsell note? 9 A. I think he was scheduled for a stress echo 10 that day. And he was noted to be in atrial fibrillation 11 with rapid ventricular response. And I think the stress 12 echo might have been cancelled because of that. 13 Q. And in layman's terms, what is atrial 14 fibrillation? 15 A. It's an irregular heart rhythm, which starts 16 in the upper chamber of the heart, increases the risk of 17 stroke. A lot of patients feel poorly with it. 18 Q. And then it looks like that stress echo was 19 done on approximately March 20th of 2006, is that 20 correct? 21 A. I don't know the exact date. There is a 22 record of it in here somewhere. It's not in here -- not 23 in exact location, but he did have a stress echo, I know 24 that. 25 Q. Do you recall, without looking at that actual</p>	<p style="text-align: right;">Page 15</p> <p>1 A. Correct. 2 Q. When is the first date that you actually saw 3 Mr. DeChambeau? 4 A. 5-15-2006. 5 Q. And what did your evaluation reveal? 6 A. There was a question of whether he had 7 supraventricular tachycardia, which is another arrhythmia 8 that goes along with A-fib and sometimes leads to A-fib. 9 And he had documented atrial fibrillation also. So that 10 was symptomatic and pretty well documented on his 11 previous medical records. 12 Q. I realize you may not know this word for word, 13 but when you have these types of findings, do you sit 14 down with the patient and explain what occurred? 15 A. I try to. You know, I can't swear to what I 16 did in 2006, but, of course, I try to make it 17 understandable to the patient and the patient's family. 18 Q. And in layman's terms what would your custom 19 and practice be about telling a patient what these 20 findings, what they mean? 21 A. I'd say, "The standard treatment would be -- 22 that by having atrial fibrillation, you're at higher risk 23 of stroke, and therefore, that's why the anticoagulation 24 is prescribed for you." 25 In regards to treatment, we generally try</p>
<p style="text-align: right;">Page 14</p> <p>1 document, what the echocardiogram revealed? 2 A. Without looking at it? 3 Q. I mean, if you recall. If you can find it -- 4 A. It's right here. Left ventricular 5 hypertrophy, normal LV function, enlargement of both 6 atria, some valve leakage. It was negative for 7 myocardial ischemia. So it was not suggestive of 8 coronary artery disease. 9 Q. And are those findings good findings or bad 10 findings? 11 A. It's a good finding that he didn't have 12 myocardial ischemia, it's a good finding that his heart 13 function was normal, less good finding that his atrium 14 are enlarged when it comes from atrial fibrillation. 15 Q. It's something to watch? 16 A. Exactly. 17 Q. And after the stress echocardiogram was done, 18 did he continue to come back and treat with Reno Heart 19 Physicians? 20 A. I believe so. 21 Q. And if I understand correctly, it was 22 Dr. Berndt that thought he may need a possible ablation, 23 is that correct? 24 A. Correct. 25 Q. And then he was referred to you?</p>	<p style="text-align: right;">Page 16</p> <p>1 antiarrhythmic medications first. If the antiarrhythmic 2 medications fail or patients get too many side effects 3 with antiarrhythmic medications, then we consider more 4 invasive options. 5 Q. And if somebody has the same kind of findings 6 as Mr. DeChambeau did in May of '06 and do not treat it, 7 then it can result in a stroke? 8 A. Correct. 9 Q. How did Mr. DeChambeau progress? 10 A. We started him with medications, with 11 Tambacor, which we started him at 100 milligrams twice a 12 day. And we also I think gave him an event recorder to 13 try to record whether he was having recurrent 14 arrhythmias. I don't recall whether that occurred on the 15 first visit or the next. 16 5-31, I gave him the event recorder. 17 Q. And the event recorder tries to monitor the 18 heart? 19 A. Right. If patients have recurrent atrial 20 arrhythmias, it's something to record what's going on. 21 Q. And after he received the recorder and the 22 medications, how did he progress? 23 A. He had some improvement with the medications, 24 but not complete control. He had significant fatigue 25 with the medications. We tried lowering the dose to</p>

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<p style="text-align: right;">Page 17</p> <p>1 50 milligrams twice a day, but he continued to have</p> <p>2 arrhythmias at that point on the medications.</p> <p>3 Q. And then I know that he returns on July 12,</p> <p>4 2006, is that correct?</p> <p>5 A. Correct.</p> <p>6 Q. And at this point what was his status?</p> <p>7 A. He was still having recurrent atrial</p> <p>8 arrhythmias. And we discussed medicines and we also</p> <p>9 discussed catheter ablation. And then he was asked to</p> <p>10 follow up with me in six weeks.</p> <p>11 Q. Now when you say that you did discuss the</p> <p>12 supraventricular tachycardia ablations, what did you tell</p> <p>13 him about that process?</p> <p>14 A. For A-fib ablation or SVT ablation?</p> <p>15 Q. I thought your note said SVT ablations, but I</p> <p>16 could be wrong.</p> <p>17 A. It says both.</p> <p>18 Q. Okay.</p> <p>19 A. I had a question whether the patient had SVT,</p> <p>20 which also can be treated with ablation with a 90 to</p> <p>21 95 percent success rate. I also discussed A-fib</p> <p>22 ablation, which has a 60 percent success rate, but has</p> <p>23 more risks than the SVT ablation. So I talked about both</p> <p>24 of those.</p> <p>25 Q. For lay people, what's the difference between</p>	<p style="text-align: right;">Page 19</p> <p>1 anybody other than Mr. DeChambeau?</p> <p>2 A. I believe his wife came to the visits, but I</p> <p>3 can't say with certainty to all visits.</p> <p>4 Q. If I understand correctly then, a decision had</p> <p>5 been made to go forward. And I take it this is a</p> <p>6 scheduled procedure, is that correct?</p> <p>7 A. Correct.</p> <p>8 Q. When was this procedure to take place?</p> <p>9 A. Exact date, I don't -- I think it was</p> <p>10 September 6th, if I remember correctly.</p> <p>11 Q. I know that your history and --</p> <p>12 A. September 6th or 7th. It was the 7th.</p> <p>13 MS. PISCEVICH: May I have this marked as</p> <p>14 exhibit next in order.</p> <p>15 (Exhibit 3 was marked for identification.)</p> <p>16 BY MS. PISCEVICH:</p> <p>17 Q. Doctor, is this the History and Physical that</p> <p>18 you dictated for this procedure?</p> <p>19 A. Correct.</p> <p>20 Q. And it's fairly self-explanatory. In the</p> <p>21 first part you give the reasons for what you're doing, is</p> <p>22 that correct?</p> <p>23 A. Correct.</p> <p>24 Q. And you indicate that he's had a 25-year</p> <p>25 history of arrhythmias and two types. One being rapid</p>
<p style="text-align: right;">Page 18</p> <p>1 those two ablation procedures?</p> <p>2 A. SVT ablation is a single circuit, either on</p> <p>3 the left side or the right side. It's easier to ablate</p> <p>4 with a higher success rate. That's why I'm quoting a 90</p> <p>5 to 95 percent rate with that type of ablation, because</p> <p>6 you're burning out one circuit, as opposed to A-fib,</p> <p>7 which is multiple circuits, and therefore, much more</p> <p>8 difficult as a procedure and a longer procedure.</p> <p>9 Q. And at this time you were fairly sure he had</p> <p>10 the A-fib?</p> <p>11 A. I knew he had A-fib. There was a question</p> <p>12 from history whether he had SVT. Some people have SVT</p> <p>13 and A-fib. So if we were going to go in for an A-fib</p> <p>14 ablation, we would also look for SVT, which would be</p> <p>15 standard.</p> <p>16 Q. And I take it after you discussed this matter</p> <p>17 with him in July of 2006, eventually he agreed to do</p> <p>18 this, is that correct?</p> <p>19 A. I think he called or a family member called</p> <p>20 and scheduled after.</p> <p>21 Q. According to one of the notes in your records</p> <p>22 it says that his wife called and indicated the patient</p> <p>23 decided to go through with the procedure.</p> <p>24 A. That might be it.</p> <p>25 Q. Up to this point, had you ever spoken to</p>	<p style="text-align: right;">Page 20</p> <p>1 and irregular, and another one being rapid and regular.</p> <p>2 What are you basically trying to say there?</p> <p>3 A. I'm trying to say that he definitely has</p> <p>4 atrial fibrillation, but there's a possibility that he</p> <p>5 has SVT also, because that would give you the regular</p> <p>6 one.</p> <p>7 Q. And then if I understand, you go through the</p> <p>8 history of the diagnosis studies that he underwent and</p> <p>9 then you do an assessment and plan. And what was your</p> <p>10 assessment and plan with respect to this patient?</p> <p>11 A. A recurrent atrial fibrillation with possible</p> <p>12 PSVT and wished to go ahead with possible -- we should go</p> <p>13 ahead with catheter ablation for possible cure.</p> <p>14 Q. Now you indicate in here that the risks and</p> <p>15 benefits of the procedure were explained. And I mean, I</p> <p>16 can read what you've written here. And are these</p> <p>17 basically what you would have told Mr. DeChambeau?</p> <p>18 A. Correct.</p> <p>19 Q. Do you know if his wife was present when you</p> <p>20 went over the risks and the benefits?</p> <p>21 A. I don't.</p> <p>22 Q. And for the record, what are the risks of this</p> <p>23 procedure?</p> <p>24 A. Bleeding, stroke, heart attack, death,</p> <p>25 punctured lung, blood in the thorax, atrial esophageal</p>

<p style="text-align: right;">Page 21</p> <p>1 fistula, pulmonary vein stenosis. There's some other 2 risks also that are not listed there, but those are the 3 main ones. Clot formation. 4 Q. And what are the chances of a complication 5 occurring? 6 A. One to three percent. 7 Q. So it's a low risk, but known complications? 8 A. Correct. 9 Q. And you indicate in here, you put in the 10 success rate for the supraventricular tachycardia 90 to 11 98 and for the fibrillation is approximately 60, is that 12 correct? 13 A. Correct. 14 Q. And then you said that he will get a 15 transesophageal echocardiogram and an intracardiac 16 echocardiogram catheter. What were the reasons for this? 17 A. Transesophageal echocardiogram is to make sure 18 there's no clots in the left side that could break off 19 during the procedure. So you're ruling out any left 20 atrial clot. The intracardiac echo is for the 21 transeptal catheterization, which is the puncturing of 22 the -- 23 THE REPORTER: I'm sorry. 24 THE WITNESS: The intracardiac echo goes 25 directly up the vein. And it's used for the imaging to</p>	<p style="text-align: right;">Page 23</p> <p>1 Usually in the room there's going to be 2 myself, a nurse, a tech, maybe a scrub. So there's 3 probably three to four other people in the room. 4 Q. With respect to this particular procedure, I 5 know in your chart there is about a 25-page printout from 6 the cath lab, if I'm not mistaken, that looks like this? 7 A. Looks like a log, yes. 8 Q. How does this come about, the log, if you 9 know? 10 A. It's inputted by the person on the machine, 11 the Prucka. It could be a nurse, but often it's a CV 12 tech. 13 Q. And you called it a Prucka? 14 A. Well, that was the recording system we had 15 back then. It's called Prucka, P-R-U-C-K-A. It's owned 16 by GE. 17 Q. And does the Prucka machine record everything 18 that you do in actual time? I mean, you can pull it off 19 of the machine? 20 A. Correct. 21 Q. And this is an actual -- 22 A. Not everything will get recorded. I mean, not 23 every second. So you can turn it on and turn it off for 24 recording electrocardiograms, but it is based on a clock, 25 that's correct. But if you're going to put in</p>
<p style="text-align: right;">Page 22</p> <p>1 allow the safe puncture of the septum between the right 2 atrium and the left atrium. 3 (Exhibit 4 was marked for identification.) 4 BY MS. PISCEVICH: 5 Q. Dr. Smith, I've handed you your dictation, 6 which I understand would be done after the procedure, is 7 that correct? 8 A. Correct. 9 Q. Do you have any recollection of this procedure 10 separate and apart from your dictation? 11 What I'm getting at is do you recall the 12 timing of the events and what happened, because it's not 13 exactly set forth? 14 A. I don't know how to answer that. I mean, I 15 remember some stuff, but this is from 2006. So exact 16 timing, I'd have some difficulty with. 17 Q. With this particular procedure, where is it 18 done? 19 A. It's done in the cardiac catheterization lab. 20 This was at Washoe, and now it's Renown. 21 Q. And besides yourself and an anesthesiologist, 22 who else would be present? 23 A. There's cardiovascular techs, nurses, I think 24 Dr. Kolli might have been there for a brief period of 25 time for the transesophageal echo.</p>	<p style="text-align: right;">Page 24</p> <p>1 information, if somebody is going to put information as 2 to when a medication is given, it doesn't do it 3 automatically based on the medication. Somebody has to 4 input in that. 5 Q. That's what I'm getting at. But in terms of 6 the actual rhythm of the heart, et cetera, that's just an 7 ongoing recording? 8 A. That's correct. 9 Q. But if somebody is going to say medication A 10 was given at this time, somebody has to actually type 11 that in? 12 A. Correct. 13 Q. In layman's terms -- I understand that this 14 procedure was complicated by the pericardial tamponade. 15 But what occurred, just is in layman's terms, before 16 there was a hemodynamic instability? 17 A. From the beginning? 18 Q. Yes, just generally what you had done. I 19 mean, I don't need you to read it, but just kind of an 20 overview. 21 A. So the patient comes into the lab, receives 22 general anesthesia from the anesthesiologist, then gets 23 prepped and draped, and then we put in venous sheaths. 24 One went into the neck and three down -- at least three 25 down in the groin. Following that we put catheters into</p>

Page 25

1 the heart and do testing of the heart to see if the
 2 patient has evidence of PSVT. That's a supraventricular
 3 tachycardia, which he did not have. Then following that
 4 we knew that he had clinical atrial fibrillation, we went
 5 through the standard procedure for an A-fib ablation,
 6 which involves isolation of the pulmonary veins. This
 7 occurred after the double transseptal catheterization and
 8 the mapping.
 9 The mapping is done with a mapping system.
 10 And called ESI at that time.
 11 So basically the standard procedure and
 12 setting of doing the study first, then the catheter
 13 ablation for the A-fib with a mapping system.
 14 Q. Okay. And it says in the middle of the long
 15 paragraph that at the end of the ablation, the patient
 16 had evidence of some hemodynamic compromise. Was this
 17 the very end of the procedure?
 18 A. It was towards the end of the procedure.
 19 He had had ablation on the left side of the
 20 heart. And then he had inducible atrial flutter from the
 21 right side of the heart. And I believe the hemodynamic
 22 compromise occurred after the ablation on the right side
 23 of the heart.
 24 Q. And did you recognize this hemodynamic
 25 compromise?

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1 A. I did.
 2 Q. And how did it manifest itself?
 3 A. Minimal blood pressure. Couldn't test a
 4 response unless he was under general anesthesia, but his
 5 blood pressure went quite low.
 6 Q. And what does that tell you as a cardiologist?
 7 A. When we do ablations on the right side/left
 8 side of the heart, the first thing we think about is a
 9 bleed. Told me that he probably had a pericardial
 10 effusion.
 11 Q. So once you considered a bleed, what did you
 12 do?
 13 A. Started CPR, ACLS, called for a stat echo -- I
 14 don't know if this is all in sequence -- got a
 15 pericardiocentesis tray and went into the
 16 pericardiocentesis. Also in that period of time we call
 17 the CT surgeons. I don't know when in the process.
 18 There's a lot of things going on at once.
 19 Q. There's been some indication that you should
 20 have done a pericardiocentesis; just immediately stuck
 21 the needle into the heart. Is that common?
 22 A. To do it that way?
 23 Q. Yes.
 24 A. Yes.
 25 Q. Do you know if you did that?

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1 A. Yes.
 2 Q. Did you have any undue delay in doing it?
 3 A. I don't believe so.
 4 Q. I've never obviously seen the -- is it called
 5 a Prucka tape?
 6 A. Right.
 7 Q. Did you ever review that tape?
 8 A. The Prucka tape is the tape of the
 9 intracardiac EGMs. It has nothing to do with the
 10 pericardial effusion. It won't show you anything when it
 11 comes to that.
 12 Q. There's been a lot of controversy in this case
 13 about -- I'm going to call it a CD or a disk of the
 14 procedure. What am I referencing when I talk about that?
 15 A. Those are the beat-to-beat analyses of the
 16 patient's EKG and intracardiac electrocardiograms, which
 17 is the recording from inside of the heart, the electrical
 18 recordings that were ablated.
 19 Q. If do we refer to this as a CD or a disk or
 20 a P --
 21 A. It is a CD of some sort. It's an older
 22 system. It can only be read under an older system. So
 23 you couldn't pop it into a CD.
 24 Q. Did you review all of these particular tests,
 25 including the CD or the disk?

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1 A. Recently, the CD, or back?
 2 Q. Back then?
 3 A. I did.
 4 Q. And have you reviewed it recently?
 5 A. I haven't, not the CD.
 6 Q. Not the CD?
 7 A. No. Be hard to read it. I don't even think
 8 we could read it at this point, it's such old technology.
 9 You could probably get somebody to do it, but we don't
 10 have the capability to do that.
 11 Q. When you reviewed it at the time of this
 12 litigation, do you recall what it revealed?
 13 A. Well, I reviewed it for a couple reasons. I
 14 reviewed to see whether the patient actually had VT to be
 15 shocked. And I reviewed that and confirmed that it
 16 wasn't VT, it was atrial fibrillation.
 17 And I reviewed the patient's intracardiac
 18 EGMs, which is the recording inside of the heart, and the
 19 EKGs right prior to the code. That's what I reviewed.
 20 Q. And what did they reveal, the intracardiac EKG
 21 and EMC?
 22 A. Sinus rhythm, and then some bradycardia rhythm
 23 where it slowed down, and then the code. That's what
 24 really happened right before he arrested.
 25 Q. Now you indicated that you requested several

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1 things be done. Do you have any idea of how long it took
 2 to go through the various steps of CPR, ACLS, stat echo,
 3 et cetera?
 4 A. I don't. I mean in the midst of a code you're
 5 doing everything as fast as you can and as best as you
 6 can. And it's kind of a team process. All I know is
 7 that we're working as fast as we can to try to revive the
 8 patient. And I really am dependent on the person who is
 9 writing down as to the time frame, because it can feel
 10 like an hour, even though it could be five minutes.
 11 Q. I understand that. It says in your note that
 12 about 300 milliliters of blood was removed from the
 13 pericardial space. Do you know if CPR was ongoing and
 14 you were also doing the pericardiocentesis basically
 15 together? How is this working?
 16 A. Yes. I'm doing the pericardiocentesis and one
 17 of the nurses or one of the techs is doing the CPR.
 18 Q. So the CPR is at the same time?
 19 A. Simultaneous.
 20 Q. Okay. My question is, I guess, why did you
 21 order a stat echocardiogram?
 22 A. Stat echo is to -- once you get the tube in
 23 during the pericardiocentesis, you can determine whether
 24 it's in the right place. Also as you drain the blood,
 25 you can see that it's diminishing and that it's not

Page 30

1 reaccumulating.
 2 Q. So the stat echo would have been taken
 3 after --
 4 A. No question about it.
 5 Q. -- you inserted the needle?
 6 A. Right. I mean, you could do a
 7 pericardiocentesis with an echo there at the time, but
 8 that's not what you wait for, you just do the
 9 pericardiocentesis.
 10 Q. So you did not wait for the echo before you
 11 did --
 12 A. No.
 13 Q. -- the pericardiocentesis?
 14 A. I'm sorry. I did not.
 15 Q. I need a clear question. When did you insert
 16 the needle in relationship to the echocardiogram?
 17 A. Before.
 18 Q. And then I take it once you inserted the
 19 needle, you found blood in the pericardium?
 20 A. Right.
 21 Q. And --
 22 A. You don't know how much blood you have at the
 23 time you do the needle, because you bring the echo there
 24 to see how much is left, how much you have to drain off,
 25 all the rest, whether it reaccumulates.

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1 So the echo is helpful in the setting that as
 2 you're getting the blood out, do you have something
 3 that's 100 CCs or do you have something that's 50 CCs;
 4 how much do you have to take off.
 5 Q. And in this case where you said you had 300
 6 milliliters, would that basically equal 300 CCs?
 7 A. Correct.
 8 Q. And what did that tell you?
 9 A. That the patient had a fairly large bleed into
 10 the pericardial space.
 11 Q. Then it indicates in your dictation that, "We
 12 continued to echo-monitor the patient and showed evidence
 13 of improved LV function and minimal pericardial fluid."
 14 And you go on and talk about it. And then it says, it
 15 developed -- "It showed blood pressures greater than
 16 100." What does that mean? What were you doing at the
 17 last part of your first large paragraph?
 18 A. The echo monitor is to make sure it wasn't
 19 reaccumulating, that we took care of the problem in which
 20 the patient had bled, so the patient had come back
 21 hemodynamically and had a blood pressure. The echo again
 22 is there to make sure that there's not a recurrence of
 23 pericardial fluid.
 24 Q. And you indicate there was approximately five
 25 to ten minutes of CPR, is that correct?

Page 32

1 A. Correct.
 2 Q. And that would be started at the very
 3 beginning, when his blood pressure dropped?
 4 A. Correct.
 5 Q. And that would be done by a tech or a nurse?
 6 A. Correct.
 7 Q. And at the same time you were doing the
 8 pericardiocentesis?
 9 A. Correct.
 10 Q. Putting the needle in, is that correct?
 11 A. Correct.
 12 Q. And then it says you received pressors from
 13 the anesthesiologist, including epinephrine, atropine and
 14 bicarbonate three ampules. What was the anesthesiologist
 15 doing at this time?
 16 A. During the code?
 17 Q. During what you dictated here.
 18 A. He was giving medications during the code,
 19 which included epinephrine to raise the blood pressure,
 20 atropine to raise the heart rate, and bicarbonate to
 21 prevent acidosis, which all three would be standard
 22 medications during a code situation.
 23 Then we also gave protamine to reverse the
 24 heparin that we gave during the procedure. That's to
 25 prevent further bleeding.

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6
7
8 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE**
9 **OF NEVADA**
10 **IN AND FOR THE COUNTY OF WASHOE**
11

12 ANGLEA DECHAMBEAU and
13 JEAN-PAUL DECHAMBEAU, both
Individually and as SPECIAL
14 ADMINISTRATORS of the ESTATE
Of NEIL DECHAMBEAU,
15

Case No. CV12-00571

Dept. No. 7

16 Plaintiffs,

17 vs.

18 STEPHEN C. BALKENBUSH, ESQ.,
THORNDAL, ARMSTRONG, DELK,
19 BALKENBUSH and EISINGER,
A Nevada Professional Corporation,
20 And DOES I through X, inclusive,
21

Defendants.
22 _____ /

23 **Motion for Summary Judgment**
24
25
26
27
28

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Motion for Summary Judgment


Defendants move the Court pursuant to NRCP 56 for an Order granting summary judgment in Defendants' favor on the ground Plaintiffs cannot meet the required elements for a claim of legal malpractice or a claim for punitive damages. Discovery is completed and Plaintiffs have failed to proffer or obtain any evidence of causation, or to prove the underlying case.

This Motion is made and based on the Memorandum of Points and Authorities in Support, and on all the records papers and pleadings on file in this action.

Dated this 14th day of August, 2013.

PISCEVICH & FENNER

By:


Mark J. Lenz
Attorneys for Defendants

Memorandum of Points and Authorities

I. Nature of the Case

This is a legal malpractice action in which the underlying case was a medical malpractice action. Plaintiffs allege that Defendant Stephen Balkenbush mishandled their medical malpractice case. Plaintiffs are obligated to prove, by medical expert testimony, the standard of care, breach, and causation in the underlying case. Separately, and distinctly disconnected from the medical malpractice elements, in the legal malpractice action, Plaintiffs are required to prove an attorney-client relationship, duty and breach, and that "but for" the attorney's breach of duty, Plaintiffs would have prevailed in the underlying case. Because Plaintiffs cannot prove the underlying medical malpractice case, they cannot establish any breach of duty or proximate cause, both necessary elements, and their claim fails as a matter of law.

1 Discovery is now complete. Plaintiffs' have no evidence or testimony that had Mr.
2 Balkenbush done something different, Plaintiffs would have achieved a better outcome. All of
3 their legal theories are negated, often by testimony of their own experts. Summary judgment is
4 warranted.

6 **II. Statement of Undisputed Facts**

7 The following facts are either undisputed or conclusively established:

8 1. In this legal malpractice action, Plaintiffs allege that Mr. Balkenbush failed to
9 exercise the legal skills necessary to their purported medical malpractice claim against Dr. David
10 Smith and others. [Complaint, ¶ 24].

11 2. Plaintiffs' claim for medical malpractice against Dr. Smith arose out of a heart
12 procedure known as cardiac ablation. During the procedure, (an atrial fibrillation ablation), there
13 was a complication involving a pericardial tamponade. [Exhibit "1," (Deposition of Dr. Smith),
14 p. 7, lns. 22-25; p. 8, lns. 1-2].

15 3. During Dr. Smith's efforts to deal with the complication, Plaintiffs' decedent
16 "coded," i.e. went into cardiac arrest, likely from a pericardial effusion. [Exh. "1," p. 26, lns.6-
17 10]. Plaintiffs' decedent suffered an anoxic brain injury and died.

18 4. On September 5, 2007, Plaintiffs' then-counsel, Mr. Balkenbush filed a medical
19 malpractice lawsuit against Dr. Smith and others. [Exhibit "2" (underlying Complaint – CV07-
20 02028)].

21 5. Attached to the underlying Complaint was the Affidavit of Dr. Fred Morady dated
22 August 29, 2007. [Exhibit "3"].

23 6. Mr. Balkenbush considered Dr. Morady to be "one of the preeminent
24 electrophysiologists" in the country. [Exhibit "4," (Deposition of Stephen Balkenbush) p. 32,
25 lns. 24, 25; p. 33, lns. 1-2)].
26
27
28

1 7. Dr. Morady initially opined that, based on his review of the medical records
2 provided to him, Dr. Smith's conduct fell below the standard of care, as follows:

3 10. I believe to a reasonable degree of probability that the care provided by David
4 Smith, M.D. was negligent and breached the standard of care owed to Neil
DeChambeau in the following particulars:

5 a) David Smith, M.D., failed to timely diagnosis that Neil DeChambeau was
experiencing cardiac tamponade.

6 b) David Smith, M.D., failed to timely perform a pericardiocentesis procedure on
Neil DeChambeau.

7 c) After Neil DeChambeau experienced ventricular tachycardia on September 7,
8 2006 at approximately 12:22 p.m., the cause of ventricular tachycardia should have
been determined before any additional radiofrequency ablation was performed.

9 d) At the time David Smith, M.D., observed Neil DeChambeau to exhibit no pulse,
he should have immediately requested a surgeon to review the condition of Neil
10 DeChambeau but failed to do so.

11 e) A transthoracic echocardiogram was not ordered until approximately 12:44 p.m.
on September 7, 2006 and did not arrive until approximately 12:49 p.m. The
12 transthoracic echocardiogram was performed too late to benefit Neil DeChambeau.
All of the aforementioned conduct of David Smith, M.D. caused Neil DeChambeau to
13 suffer irreversible brain damage and death.

14 [Exh. "3," p. 2, ¶10].

15 Dr. Morady had not, at that time, been provided with the "Prucka" recording, also called
16 the "EPS" data, which provides a record of the procedure in actual time. [Exh. "1," p. 23, lns.
17 10-25].

18 8. Dr. Morady advised Mr. Balkenbush that he needed to review the EPS tape –
19 "there [had] to be one." [Exh. "4," p. 24, lns. 3-19].
20

21 9. Despite efforts to do so, Mr. Balkenbush was unable to obtain the EPS tape until
22 March, 2010. [Exh. "4," p. 25, lns. 11-12].

23 10. Upon receipt of the EPS tape, Mr. Balkenbush provided it to Dr. Morady for
24 review; and after Dr. Morady reviewed it, he told Mr. Balkenbush that he had "changed his
25 opinion." [Exh. "4," p. 30, lns. 1-3].
26

27 11. Specifically, Dr. Morady told Mr. Balkenbush he "didn't believe that there was
28 any malpractice in the action by Dr. Smith." [Exh. "4," p. 30, lns. 6-9].

1 12. Dr. Morady also advised Mr. Balkenbush that "he would not have done anything
2 differently [from Dr. Smith regarding the pericardiocentesis procedure]...." [Exh. "4," p. 30, lns.
3 21-24].

4 13. Mr. Balkenbush did not consider obtaining another expert opinion from a
5 different electrophysiologist about whether Dr. Smith had committed malpractice because he
6 believed Dr. Morady to be the preeminent electrophysiologist in the country, the time for
7 designating experts had expired, and because when he discussed the case with his clients at its
8 inception, they agreed that the case would "rise or fall based upon that expert's opinion." [Exh.
9 "4," p. 33, lns. 16-21].

10 14. Dr. Morady testified that after reviewing the EPS data, he no longer stood by his
11 earlier opinions that Dr. Smith failed to diagnose cardiac tamponade or perform a
12 pericardiocentesis procedure. [Exhibit "5," (Deposition of Dr. Morady upon Written
13 Questions), p. 3, lns. 2-17].

14 15. Plaintiffs allege that Mr. Balkenbush's legal malpractice occurred when he
15 allegedly dismissed the case "without consulting with Plaintiffs," on the ground that Plaintiffs'
16 own expert had reversed his medical opinion upon being shown the "EPS" data. Dr. Morady
17 advised Mr. Balkenbush that there was, in fact, no malpractice involved in the treatment of
18 Plaintiffs' decedent.

19 16. Specifically, Plaintiffs have alleged:

20 14. BALKENBUSH'S stated reason for dismissing Plaintiffs' case was that as a result
21 of a review of an EPS tape recorded during the operation, DR. MORADY, one of
22 Plaintiffs' experts, had reversed his opinion as to the negligence of DR. DAVID
23 SMITH. BALKENBUSH never provided Plaintiffs with any written communication
24 from DR. MORADY to him in which DR. MORADY explained his alleged reversal
25 of his original opinion of DR. SMITH'S malpractice. In fact no such opinion exists in
26 any written form. ,,,
27
28

1 24. The Defendants breached their duty to the Plaintiffs and failed to perform
2 legal services that met the acceptable standard of practice for attorneys
3 handling medical malpractice cases in the following respects:
4 A. Defendants failed to keep the Plaintiffs informed of the status of their case.
5 B. Defendants dismissed Plaintiffs case without consulting with Plaintiffs and
6 obtaining their consent before entering into an agreement with opposing
7 counsel and dismissing Plaintiffs case with prejudice.
8 C. Defendants failed to provide legal services reasonably required to
9 investigate the merits of Plaintiffs' case. In a wrongful death case involving
10 medical malpractice, failure to take depositions of the treating physicians and
11 other physicians who were present in the operating room where the fatal
12 injury occurred violates the acceptable legal standard of care for attorneys
13 handling such cases. Furthermore, Defendants were negligent in not asking
14 Interrogatories, failing to make any Requests for Admissions or using any or
15 the normal discovery tools expected of litigation attorneys handling a medical
16 malpractice case.

17 [Complaint ¶¶ 14, 24]

18 17. Plaintiffs' expert Gerald Gillock, Esq., identified "five or six areas" pertaining to
19 which he believed Mr. Balkenbush "violated the standard of care," including:

- 20 a. Lack of diligence;
- 21 b. Failure to do formal written discovery;
- 22 c. Failure to take depositions of defendants in first three years;
- 23 d. Failure to take formal measures to obtain EPS tape;
- 24 e. Failure to take percipient witness depositions; and
- 25 f. Failure to investigate the Code.

26 [Exhibit "6," (Gillock Deposition, p. 70, lns. 19-25; p. 71, lns. 1-3)].

27 18. Mr. Gillock testified at deposition as follows, with respect to the alleged bases for
28 their malpractice claims:

- a. *[Defendants failed to keep the Plaintiffs informed of the status of their case.]*

Q Are you contending that there was a violation of
the standard of care with respect to the communication with the
clients?

A No.

1 [Exh. "6" (Gillock Depo, p. 48, Ins. 14-17)].

- 2
- 3 b. *Defendants dismissed Plaintiffs case without consulting with Plaintiffs and*
- 4 *obtaining their consent before entering into an agreement with opposing counsel*
- 5 *and dismissing Plaintiffs case with prejudice...*

6 Q I guess I need to ask this a different way. Are

7 you going to be giving some kind of an opinion that it was below

8 standard of care because Mr. Balkenbush did not obtain his

9 client's permission to dismiss this case?

10 A No.

11 Q So that's not an issue in this case?

12 A Right.

13 [Exh. "6" (Gillock Depo, p. 68, Ins. 16-22)].

- 14
- 15 c. *[Defendants failed to provide legal services reasonably required to investigate the*
- 16 *merits of Plaintiffs' case. In a wrongful death case involving medical malpractice,*
- 17 *failure to take depositions of the treating physicians and other physicians who*
- 18 *were present in the operating room where the fatal injury occurred violates the*
- 19 *acceptable legal standard of care for attorneys handling such cases.]*

20 Q And what was your understanding toward the end of

21 the case what the parties were going to do, the attorneys? What

22 what was the discovery plan?

23 A The discovery plan, if there was a plan, as

24 evidenced by some correspondence and e-mails, was going to be

25 that they were going to exchange expert witness reports, and --

26 under the expert disclosures, which they did in March of 2010.

27 And I'm not sure. It's not real clear where they were going

28 from there.

So, it looked like they were going to set

depositions after they exchanged expert reports, even though

they were looking at a July trial date.

Q Well, I have done that. But, you get plenty of

time to do the depositions. I'm not worried about that.

But, is it your understanding they were going to

set the depositions after the exchange of the report and the review of

the EPS tape or the Pruka disk, whatever it's called?

A They were going to do some depositions of the

experts afterwards.

Q And the parties?

1 A Well, I'm not sure where you're getting that
2 information. But, Mr. Lemons said yes, of the parties. But,
3 I don't think Mr. Balkenbush did. I'd have to look and see.

4 [Exh. "6," Gillock Depo, pp. 35-37]

5 d. [... not investigating the Code.]

6 A So why wasn't this reviewed by a nursing person
7 or someone who knows about Code sheets to see whether or not the
8 hospital, if they put in accurate numbers on the Code sheet,
9 shouldn't have been named as a defendant in the case?

10 Q Well, how would that have changed the outcome if
11 the code sheet is incorrect?

12 A You mean how would it have changed the death?

13 Q Yeah. How would it have changed the outcome of
14 the case if the Code sheet is incorrect?

15 A It wouldn't have.

16 [Exh. "6," p. 57, lns. 4-13].

17 19. Mr. Gillock did not testify about causation.

18 20. Plaintiffs' expert Dr. Siefert testified that, at the time of his deposition in this
19 case, he had not reviewed the EPS data because he did not believe it was "worth [his] time" to do
20 so. [Exhibit "7," (Dr. Siefert deposition) p. 16, lns. 8-22; p. 17, lns. 6-15].

21 21. Dr. Siefert did not testify that any conduct by Dr. Smith caused anything. He
22 contended only "that Dr. Smith did the timing of the procedure incorrectly." [Exh. "7," p. 74,
23 lns. 6-9].

24 22. Dr. Siefert testified that if the sequence or order of events were as described by
25 Dr. Smith in his deposition, then there was no breach of the standard of care. He does not
26 believe that Dr. Smith's testimony is corroborated by the medical record; but agrees that he
27 himself was not present. [Exh. "7," p. 29, lns. 2-6; p. 24, lns. 13-16; p. 74, lns. 17-21].
28

1 23. Dr. Seifert did not “find anything inappropriately done by any of the technicians
2 or nurses in the catheter lab,” nor “any inappropriate care on the floor.” [Exh. “7,” p. 54, lns. 15-
3 21].

4 5 **III. Argument**

6 **A. Standard of Review**

7
8 Summary judgment may be granted where there are no genuine issues of material fact
9 and the movant is entitled to judgment as a matter of law. NRCP 56. Relying upon the Supreme
10 Court's decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty*
11 *Lobby*, 477 U.S. 242 (1986), the applicable standard of review and burdens of proof for summary
12 judgment motions are as follows:

13 The moving party is entitled to summary judgment as a matter of law
14 where, viewing the evidence and the inferences arising therefrom in favor of the
15 nonmovant, there are no genuine issues of material fact in dispute. ...

16 The moving party bears the burden of informing the court of the basis for
17 its motion, together with evidence demonstrating the absence of any genuine issue
18 of material fact. ... Once the moving party has met its burden, the party opposing
19 the motion may not rest upon the mere allegations or denials of his pleadings, but
20 must set forth specific facts showing that there is a genuine issue for trial. ...

21 Summary judgment is not a disfavored procedural shortcut, but an integral
22 part of the [] rules as a whole. ...
23 *Alam v. Reno Hilton Corporation*, 819 F. Supp. 905, 909 (D. Nev. 1993) (citations omitted).

24 In *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005), the Nevada Supreme
25 Court made it clear that the “‘slightest doubt’ standard ... is an incorrect statement of the law and
26 should no longer be used when analyzing motions for summary judgment.” *Id.* The nonmoving
27 party must “‘do more than simply show that there is some metaphysical doubt’ as to the
28 operative facts in order to avoid summary judgment being entered in the moving party’s favor.”
Id. at p. 4.

 In the present case, Plaintiffs cannot prove the underlying case. Their claim for
legal malpractice fails as a matter of law.

B. Plaintiffs must prove the underlying medical malpractice claim.

In order to prevail in a legal malpractice action, Plaintiffs must allege and prove:

1. an attorney-client relationship;
2. duty to use the skill, prudence and diligence ordinary lawyers possess in exercising and performing similar tasks;
3. breach of that duty;
4. proximate cause; and
5. damages.

Mainor v. Nault, 120 Nev. 750, 101 P.3d 308 (2004).

A legal malpractice claim in the context of litigation does not accrue “until the underlying legal action has been resolved.” *Moon v. McDonald Carano & Wilson, LLP*, 129 Nev. Adv. Op. No. 56, __ P.3d __ (August 1, 2013). A “legal malpractice action does not accrue until the plaintiff’s damages are certain and not contingent upon the outcome of an appeal. *Amfac Distribution Corp. v. Miller*, 673 P.2d 795, 796 (Ariz. App. 1983). Specifically, “[w]here there has been no final adjudication of the client’s case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence.” *Id.* *A fortiori*, in a legal malpractice action predicated on the client’s underlying medical malpractice case, proof of the underlying case is necessary to remove it from the realm of “speculative and remote.” *See also, e.g., Schultheis v. Franke*, 658 N.E.2d 932, 939 (Ind. App. 1995) (“In order to prevail on his legal malpractice claim, Franke had the burden of establishing the elements of the underlying medical malpractice claim.”).

1 **1. Plaintiffs cannot establish the elements of the**
2 **underlying medical malpractice claim.**

3 The elements necessary to a claim of medical malpractice are:

- 4 1. failure of a hospital or physician to use the reasonable care, skill or knowledge
5 ordinarily used in similar circumstances;
6 2. proximate cause; and
7 3. damages.

8 *Prabhu v. Levine*, 112 Nev. 1538, 930 P.2d 103 (1996).

9 Breach of the standard of care and causation must ordinarily be established by expert
10 testimony, to a reasonable degree of medical probability. *Morsicato v. Sav-on Drug Stores, Inc.*,
11 121 Nev. 153, 111 P.3d 1112 (2005).

12 As noted above, Plaintiffs' principal theory in the underlying case was that Dr. Smith's
13 conduct fell below the standard of care for his failure to diagnose cardiac tamponade, perform a
14 pericardiocentesis procedure, determine the cause of ventricular tachycardia, request a consult,
15 and order a transthoracic echocardiogram in time. However, after Dr. Morady reviewed the EPS
16 data and advised Plaintiffs' counsel that he had changed his opinion, and there was no
17 malpractice, Mr. Balkenbush was left with but one honorable choice – consult with his clients
18 and dismiss the case.

19 Plaintiffs urge the Court that Mr. Balkenbush should have sought another expert opinion,
20 one that would counter that of Dr. Morady. Such a meretricious approach is probably common,
21 but any lawyer with a modicum of integrity would avoid it. From a practical standpoint, it would
22 not have revived this case. Defense counsel would merely call Dr. Morady as a witness,
23 establish that he was hired by Plaintiffs for his world-class preeminence as an
24 electrophysiologist, have him testify that he changed his opinion based on data he requested in
25 2007 but did not receive until 2010, and that he would have done the same as Dr. Smith.

1 Plaintiffs would then be hard pressed to convince the jury that their new expert, Dr.Siefert, knew
2 better than Dr. Morady, without even reviewing the EPS data, whereupon defense counsel¹
3 would politely reduce the new expert to a nullity. Mr. Balkenbush acted appropriately by hiring
4 the best expert he could find, and relying on his opinions, and then dismissing the case without
5 exposing his clients to an award of fees and costs.
6

7 Plaintiffs assert one additional theory, not framed in their pleadings, however, which is
8 that Mr. Balkenbush should have "investigated the code," so as to possibly have sued Washoe
9 Medical Center (nka "Renown Regional Medical Center). [See, Exh. "4," p. 48, lns. 20-25; p.
10 49, ln. 1]. However, Mr. Gillock also testified that even if hospital staff had done something
11 different it would not have changed the outcome. Moreover, Plaintiffs' current medical expert,
12 Dr. Siefert, has opined on that issue and stated he found nothing objectionable either in the
13 conduct of the anesthesiologist, or in the conduct of any Washoe staff. [Exh. "7," p. 54, lns. 9-
14 21].
15

16 Accordingly, Plaintiffs could not have established the necessary elements of their medical
17 malpractice claim. They had no expert who would testify that Dr. Smith's conduct fell below the
18 standard of care; and their current expert, Dr.Siefert, offers only that he does not believe Dr.
19 Smith's testimony, and does not need to review the EPS data on which Dr. Morady relied. He
20 nowhere mentions causation, admits that if Dr. Smith did as he testified, there was no
21 malpractice, and agrees that no hospital staff conduct fell below the standard of care. Thus,
22 Plaintiffs had, and have, no medical malpractice claim.
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28 ¹ In this case, Edward Lemons, whose ability to disassemble opposing experts is well-known.

1 **C. Plaintiffs' purported legal malpractice claim is**
2 **untenable.**

3 In addition to their failure to prove the underlying case, Plaintiffs cannot support their
4 legal malpractice claim on the chimerical evidence they propose. First, as noted above, they
5 have had to abandon virtually all of their initial theories. For example, there is no evidence that
6 Mr. Balkenbush failed to keep Plaintiffs informed, or that he dismissed the case without
7 consulting with his clients.

8 As to the alleged failure to do "formal written discovery," Plaintiffs' expert, Mr. Gillock
9 opines that an NRCP 16.1 Request for Documents is essentially worthless as a discovery device.
10 [Exh. "6," p. 33, Ins. 23-25]. Mr. Gillock should perhaps review the most recent Nevada
11 Supreme Court rulings on enforcement of NRCP 16.1, including *Moon v. McDonald*, 126
12 Nev.Adv.Op. No. 47, 245 P.3d 1138 (2010) (affirming dismissal for failure timely to file report
13 pursuant to NRCP 16.1(e)(2)). The Court may and should be reluctant to countenance Plaintiffs'
14 argument that document requests pursuant to Rule 16.1 do not constitute "formal written
15 discovery."
16 discovery."

17 Mr. Gillock opines that propounding interrogatories in a medical malpractice case is
18 "absolutely" a standard of care issue. [Exh. "6," p. 37, Ins. 11-13]. His opinion is contrary to
19 law. The Court may note that NRCP 26 teaches that discovery is entirely permissive rather than
20 mandatory. ("... any party who has complied with Rule 16.1(a)(1) may obtain discovery by one
21 or more of the following additional methods ..."). (Emphasis added). It also establishes that
22 Rule 16.1 is, in fact, a discovery rule, to which other methods are "additional."
23 Rule 16.1 is, in fact, a discovery rule, to which other methods are "additional."
24 Rule 16.1 is, in fact, a discovery rule, to which other methods are "additional."

25 Plaintiffs' argument appears to be that if Mr. Balkenbush had propounded formal
26 interrogatories or requests for production, he might have obtained the EPS data sooner than he
27 did. Clearly, this argument is mere speculation, but it is also fraught with false logic. The EPS
28 did. Clearly, this argument is mere speculation, but it is also fraught with false logic. The EPS

1 data compelled Dr. Morady to change his opinion regarding Dr. Smith's conduct – how would
2 having the same data a month, or a year, earlier make any difference? It would have allowed Mr.
3 Balkenbush to seek out an “expert of the night?” Once again, we can be thankful that at least
4 some attorneys do not succumb to subtle but meretricious folly.

5 With respect to the alleged failure to take depositions, Mr. Gillock's opinion is merely
6 one of timing – he objects to not having the depositions of the hospital personnel involved in the
7 “code,” or of the experts within the first three years of filing. [Exh. “6,” p. 33, lns. 10-22].
8 Mr. Gillock, however, admits that all the medical records were obtained, [Exh. “6,” p. 34, lns. 6-
9 25; p. 35, lns. 1-3], that Ms. Dechambeau's deposition was in fact taken, and that the parties
10 agreed to complete the remaining depositions in the last two-and-a-half months before trial.
11 [Exh. “6,” p. 36, lns. 16-25; p. 37, lns. 1-8].

12 Most importantly, Mr. Gillock nowhere asserts that the alleged failure to engage in
13 formal written discovery caused anything. The word “cause” does not appear in Mr. Gillock's
14 deposition; and the term “causation” appears once, in a general question. [Exh. “6,” p. 47, ln. 6].
15 Logically, even if Mr. Balkenbush had buried defendants with written discovery and obtained the
16 EPS data sooner, it would not have made a particle of difference to Dr. Morady's opinion. The
17 alleged failure to propound interrogatories did not, and could not have, caused anything.

18 Finally, with respect to Plaintiffs' theory that Mr. Balkenbush failed to “investigate” the
19 “code,” the theory is untenable as noted above. Mr. Gillock's testimony is directed only at a
20 possible claim against the hospital staff, a claim which, in the opinion of Dr. Siefert, has no basis
21 in the record.
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D. Plaintiffs may not maintain a claim for punitive damages.

Plaintiffs have included in their Complaint a bare claim for punitive damages, averring, without reference to any factual basis, that Defendants' actions and omissions were so egregious, wanton, willful, reckless and in such complete disregard of Plaintiffs' rights that they are thereby liable for punitive or exemplary damages." [Exh. "1," p.9, lns. 3-6]. NRS 42.005 provides:

1. Except as otherwise provided in NRS 42.007, in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:

(a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is \$100,000 or more; or

(b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than \$100,000.

NRS 42.001 provides:

As used in this chapter, unless the context otherwise requires and except as otherwise provided in subsection 5 of NRS 42.005:

1. "Conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.

2. "Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injure another person.

3. "Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

4. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

Plaintiffs' bare citation to the language of NRS 42.005 is insufficient as a matter of law – some evidence is required. Plaintiffs do not refer to any evidence to support that Mr. Balkenbush acted with malice, defined as "conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the

1 rights or safety of others." *Delaware v. Rowatt*, 126 Nev.Adv.Op. No. 44, 244 P.3d 765
2 (2010).

3 A defendant has a "[c]onscious disregard" of a person's rights and safety when he
4 or she knows of "the probable harmful consequences of a wrongful act and a
5 willful and deliberate failure to act to avoid those consequences." NRS
6 42.001(1). In other words, under NRS 42.001(1), to justify punitive damages, the
7 defendant's conduct must have exceeded "mere recklessness or gross
8 negligence."

9 *Id.* (citations omitted).

10 The Complaint in this case is simply devoid of any factual allegations that would
11 support a claim for punitive damages. Plaintiffs' experts nowhere refer to any conduct
12 by Mr. Balkenbush that they describe as malicious, wanton, or oppressive; nor do they
13 suggest that he acted with a conscious disregard of Plaintiffs' rights. Accordingly, the
14 Court should dismiss Plaintiffs' unsupported claim for punitive damages.

15 **IV. Conclusion**

16 Plaintiffs cannot establish the elements of the underlying medical malpractice claim.
17 Their inability to do so renders their legal malpractice claim a nullity. At the end of discovery,
18 Plaintiffs have no viable theory of liability left. They have no cognizable evidence of causation,
19 and no expert testimony or other evidence establishing causation. Finally, they have no evidence
20 or argument to support a claim for punitive damages.
21

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WHEREFORE, Defendants request relief as follows:

1. For an Order granting Defendants' Motion for Summary Judgment;
2. For costs of suit and a reasonable attorney's fee; and
3. Such other and further relief as the Court deems appropriate in the circumstances.

AFFIRMATION

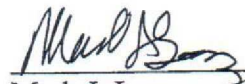
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document **DOES NOT**
CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

Dated this 14th day of August, 2013.

PISCEVICH & FENNER

By:


Mark J. Lenz
Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of PISCEVICH & FENNER and that on this date I caused to be served a true and correct copy of the document described herein by the method indicated below, and addressed to the following:

Document Served:

Motion for Summary Judgment

Person(s) Served:

Charles R. Kozak
1225 Tarleton Way
Reno, NV 89523

<input type="checkbox"/>	Hand Deliver
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile (775)
<input checked="" type="checkbox"/>	Electronic Filing

DATED this 14th day of August, 2013.


Beverly Chambers

Exhibit List

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- Exhibit "1" - Deposition Transcript, David Smith M.D.
- Exhibit "2" - Complaint in Case No: CV07-02028
- Exhibit "3" - Affidavit of Fred Morady, M.D.
- Exhibit "4" - Deposition of Stephen Balkenbush
- Exhibit "5" - Deposition on Written Questions of Dr. Fred Morady
- Exhibit "6" - Deposition of Gerald Gillock
- Exhibit "7" - Deposition of Mark Siefert, M.D.

FILED

Electronically

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Joey Orduna Hastings

Clerk of the Court

Transaction # 2805996

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4 Reno, NV 89523
5 (775) 622-0711
6 Kozak131@charter.net
7 Attorney for the Plaintiff

8 **IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA**
9 **IN AND FOR THE COUNTY OF WASHOE**

10 ANGELA DECHAMBEAU and
11 JEAN-PAUL DECHAMBEAU, both
12 Individually and as SPECIAL
13 ADMINISTRATORS of the ESTATE
14 of NEIL DECHAMBEAU,

Case No.

Dept. No.

15 Plaintiff,

16 Vs.

17 STEPHEN C. BALKENBUSH, ESQ.,
18 THORNDAL, ARMSTRONG, DELK,
19 BALKENBUSH and EISINGER,
20 A Nevada Professional Corporation,
21 & DOES I through X, inclusive,

22 Defendants.

23 **COMPLAINT**

24 **COME NOW** Plaintiffs, ANGELA DECHAMBEAU and JEAN-PAUL

25 DECHAMBEAU both individually and as SPECIAL ADMINISTRATORS of the ESTATE of
26 NEIL DECHAMBEAU, by and through their attorney, CHARLES R. KOZAK, ESQ., and for
27 their COMPLAINT against the Defendants, STEPHEN C. BALKENBUSH, ESQ.,
28 THORNDAL, ARMSTRONG, DELK, BALKENBUSH and EISINGER, a Nevada Professional

1 Corporation, and DOES I – X, hereby allege as follows:

2 **PARTIES**

3
4 1. Plaintiff, ANGELA DECHAMBEAU, at all material times hereto was a competent, adult
5 resident of Reno, Nevada including at the time of the incidents set forth in this Complaint. At
6 all material times hereto, said Plaintiff was the wife and/or widow of NEIL DeCHAMBEAU.

7 2. Plaintiff, JEAN-PAUL DECHAMBEAU, at all material times hereto was a competent,
8 adult resident of Reno, Nevada including at the time of the incidents set forth in this Complaint.
9 At all material times hereto, said Plaintiff was the son and/or survivor of NEIL DeCHAMBEAU.

10 3. On September 8, 2006, NEIL DeCHAMBEAU, the husband of Plaintiff, ANGELA
11 DECHAMBEAU and the father of Plaintiff, JEAN-PAUL DECHAMBEAU, died while
12 undergoing a procedure on his heart at Washoe Medical Center in Reno, Nevada.

13
14 4. On or about December 26, 2006 Plaintiffs, ANGELA DECHAMBLEAU and JEAN-
15 PAUL DECHAMBEAU, were appointed Special Administrators of the Estate of NEIL
16 DeCHAMBEAU
17

18 5. Defendant, STEPHEN C. BALKENBUSH, ESQ. (hereinafter “BALKENBUSH”), at all
19 material times hereto was a competent, adult resident of Reno, Nevada, licensed to practice law
20 in the State of Nevada.

21
22 6. Defendant, THORNDAL, ARMSTRONG, DELK, BALKENBUSH and EISINGER
23 (hereinafter “THORNDAL LAW FIRM” or “TADBE”), at all material times hereto was and is a
24 Reno, Nevada law firm and resident with offices located at 6590 South McCarran Blvd., Suite B,
25 Reno, Nevada 89509. THORNDAL LAW FIRM members and employees at all material times
26 hereto were and continue to be engaged in the practice of law in Reno, Washoe County, Nevada.

27
28 7. Defendants, JOHN DOES I – X, are individuals who reside in Nevada and who may have

1 aided and abetted other defendants in the actions which form the basis for the Plaintiffs' various
2 complaints as set forth herein below and thereby may be liable to Plaintiffs as discovery may
3 reveal. Upon their true identities becoming known by Plaintiffs, Plaintiffs' counsel will move the
4 Court to have them added as Named Defendants.
5

6 **FIRST CAUSE OF ACTION**
7 **(Legal Malpractice)**

8 8. On or about September 5, 2007, Defendants filed a medical malpractice lawsuit on behalf
9 of the Plaintiffs, alleging that DAVID SMITH, M.D., BERNDT, CHANEY-ROBERTS,
10 DAVEE, GANCHAN, ICHINO, JUNEAU, NOBLE, SEHER, SWACKHAMER, THOMPSON,
11 WILLIAMSON and ZEBRACK, LTD., a Nevada Professional Corporation, DAVID KANG,
12 M.D., RINEHART, LTD., a Nevada Professional Corporation and DOES 1 – 10 caused the
13 wrongful death of NEIL DeCHAMBEAU on September 8, 2006 through medical professional
14 negligence.
15

16 9. Defendant, BALKENBUSH was the lead attorney among the Defendants named herein.
17 As such he retained two medical experts, Cardiologist FRED MORADY, M.D. and
18 Anesthesiologist WILLIAM MEZZEI, M.D. Both of these experts provided sworn expert
19 witness reports in which they stated that Cardiologist, DAVID SMITH, M.D. and
20 Anesthesiologist DAVID KANG, M.D. had failed to meet the standard of care in treating NEIL
21 DeCHAMBEAU and thereby caused the death of NEIL DeCHAMBEAU in the operating room
22 on September 7, 2006.
23

24 10. As set forth in paragraphs 20 through 31 of Defendants' medical malpractice lawsuit filed
25 on behalf of Plaintiffs, the defendants hereto alleged the following facts, with their signature to
26 said lawsuit verifying the truth thereof:
27
28

1 20. On September 7, 2006, Neil DeChambeau was [sic] 57 year old male in good
2 physical health who was admitted to Washoe Medical Center to undergo an atrial
3 fibrillation ablation procedure to address a previously diagnosed paroxysmal atrial
4 fibrillation.

5 21. On the morning of September 7, 2006, Neil DeChambeau was brought to the
6 cath lab at Washoe Medical Center where David Kang, M.D. Induced anesthesia.
7 Neil DeChambeau was intubated and anesthesia was maintained throughout the
8 atrial fibrillation ablation procedure.

9 22. At or about 12:39 p.m., Neil DeChambeau suddenly developed cardiac
10 arrest. In response to the cardiac arrest cardio pulmonary resuscitation was
11 instituted on Neil DeChambeau and multiple doses of vasoactive drugs were
12 administered as chest compressions were performed.

13 23. At or about 1:00 p.m., an echo-cardiogram of the heart showed a cardiac
14 tamponade.

15 24. At or about 1:00 p.m., a pericardiocentesis was performed and approximately
16 300 ccs of blood were removed from Neil DeChambeau's pericardial sac.

17 25. David Smith, M.D. failed to timely diagnose that Neil DeChambeau
18 experienced a cardiac tamponade.

19 26. David Smith, M.D. failed to timely perform a pericardiocentesis procedure
20 on Neil DeChambeau.

21 27. David Kang, M.D. failed to timely diagnose that Neil DeChambeau
22 experienced a cardiac tamponade.

23 28. David Kang, M.D. failed to timely recommend to David Smith, M.D. that he
24 perform a pericardiocentesis [sic] on Neil DeChambeau.

25 29. David Kang, M.D. failed to timely perform a pericardiocentesis [sic] on Neil
26 DeChambeau.

27 30. The conduct of David Smith, M.D. set forth in paragraphs 25 and 26 fell
28 below the standard of care owed by David Smith, M.D. to Neil DeChambeau and
caused Neil DeChambeau to suffer irreversible brain damage and death.

31. The conduct of David Kang, M.D. set forth in paragraphs 27, 28, and 29 fell
below the standard of care owed by David Kang, M.D. to Neil DeChambeau and
caused Neil DeChambeau to suffer irreversible brain damage and death.

11. Trial of the above described medical malpractice suit was eventually set for July 12,

1 2010.

2 12. In June 2010, Plaintiffs were informed by BALKENBUSH that their case had been
3 dismissed against all of the Defendants.
4

5 13. In actuality, BALKENBUSH had stipulated to a dismissal with prejudice of their
6 Complaint on May 5, 2010 **without ever informing Plaintiffs he was doing this and without**
7 **ever obtaining their permission or authority to do so before he did.**

8 14. BALKENBUSH'S stated reason for dismissing Plaintiffs' case was that as a result of a
9 review of an EPS tape recorded during the operation, DR. MORADY, one of Plaintiffs' experts,
10 had reversed his opinion as to the negligence of DR. DAVID SMITH. BALKENBUSH never
11 provided Plaintiffs with any written communication from DR. MORADY to him in which DR.
12 MORADY explained his alleged reversal of his original opinion of DR. SMITH'S malpractice.
13 In fact no such opinion exists in any written form.
14

15 15. No reason was given to Plaintiffs by BALKENBUSH for the dismissal of the case
16 against DR. KANG. They were simply told that the case against DR. KANG had been dismissed
17 with prejudice as well a month or so after BALKENBUSH had done so without Plaintiffs'
18 knowledge or permission.
19

20 16. At no time did BALKENBUSH conduct any written discovery of any Defendants in the
21 case, other than to request production of the medical records of the various Defendants.
22

23 17. The critical issue in the medical malpractice case was the timing of DR. SMITH'S
24 reaction to NEIL DeCHAMBEAU going into cardiac arrest during the scheduled six (6) hour
25 cardiac ablation procedure. Instead, the procedure lasted over nine (9) hours.
26

27 18. At no time during the pendency of the medical malpractice case from its filing date of
28 September 5, 2007 until BALKENBUSH dismissed it on May 5, 2010 without Plaintiffs'

1 knowledge or permission, did BALKENBUSH take the depositions of DR. SMITH, DR. KANG,
2 DR. KROLLI (a resident physician who was present with DR. SMITH and DR. KANG during
3 the procedures performed on NEIL DeCHAMBEAU on September 7, 2010), or the thoracic
4 surgeon who was called in to consult after the patient had suffered cardiac arrest due to a hole
5 being punched in the decedent's heart during the ablation procedure. These physicians were all
6 present in the operating room and witnessed each other's actions, omissions and malfeasance
7 which caused the premature death of NEIL DeCHAMBEAU.
8

9
10 19. In order to meet the acceptable standard of care for physicians, DR. SMITH and/or DR.
11 KANG should have immediately performed the procedure known as "pericardiocentesis"
12 immediately after becoming aware that the patient had gone into cardiac arrest. Instead, both
13 DR. SMITH and DR. KANG violated the standard of care by waiting until an echocardiogram
14 could be ordered and performed, after a useless ten (10) minutes of CPR were administered. By
15 the time the futile CPR measures had been performed (they did absolutely no good as the CPR
16 only acted to push the blood out of the heart through the tamponade) and then the
17 echocardiogram ordered and performed, the patient's brain had been deprived of oxygen for at
18 least ten (10) minutes, resulting in irreversible brain damage.
19

20
21 20. The Defendants provided an EPS tape allegedly recorded during the operation to
22 BALKENBUSH. Defendants claimed this tape contradicted the written medical records and
23 proved that DR. SMITH had acted in accordance with the acceptable standards of practice when
24 responding to the cardiac arrest of NEIL DeCHAMBEAU. Other than DR. SMITH'S Counsel's
25 representations as to the authenticity of the EPS tape, BALKENBUSH made no attempt to verify
26 its authenticity or even explore the spoliation of evidence issues attendant with the isolated
27 appearance of the EPS tape long after the other medical records had been produced by the
28

1 Defendants. BALKENBUSH made no attempts through discovery to verify that the tape was
2 authentic or was in fact made during NEIL DeCHAMBEAU'S operation. BALKENBUSH also
3 failed to have the tape examined and tested by a properly credentialed expert to determine if the
4 tape had been tampered with or altered in any way. BALKENBUSH failed to use any discovery
5 tools whatsoever to determine whether the tape, if genuine, in any way exonerated DR. SMITH
6 and DR. KANG from medical malpractice in the operating room.
7

8 21. DR. SMITH'S own records of the events leading up to and causing the premature death
9 of NEIL DeCHAMBEAU, transcribed on September 8, 2006 specifically state:
10

11 At the end of the ablation, the patient had evidence of hemodynamic compromise
12 with hypotension and some bradycardia. Stat echocardiogram was performed,
13 which showed a fairly large pericardial effusion. CPR was also performed for
approximately 10 minutes.

14 Later in DR. SMITH'S transcription he repeats:

15 Please note that there was approximately 5 to 10 minutes of CPR.

16 22. A simple reading of the records in DR. SMITH'S own words immediately after the
17 operation confirms the opinions of DR. MORADY and DR. MESSEI, Plaintiffs' experts, that
18 DR. SMITH and DR. KANG, in delaying the pericardiocentesis until after futile CPR was
19 performed and then the echocardiogram ordered and performed instead of immediately doing the
20 pericardiocentesis, caused the needless death of NEIL DeCHAMBEAU on September 8, 2007.
21

22 23. This delay was medical malpractice and BALKENBUSH dismissed the case with no
23 sworn evidence to the contrary, without taking any Depositions, asking any Interrogatories,
24 making any Requests for Admissions and without giving Plaintiffs the chance to pursue their
25 Causes of Action with other counsel competent to handle a medical malpractice case as he,
26 **without their permission, dismissed their case with prejudice.**
27
28

1 24. The Defendants breached their duty to the Plaintiffs and failed to perform legal services
2 that met the acceptable standard of practice for attorneys handling medical malpractice cases in
3 the following respects:

4 A. Defendants failed to keep the Plaintiffs informed of the status of their case.

5 B. Defendants dismissed Plaintiffs case without consulting with Plaintiffs and obtaining
6 their consent before entering into an agreement with opposing counsel and dismissing Plaintiffs
7 case with prejudice.
8

9 C. Defendants failed to provide legal services reasonably required to investigate the
10 merits of Plaintiffs' case. In a wrongful death case involving medical malpractice, failure to
11 take depositions of the treating physicians and other physicians who were present in the
12 operating room where the fatal injury occurred violates the acceptable legal standard of care for
13 attorneys handling such cases. Furthermore, Defendants were negligent in not asking
14 Interrogatories, failing to make any Requests for Admissions or using any or the normal
15 discovery tools expected of litigation attorneys handling a medical malpractice case.
16

17 D. Defendants failed to provide Plaintiffs with the opportunity to obtain new counsel
18 who could have substituted in on the case and verified the reasonableness of DR. MORADY'S
19 claimed change of opinion approximately five (5) months prior to Trial or obtained another
20 expert cardiologist.
21

22 E. Defendants failed to properly investigate the authenticity of the EPS tape and to
23 allow the Plaintiffs to obtain a second opinion from qualified technical and/or medical experts
24 as to the significance of the EPS tape to the ultimate issues in the case. Defendants also failed
25 to investigate the spoliation of evidence issues attendant with a tape which had not been
26 produced with the other medical records, including whether the tape was even from the
27
28

1 operation on NEIL DeCHAMBEAU on September 7, 2006 or whether the tape had been
2 tampered with or altered in any manner.

3 F. Defendants' actions and omissions were so egregious, wanton, willful, reckless and in
4 such complete disregard of Plaintiffs' rights that they are thereby liable for punitive or
5 exemplary damages.
6

7 **WHEREFORE**, Plaintiffs, ANGELA DECHAMBEAU and JEAN-PAUL
8 DECHAMBEAU, pray for the following relief against the Defendants and each of them for:
9

10 1. General damages, including damages for pain and suffering and disfigurement of the
11 decedent in an amount to be proven at trial.

12 2. Special damages, pecuniary damages for grief, loss of probable support,
13 companionship, love and affection in an amount to be proven at trial.

14 3. Punitive or exemplary damages.

15 4. All costs and expenses of this action, prejudgment interest and attorneys fees.

16 5. Such other and further relief as the Court deems equitable in the premises.
17

18 **WHEREFORE**, the Special Administrators of the Estate of Neil DeChambeau,
19 ANGELA DECHAMBEAU and JEAN-PAUL DECHAMBEAU, pray for relief on behalf of
20 said Estate against the Defendants and each of them for:
21

22 1. Special damages including medical expenses which the decedent incurred or sustained
23 before his death and for his funeral expenses.

24 2. Punitive or exemplary damages.

25 3. All costs and expenses of this action, prejudgment interest and attorneys fees.
26

27 \\\

28 \\\

1 4. Such other and further relief as the Court deems equitable in the premises.

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

3 Dated this 5th day of March, 2012.

4
5
6 /s/ Charles R. Kozak

7 CHARLES R. KOZAK, ESQ.

8 Nevada State Bar No. 11179

9 1225 Tarleton Way

10 Reno, NV 89523

11 (775) 622-0711

12 Kozak131@charter.net

13 Attorney for the Plaintiff

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VERIFICATION

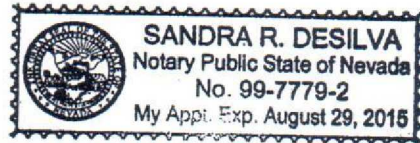
STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

ANGELA DeCHAMBEAU, under penalties of perjury being first duly sworn, deposes and says: That she is a Plaintiff in the above-entitled action, and has read the Complaint and Jury Demand, that the same is true of her own knowledge, except for those matters therein contained stated upon information and belief, and as to those matters she believes it to be true.

Angela DeChambeau
ANGELA DeCHAMBEAU

SUBSCRIBED and SWORN to before me
this 2nd day of March, 2012.

Sandra R. Desilva
NOTARY PUBLIC

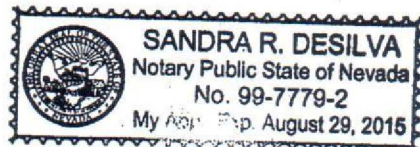


ACKNOWLEDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

On this 2nd day of March, 2012, personally appeared before me, ANGELA DeCHAMBEAU, proven to me to be the person whose name is subscribed to the above instrument, and who acknowledged to me that she executed the foregoing Complaint and Jury Demand.

Sandra R. Desilva
NOTARY PUBLIC



1
2
3 **VERIFICATION**

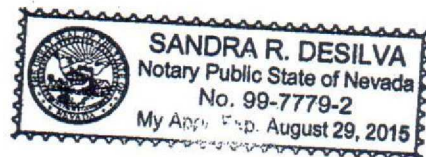
4 STATE OF NEVADA)
5) ss.
6 COUNTY OF WASHOE)

7 JEAN-PAUL DeCHAMBEAU, under penalties of perjury being first duly sworn,
8 deposes and says: That he is a Plaintiff in the above-entitled action, and has read the Complaint
9 and Jury Demand, that the same is true of his own knowledge, except for those matters therein
10 contained stated upon information and belief, and as to those matters he believes it to be true.
11

12
13
14 SUBSCRIBED and SWORN to before me
15 this 2nd day of March, 2012.


JEAN-PAUL DeCHAMBEAU

16
17 
18 NOTARY PUBLIC

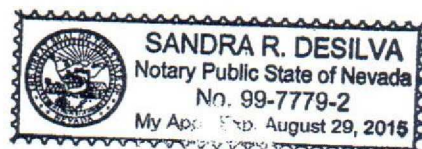


19 **ACKNOWLEDGMENT**

20 STATE OF NEVADA)
21) ss.
22 COUNTY OF WASHOE)

23 On this 2nd day of March, 2012, personally appeared before me, JEAN-PAUL
24 DeCHAMBEAU, proven to me to be the person whose name is subscribed to the above
25 instrument, and who acknowledged to me that he executed the foregoing Complaint and Jury
26 Demand.

27 
28 NOTARY PUBLIC



ORIGINAL

FILED

2012 MAR 28 PM 12:38

JOEY HASTINGS
BY [Signature]
DEPUTY

1130
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PISCEVICH & FENNER
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Reno, Nevada 89509
775-329-0958
Attorneys for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ANGLEA DECHAMBEAU and
JEAN-PAUL DECHAMBEAU, both
Individually and as SPECIAL
ADMINISTRATORS of the ESTATE
Of NEIL DECHAMBEAU,

Case No. CV12-00571

Dept. No. 7

Plaintiffs,

vs.

STEPHEN C. BALKENBUSH, ESQ.,
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH and EISINGER,
A Nevada Professional Corporation,
And DOES I through X, inclusive,

Defendants.

DEFENDANTS' ANSWER TO COMPLAINT

Defendants STEPHEN C. BALKENBUSH and THORNDAL, ARMSTRONG, DELK,
BALKENBUSH and EISINGER, a Nevada Professional Corporation, by and through their
counsel, PISCEVICH & FENNER, and in answer to Plaintiffs' Complaint, admit, deny and
allege as follows:

PARTIES

1. Upon information and belief, Defendants admit the allegations contained in paragraph 1 of Plaintiffs' Complaint.

2. Upon information and belief, Defendants admit the allegations contained in paragraph 2 of Plaintiffs' Complaint.

3. Upon information and belief, Defendants admit the allegations contained in paragraph 3 of Plaintiffs' Complaint.

4. These answering Defendants are without information sufficient to form a belief form as to the allegations contained in paragraph 4 of Plaintiffs' Complaint and therefore deny the same.

5. Defendants admit that Stephen Balkenbush is a resident of Reno, Nevada, and licensed to practice law in the State of Nevada.

6. Defendants admit that Thorndal, Armstrong, Delk, Balkenbush and Eisinger is a law firm with offices located at 6590 S. McCarran Boulevard in Reno, Nevada.

7. It appears that no answer is required of these answering Defendants as to the allegations contained in paragraph 7; however, if it is determined that an answer is required, these answering Defendants hereby deny said allegations.

FIRST CAUSE OF ACTION

(Legal Malpractice)

8. Defendants admit a medical malpractice lawsuit was filed arising out of the alleged wrongful death of Neil DeChambeau; however, denies the remaining allegations of paragraph 8 of Plaintiffs' Complaint.

9. Defendants admit that medical experts were retained; however, denies the remaining allegations of paragraph 9 of Plaintiffs' Complaint.

1 10. Defendants admit a medical malpractice was filed; however, the allegations could
2 not be proven as set forth in paragraph 10 of Plaintiffs' Complaint.

3 11. These answering Defendants are without information sufficient to form a belief
4 form as to the allegations contained in paragraph 11 of Plaintiffs' Complaint and therefore deny
5 the same.

6 12. These answering Defendants deny the allegations contained in paragraph 12 of
7 Plaintiffs' Complaint.

8 13. These answering Defendants deny the allegations contained in paragraph 13 of
9 Plaintiffs' Complaint.

10 14. Defendants admit that Dr. Morady reversed his opinion; however, deny the
11 remaining allegations contained in paragraph 14 of Plaintiffs' Complaint.

12 15. These answering Defendants deny the allegations contained in paragraph 15 of
13 Plaintiffs' Complaint.

14 16. These answering Defendants deny the allegations contained in paragraph 16 of
15 Plaintiffs' Complaint.

16 17. These answering Defendants deny the allegations contained in paragraph 17 of
17 Plaintiffs' Complaint.

18 18. These answering Defendants deny the allegations contained in paragraph 18 of
19 Plaintiffs' Complaint.

20 19. These answering Defendants are without information sufficient to form a belief
21 form as to the allegations contained in paragraph 19 of Plaintiffs' Complaint and therefore deny
22 the same.

23 20. These answering Defendant deny the allegations contained in paragraph 20 of
24 Plaintiffs' Complaint.

1 21. These answering Defendants are without information sufficient to form a belief
2 form as to the allegations contained in paragraph 21 of Plaintiffs' Complaint and therefore deny
3 the same.

4 22. These answering Defendants are without information sufficient to form a belief
5 form as to the allegations contained in paragraph 22 of Plaintiffs' Complaint and therefore deny
6 the same.

7 23. These answering Defendant deny the allegations contained in paragraph 23 of
8 Plaintiffs' Complaint.

9 24. These answering Defendant deny the allegations contained in paragraph 24 of
10 Plaintiffs' Complaint.

11
12 **AFFIRMATIVE DEFENSES**

13
14 As separate and affirmative defenses to Plaintiffs' Complaint and each cause of action,
15 claim and allegation contained therein, these answering Defendants allege as follows:

16 **FIRST AFFIRMATIVE DEFENSE**

17 Plaintiffs have failed to state a claim against these answering Defendants.

18 **SECOND AFFIRMATIVE DEFENSE**

19 There is no causal relationship between the alleged malpractice as set forth in Complaint
20 and the damages being claimed.

21 **THIRD AFFIRMATIVE DEFENSE**

22
23 Pursuant to Chapter 41A of Nevada Revised Statutes, Plaintiffs have failed to state a
24 claim for exemplary or punitive damages.

25 /

1 **FOURTH AFFIRMATIVE DEFENSE**

2 Punitive damages are unconstitutional in that they are in violation of the equal protection
3 clause, due process clause and undue burden on interstate commerce in violation of contract
4 clause and the Eighth Amendment prescription of excessive fines.
5

6 **FIFTH AFFIRMATIVE DEFENSE**

7 With respect to punitive damages, NRS 42.025 does not provide for adequate standards
8 for the application for punitive damages, the statute is inherently vague, and said statute violates
9 the rights and safeguards of the Eighth and Fourteenth Amendments of the United States
10 Constitution and the Constitution of the State of Nevada.
11

12 **SIXTH AFFIRMATIVE DEFENSE**

13 Plaintiffs were placed on notice of the problems in the underlying case, including that the
14 Plaintiffs could not prevail on the malpractice claims, met with Defendants, and specifically
15 agreed to dismiss the malpractice case.
16

17 **SEVENTH AFFIRMATIVE DEFENSE**

18 Plaintiffs' conduct constitutes a known waiver or abandonment of the underlying medical
19 malpractice case and Plaintiffs consented to the dismissal of the underlying case.
20

21 **EIGHTH AFFIRMATIVE DEFENSE**

22 Plaintiffs' claims are barred by the doctrine of equitable estoppel.
23

24 **NINTH AFFIRMATIVE DEFENSE**

25 The Plaintiffs' claims are barred as they agreed to a compromise of the underlying case,
26 consisting of a dismissal with each side to bear their own costs and fees.
27
28

1 **TENTH AFFIRMATIVE DEFENSE**

2 The exercise of professional judgment used by Defendants was totally within the
3 standards used by litigation attorneys and was not a breach of the duty arising from the attorney-
4 client relationship.

5 **ELEVENTH AFFIRMATIVE DEFENSE**

6 Plaintiffs cannot prevail in the underlying action and would not have succeeded in the
7 underlying action.

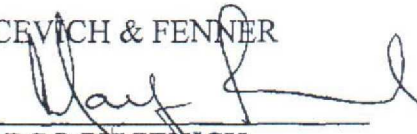
8 **TWELFTH AFFIRMATIVE DEFENSE**

9 Pursuant to NRCP 11, all possible affirmative defenses may not be alleged herein, insofar
10 as sufficient facts were not available after reasonable inquiry upon the filing of Defendants'
11 Answer. Defendants therefore reserve the right to amend this Answer to allege additional
12 affirmative defenses.

13 **AFFIRMATION**

14 The undersigned does hereby affirm that the preceding document **DOES NOT** contain
15 the Social Security number of any person.

16 DATED this 28th day of March, 2012.

17
18
19
20 PISCIVICH & FENNER
21 By: 
22 MARGO PISCIVICH
23 Attorneys for Defendants
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of PISCEVICH & FENNER and that on this date I caused to be served a true and correct copy of the document described herein by the method indicated below, and addressed to the following:

Document Served:

ANSWER TO COMPLAINT

Person(s) Served:

Charles R. Kozak
1225 Tarleton Way
Reno, NV 89523

<input type="checkbox"/>	Hand Deliver
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile (775)
<input type="checkbox"/>	Electronic Filing

DATED this 28th day of March, 2012.


Beverly Chambers

In the
SUPREME COURT
For the
STATE OF NEVADA

Electronically Filed
Apr 18 2014 01:28 p.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 JOINT INDEX OF EXHIBITS, Vol I

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