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

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

14 Plaintiffs,

15 vs.

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

21 Defendants.
22 _____/

23 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

24 Defendants Stephen C. Balkenbush, Esq., and Thorndal, Armstrong, Delk, Balkenbush
25 and Eisinger, having moved the Court pursuant to NRCP 56 for an Order granting summary
26 judgment in Defendants' favor, the Court being familiar with the briefing on file, and having
27 heard the arguments of counsel, being fully advised in the premises, finds, concludes and orders
28 as follows:

1 **Findings of Fact.**

2 The Court finds that the material facts in this case are as follows:

3 In this legal malpractice action, Plaintiffs allege that Mr. Balkenbush failed to exercise
4 the legal skills necessary to their purported medical malpractice claim against Dr. David Smith
5 and others. Plaintiffs' claim for medical malpractice against Dr. Smith arose out of a heart
6 procedure known as cardiac ablation. During the procedure, (an atrial fibrillation ablation), there
7 was a complication involving a pericardial tamponade. During Dr. Smith's efforts to deal with
8 the complication, Plaintiffs' decedent "coded," i.e. went into cardiac arrest, suffered an anoxic
9 brain injury and died.

10
11 On September 5, 2007, Plaintiffs' then-counsel, Mr. Balkenbush, filed a medical
12 malpractice lawsuit against Dr. Smith and others. Attached to the underlying Complaint was the
13 Affidavit of Dr. Fred Morady dated August 29, 2007. Plaintiffs had agreed that Mr. Balkenbush
14 would seek to retain the most preeminent expert in the country on cardiac ablation, and that the
15 case would "rise or fall" on the expert's opinion. Plaintiffs and Mr. Balkenbush hired Dr.
16 Morady to fill that role.

17
18 Dr. Morady reviewed the medical records provided to him, and based on that review,
19 initially opined that Dr. Smith's conduct fell below the standard of care. Dr. Morady advised
20 Mr. Balkenbush that he needed to review the "Prucka" recording, also called the "EPS data"
21 noting "there [had] to be one." Mr. Balkenbush was unable to obtain the EPS tape until March,
22 2010, but upon receipt, Mr. Balkenbush provided it to Dr. Morady for review. After Dr. Morady
23 reviewed it, he told Mr. Balkenbush that he had "changed his opinion," and that he no longer
24 believed that there was any malpractice in the action by Dr. Smith.

25
26 Mr. Balkenbush advised Plaintiffs of Dr. Morady's change of opinion, and offered to
27 have them speak directly and confidentially to Dr. Morady, which they declined. Plaintiffs
28

1 agreed to dismiss their case, and Mr. Balkenbush filed the appropriate dismissal. Subsequently,
2 Plaintiffs brought this action alleging legal malpractice against Mr. Balkenbush.

3 At the close of discovery, Defendants moved for summary judgment on the ground there
4 was no genuine dispute as to any material issue of fact, and Defendants were entitled to
5 judgment as a matter of law. Specifically, Defendants challenged the existence of any evidence
6 that would support a conclusion that had Mr. Balkenbush done something different it would have
7 resulted in a different outcome. Defendants also challenged Plaintiffs' ability to prove by a
8 preponderance of evidence that they would have prevailed in their underlying medical
9 malpractice action.
10

11 **Standard of Review**

12

13 Summary judgment may be granted where there are no genuine issues of material fact
14 and the movant is entitled to judgment as a matter of law. NRCP 56. This Court must view the
15 evidence and any reasonable inferences drawn from it in a light most favorable to the non-
16 moving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). In *Wood*, however,
17 the Nevada Supreme Court made it clear that the "slightest doubt" standard ... is an incorrect
18 statement of the law and should no longer be used when analyzing motions for summary
19 judgment." *Id.* The nonmoving party must "do more than simply show that there is some
20 metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered
21 in the moving party's favor." *Id.* The non-moving party is not permitted to build its case on "the
22 gossamer threads of whimsy, speculation or conjecture." *Pegasus v. Reno Newspapers, Inc.*, 118
23 Nev. 706, 713-14, 57 P.3d 82 (2002). In addition, the mere existence of some alleged factual
24 dispute between the parties will not defeat an otherwise properly supported motion for summary
25 judgment – there must be some genuine issue of material fact. The showing of such a genuine
26 issue for trial is predicated upon the existence of a legal theory which remains viable under the
27 asserted version of the facts and which would entitle the party opposing the motion, assuming
28 that version to be true, to a judgment as a matter of law. *Wood, supra.*

1 **Conclusions of Law**

2 Based upon the briefs, evidence and argument presented to the Court, and on the
3 arguments and presentments of counsel at hearing on September 24, 2013, the Court makes the
4 following conclusions of law and/or application of the facts thereto:

5 Turning first to the underlying medical malpractice claim, the parties agreed that the
6 pivotal issue of fact, or rather, the pivotal set of facts at issue revolved around the administration
7 of pericardiocentesis by Dr. Smith sometime between 12:36 pm and 12:54 pm. Plaintiffs'
8 medical expert concedes that the procedure was properly performed, but disputes the timing.
9 However, while there may have been a dispute in the medical malpractice action, that factual
10 dispute is both speculative and immaterial in light of the failure of Plaintiffs to demonstrate
11 causation in the legal malpractice case.
12

13 In order to prevail in a legal malpractice action, Plaintiffs must allege and prove (1) an
14 attorney-client relationship; (2) the duty to use the skill, prudence and diligence ordinary lawyers
15 possess in exercising and performing similar tasks; (3) a breach of that duty; (4) proximate
16 cause; and (5) damages. *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308 (2004).
17

18 The Court finds that the first two elements are not disputed. Mr. Balkenbush was
19 Plaintiffs' former counsel, and there was no evidence that Mr. Balkenbush lacked any necessary
20 skill, prudence or diligence. In addition, as noted above, Mr. Balkenbush communicated
21 appropriately and timely with his clients. However, Plaintiffs failed to establish the fourth
22 element, proximate cause.
23

24 Plaintiffs' expert, Gerald Gillock, could not point to any action or inaction on the part of
25 Mr. Balkenbush which caused damages to Plaintiffs. While Mr. Gillock was critical of Mr.
26 Balkenbush' discovery, including not obtaining the EPS data sooner, he was unable to suggest
27 how a different course of conduct by Mr. Balkenbush would have changed the outcome. The
28

1 Court notes that even if Mr. Balkenbush had obtained the EPS data sooner, that would only have
2 allowed Dr. Morady to retract his earlier opinion sooner; and the suggestion that Mr. Balkenbush
3 would have had time to hire a different expert does not make the outcome any less speculative.
4 Mr. Balkenbush would have been left with a turncoat witness who would have gutted his case
5 like a trout if he were called as a witness by the defense. Mr. Balkenbush would then have
6 occupied the unenviable position of struggling to rehabilitate his former expert. The likelihood
7 of a favorable outcome under that scenario is ephemeral at best; and no Plaintiffs' expert testified
8 that the outcome would have been any different. Mr. Gillock nowhere asserted that the alleged
9 failure to engage in formal written discovery caused anything.

11 Finally, although Plaintiffs included in their Complaint a claim for punitive damages,
12 Plaintiffs appear to have abandoned that claim. In response to Defendants' Motion for
13 Summary Judgment, Plaintiffs' offered no evidence or argument supporting such claim,
14 and the Court therefore finds it must be dismissed.

16 ORDER

17 The Court having found and concluded as set forth above, therefore orders Defendants'
18 Motion for Summary Judgment shall be, and hereby is **GRANTED**; and Plaintiffs' claims as set
19 forth in their Complaint are **DISMISSED**, with prejudice.

20 Dated this 17 day of OCTOBER, 2013

22 Patrick Flanagan
23 DISTRICT JUDGE

EXHIBIT ~~A~~ 8

CV12-00571 DC-9900049015-014
A DECHAMBEAU ETAL VS STEP 6 Pages
District Court 09/03/2013 01 55 PM 2645
Washoe County
rva

EXHIBIT ~~A~~ 8

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ANGELA DeCHAMBEAU and
JEAN-PAUL DeCHAMBEAU, both
Individually and as SPECIAL
ADMINISTRATORS of the ESTATE
of NEIL DeCHAMBEAU,

Plaintiffs,

-v-

Case No. CV12-00571

STEPHEN C. BALKENBUSH, ESQ.,
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH and EISINGER, a
Nevada Professional
Corporation, & DOES I
through X, inclusive,
Defendants.

PAGE 1 TO 14

The deposition of FRED J. MORADY, M.D.,
Taken at 623 West Huron Street,
Ann Arbor, Michigan,
Commencing at 10:00 a.m.,
Wednesday, June 12, 2013,
Before Cheryl McDowell, CSR-2662, RPR.

1 Ann Arbor, Michigan

2 Wednesday, June 12, 2013

3 About 10:00 a.m.

4 FRED J. MORADY, M.D.,

5 having first been duly sworn, was examined and testified
6 on his oath as follows:

7 EXAMINATION BY WRITTEN QUESTIONS:

8 Q. 1. Were you ever retained as an expert witness in the
9 case of Dechambeau et al v. David Smith, M.D., et al,
10 Case No. CV07 02028 filed in the Second Judicial
11 District Court of the State of Nevada in and for the
12 County of Washoe ("DeChambeau case")?

13 A. Yes.

14 Q. 2. Did you ever sign an affidavit for use in the
15 Dechambeau case wherein you expressed an expert
16 opinion that Dr. David E. Smith rendered treatment to
17 Neil DeChambeau on or about September 7, 2006 that was
18 beneath the acceptable standard of care by a treating
19 cardiologist/electrophysiologist?

20 A. Yes.

21 Q. 3. Is the document identified as "Morady Deposition
22 Exhibit 1" the affidavit which you signed on August
23 29, 2007 setting forth your opinion of Dr. David E.
24 Smith's care of Neil DeChambeau on or about
25 September 7, 2006?



1 A. Yes.

2 Q. 4. Do you still stand by your opinions expressed in
3 paragraph 10 subsections 1) and b) of your above
4 described affidavit in which you state:

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

8 A. No.

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

12 A. No.

13 Q. 5. State if you changed your expert opinion in the
14 DeChambeau case after reviewing an EPS tape recorded
15 in the operating room during an ablation procedure on
16 Neil Dechambeau on or about September 7, 2006.

17 A. Yes.

18 Q. 6. Please state the number of cases in the last ten
19 years in which you have been retained to testify in as
20 an expert witness for a plaintiff.

21 A. Approximately twenty-five.

22 Q. 7. Please state the number of cases in the last ten
23 years in which you have been retained to testify in as
24 an expert witness for a defendant.

25 A. Approximately fifty.

1 A. No.

2 Q. 22. Did you tell attorney, Stephen C. Balkenbush,
3 shortly after reviewing the EPS tape for the first
4 time, that you would have done exactly what Dr. Smith
5 did in the Cath Lab (operating room) on September 7,
6 2006?

7 A. I don't remember exactly what I told Mr. Balkenbush.

8 Q. a. To the best of your ability, state what you
9 meant by "exactly what Dr. Smith did".

10 A. I don't remember saying that, so I can't say what I
11 meant. I mean, I know what I would mean if I said it
12 now, but I can't tell you what I meant on September
13 when I allegedly told Mr. Balkenbush that. I don't
14 remember saying that, so I can't say.

15 Q. b. Please state your reasons for saying this to
16 Mr. Balkenbush.

17 A. Well, I don't remember saying it.

18 Q. 23. Did you at any time communicate about the
19 substance of your expert witness report sworn to on
20 August 29, 2007 with any of the medical experts for
21 the defense in the DeChambeau case? If so, state the
22 approximate date, parties to and substance of any such
23 communications.

24 A. No.

25 Q. 24. Did you state in your affidavit at paragraph



1 10.e) that "A transthoracic echocardiogram was not
2 ordered until approximately 12:44 p.m. on September 7,
3 2006 and did not arrive until approximately 12:49 p.m.
4 The transthoracic echocardiogram was performed too
5 late to benefit Neil DeChambeau. All of the
6 aforementioned conduct of David Smith, M.D. caused
7 Neil DeChambeau to suffer irreversible brain damage
8 and death"?

9 A. Yes.

10 Q. a. Do you now disagree with anything in the
11 above statements?

12 A. Yes.

13 Q. b. Please set forth what you now disagree with
14 in these statements.

15 A. I disagree that the conduct of David Smith caused
16 Mr. DeChambeau to suffer irreversible brain damage and
17 death.

18 Q. c. Please state your reasons for any such
19 disagreement disclosed.

20 A. Because the pericardiocentesis was performed even
21 before the transthoracic echocardiogram was performed,
22 the statement that the transthoracic echocardiogram
23 was performed too late to benefit Mr. DeChambeau is
24 incorrect.

25 Q. 25. Have you ever testified or been retained as an

CV12-00571 DC-9900049015-013
A DECHAMBEAU ETAL VS STEPH 3 Pages
District Court 09/03/2013 01 55 PM
Washoe County 2645
CY7 DEMO

EXHIBIT ~~X~~ 7

EXHIBIT ~~X~~ 7

April 21, 2010

Via Facsimile Only

2300

WEST

SAHARA

SINTE 420

LAS VEGAS, NEVADA

40102

TELEPHONE: 702.367.9993

FAX: 702.367.9977

Steven C. Balkenhush, Esq.
 Thorndal, Armstrong, et al.
 6590 S. McCarren Blvd., Suite B
 Reno, Nevada 89509
 Fax: (775) 786-8004

Re: Kang adv. DeChambeau
 Our File No.: 1642.009

Dear Steve:

I am writing in response to your inquiry regarding Dr. Kang's timeline of the events in the cardiac suite. I can tell you the following based upon Dr. Kang's recollection and review of the chart:

At around 12:39 (give or take a minute or two), Dr. Kang called an arrest. He recalled the nurses and staff responding immediately and started CPR. Dr. Kang was monitoring the patient's vital signs, giving commands to ancillary staff, and administering vasoactive drugs, including epinephrine, atropine, vasopressin, and sodium bicarbonate. While proceeding with resuscitation, Dr. Smith called for a STAT echo by placing a call to the echo technician. While waiting for the ECHO machine to arrive, the patient was receiving chest compressions and continued to receive the vasoactive drugs.

Again, plus or minus a minute or so, at around 12:48, the echo technician arrived and performed the transthoracic ECHO. By 12:54, Dr. Smith had successfully cannulated the pericardium and had withdrawn 300cc of blood. The heart immediately became pulsatile with return of peripheral pulses by palpation. Upon cycling the non-invasive blood pressure cuff, a normal blood pressure was obtained. At 1:08, with verification that the vital signs had stabilized, he placed a right radial arterial catheter to further monitor the blood pressure and for frequent laboratory analysis while in recovery from anesthesia.

Dr. Kang believes that the staff involved reacted exceedingly quick and efficiently during the arrest and he actually felt that the patient would recover from the event. He did not feel that the resuscitation was prolonged at all. He believes, but cannot state for certain given that he was tending to his responsibilities during the code, that Dr. Smith was preparing to perform the pericardiocentesis prior to the arrival of the echo technician. He was satisfied that Dr. Smith was conducting a cardiac work up of the situation and deferred to Dr. Smith to resolve the issue. There is

Defendant's Exhibit

Nurafil 13
 12-12-12 GFD

© ESQUIRE

SB00014

no specific documentation as to when the pericardiocentesis was performed, and Dr. Kang does not have an exact recollection of the time it was started, only that the procedure was complete by 12:54 according to his recall against the records.

I also will add that not only did Dr. Kang not have privileges to perform a pericardiocentesis, he has actually never done one, even in residency. He witnessed one during his training, and the procedure was performed by a cardiothoracic surgeon. It is not something within his area of expertise or responsibility in this case.

I hope that this information assists you in your decision to let Dr. Kang out of this case. He had no responsibility whatsoever in this case to perform a pericardiocentesis. I expect that Dr. Smith would even admit this.

If you have any questions or wish to discuss this further, please do not hesitate to contact me.

Very truly yours,



Michael D. Navratil, Esq.

/mn

Cc: Ed Lemons, Esq. — via Facsimile

SB00015

April 21, 2010

Via Facsimile Only

2300

WEST

SAHARA

SUITE 420

LAS VEGAS, NEVADA

89102

TELEPHONE: 702.367.9993

FACSIMILE: 702.367.9977

Steven C. Balkenbush, Esq.
Thorndal, Armstrong, et al.
6590 S. McCarren Blvd., Suite B
Reno, Nevada 89509
Fax: (775) 786-8004

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Defendant's Exhibit

Nurrafil 13
12-12-12 GFD

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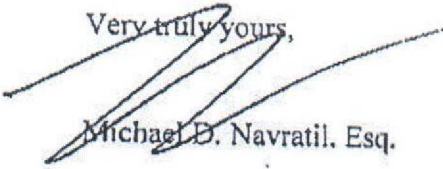
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I hope that this information assists you in your decision to let Dr. Kang out of this case. He had no responsibility whatsoever in this case to perform a pericardiocentesis. I expect that Dr. Smith would even admit this.

If you have any questions or wish to discuss this further, please do not hesitate to contact me.

Very truly yours,



Michael D. Navratil, Esq.

/mn

Cc: Ed Lemons, Esq. — via Facsimile

EXHIBIT ~~E~~ 5

CV12-00571
A DECHAMBERAU ETAL VS
District Court
Washoe County
DC-9900049015-011
STEP 12 Pages
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EXHIBIT ~~E~~ 5

1 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
2 IN AND FOR THE COUNTY OF WASHOE
3

4 ANGELA DECHAMBEAU and JEAN-PAUL)
5 DECHAMBEAU, both individually)
6 and as SPECIAL ADMINISTRATORS of)
7 the ESTATE of NEIL DECHAMBEAU,)

8 Plaintiffs,)

9 vs.)

10 STEPHEN C. BALKENBUSH, ESQ.,)
11 THORNDAL, ARMSTRONG, DELK,)
12 BALKENBUSH AND EISINGER, a)
13 Nevada professional corporation,)
14 and DOES I through X, inclusive,)

15 Defendants.)

CERTIFIED COPY

Case No. CV12-00571

Dept. No. 7

16 DEPOSITION OF

17 GERALD GILLOCK

18 LAS VEGAS, NEVADA

19 JULY 31, 2013

20
21
22
23
24 Reported by: MILLIE HOENSHELL
25 NV CCR NO. 303; CA CSR NO. 5913

1 Q This year?

2 A Yes.

3 Q Okay. And what was discussed on April 24th?

4 A We discussed my review of the underlying action
5 and my request for the additional depositions when they got them
6 in this case, i.e., the Lemons, the Navratil, so forth.

7 Q And he would have had them by April 13th, right?

8 A Right. But, I didn't have them at that point.

9 Q Gotcha. And then what did you discuss on May 1?

10 A We discussed basically some of my tentative
11 observations and some of my tentative conclusions.

12 Q And as of May 1 of 2012, what were your tentative
13 observations?

14 A That there were aspects of the handling of this
15 case where Attorney Balkenbush fell below the standard required
16 of him?

17 Q Okay. And what were those aspects?

18 A Well, at that time I hadn't reviewed everything.
19 But, it was my opinion that, uh, there was an issue with respect
20 to him actively pursuing the case. And I felt that there was a
21 lack of diligence and lack of timeliness in pursuing and
22 handling the discovery in this case and trying to get it ready
23 for trial.

24 Q Okay. Anything else?

25 A Uh, I was very concerned about the written

1 discovery not being present, and I was always concerned about
2 there not being any depositions of any fact witnesses or any
3 defendants. I felt that the failure to take the depositions of
4 the defendants within the first three years of handling fell
5 below the standard of care.

6 I felt that him not taking formal steps to get the
7 tape -- everybody seemed to be hung up on this EPS tape, and it
8 seemed to be a document that everybody felt was necessary to
9 obtain. And he didn't make any formal efforts with subpoenas or
10 court orders or motions before the Court to get that tape, and,
11 in fact, did not get it until 2010, when the case was filed in
12 2007. And Attorney Balkenbush knew about the existence of the
13 tape as early as 2007.

14 Q Okay. Anything else?

15 A Uh, I felt that it was below the standard for him
16 not to get it before a mandatory settlement conference, in the
17 time before the case was dismissed or before that discovery ran.

18 And I thought that, uh, there should have been
19 more communications with his expert witnesses, to find out what
20 they needed that they didn't have and to determine what facts
21 they needed to help support or disavow their opinions.

22 Q Okay. Any other tentative observations and
23 conclusions. You've got the issue of not actively pursuing the
24 case; and then number two, the written discovery not being
25 present, the depositions, pursuing the EPS tape, and more

1 conversations with experts.

2 A Right. And no depositions of the percipient
3 witnesses or the Code team, people participating in the
4 resuscitation. There was not any testimony if them. And there
5 wasn't any sworn testimony from the defendants as to their
6 version of what was happening.

7 I thought it was below the standard of care for
8 him to rely on a letter from Mr. Lemons concerning what
9 Dr. Smith was going to say. And then he seemed to place a great
10 deal of emphasis on a letter from Mr. Navratil which represented
11 what Mr. Navratil thought his client would testify to.

12 And I thought that that should have been
13 information that he got either by answers to Interrogatories or
14 deposition. And I thought that those constituted, uh,
15 negligence.

16 Q Okay.

17 A In the handling.

18 Q Any other tentative opinions or conclusions as of
19 May 1?

20 A No. Those were the general, uh -- those were the
21 general opinions as of May 1.

22 Q Have any of these opinions changed since May 1?

23 A No.

24 Q Okay. Have you formed any new opinions since
25 May 1?

1 would assume that it's authentic?

2 A Of course.

3 Q I'll give you another document we'll mark as
4 Exhibit next in order, and this was in response to Mr. Kozak.

5 MS. PISCEVICH: Which will be Exhibit what?

6 THE COURT REPORTER: 7.

7 (Exhibit 7 was marked for Identification.)

8 Q BY MS. PISCEVICH: Would you mind putting a little
9 7 on the bottom of that, Jerry. And what the letter basically
10 says is that somebody got the disk, it cost 3- to \$5,000, and we
11 had to have the manufacturer come in and make the copy. So
12 that's why I'm asking, are you contending in any manner that
13 that disk is not authentic?

14 A No. No. No. I think the existence of the disk
15 and the importance of the disk became a red herring throughout
16 the course of this handling.

17 Q Okay. And why is that?

18 A Because I think when you look at Dr. Doshi's
19 timeline, and you look at the computerized printout timeline,
20 and you look at the code sheets, I don't think that the tape can
21 shed much light on the case.

22 Q Okay. Are you going to be giving opinions on the
23 medicine in this case?

24 A No.

25 Q That was going to be one of my questions down the

1 Q In Hokes. Correct.

2 A Correct.

3 Q All right. So are you saying it's a standard of
4 care that you must send written Interrogatories in a medical
5 malpractice case for a plaintiff?

6 A I wouldn't say "must." But, I would say in a case
7 like this where you need to identify the players, you have to
8 totally identify all of the people that participated in the Code
9 and so forth, you need to send those Interrogatories so that you
10 can identify and depose those people.

11 Q Well, the hospital wasn't a party, was it?

12 A I have a little bit of an issue with that, too.

13 Q Oh, really? What's the issue with the hospital?

14 A They didn't have the proper equipment in the room
15 for a resuscitation, they didn't have the proper equipment in
16 there for the echocardiogram, in the room, which resulted in a
17 five-minute delay. And it's my understanding that in a Code
18 situation, when a Code is called, the hospital is also supposed
19 to have the emergency room doctor respond to the Code to be sure
20 that it's being conducted in accordance with the procedures.

21 Q Well, they don't respond in an operating room.

22 A You're telling me that.

23 Q Well, I've never seen it at Renown. So, my
24 question is you're contending that he should have sued the
25 hospital?

1 A Supposed to be continuing. Supposed to still be
2 in place.

3 Q Did you find the report of the thoracic cardiogram
4 being done immediately before the procedure?

5 A Yes.

6 Q And it's your understanding that that particular
7 doctor stays there through the procedure?

8 A No.

9 Q And that didn't happen in this case, correct?

10 A Correct.

11 Q So, I want to get back to this question. Is it
12 your opinion that the standard of care in a medical malpractice
13 case requires the sending of Interrogatories?

14 A Not in every case.

15 Q Is it your opinion that the standard of care
16 requires taking the depositions of the medical malpractice
17 experts? And I'm talking in cases where there's written
18 reports.

19 A In cases -- I can't just answer that yes or no.
20 Because in cases where there are factual discrepancies in the
21 time lines set forth by the experts in their reports, then the
22 answer to the question would be yes, depositions are required of
23 the experts.

24 If all the experts agree on the factual
25 representations as to the timing of events in a Code procedure,

1 and everybody is on the same page, then you might not take the
2 experts' reports if you have the depositions and sworn testimony
3 from the defendants.

4 Q Well, I'm going to break it down.

5 A Absent testimony from the defendants and any
6 percipient witnesses whatsoever, you would definitely have to
7 take the depositions of the experts.

8 Q And was it your understanding from reading the
9 depositions of the attorneys in the underlying case that the
10 depositions of the defendant doctors were going to be taken
11 after Dr. Morady's review of the EPS tape?

12 A That's what they said. And I agree that it's the
13 representations. I disagree that that's timely, and I disagree
14 that that would conform with the standard of care required of an
15 attorney handling the case. The case was filed in 2007.

16 Q Assuming Dr. Morady did not change his mind, do
17 you have any doubt that those depositions would have been taken?

18 A I have no reason to doubt that they would have
19 been taken.

20 Q And is there any standard of care as when to take
21 depositions in any case?

22 A I think there's rules that determine --

23 Q Scheduling orders?

24 A -- scheduling orders that determine when discovery
25 is to be completed, and that would include the taking of

1 depositions. In this case, those deadlines passed twice, and
2 the depositions weren't taken.

3 Q I understand the deadlines passed twice. But, was
4 there any understanding between the parties that these
5 depositions would not go forward after the discovery deadlines?

6 A Well, I kind of think that after -- that
7 Dr. Kang's counsel was thinking that this case would just go
8 away, because it wasn't being pursued. So, I'm not sure -- I'm
9 not sure that there was an agreement as to all the depositions
10 that would be taken.

11 Q Well, did you read anything in the depositions of
12 Mr. Balkenbush, Mr. Lemons, and Mr. Navratil that they were
13 going to do anything other than cooperate to get these depositions
14 done if Dr. Morady did not change his mind?

15 A There was nothing to indicate that they wouldn't
16 cooperate.

17 Q Now, have you ever taken depositions and done
18 discovery after the discovery cutoff date and then ordered based
19 upon representations with counsel?

20 A Many times. Of experts. I've never waited until
21 the last three months to take a party's deposition or a
22 percipient witness's deposition, to my knowledge. I think that
23 was -- I don't think that you can get accurate expert reports if
24 they don't have sworn testimony of the parties. And I think
25 that happened here.

1 Q He actually changed his mind before I hired him.
2 I have to ride that horse, Mr. Gillock.

3 A Did he change his mind?

4 Q Before I hired him.

5 A How do we know that?

6 Q Well, even Mr. Balkenbush talked about it, in
7 their billing records about it. Give me a break.

8 A I think that he doesn't address the Code one way
9 or the other.

10 Q What about Dr. Kang?

11 A See, he also -- I say he doesn't address the Code.
12 But Dr. Morady says in his deposition that the
13 pericardiocentesis was performed even before the transthoracic
14 echocardiogram was performed. So he's assuming a fact that's in
15 conflict to be true.

16 He's decided not to believe Dr. Doshi, Dr. Mazzei,
17 Dr. Kang, that the echocardiogram was performed before the
18 pericardiocentesis. So he's setting aside that and going with
19 Dr. Smith. So, yes, he does have -- he is dealing with the
20 Code. Because that is part of the Code.

21 Q Okay. What about Dr. Kang?

22 A Dr. Kang's version of what happened --

23 Q Is in the records.

24 A -- is in the records. And in the letter from
25 Mr. Navratil. Which is different than Dr. Smith's version.

1 Q And who was performing this procedure?

2 A Are you talking about the pericardiocentesis, or
3 are you talking about the echocardiogram, or are you talking
4 about the Code?

5 Q I'm talking about the pericardiocentesis, I'm
6 talking about the ablation procedure, I'm talking about the
7 entire procedure before the Code.

8 A Dr. Smith was performing the procedure. The Code,
9 a lot of the resuscitation was directed by Kang in terms of the
10 medications. So they both were performing the Code.

11 Q And is it your opinion that Dr. Kang would not
12 have privileges to do a pericardiocentesis?

13 A His privileges did not extend to that.

14 Q I'm just curious. In your experience, have you
15 ever had an expert change their mind after going through
16 discovery?

17 A Yes.

18 Q What have you done?

19 A I've applied to the discovery commissioner to
20 allow a different expert to come in to review the case. Uh --

21 Q Have you ever dismissed a case? Or a party out of
22 the case?

23 A I don't think so. I've dismissed parties out of
24 cases when the facts I developed didn't establish a basis that I
25 thought would go to the jury.

EXHIBIT ~~D~~ 4

CV12-00571
A DECHAMBEAU ETAL
District Court
Washoe County
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EXHIBIT ~~D~~ 4

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

-o0o-

ANGELA DECHAMBEAU and JEAN PAUL
DECHAMBEAU, both individually and
as SPECIAL ADMINISTRATORS of the
ESTATE of NEIL DECHAMBEAU,

Plaintiffs,

Case No. CV12-00571

vs.

Dept. No. 7

STEPHEN C. BALKENBUSH, ESQ.,
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH and EISINGER, A
Nevada Professional Corporation,
et al.,

Defendants.

DEPOSITION OF

STEPHEN C. BALKENBUSH

Wednesday, February 20, 2013

Reno, Nevada

Reported by: Lesley A. Clarkson, CCR #182

JOB NO. 175763

1 Q As part of that, do you represent health care
2 providers?

3 A Not, no. I mean I have at times, but it's not a
4 general part of our practice.

5 Q Okay. How would you characterize the general part
6 of your practice?

7 A It's civil litigation, defense of civil
8 litigation.

9 Q Do you primarily work for insurance companies?

10 A I would say probably that's true.

11 Q Okay. And when you say civil litigation, is that
12 construction defect cases, or can you give me some idea of
13 what your specialty is?

14 A I have done construction defect litigation, I've
15 done employment litigation, I've done real estate
16 litigation, I have done commercial litigation, I have done
17 personal injury litigation, I have done medical malpractice
18 litigation, I have done constitutional litigation, I've done
19 civil rights litigation, I've done products liability
20 litigation.

21 Q And is it primarily on the defense side that you
22 practice?

23 A Yes, sir, that would be correct.

24 Q Okay. Now, this case involved a plaintiff
25 bringing a lawsuit; is that correct?

1 A Yes, sir.

2 Q Why did you decide to take this case, since most
3 of your work is on the defense side?

4 A Well, I had done plaintiffs' work before. She
5 came to me, she had a problem, or an issue, and I told her I
6 would take a look at it and to see what the merits of the
7 case would be.

8 Q What investigation did you do after that?

9 A Well, we went about accumulating the medical
10 records in the case, and then proceeded from there to
11 finding someone who was competent to review those records to
12 determine whether there was any case.

13 Q Who did you consult about being an expert in this
14 case?

15 A The primary person would have been Dr. Morady.

16 Q How did you learn about Dr. Morady?

17 A I received a recommendation from someone about his
18 expertise in the area of electrophysiology.

19 Q And I believe you eventually retained a Dr.
20 Mazzei?

21 A Mazzei, yes.

22 Q Mazzei.

23 A Yes.

24 Q How did you come to learn about him?

25 A I think he was recommended to me as well by

1 in paragraph 5 of his affidavit.

2 Q And then down at the middle of the paragraph he
3 states the standard of care required that the cardiologist
4 perform a pericardiocentesis within minutes of the onset of
5 the cardiac arrest.

6 A Yes, sir. That's what he says.

7 Q Did you form an opinion, then, that Dr. Smith and
8 Dr. Kang had failed to meet the standard of care by not
9 performing a pericardiocentesis within minutes of the onset
10 of the cardiac arrest?

11 A I came to the understanding that that was the
12 opinion of Dr. Morady and Dr. Mazzei.

13 Q Based upon these two opinions, you felt confident
14 then in going forward and filing a complaint against Dr.
15 Kang and Dr. Smith?

16 A I felt that we, yes, sir, that we had competent
17 physicians who believed that there, the standard of care of
18 both Dr. Kang and Dr. Smith fell below the acceptable
19 standard of care.

20 Q And what was your understanding of why this
21 pericardiocentesis procedure needs to be performed within
22 minutes of cardiac arrest?

23 A Well, I'm not a physician, and I don't purport to
24 understand all of the medicine involved, but my
25 understanding is that if you do have a bleed out of the

1 how long the brain can survive without suffering serious
2 injury when it's deprived of oxygen?

3 A Completely deprived of oxygen?

4 Q Yes.

5 A I just don't know.

6 Q Did you ever know during the course of this
7 litigation how long that period of time is?

8 A I recall that, I think Dr. Morady indicated to me
9 that five to seven minutes, somewhere in that area, I
10 believe.

11 Q Do you recall that the medical records reflected
12 that Neil DeChambeau was without oxygen from approximately
13 12:39 a.m. to 12:55 a.m.?

14 A No.

15 Q Do you think you ever knew that?

16 A I don't know that that was the case.

17 Q Could you explain what you mean by you don't know
18 whether that was the case, that he was deprived of oxygen?

19 A I wasn't there, I don't know.

20 Q Was that information available in Neil
21 DeChambeau's medical records?

22 A There was, the records were unclear as to how long
23 he was deprived of oxygen.

24 Q How were they unclear?

25 A Well, there were, the anesthesiologist's records

1 said one thing, the nursing notes said another thing, the
2 narratives done by some people said another thing. They did
3 not all match up.

4 Q Okay. Did you form an opinion as to which were
5 the most reliable recording of the sequence of events in the
6 operating room, the nurses' notes, Dr. Kang's notes, or
7 anything else you just referred to?

8 A No, I didn't. I didn't make an opinion on that.

9 Q Okay. And did you ask any of your expert
10 witnesses to render an opinion on that?

11 A No. I asked them to look at the medical records
12 and tell me whether the standard of care of these two
13 physicians fell below that which the industry requires.

14 Q Did you review the medical literature on what the
15 standard of care is when a patient is undergoing an
16 ablation, as Neil DeChambeau was, and he suddenly goes into
17 cardiac arrest?

18 A No. I mean I relied on my experts for that, for
19 that issue.

20 Q Okay. And in your opinion did the experts take
21 the position that when a patient goes into cardiac arrest
22 during an ablation procedure, that an immediate
23 pericardiocentesis must be performed?

24 A That could be part of the protocol, a
25 pericardiocentesis, if there's a tamponade. I mean if

1 there's a cardiac arrest, what's the cause of it. I mean
2 it's kind of a wide-ranging hypothetical.

3 Q Well, isn't it true that the standard of care when
4 a patient undergoes cardiac arrest during an ablation
5 procedure is to perform an immediate pericardiocentesis,
6 isn't that the standard of care?

7 A Not to my knowledge.

8 Q What is the standard of care, do you know?

9 A It depends upon the circumstances.

10 Q What are those?

11 A Well, it depends upon what caused the cardiac
12 arrest. I mean that's why I hired these physicians to look
13 at these issues, for them to offer their opinions on that.

14 Q What is the most serious cause of
15 pericardiocentesis -- what is the most serious cause of
16 cardiac arrest during an ablation procedure?

17 MS. PISCEVICH: I don't think you have a proper
18 foundation here. I'm going to object on foundation and
19 overly broad. He's already said he didn't review the
20 medical records, I mean he didn't review the medical
21 literature, he relied on the people.

22 So if it's in the affidavit, he can talk about it,
23 but he's not here as an expert witness in medicine.

24 MR. KOZAK: Okay.

25 //

1 Q What were his comments about them?

2 A I don't recall.

3 Q When did you become aware of this EPS tape?

4 A From talking with Dr. Morady, it would have been
5 early on, it would have been in 2007.

6 Q Who brought that to your attention?

7 A Dr. Morady.

8 Q And what did you do when Dr. Morady made you aware
9 of this tape?

10 A Well, he told me he wanted a copy of it.

11 Q Did he tell you why?

12 A He said there has to be one, I want to review it,
13 that's an important piece of evidence.

14 Q But did he tell you why it was an important piece
15 of evidence?

16 A No. He said it's -- I don't recall. I just think
17 he told me it was a real time piece of information, and they
18 have those in all of these ablation procedures, there's that
19 tape, the EPS tape.

20 Q Did Dr. Mazzei request to review the EPS tape?

21 A I don't recall that he did.

22 Q Did you make him aware of the fact that there was
23 an EPS tape?

24 A Well, I was trying to, through the course of this
25 litigation I was trying to determine whether there was one

1 and how we would get it.

2 Q What steps did you take to get it?

3 A I worked with the hospital, Washoe Medical Center,
4 I worked with counsel for the plaintiff, Mr. Lemons.

5 MS. PISCEVICH: Defendant.

6 THE WITNESS: I mean --

7 BY MR. KOZAK:

8 Q Defendant.

9 A Oh, yeah, counsel for Dr. Smith, to obtain that.

10 Q When did you obtain it?

11 A I believe I obtained that March, late March of
12 2010.

13 Q How long did it take you to obtain that EPS tape?

14 A Well, from the time I was looking for it, a couple
15 of years to get it.

16 Q Why did it take two years to get the EPS tape?

17 A Because I kept getting, because Washoe Med had no
18 way of reproducing that EPS tape. It's some proprietary,
19 proprietary procedure from the company, the company who owns
20 the machine. So they, while they gave me all their
21 documents, and I kept providing documents to Dr. Morady, Dr.
22 Morady kept telling me that isn't what he needed. So we
23 eventually got it.

24 Q Exactly what steps did you have to take to get it,
25 over the two years?

1 A The, somebody from the company had to come out and
2 pull that information off the machine.

3 Q Were those people available sooner than two years?

4 A I don't know. I mean we had to figure that out
5 first and then find them. And there's nobody local that
6 does that as well.

7 Q Now, during the procuring of this EPS tape, was
8 any discovery done by you as to the defendants?

9 A Yes.

10 Q What did you do?

11 A Well, I obtained all of the information from each
12 of the defendants, all the medical records, all the
13 documents that would support anything that they had done in
14 the procedure, any office notes that they had. I also
15 obtained that, all the medical records from each of the
16 providers of medical care for Mr. DeChambeau so we would
17 have a full and complete history of him. And then we, we
18 subpoenaed records from certain medical care providers as
19 well so we would have a complete medical picture of
20 Mr. DeChambeau.

21 Q Did you serve any requests for admissions,
22 interrogatories, on the defendants during this two years
23 that you were trying to get ahold of the EPS tape?

24 A No.

25 Q And why not?

1 A Generally interrogatories are not propounded in
2 these types of cases by the plaintiff. What you do is if
3 you need that information, you can do it through a
4 deposition. And generally what you get is nothing back in
5 interrogatories from physicians and in medical malpractice
6 cases. You will get their CV and reference to medical
7 records. And so that's the primary reason that we didn't
8 use that, those avenues of discovery.

9 Q Did you consider taking the deposition of Mr.
10 Smith during this period of time?

11 A No. Yes, I did consider taking his deposition,
12 but not until we had a complete and full medical picture.

13 Q And you considered that you did not have a
14 complete and full medical picture until you had the EPS
15 tape?

16 A Yes, that's, Dr. Morady kept telling me he needed
17 that. So I wanted to have that first. And everybody
18 believed that, too, in the case. The other attorneys
19 believed that, at least Mr. Lemons. And so we all had an
20 agreement that once we got that we could proceed if people
21 wanted to take the depositions of the experts or the
22 physicians that were sued in the case.

23 Q Did Mr. Lemons tell you why he thought the EPS
24 tape was critical and should hold up the taking of
25 depositions of experts until you had the EPS tape?

1 A I don't recall. I don't recall. All I know is we
2 had conversations amongst ourselves, that would be
3 Mr. Navratil, Mr. Lemons, and myself, regarding that issue
4 and putting off the depositions until that tape was produced
5 to all who wanted to review it.

6 Q Did you consider sending request for admissions to
7 Dr. Smith regarding what the standard of care was in the OR
8 if a patient suffers sudden cardiac arrest?

9 A I didn't consider doing any written discovery
10 other than what we have discussed. I was going to do that
11 during his deposition.

12 Q And likewise, did you consider sending him an
13 interrogatory confirming the sequence of events in the OR
14 after Neil DeChambeau suffered from cardiac arrest?

15 A No. I mean I did not consider that, because I was
16 going to take care of that issue, to the extent that it
17 needed to be taken care of, during his deposition.

18 Q Have you ever personally examined the EPS tape or
19 had one of your experts tell you exactly what was on the
20 tape after they reviewed it?

21 A Compound. I mean I don't quite understand what
22 you are saying.

23 Q Objection taken. I'll break that down into two
24 questions. Have you ever personally reviewed what was on
25 the EPS tape?

1 A No, sir.

2 Q Have any of your experts ever told you exactly
3 what was on the tape after they reviewed it?

4 A I discussed the EPS tape with Dr. Morady after he
5 reviewed it, if that's what you are asking.

6 Q Yes.

7 A Yes.

8 Q What did Dr. Morady tell you was on the EPS tape?

9 A One of the things he did tell me is that he
10 believed there was a ventricular tachycardia event at 12:22
11 p.m. on the day of the ablation procedure. That was his
12 initial impression from the records. From having reviewed
13 the EPS tape, that was not a ventricular tachycardia event,
14 that he was wrong. The EPS tape clearly showed that that
15 was not a ventricular tachycardia event.

16 Q What else did he tell that the tape revealed?

17 A I don't, I didn't go in to any more, he just told
18 me what he had learned, that's one of the things that he had
19 learned. And so with respect to more, additional
20 specificity on the tape, I don't recall what else I
21 discussed with him about the tape. That was one thing I
22 recall him telling me.

23 Q Okay. Did he tell you that he had changed his
24 opinion as to Dr. Smith's failure to meet the standard of
25 care after reviewing the EPS tape?

1 the medical records, did he tell you that he had changed his
2 opinion as to what the medical records revealed?

3 MS. PISCEVICH: I'm going to object to the form of
4 the question. I'm not sure I'm understanding. Are you
5 saying after he looked at the --

6 MR. KOZAK: I'll try to fine tune that a little
7 bit.

8 BY MR. KOZAK:

9 Q After he reviewed the EPS tape, you said he also
10 came to the conclusion that the medical records were
11 inaccurate in certain respects, so therefore he was changing
12 his opinion as to malpractice?

13 A No, that's not what I remember him telling me.

14 Q So he was not saying the medical records were
15 inaccurate and therefore he had changed his opinion?

16 A Well, he clearly did tell me, I mean I want to, I
17 have already told you that he said the medical records were
18 inaccurate with respect to one item, and that would be the
19 ventricular tachycardia event that was reported by the
20 anesthesiologist and also on the nurses' notes.

21 That simply wasn't accurate. He said it wasn't,
22 because it wasn't a ventricular tachycardia event, and he
23 was very critical of that in his initial analysis of this
24 whole case. So he told me that was wrong, that was one
25 thing that was wrong in the records in a number of places.

1 Q Did he cite any other places in the medical
2 records where he had found inaccuracies that resulted in him
3 changing his opinion as to Dr. Smith's negligence?

4 A I don't recall. I just don't recall that. I do
5 recall my specifically asking him about what happened from
6 12:39 forward, and he told me, and his response was he would
7 not have done anything any differently with that record in
8 front of him.

9 Q So in your mind was he then changing his opinion
10 as to standard of care and the need to perform a
11 pericardiocentesis immediately upon the patient going into
12 cardiac arrest?

13 A He believed that Dr. Smith met the standard of
14 care in terms of doing what he needed to do under the
15 circumstances that existed.

16 Q Did it occur to you that if he had done the same
17 things that Dr. Smith had done, that Neil DeChambeau would
18 have gone into, would have been deprived of oxygen and died
19 of anoxia?

20 MS. PISCEVICH: Are you talking at the time of the
21 conversation in 2010?

22 BY MR. KOZAK:

23 Q Or after.

24 A I'm not a doctor. I've told you that this guy is
25 an experienced, Dr. Morady is one of the preeminent

1 electrophysiologists in the United States, probably in the
2 country. He told me what I just told you, and he told me it
3 more than one time, that there was no malpractice in the
4 case. And I have done the best I can to describe to you
5 what he told me. I respect him eminently.

6 Q Did you discuss Dr. Morady's change of opinion
7 with Dr. Mazzei?

8 A I believe I did.

9 Q What did Dr. Mazzei tell you?

10 A I don't recall.

11 Q After this conversation with Dr. Morady, did you
12 consider getting another opinion from an electrophysiologist
13 about whether or not Dr. Smith had committed malpractice?

14 A No.

15 Q Why not?

16 A One, I believed that he was the preeminent
17 electrophysiologist in the country.

18 Two, when I discussed this case at the beginning
19 with my clients, I told them we would hire the best we could
20 find with respect to this issue, and the case would rise or
21 fall based upon that expert's opinion. They agreed.

22 Three, there was no time in the case to do that.
23 The time for designating expert witnesses had already
24 expired.

25 So those are three reasons that I didn't, and I

1 didn't, I just simply could not go forward with the case
2 with my electrophysiologist taking the position that he
3 took.

4 Q When did Dr. Morady inform you of this change in
5 his opinion?

6 A I believe I spoke with him on April 22, 2010. I
7 had sent him the tape about a month prior.

8 Q Trial of this case was set for what date?

9 A It was set in July.

10 Q Of 2010?

11 A Yes, sir.

12 Q In your mind was there anybody in this case
13 disputing the facts that were stated in the medical records,
14 including the defense experts or your experts?

15 MS. PISCEVICH: That's been asked and answered.
16 But go ahead and do it again. We have already gone over
17 the --

18 THE WITNESS: Yes.

19 MS. PISCEVICH: -- medical records were
20 inaccurate, the V-tach, the nurses' notes. Are you talking
21 about other areas?

22 BY MR. KOZAK:

23 Q Yeah. Other than that were there any other areas
24 of dispute as far as the medical records are concerned?

25 MS. PISCEVICH: I think you have emails in your

1 Q The length of time that Neil DeChambeau was
2 deprived of oxygen.

3 MS. PISCEVICH: Those got changed is what I'm
4 saying, based on the EPS tape and the records. The EPS is
5 real time. The records are done after the fact. They are
6 not done contemporaneously when they are trying to save the
7 man's life.

8 MR. KOZAK: Well, aren't the nurses' notes done
9 contemporaneously?

10 MS. PISCEVICH: No, absolutely not.

11 MR. KOZAK: I see.

12 THE WITNESS: That's correct.

13 MS. PISCEVICH: They chart after the fact, the end
14 of the shift or whenever they get a chance.

15 BY MR. KOZAK:

16 Q My question is, do you remember what the
17 discrepancy was then between the nurses' notes and the EPS
18 tape?

19 A Well, I have articulated three or four times
20 already --

21 Q Besides the tachycardia, yeah.

22 A The V-tach. And then I can also just tell you
23 that Dr. Morady, his position was there was no malpractice
24 by Dr. Smith. After having reviewed the medical records
25 that he had and after having reviewed the tape that he had,

1 he said that his conduct did not fall below the standard of
2 care, and that he wouldn't have done anything any different.
3 That was pretty strong.

4 And I tried to probe him on that, and essentially
5 he told me that he simply would not have done anything any
6 differently in terms of the sequence of events that
7 occurred, after having reviewed all of the information. I
8 respect him, I trust him, that's why he was hired.

9 Q Okay. So as we sit here today, you don't have an
10 understanding of, besides the tachycardia, the discrepancies
11 between the nurses' notes and the EPS tape.

12 A Well, I do have some of that, because, from other
13 sources, and that would be the source from Mr. Lemons on
14 behalf of Dr. Smith, that after the cardiac event occurred
15 he did everything immediately. He ordered the advanced
16 cardiac life support, the anesthesiologist started inducing
17 drugs immediately, stat echo was called for immediately,
18 pericardiocentesis was called for immediately, all of those
19 things, which are not consistent with the records, all of
20 those things. So.

21 Q So Mr. Lemons told you that the EPS tape confirmed
22 that pericardiocentesis was performed immediately after
23 cardiac arrest?

24 A No. No, all of those were ordered, everything was
25 ordered immediately, that his reaction was immediate, that

1 jury as to what the standard of care was; isn't that
2 correct?

3 A If the case had gone to trial, and if I had an
4 expert who told me that there was malpractice in this case,
5 yes. But without him we simply had no case.

6 Q Okay. Would you have anticipated, based on the
7 affidavits of your experts, that the standard of care that
8 the jury would have been instructed to abide by would have
9 been that there had to be an immediate pericardiocentesis?

10 MS. PISCEVICH: Objection.

11 THE WITNESS: That's -- well --

12 MS. PISCEVICH: Objection as to form, lack of
13 foundation. And he's not here as an expert witness on his
14 own behalf.

15 If you are asking him if that's the standard for
16 an attorney, there is a standard of care instruction, end of
17 hunt. There's not a standard of care instruction for
18 procedure.

19 MR. KOZAK: Okay.

20 BY MR. KOZAK:

21 Q After you got this information from Dr. Morady
22 about his change of opinion, did you discuss it with Angela
23 DeChambeau?

24 A Yes, sir, I did.

25 Q When did you do that?

1 A As soon as I got off the phone with him, I
2 contacted Mrs. DeChambeau. I think I talked with him on the
3 22nd, I talked with her either on the 22nd or the 23rd,
4 which was a Friday. The 22nd was Thursday. And I met with
5 her on Monday, which would have been April 26, 2010.

6 Q And what did you tell her?

7 A What I told her was, and she was aware that we
8 were trying to find this tape and that the tape was found,
9 and we had provided it to Dr. Morady, that Dr. Morady had
10 reviewed the tape. I told her specifically that one of the
11 things that he was troubled by was that there was a
12 ventricular tachycardia event at about 12:22. And his
13 opinion in his affidavit was that he should have, Dr. Smith
14 should have stopped ablating at that time, that he was wrong
15 on that, because there wasn't a ventricular tachycardia
16 event at that time, so he saw that this EPS tape showed that
17 clearly. I told her that.

18 I also told her that he told me that, having
19 reviewed the records and reviewed the EPS tape, that he
20 wouldn't have done anything any differently. He did not
21 believe there was any medical malpractice.

22 The other thing that I told her and offered her
23 was to speak with him. And she understood that, she
24 understood it, she says we don't have an expert, we don't
25 have a case, she understood that. I offered her the ability

1 to speak with him on the phone about any of the medicine in
2 the case at all, anything, and that he would respond to her.

3 I also told her that if she wanted to do it in her
4 privacy with him as opposed to with me, I provided the phone
5 number to her. She said that wouldn't be necessary.

6 Q Did you offer her the option of getting another
7 expert besides Dr. Morady?

8 A No, because it wasn't necessary. Because she had
9 agreed without the expert we had no case. She agreed with
10 me.

11 Q Did you tell her that a continuance in the case
12 was possible if she wanted to get another expert?

13 MS. PISCEVICH: Objection, calls for lack of
14 foundation and total speculation.

15 MR. KOZAK: I'll withdraw the question.

16 BY MR. KOZAK:

17 Q Did you consider a continuance in the case or
18 request to the court for time to get another expert?

19 A It was too late to request a continuance, one.
20 But two, and more importantly, we discussed at the beginning
21 of the case that we were going to hire the best expert that
22 we could find in the area of electrophysiology, and the case
23 would either rise or fall based upon the expert's opinion.
24 If the expert didn't support a malpractice case, and she
25 said if the expert didn't support the malpractice case, then

1 that was fine, she would walk away from the case.

2 This was at the very outset of the case. I said
3 listen, I'm not a doctor, we will hire the best, and we will
4 ride with that doctor. And that's what we did, until he
5 changed his opinions.

6 And she was satisfied with that when we spoke. I
7 mean she wasn't happy for sure, but I did all that I could
8 to, I thought, to provide comfort to her, and also to make
9 available the doctor to her to explain any question that she
10 would have about anything that happened. And she just said
11 that wouldn't be necessary.

12 Q Did you then have a conversation with Jean Paul?

13 A Yes, sir, I did.

14 Q How long after your conversation with Angela?

15 A I, my best recollection is that I met with him on
16 May 3. I got ahold of him right away, but he works, and so
17 I would have met with him either on April 30, that Friday,
18 or the following Monday, and explained to him what had
19 happened, that the tape, the EPS tape, we obtained it, it
20 had been reviewed by Dr. Morady. I explained the, talked to
21 him about the ventricular tachycardia issue, but also the
22 issue that he simply believed, more importantly, that there
23 was no malpractice on Dr. Smith's part.

24 And he seemed satisfied with that explanation, and
25 then we had a discussion about another issue in his life at

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EXHIBIT ~~C~~ 3

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EXHIBIT ~~B~~ 2

EXHIBIT ~~B~~ 2

1 IN THE SECOND JUDICIAL DISTRICT COURT

2 OF THE STATE OF NEVADA

3 IN AND FOR THE COUNTY OF WASHOE

4 --oOo--

5 CERTIFIED COPY

6 ANGELA DECHAMBEAU and
7 JEAN-PAUL DECHAMBEAU, both
8 Individually and as SPECIAL
ADMINISTRATORS of the ESTATE
OF NEIL DECHAMBEAU,

Case No. CV12-00571

Dept. No. 7

9 Plaintiffs,

10 vs.

11 STEPHEN C. BALKENBUSH, ESQ.,
12 THORNDAL, ARMSTRONG, DELK,
13 BALKENBUSH and EISINGER, a
Nevada Professional Corporation;
and DOES I through X, inclusive,

14 Defendants.
15
16
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23

DEPOSITION OF DAVID E. SMITH, M.D.

Tuesday, May 7, 2013

Reno, Nevada

24 Reported by:

EVELYN J. STUBBS, CCR #356
MOLEZZO REPORTERS
(775) 322-3334

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.

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 a 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?

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?

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?

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?

1 it takes 24 to 48 hours to determine after an arrest
2 whether they're going to get a meaningful recovery.

3 Q. Do you have any estimate of how long this
4 arrest was?

5 A. I can only go back to the code note. I know
6 the reps start at 12:39, and it says that a blood
7 pressure was obtained by 12:54. I can't that say that
8 12:54 was the first time that the pulse was found, that's
9 just what was documented. It doesn't have the timing of
10 the pericardiocentesis on the code note.

11 Q. And when a person has had an arrest for
12 approximately 10 to 15 minutes, what does the outcome
13 generally mean?

14 A. It varies. I'm not a neurologist. I mean, it
15 varies.

16 Q. And in Mr. DeChambeau's case what was his
17 status after 24 to 48 hours?

18 A. As per the neurologist, they didn't think he
19 would make meaningful recovery. At least that's what I
20 read. I wasn't part of those meetings.

21 Q. Now, I know that you talked with
22 Mrs. DeChambeau to let her know about the complications
23 and what had occurred. Do you recall any other
24 conversations with her?

25 A. I recall the conversation after the -- in the

1 It said that "Dr. Smith violated the standard
2 of care by failing to restore Neil DeChambeau's pulse
3 within an almost four to five minutes of the time he
4 underwent a cardiac arrest at 12:39 p.m. on September 7,
5 2006."

6 Do you know anything about this timing of four
7 to five minutes and if this is close to what occurred?

8 A. I have no idea about that. And a lot of it
9 depends on if the patient is getting CPR at the time
10 also.

11 Q. Said, "Dr. Smith should have assumed the worst
12 (cardiac tamponade) and responded to the emergency by
13 immediately inserting a needle and drain the pericardial
14 sac surrounding the heart through one of several
15 approaches, followed by a pericardiocentesis, removal of
16 the accumulated blood in the sac immediately upon onset
17 of cardiac arrest and loss of blood pressure."

18 I'm going to kind of break this down. Did you
19 assume the worst, cardiac tamponade?

20 A. I did.

21 Q. And how did you respond to this?

22 A. I did a pericardiocentesis.

23 Q. And once you assumed it, how long does it take
24 to do a pericardiocentesis?

25 A. It varies. I mean some are difficult and some

1 aren't difficult.

2 Q. Do you recall in this case --

3 A. I don't remember it being difficult. But to
4 get all the fluid out, you have to drain it. So it
5 depends -- to complete the procedure, it depends on how
6 much blood is in the sac. If you only had 30 or 40 CCs
7 it would be quicker than if you had 300 CCs.

8 Q. So you have to take out the 300 CCs to
9 complete the pericardiocentesis?

10 A. Correct.

11 Q. So you inserted the needle and drained the
12 pericardial sac, is that correct?

13 A. Yes.

14 Q. And then it was followed by a
15 pericardiocentesis, is that correct?

16 A. That's all a part of the same thing.

17 Q. Oh, it's the same?

18 A. Um-hum.

19 Q. Okay. And it says, "Confirmation of cardiac
20 tamponade using transthoracic echo prior to the
21 pericardiocentesis resulted in an unnecessary harmful
22 delay in treatment."

23 First of all, did you use the echo prior to
24 doing the pericardiocentesis?

25 A. No.

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?

EXHIBIT ~~A~~ 1

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Washington County 2645
MD

EXHIBIT ~~A~~ 1

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,)
Plaintiffs,)

vs.)

Case No. CV12-00571

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

DEPOSITION OF MARK SEIFERT, M.D.

Phoenix, Arizona

July 1, 2013

(Copy)

Prepared by:
Deborah L. Tucker, RPR
Certified Reporter
No. 50464



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21:25:06 1 restored roughly 15 minutes to 20 minutes after the
21:25:10 2 initial event.

21:25:11 3 Q. What else did Dr. Smith do other than follow
21:25:14 4 the ACLS protocol?

21:25:16 5 A. It looks like at some point a
21:25:20 6 pericardiocentesis was performed.

21:25:20 7 Q. When did Dr. Smith say he did the
21:25:23 8 pericardiocentesis?

21:25:25 9 A. Dr. Smith said that he did pericardiocentesis
21:25:28 10 immediately.

21:25:28 11 Q. Is that what you're supposed to do?

21:25:29 12 A. It is what you're supposed to do.

21:25:31 13 Q. And you're saying he's lying?

21:25:33 14 A. I'm not sure that I view his testimony as
21:25:38 15 consistent with the entirety of the remaining medical
21:25:41 16 record.

21:25:43 17 Q. Well, the pericardiocentesis is not timed
21:25:49 18 anywhere in the records, is it?

21:25:50 19 A. Well, there are some places where it's timed.
21:25:55 20 As a indirect indicator -- and that is that it is the
21:25:59 21 only thing that would have restored the pulse, one can
21:26:04 22 reasonably infer that the pulse was restored immediately
21:26:07 23 following the pericardiocentesis.

21:26:10 24 Q. So, you're saying that when you do a
21:26:12 25 pericardiocentesis the pulse is immediately restored?

21:26:16 1 A. Essentially, that's correct.

21:26:18 2 Q. In all cases?

21:26:19 3 A. No. In some cases the patient dies. In some
21:26:22 4 cases the patient has to go to surgery.

21:26:31 5 Q. Dr. Smith is indicating that he did the
21:26:35 6 pericardiocentesis immediately upon recognizing the
21:26:38 7 hemodynamic instability or when the code was called.
21:26:41 8 And you disagree that he did that?

21:26:44 9 A. It doesn't appear it was the done as promptly
21:26:47 10 as his testimony would suggest.

21:26:48 11 Q. Okay. And you weren't there, correct?

21:26:50 12 A. That is correct.

21:26:52 13 Q. And so tell me what else you base that opinion
21:26:55 14 on that it wasn't done upon recognizing the hemodynamic
21:27:00 15 instability.

21:27:01 16 A. Well, CPR appears to be one of the first
21:27:03 17 things started, though that also seems to have been done
21:27:10 18 in conjunction with the attempt at pharmacologic
21:27:14 19 resuscitation.

21:27:14 20 Q. Well, pharmacologic resuscitation is done by
21:27:18 21 the anesthesiologist, is it not?

21:27:19 22 A. It typically is done by an anesthesiologist or
21:27:22 23 a nurse.

21:27:22 24 Q. In this case there was an anesthesiologist in
21:27:24 25 the room. Do you understand that?

21:27:25 1 A. I do.

21:27:26 2 Q. And the anesthesiologist would automatically
21:27:29 3 know to get Epinephrine, et cetera?

21:27:32 4 A. One would hope.

21:27:35 5 Q. So, what was Dr. Smith doing -- well, first of
21:27:38 6 all, who was doing the CPR?

21:27:40 7 A. It's not stated in the record.

21:27:41 8 Q. What did Dr. Smith say?

21:27:44 9 A. I don't recall who was doing the CPR,
21:27:46 10 according to Dr. Smith's testimony.

21:27:52 11 Q. Dr. Smith says that he immediately did the
21:27:56 12 pericentesis -- pericardiocentesis; is that correct?

21:27:59 13 A. That's correct.

21:28:00 14 Q. So, when one does a pericardiocentesis, if
21:28:05 15 it's not successful what does that tell you?

21:28:07 16 A. That tells me that the patient is dead.

21:28:11 17 Q. And they continue to do CPR and resuscitative
21:28:16 18 effects, correct?

21:28:17 19 A. I'm sorry, say that again, please.

21:28:19 20 Q. They did -- in this particular case the
21:28:21 21 patient wasn't dead. He did the pericardiocentesis.

21:28:25 22 They continued to do CPR. They continued -- the
21:28:27 23 anesthesiologist continued to work on him. Is that
21:28:29 24 correct?

21:28:31 25 A. It appears to be correct, though not

21:28:33 1 necessarily in the order you relate.

21:28:40 2 Q. Well, isn't one of the risks of doing this
21:28:43 3 ablation procedure death --

21:28:45 4 A. It is.

21:28:46 5 Q. -- or other issues?

21:28:48 6 A. There are other complications, as well.

21:28:50 7 Q. Did the patient have any complications?

21:28:53 8 A. They did.

21:28:55 9 Q. What complications did the patient have?

21:28:57 10 A. Pericardial tamponade, anoxic brain injury
21:29:03 11 and, ultimately, death.

21:29:10 12 Q. Now, according to this letter it says

2 29:15 13 Dr. Smith should have assumed the worst, a cardiac
21:29:19 14 tamponade. According to his deposition he did assume
21:29:23 15 that; is that correct?

21:29:23 16 A. According to his deposition, that is correct.

21:29:26 17 Q. And you disagree with his deposition, if I
21:29:29 18 understand it?

21:29:30 19 A. It seems to be at odds with the remainder of
21:29:33 20 the record in its totality.

21:29:36 21 Q. And we'll go into that in a minute.

21:29:39 22 And then it says he should have immediately
21:29:43 23 inserted a needle to drain the pericardial sac.

21:29:46 24 According to Dr. Smith, he did that; is that correct?

21:29:48 25 A. That's correct.

21:31:03 1 another echo imaging technology present.

21:31:08 2 Q. I understand, but he did it at the end of the
21:31:10 3 procedure to see if he had all of the blood. So, that
21:31:12 4 would not be below standard of care?

21:31:14 5 A. It would not be if that's the order events
21:31:18 6 occurred in.

21:31:20 7 Q. Well, who else can tell us the order other
21:31:21 8 than Dr. Smith?

21:31:22 9 A. Well, we have a log that tells us when the
21:31:25 10 stat echo was paged. And we have a time that the pulse
21:31:30 11 was restored, which, to a reasonable degree of medical
21:31:33 12 certainty, was immediately following the removal of the
2 31:36 13 blood from the pericardial space.

21:31:47 14 Q. With respect to that record, do you believe it
21:31:52 15 to be a correct record, or do you believe there are
21:31:54 16 inconsistencies in the records that you reviewed?

21:31:57 17 A. I believe both to be true. I believe that the
21:32:00 18 records are overall correct. And I believe that there
21:32:03 19 are, indeed, some inconsistencies within them.

21:32:07 20 Q. All right. Tell me what was overall -- what
21:32:11 21 do you -- what do you mean by the -- what time does the
21:32:15 22 record even show a pericentesis being -- a
21:32:18 23 pericardiocentesis being done?

21:32:24 24 A. I don't see the specific time entry for the
21:32:28 25 pericardiocentesis.

22:27:45 1 It says -- he puts in his affidavit, although,
22:27:49 2 that hemodynamic condition of the patient stabilized he
22:27:52 3 could not be awakened. And he goes on and talks about
22:27:56 4 that, and then concludes on Paragraph 12 that Dr. Smith
22:28:01 5 met the standard of care, meaning that there were
22:28:06 6 appropriate indications to undertake the ablation
22:28:08 7 procedure, informed consent. And the procedure was
22:28:12 8 performed appropriately, and he says, as described in
22:28:18 9 his record, Dr. Smith's record, and that the hemodynamic
22:28:22 10 emergency was addressed without unreasonable delay.

22:28:25 11 I assume that you would agree with all of his
22:28:28 12 conclusions except the delay?

22:28:30 13 A. That's correct.

22:28:32 14 Q. And tell me in your opinion why you believe
22:28:39 15 that Dr. Smith delayed in doing the pericardiocentesis
22:28:44 16 when he says he did not.

22:28:45 17 A. Well, looking at the totality of the record,
22:28:50 18 there are several different people in the room at the
22:28:51 19 same time, each of them keeping their own records. The
22:28:55 20 times may not reference one another accurately, but the
22:28:59 21 records in and of themselves appear to be fairly
22:29:02 22 self-consistent, each one in itself.

22:29:05 23 The anesthesiologist's record records a
22:29:08 24 10-minute delay between CPR starting or cardiac arrest
22:29:12 25 and obtaining an echo, at 10 minutes after the event

22:

22:29:16 1 still showed a large pericardial effusion.

22:29:19 2 The nursing log shows a lot of interventions
22:29:23 3 taking place over a period of 15 minutes or so, none of
22:29:27 4 which included reversal anticoagulation with Protamine,
22:29:32 5 none of which included wide open fluid boluses, and none
22:29:35 6 of which included pericardiocentesis.

22:29:39 7 Since the only thing that would have restored
22:29:42 8 the blood pressure would be the pericardiocentesis, and
22:29:45 9 since in my experience having had this complication and
22:29:49 10 dealt with it on multiple occasions, I know that within
22:29:53 11 a matter of a few seconds or a minute or so, in
22:30:00 12 evacuating that fluid the blood pressure increases. It
22:30:02 13 is reasonable and most consistent with the records to
22:30:06 14 believe that the pericardiocentesis immediately preceded
22:30:12 15 the restoration of a pulse by seconds and not by many
22:30:14 16 minutes.

22:30:16 17 And so we have a couple of different concepts
22:30:19 18 of what took place in the room by a number of different
22:30:23 19 observers, one of whom is Dr. Smith. But his assertion
22:30:29 20 as to the sequence and timing seems, to me, to be at
22:30:34 21 odds with the majority.

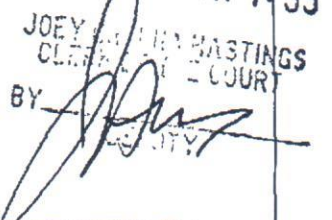
22:30:35 22 Q. Okay. So, I guess this case is who the jury
22:30:40 23 believes, you or Dr. Smith?

22:30:42 24 A. Or the medical records.

22:30:44 25 Q. And then do you know Dr. Pearl from Stanford?

CV12-00571
A DECHAMBEAU ETAL
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OPRMO

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2013 SEP 3 PM 1:55
JOEY HASTINGS
CLERK OF COURT
BY 

9
10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

11 **IN AND FOR THE COUNTY OF WASHOE**

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

Case No. CV12-00571

Dept. No. 7

17 Plaintiffs,

18 vs.

19 **PLAINTIFFS' OPPOSITION TO**
20 **DEFENDANTS' MOTION FOR**
21 **SUMMARY JUDGMENT**

22 STEPHEN C. BALKENBUSH, ESQ.,
23 THORNDAL, ARMSTRONG, DELK,
24 BALKENBUSH and EISINGER,
25 A Nevada Professional Corporation,
26 And DOES 1 through X, inclusive.

27 Defendants.
28

COME NOW, Plaintiffs ANGLEA DECHAMBEAU and JEAN-PAUL
DECHAMBEAU ("Plaintiffs"), by and through their counsel of record, CHARLES R.
KOZAK, ESQ., and submit their response in opposition to defendants STEPHEN C.
BALKENBUSH, ESQ., and THORNDAL, ARMSTRONG, DELK, BALKEN BUSH and
EISINGER's ("Defendants") Motion for Summary Judgment. Plaintiffs oppose Defendants'
motion on grounds that triable issues of disputed material fact exist for this case to go to a
jury. Plaintiffs support their opposition with the records and papers on file with this Court,
the following Memorandum of Points and Authorities and the attached exhibits.

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1 **I. Introduction**

2 This malpractice action involves two key triable issues of fact. First, with regards to
3 the underlying medical malpractice, a jury is needed to determine whether Dr. Smith was
4 negligent by failing to timely perform a pericardiocentesis on the deceased Neil DeChambeau.
5 Second, with respect to Defendants' legal malpractice, a jury will need to decide whether
6 Stephen Balkenbush, Esq. was negligent in failing to prosecute the medical malpractice
7 lawsuit given strong evidence in the record that Dr. Smith failed to meet the standard of care.

8 As to the first issue, Plaintiffs are able to present expert testimony and medical reports
9 showing that Dr. Smith's actions fell below the standard of care. Dr. Smith was not the only
10 witness present in the operating room. Testimony and documents exist that are in direct
11 conflict with the statements made by Dr. Smith in his own defense. One such communication
12 is from Dr. Kang, now deceased, to his attorney Michael Navratil, in which he indicts Dr.
13 Smith for not having performed the pericardiocentesis immediately after Neil DeChambeau's
14 cardiac arrest as he said he did. These contradictory statements create a fact issue requiring
15 review by a trier of fact rather than a determination as a matter of law.

16 As to the legal malpractice issue, Mr. Balkenbush breached his standard of care to his
17 clients in multiple ways, the subject matter and facts of which are also in dispute. Primarily,
18 Mr. Balkenbush was negligent in failing to realize that the timing of the pericardiocentesis
19 was the critical issue in the underlying case. Instead, he sat on the case for three years waiting
20 for irrelevant information on the EPS tape. He should have taken Dr. Kang's deposition
21 immediately, but failed to do so. He also neglected to inform his experts and clients of vital
22 information in his haste to get out of the case. Simply put, Mr. Balkenbush's lack of
23 experience in trying a malpractice case on behalf of a plaintiff and mishandling of the action
24 deprived the DeChambeau Plaintiffs from a successful trial or settlement of their lawsuit.
25 Accordingly, a trier of fact is necessary to weigh the facts and evidence that Plaintiffs intend
26 to present in this case, and Defendants' motion for summary judgment should be denied.

II. Statement of Undisputed Facts

1. The standard of care for an electrophysiologist performing a cardiac ablation procedure when the patient goes into cardiac arrest is to immediately perform a pericardiocentesis to restore the patient's pulse within a few minutes of the arrest. [Exhibit A, Seifert Depo. at P24 L7-16, P24 L24 - P25 L10; Exhibit B, Smith Depo. at P26 L3 - P 27 L3.]

2. On September 6, 2006, Neil DeChambeau presented for a cardiac ablation procedure at Washoe Medical Center (n/k/a Renown Regional Medical Center) under the care of Dr. David Smith. [Exhibit C, Code Notes, dated September 6, 2006.]

3. The Code Notes reflect the following sequence of events between 12:39 p.m. and 12:54 p.m. [Exhibit B, Smith Depo. at P10 L10-17, P11 L1-3, P11 L11-20.]

4. At 12:39 p.m., Neil DeChambeau went into cardiac arrest and a "Code Blue" was noted in the record. [Exhibit C]

5. At 12:44 p.m., a transthoracic echo cardiogram (ECHO) machine was hooked up at Neil DeChambeau's bedside. [Exhibit C]

6. At 12:49 p.m., Dr. Smith observed a large pericardial effusion through the stat echo machine confirming the existence of a cardiac tamponade (puncture of the atrium wall). [Exhibit C]

7. At 12:54 p.m. and 53 seconds, Neil DeChambeau's pulse was detected. [Exhibit C]

8. Neil DeChambeau died of anoxia (lack of oxygen to the brain) because his pulse was not restored for approximately 15 minutes. [See Exhibit C.]

9. The code was from 12:39 p.m. to 12:54 p.m., but no timing for the pericardiocentesis appears on the Code Note. [See Exhibit C; Exhibit B, Smith Depo. at P41 L3-10.]

10. There is no record of when the pericardiocentesis was done. [Exhibit A, Seifert Depo at P29 L20-24.]

1 11. Dr. Smith testified that the pericardiocentesis was not difficult and that it was
2 completed. [Exhibit B, Smith Depo. at P43 L21 - P44 L3-16.]

3 12. Dr. Smith's testimony regarding the timeliness of the pericardiocentesis
4 contradicts the medical record. [Exhibit A, Seifert Depo at P27 L12-20, P62 L14 - P63 L21.]

5 13. Absent unusual complications which were not present in this case, a
6 pericardiocentesis procedure will restore a cardio ablation patient's pulse immediately.
7 [Exhibit A, Seifert Depo at P24 L17-23; Exhibit G, Letter from Mr. Navratil to Mr.
8 Balkenbush dated April 21, 2010.]

9 14. Dr. Mark Siefert testified that "one can reasonably infer that the pulse was
10 restored immediately following pericardiocentesis." [Exhibit A, Seifert Depo at P24 L17-23.]

11 15. The patient will respond immediately or he is "dead." [Exhibit A, Seifert Depo
12 at P26 L14-16.]

13 16. To a reasonable degree of medical certainty, the pulse was restored when the
14 pericardiocentesis was done. [Exhibit A, Seifert Depo at P29 L7-13.]

15 17. This was Dr. Smith's first experience with a patient undergoing cardiac arrest
16 during an atrial fibrillation ablation procedure. [Exhibit B, Smith Depo. at P47 L15-21.]

17 18. Dr. Kang, the anesthesiologist in the operating room at the time of the cardiac
18 arrest, had never worked with Dr. Smith before. [Exhibit B, Smith Depo. at P8 L5-10.]

19 19. Defendant Stephen Balkenbush filed a medical malpractice complaint on
20 behalf of Plaintiffs on or about September 5, 2007. [Complaint at P3 L8.]

21 20. The DeChambeau lawsuit was his first medical malpractice case in which he
22 represented a plaintiff. [See Exhibit D, Balkenbush Depo at P6 5 - P7 L7.]

23 21. From the time Mr. Balkenbush filed the complaint up until he filed a dismissal
24 of the case on May 5, 2010, he did not issue any formal written discovery or take the
25 depositions of any experts or percipient witnesses. [Exhibit D, Balkenbush Depo. at P26 L21-
26 24, P28 L12-17.]

1 22. Mr. Balkenbush did not take the deposition of Dr. David E. Smith, the
2 defendant physician in the underlying matter. [Exhibit D, Balkenbush Depo. at P27 L9-11.]

3 23. Mr. Balkenbush also failed to take the deposition of percipient witness Dr.
4 Kang. [Exhibit E, Gillock Depo at P25 L22 - P26 15.]

5 24. These percipient witness depositions were needed early on in the case to
6 identify the players. [Exhibit E, Gillock Depo at P41 L6-10.]

7 25. Taking no percipient witness depositions is beneath the standard of care
8 because experts don't have the information necessary for accurate reports. [Exhibit E, Gillock
9 Depo at P46 L20-25.]

10 26. Expert witness depositions are required where experts differ on timelines or
11 where percipient witnesses are not deposed. [Exhibit E, Gillock Depo at P44 L19 – P45 L3.]

12 27. Taking expert depositions after Dr. Morady's review of the EPS tape would
13 not be timely and was beneath the standard of care. [Exhibit E, Gillock Depo at P45 L8-15.]

14 28. Mr. Balkenbush did not propound interrogatories regarding the sequence of
15 events in the operating room. [Exhibit D, Balkenbush Depo. at P28 L12-17.]

16 29. Mr. Balkenbush did obtain the medical records from Washoe Medical Center.
17 [Exhibit D, Balkenbush Depo. at P7 L8-12.]

18 30. Mr. Balkenbush admitted that he doesn't know the standard of care in ablation
19 procedures – he left this to his experts. [Exhibit D, Balkenbush Depo. at P21 L3-13.]

20 31. Mr. Balkenbush understood that Drs. Mazzei and Morady opined that Drs.
21 Kang and Smith did not perform a pericardiocentesis "within minutes" of cardiac arrest, and
22 that this was negligence. [Exhibit D, Balkenbush Depo. at P14 L2-12.]

23 32. Nevertheless, Mr. Balkenbush never made any effort to reconcile the
24 differences in the sequence of events in the various medical records. [Exhibit D, Balkenbush
25 Depo. at P19 L11 – P20 L13.]

26 33. Mr. Balkenbush did not conduct discovery in the case because he was waiting
27 to have Dr. Fred Morady review a "PRUCKA" electronic recording of the events in the
28

1 operating room that took place on September 6, 2006. [Exhibit D, Balkenbush Depo. at P27
2 L9-17.]

3 34. Mr. Balkenbush got the tape for Dr. Morady in late March 2010, [Exhibit D,
4 Balkenbush Depo. at P25 L10-12.] even though he'd known about it as early as mid 2007.
5 [Exhibit D, Balkenbush Depo. at P24 L3-5; Exhibit E, Gillock Depo. at P24 L24.]

6 35. The PRUCKA or EPS tape only revealed that there was no "ventricular
7 tachycardia" at 12:22 p.m. such that Dr. Smith was within the standard of care in proceeding
8 with the operation. [Exhibit D, Balkenbush Depo. at P29 L8-22, P31 L9-13.]

9 36. The PRUCKA tape has nothing to do with pericardial effusion and did not
10 show the pericardiocentesis. [Exhibit D, Balkenbush Depo. at P37 L16 - P38 L23; Exhibit B,
11 Smith Depo. at P27 L4-11.]

12 37. The PRUCKA tape was a "red herring" which provided no further relevant
13 information with regards to the issue of Dr. Smith's failure to meet the standard of care on
14 September 6, 2006. [Exhibit F, Navratil Depo.¹ at P50 L23 - P51 L8; Exhibit E, Gillock
15 Depo. at P35 L14-21.]

16 38. Mr. Balkenbush never elicited from Dr. Morady specifically what in the
17 records caused him to change his opinion other than the PRUCKA tape. [Exhibit D,
18 Balkenbush Depo. at P32 L9 - P33 L5.]

19 39. Mr. Balkenbush failed to ascertain why Dr. Morady withdrew. [Exhibit E,
20 Gillock Depo. at P26 L24 - 27 L9.]

21 40. On April 21, 2010, attorney Michael Navrotil sent a letter via facsimile to Mr.
22 Balkenbush stating that his client Dr. Kang would testify under oath to the following based
23 upon his recollection and review of the chart if called as a witness: [Exhibit F, Navratil Depo.
24 at P28 L11 - P30 L13; Exhibit G, Letter from Mr. Navratil to Mr. Balkenbush dated April 21,
25 2010.]

26 _____
27 ¹ Defendants' counsel, Margo Piscevich, and Defendants' witness Michael Navratil represented at Mr. Navratil's
28 deposition that he had not been retained as an expert and would not be called as an expert witness. [Exhibit F,
Navratil Depo at P52 L23 - P 53 L11.] However, Defendants' counsel has since named Mr. Navratil as an
expert witness.

- 1 a. At 12:39 p.m., Dr. Kang called an arrest. [Exhibit G, p.1]
2 b. Dr. Kang recalled the nurses and staff responding immediately and started
3 CPR. [Exhibit G, p.1]
4 c. While proceeding with resuscitation, Dr. Smith called for a STAT echo by
5 placing a call to the echo technician. [Exhibit G, p.1]
6 d. While waiting for the ECHO machine to arrive, the patient was receiving
7 chest compressions and continue to receive vasoactive drugs. [Exhibit G,
8 p.1]
9 e. Again, plus or minus a minute or so, at around 12:48 p.m., the echo
10 technician arrived and performed the transthoracic ECHO. [Exhibit G, p.1]
11 f. By 12:54, Dr. Smith had successfully cannulated the pericardium and had
12 withdrawn 300 cc of blood. [Exhibit G, p.1]
13 g. The heart immediately became pulsatile with the return of the peripheral
14 pulses by palpitation. [Exhibit G, p.1]
15 h. If Dr. Kang were to have testified, he would have said that Dr. Smith was
16 "preparing" to do the pericardiocentesis as the stat echo was arriving and
17 had completed it by 12:54 p.m. [Exhibit G, pp.1-2.]

18 41. Following his review of the PRUKA tape, on April 22, 2010, Dr. Morady
19 withdrew as an expert on behalf of the DeChambeau Plaintiffs. [Exhibit D, Balkenbush
20 Depo. at P32 L9-15, P34 L4-7, P37 L4-11; P37 L22 - P38 L38.]

21 42. On April 26, 2010, Mr. Balkenbush advised plaintiff Angela DeChambeau to
22 dismiss her case against Dr. Smith because Dr. Morady had withdrawn as an expert on her
23 behalf. [Exhibit D, Balkenbush Depo. at P41 L21 - P42 L5.]

24 43. Mr. Balkenbush did not offer to seek a continuance of the trial set for July of
25 2010. [Exhibit D, Balkenbush Depo. at P43 L11-P44 L 11.]
26
27
28

1 44. Mr. Balkenbush did not offer to attempt to obtain another expert on his client's
2 behalf; nor did he consider getting another expert. [Exhibit D, Balkenbush Depo. at P43
3 L610, P33 L11-14.]

4 45. On May 5, 2010, Mr. Balkenbush filed a notice of dismissal with prejudice of
5 the DeChambeau Plaintiffs' case against Dr. Smith. [Complaint at P5 L6.]

6 **III. Statement of Disputed Facts**

7 1. Dr. Smith immediately performed a pericardiocentesis. [Exhibit B, Smith
8 Depo. at P26 L3 – P27 L 3, P43 L11-22.]

9 Plaintiffs dispute this fact relied upon by Defendants. At best, Dr. Smith's statement
10 is an acknowledgment of the standard of care. As set forth in Plaintiffs' above statement of
11 undisputed of facts, there was another witness present in the operating room who would have
12 testified contrary to Dr. Smith's testimony. Additionally, the above testimony by Plaintiffs'
13 expert witnesses as well as the medical records reveal and emphasize the 15 minute gap in
14 time between cardiac arrest and pulse restoration. Dr. Smith's testimony contradicts the
15 medical record. [Exhibit A, Seifert Depo at P27 L12-20, P62 L14 – P63 L21.] Had Dr. Smith
16 immediately performed a pericardiocentesis, the decedent's pulse would have been restored
17 much sooner. Moreover, Dr. Smith's recall of the sequence of events differs from those of
18 designated expert witnesses Drs. Doshi, Mezzei, Seifert and Morady. [See e.g., Exhibit E,
19 Gillock Depo at P66 L21 – P67 L10.]

20 2. The EPS tape needed to be obtained before Mr. Balkenbush could conduct
21 discovery. [Exhibit D, Bulkenbush Depo at P27 L9-17.]

22 Plaintiffs dispute this fact because the EPS tape only showed that ventricular
23 tachycardia was not present. It did not show when the pericardiocentesis occurred. Thus, the
24 tape did not provide any further relevant information regarding Dr. Smith's breach of the
25 standard of care in the underlying action. Plaintiffs further reject and dispute this fact to the
26 extent that Defendants rely on it to justify or excuse nearly three years of failure to prosecute
27 the underlying action.

IV. Legal Argument

“Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, indicates there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. If a reasonable jury could find for the non-moving party, summary judgment is inappropriate. Furthermore, a district court cannot make findings concerning the credibility of witnesses or weight of evidence in order to resolve a motion for summary judgment.” *Borgerson v. Scanlon*, 117 Nev. 216, 19 P.3d 236, 238 (Nev., 2001). In response to a movant’s summary judgment motion, the non-moving party is given the opportunity to “set forth specific facts demonstrating the existence of a genuine issue of material fact for trial.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-1031 (2005). See also NRCP 56(e).

Here, Plaintiffs raise two fact issues for a jury that find support in the record. The only issue in the underlying medical malpractice case is whether Dr. Smith performed the pericardiocentesis before or after he ordered the stat echo. This issue speaks to whether Dr. Smith acted below the standard of care by failing to timely perform a pericardiocentesis. The only issue on the legal malpractice case is whether Mr. Balkenbush met acceptable standards of legal services given the weight of evidence that existed against Dr. Smith: namely, that the doctor did not perform the pericardiocentesis immediately after the cardiac arrest as he said he did.

A. Dr. Smith’s Actions Fell Below the Medical Standard of Care When He Failed to Timely Perform A Pericardiocentesis.

Dr. Smith has indicated that he immediately performed a pericardiocentesis. [Exhibit B, Smith Depo at P26 L3 – P27 L 3, P43 L11-22.] However, the fatal sequence of events that transpired during the decedent’s ablation procedure tells a different story. “Pericardiocentesis consists of inserting a needle into the patient’s chest to determine if fluid in the pericardial sac is present. If so, the needle would be used to continue withdrawing fluid, thereby relieving the cardiac tamponade.” *Holston v. Sisters of Third Order of St. Francis*, 165 Ill.2d 150, 159, 209

1 Ill.Dec. 12 (Ill., 1995).² It is undisputed that the decedent's pulse was not restored until 15
2 minutes after cardiac arrest. [Exhibit C.] Plaintiffs' expert witness Dr. Mark Siefert testified
3 that "one can reasonably infer that the pulse was restored immediately following
4 pericardiocentesis." [Exhibit A, Seifert Depo at P24 L17-23.] The medical record indicates
5 that cardiac arrest began at 12:39 p.m. and that a pulse was not detected until 12:54 p.m. and
6 53 seconds. [Exhibit C.] Therefore, Dr. Smith could not have immediately performed a
7 pericardiocentesis as he said he did. To the extent that this fact is disputed, a trier of fact will
8 need to weigh the evidence to make a determination. This is a fact issue that cannot be
9 resolved as a matter of law and which directly bears on the elements of causation and standard
10 of care set forth in Defendants' brief regarding medical malpractice.

11 Defendants seek to eliminate this very important issue by focusing on Dr. Morady's
12 change in opinion with regards to Dr. Smith's liability after having reviewed the EPS tape.
13 This is a "red herring" theme that has no bearing on causation or medical standard of care.
14 The EPS or "PRUCKA" tape had no influence on the underlying medical malpractice lawsuit.
15 [Exhibit F, Navrotil Depo. at P50 L23-P51 L8.] The EPS tape shows only that ventricular
16 tachycardia was not present. [Exhibit D, Balkenbush Depo. at P29 L8-22, P31 L9-13.] This
17 is irrelevant to whether Dr. Smith's actions met the standard of care because the EPS tape
18 does not show how long after cardiac arrest the pericardiocentesis was performed. [Exhibit
19 D, Balkenbush Depo. at P37 L16 - P38 L23; Exhibit B, Smith Depo. at P27 L4-11.]

20 **B. Defendant Balkenbush Failed to Meet Acceptable Standards of Legal Services**
21 **Because He Failed to Identify and Prosecute the Key Item of Malpractice In**
22 **the Underlying Action.**

23 Mr. Balkenbush should have recognized the irrelevance of the EPS tape and not
24 wasted almost three years for his expert Dr. Morady to review irrelevant evidence. In the
25 meantime, he should have immediately deposed Dr. Kang who had relevant testimony with
26 respect to the pericardiocentesis having not been timely performed. Mr. Balkenbush failed to

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

1 identify that the timing of the pericardiocentesis was the key issue and pursue discovery on
2 this issue. Even at his most recent deposition, Mr. Balkenbush seemed confused as to the
3 importance of this issue. At the very least, Mr. Balkenbush should have been on notice when
4 he received Mr. Navrotil's April 21, 2010 letter explaining what Dr. Kang's testimony against
5 Dr. Smith would be and which clearly contradicts Dr. Smith's testimony as to the issue of the
6 timing of the pericardiocentesis. Apparently he did not communicate this vital information to
7 Dr. Morady the next day on April 22, 2010. Had Dr. Morady been aware that Dr. Kang had
8 witnessed Dr. Smith perform the pericardiocentesis at 12:54 p.m. he would undoubtedly not
9 have withdrawn as an expert. Despite all of this, Mr. Balkenbush did not continue the trial
10 date scheduled for July 2010. Instead, he filed a notice of dismissal two weeks later.

11 Rather than evaluating the facts and issues of his own case, Mr. Balkenbush
12 excessively relied on the opinions of one particular medical expert, his esteemed Dr. Morady.
13 Defendants cite no law or authority for what can be best described as their "world-class
14 preeminent expert" defense, a defense which they seem to believe relieves attorneys from
15 liability for misconduct in law practice simply because their renowned expert witness
16 unexpectedly had a change of opinion for which he refused to give any logical explanation.
17 As discussed above, Dr. Morady's change in opinion was based on irrelevant evidence from
18 the EPS tape. This was apparently "good enough" for Mr. Balkenbush who admitted he never
19 elicited from Dr. Morady specifically what in the records caused him to change his opinion
20 other than the EPS tape and who made no efforts to ascertain why Dr. Morady backed out.
21 [Exhibit D, Balkenbush Depo. at P32 L9 - P33 L5; Exhibit E, Gillock Depo. at P27 L1.] Dr.
22 Morady needs to be cross examined before a jury to determine if his opinions are able to
23 qualify as "expert" testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.
24 579 (1993).

25 With or without Dr. Morady, it was counsel's duty to prosecute the DeChambeau
26 Plaintiffs' lawsuit given strong evidence in the record that Dr. Smith failed to meet the
27 standard of care. If Mr. Balkenbush was unable to do this, then the law firm of Thorndal,
28

1 Armstrong, Delk, Balkenbush and Eisinger should have transferred the case to an attorney
2 more familiar with plaintiffs' lawsuits involving the type of medicine in this case. Instead,
3 Mr. Balkenbush's failures to identify the key item of Dr. Smith's medical malpractice and to
4 conduct the necessary discovery early on in the case deprived the DeChambeau Plaintiffs
5 from a successful trial or settlement of their lawsuit. Mr. Balkenbush did not need Dr.
6 Morady's opinion in order to diligently conduct discovery needed to reconcile inconsistencies
7 in the medical records. He did not need to wait for Dr. Morady's review of the EPS tape in
8 order to take the depositions of percipient witnesses, such as Dr. Kang, who possessed crucial
9 information as to the sequence of events and timing of the pericardiocentesis. By letting years
10 pass by without identifying the issues and working up his case, Mr. Balkenbush breached his
11 duty to the Plaintiffs to "use such skill, prudence, and diligence as lawyers of ordinary skill
12 and capacity possess in exercising and performing the tasks which they undertake." *Mainor*
13 *v. Nault*, 120 Nev. 750, 774, 101 P.3d 308 (2004).

14 **C. Defendants' Arguments Involve Factual Questions of Credibility**

15 The "summary judgment procedure is not available to test and resolve the credibility
16 of opposing witnesses to a fact issue." *Aldabe v. Adams*, 81 Nev. 280, 285, 402 P.2d 34, 37
17 (Nev., 1965) (citing *Short v. Hotel Riviera, Inc.*, 378 P.2d 979, 79 Nev. 94 (Nev., 1963)).
18 "The trial judge may not in granting summary judgment pass upon the credibility or weight of
19 the opposing affidavits or evidence. That function is reserved for the trial. On a summary
20 judgment motion the court is obligated to accept as true all evidence favorable to the party
21 against whom the motion is made." *Hidden Wells Ranch, Inc. v. Strip Realty, Inc.*, 425 P.2d
22 599, 601, 83 Nev. 143, 145 (Nev., 1967) (citations omitted). Accordingly, this Court "cannot
23 make findings concerning the credibility of witnesses or weight of evidence in order to
24 resolve a motion for summary judgment." *Borgerson v. Scanlon*, 117 Nev. 216, 19 P.3d 236,
25 238 (Nev., 2001).

26 Whether or not Dr. Smith's statement that he immediately performed a
27 pericardiocentesis is true is a fact issue of credibility. A jury will need to determine whether
28

1 the opposing statements of Dr. Kang, expert witnesses and the contents of the medical records
2 are more or less credible. Likewise, a jury will need to weigh evidence concerning whether or
3 not Mr. Balkenbush was justified in relying on Dr. Morady's review of irrelevant evidence
4 and evaluate his purported reasons for not taking the depositions of Dr. Kang and Dr. Smith
5 and conducting other essential fact discovery. These are factual questions of credibility that
6 are reserved for a trier of fact.

7 Defendants also face both credibility and admissibility problems with respect to Dr.
8 Morady's "expert" testimony. It is likely that Dr. Morady's testimony will not get to the jury
9 because he cannot withstand an "offer of proof" that his opinions are based on reliable or
10 trustworthy scientific evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,
11 593-594 (1993). Dr. Morady recently gave deposition testimony on written questions in the
12 present legal malpractice action. Previously, on August 29, 2007, Dr. Morady signed an
13 affidavit in which he stated that Dr. Smith was negligent. [Exhibit H, Depo. of Dr. Morady
14 on Written Questions at P4 L14-20.] He has since revoked his prior opinion that Dr. Smith
15 did not perform a timely pericardiocentesis. [Exhibit H at P5 L4-12.] He now opines that the
16 pericardiocentesis was performed before the stat echo was taken, but gives no basis for his
17 change of opinion. [Exhibit H at P10 L25 – P11 L24.] Dr. Morady does not explain
18 specifically what in the medical records has caused him to change his opinion. The only thing
19 that has changed is that Dr. Morady has now read Dr. Smith's deposition testimony given in
20 the legal malpractice case in which Dr. Smith claims to have performed the pericardiocentesis
21 immediately. He now believes in the credibility of the treating physician and offers no other
22 new medical or scientific evidence or explanation. Conclusory opinions, particularly those
23 that contradict earlier opinions by the same expert, are not acceptable as a basis for expert
24 opinion and will not pass the *Daubert* or *Frye* gatekeeping standards.

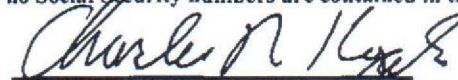
25 V. Conclusion

26 Plaintiffs have set forth specific facts demonstrating that two genuine issues of
27 material fact exist for trial. These issues involve witness credibility and will require the fact
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1 finder to weigh conflicting evidence. These are not questions of law that can be resolved on a
2 motion for summary judgment. Accordingly, Plaintiffs respectfully request that this Court
3 deny Defendants' motion.

4 Dated September 3, 2013

5
6 Pursuant to NRS 239B.030 the undersigned certifies no Social Security numbers are contained in this document.

7 

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LIST OF EXHIBITS

<u>Exhibit A</u>	Deposition of Mark Seifert, M.D., taken on July 1, 2013	9 pages
<u>Exhibit B</u>	Deposition of David E. Smith, M.D., taken on May 7, 2013	11 pages
<u>Exhibit C</u>	Code Notes dated September 7, 2006	2 pages
<u>Exhibit D</u>	Deposition of Stephen Balkenbush, taken on February 20, 2013	24 pages
<u>Exhibit E</u>	Deposition of Gerald Gillock, taken on July 31, 2013	12 pages
<u>Exhibit F</u>	Deposition of Michael Navratil, taken on December 12, 2012	9 pages
<u>Exhibit G</u>	Letter from Mr. Navratil to Mr. Balkenbush, dated April 21, 2010	3 pages
<u>Exhibit H</u>	Deposition on Written Questions of Fred Morady, M.D. taken on June 12, 2013	6 pages

CERTIFICATE OF SERVICE

I, E. Ralph Walker, certify that on the 3rd day of September, 2013, I caused to be delivered by :

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A true and correct copy of the within document: **PLAINTIFFS' OPPOSITION TO**

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

in Case #CV12-00571, addressed as follows:

MARGO PISCEVICH, ESQ.
PISCEVICH & FENNER
299 W. Plumb Lane, Ste 201
Reno, Nevada 89509


E. Ralph Walker
420 Hidden Meadows Ct.
Reno, NV 89502

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2 Nevada State Bar No. 0917
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4 499 West Plumb Lane, Suite 201
Reno, Nevada 89509
5 775-329-0958
6 Attorneys for Defendants

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

12 ANGELA 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 **NOTICE OF ENTRY OF ORDER**

24 TO: All parties and their counsel of record:
25
26
27
28

Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, NV 89509 775.329.0958

1 YOU WILL PLEASE TAKE NOTICE that on the 17th day of October, 2013, the
2 above-entitled Court entered its Order Granting Motion for Summary Judgment, a true
3 and correct copy of which is attached hereto.
4

5 **AFFIRMATION**

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

8 DATED this 18th day of October, 2013.
9

PISCEVICH & FENNER

10 By: 
11

MARGO PISCEVICH
Attorneys for Defendants
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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**
8

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

14 Plaintiffs,

15 vs.

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

21 Defendants.
22 _____/

23 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

24 Defendants Stephen C. Balkenbush, Esq., and Thorndal, Armstrong, Delk, Balkenbush
25 and Eisinger, having moved the Court pursuant to NRCP 56 for an Order granting summary
26 judgment in Defendants' favor, the Court being familiar with the briefing on file, and having
27 heard the arguments of counsel, being fully advised in the premises, finds, concludes and orders
28 as follows:

1 **Findings of Fact.**

2 The Court finds that the material facts in this case are as follows:

3 In this legal malpractice action, Plaintiffs allege that Mr. Balkenbush failed to exercise
4 the legal skills necessary to their purported medical malpractice claim against Dr. David Smith
5 and others. Plaintiffs' claim for medical malpractice against Dr. Smith arose out of a heart
6 procedure known as cardiac ablation. During the procedure, (an atrial fibrillation ablation), there
7 was a complication involving a pericardial tamponade. During Dr. Smith's efforts to deal with
8 the complication, Plaintiffs' decedent "coded," i.e. went into cardiac arrest, suffered an anoxic
9 brain injury and died.

10
11 On September 5, 2007, Plaintiffs' then-counsel, Mr. Balkenbush, filed a medical
12 malpractice lawsuit against Dr. Smith and others. Attached to the underlying Complaint was the
13 Affidavit of Dr. Fred Morady dated August 29, 2007. Plaintiffs had agreed that Mr. Balkenbush
14 would seek to retain the most preeminent expert in the country on cardiac ablation, and that the
15 case would "rise or fall" on the expert's opinion. Plaintiffs and Mr. Balkenbush hired Dr.
16 Morady to fill that role.

17
18 Dr. Morady reviewed the medical records provided to him, and based on that review,
19 initially opined that Dr. Smith's conduct fell below the standard of care. Dr. Morady advised
20 Mr. Balkenbush that he needed to review the "Prucka" recording, also called the "EPS data"
21 noting "there [had] to be one." Mr. Balkenbush was unable to obtain the EPS tape until March,
22 2010, but upon receipt, Mr. Balkenbush provided it to Dr. Morady for review. After Dr. Morady
23 reviewed it, he told Mr. Balkenbush that he had "changed his opinion," and that he no longer
24 believed that there was any malpractice in the action by Dr. Smith.

25
26 Mr. Balkenbush advised Plaintiffs of Dr. Morady's change of opinion, and offered to
27 have them speak directly and confidentially to Dr. Morady, which they declined. Plaintiffs
28

1 agreed to dismiss their case, and Mr. Balkenbush filed the appropriate dismissal. Subsequently,
2 Plaintiffs brought this action alleging legal malpractice against Mr. Balkenbush.

3 At the close of discovery, Defendants moved for summary judgment on the ground there
4 was no genuine dispute as to any material issue of fact, and Defendants were entitled to
5 judgment as a matter of law. Specifically, Defendants challenged the existence of any evidence
6 that would support a conclusion that had Mr. Balkenbush done something different it would have
7 resulted in a different outcome. Defendants also challenged Plaintiffs' ability to prove by a
8 preponderance of evidence that they would have prevailed in their underlying medical
9 malpractice action.
10

11 **Standard of Review**

12

13 Summary judgment may be granted where there are no genuine issues of material fact
14 and the movant is entitled to judgment as a matter of law. NRCP 56. This Court must view the
15 evidence and any reasonable inferences drawn from it in a light most favorable to the non-
16 moving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). In *Wood*, however,
17 the Nevada Supreme Court made it clear that the "'slightest doubt' standard ... is an incorrect
18 statement of the law and should no longer be used when analyzing motions for summary
19 judgment." *Id.* The nonmoving party must "do more than simply show that there is some
20 metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered
21 in the moving party's favor." *Id.* The non-moving party is not permitted to build its case on "the
22 gossamer threads of whimsy, speculation or conjecture." *Pegasus v. Reno Newspapers, Inc.*, 118
23 Nev. 706, 713-14, 57 P.3d 82 (2002). In addition, the mere existence of some alleged factual
24 dispute between the parties will not defeat an otherwise properly supported motion for summary
25 judgment – there must be some genuine issue of material fact. The showing of such a genuine
26 issue for trial is predicated upon the existence of a legal theory which remains viable under the
27 asserted version of the facts and which would entitle the party opposing the motion, assuming
28 that version to be true, to a judgment as a matter of law. *Wood, supra.*

1 **Conclusions of Law**

2 Based upon the briefs, evidence and argument presented to the Court, and on the
3 arguments and presentments of counsel at hearing on September 24, 2013, the Court makes the
4 following conclusions of law and/or application of the facts thereto:

5 Turning first to the underlying medical malpractice claim, the parties agreed that the
6 pivotal issue of fact, or rather, the pivotal set of facts at issue revolved around the administration
7 of pericardiocentesis by Dr. Smith sometime between 12:36 pm and 12:54 pm. Plaintiffs'
8 medical expert concedes that the procedure was properly performed, but disputes the timing.
9 However, while there may have been a dispute in the medical malpractice action, that factual
10 dispute is both speculative and immaterial in light of the failure of Plaintiffs to demonstrate
11 causation in the legal malpractice case.
12

13 In order to prevail in a legal malpractice action, Plaintiffs must allege and prove (1) an
14 attorney-client relationship; (2) the duty to use the skill, prudence and diligence ordinary lawyers
15 possess in exercising and performing similar tasks; (3) a breach of that duty; (4) proximate
16 cause; and (5) damages. *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308 (2004).
17

18 The Court finds that the first two elements are not disputed. Mr. Balkenbush was
19 Plaintiffs' former counsel, and there was no evidence that Mr. Balkenbush lacked any necessary
20 skill, prudence or diligence. In addition, as noted above, Mr. Balkenbush communicated
21 appropriately and timely with his clients. However, Plaintiffs failed to establish the fourth
22 element, proximate cause.
23

24 Plaintiffs' expert, Gerald Gillock, could not point to any action or inaction on the part of
25 Mr. Balkenbush which caused damages to Plaintiffs. While Mr. Gillock was critical of Mr.
26 Balkenbush' discovery, including not obtaining the EPS data sooner, he was unable to suggest
27 how a different course of conduct by Mr. Balkenbush would have changed the outcome. The
28

1 Court notes that even if Mr. Balkenbush had obtained the EPS data sooner, that would only have
2 allowed Dr. Morady to retract his earlier opinion sooner; and the suggestion that Mr. Balkenbush
3 would have had time to hire a different expert does not make the outcome any less speculative.
4 Mr. Balkenbush would have been left with a turncoat witness who would have gutted his case
5 like a trout if he were called as a witness by the defense. Mr. Balkenbush would then have
6 occupied the unenviable position of struggling to rehabilitate his former expert. The likelihood
7 of a favorable outcome under that scenario is ephemeral at best; and no Plaintiffs' expert testified
8 that the outcome would have been any different. Mr. Gillock nowhere asserted that the alleged
9 failure to engage in formal written discovery caused anything.
10

11 Finally, although Plaintiffs included in their Complaint a claim for punitive damages,
12 Plaintiffs appear to have abandoned that claim. In response to Defendants' Motion for
13 Summary Judgment, Plaintiffs' offered no evidence or argument supporting such claim,
14 and the Court therefore finds it must be dismissed.
15

16 ORDER

17 The Court having found and concluded as set forth above, therefore orders Defendants'
18 Motion for Summary Judgment shall be, and hereby is **GRANTED**; and Plaintiffs' claims as set
19 forth in their Complaint are **DISMISSED**, with prejudice.

20 Dated this 17 day of OCTOBER, 2013
21

22 Patrick Flanagan
23 DISTRICT JUDGE
24
25
26
27
28

Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, NV 89509 775.329.0958

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, addressed to the following:

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Charles R. Kozak
3100 Mill Street, Suite 115
Reno, NV 89502

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DATED this 18th day of October, 2013.


Beverly Chambers

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JOEY DRENNING HASTINGS
CLERK OF THE COURT

BY 
DEPUTY

1 CODE \$2515
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10 **IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**
12

13 ANGELA DeCHAMBEAU and
14 JEAN-PAUL DeCHAMBEAU, both
15 Individually and as SPECIAL
16 ADMINISTRATORS of the ESTATE
17 of NEIL DECHAMBEAU,
18

Case No. CV12-00571

Dept. No. 7

19 Plaintiff,

20 vs.

NOTICE OF APPEAL

21 STEPHEN C. BALKENBUSH, ESQ.,
22 THORNDAL, ARMSTRONG, DELK,
23 BALKENBUSH and EISINGER,
24 A Nevada Professional Corporation,
25 & DOES I through X, inclusive,
26

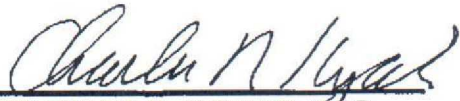
27 Defendants.
28

29 **COME NOW** Plaintiffs, ANGELA DeCHAMBEAU and JEAN-PAUL
30 DeCHAMBEAU, by and through their Attorney of Record, CHARLES R. KOZAK, ESQ., and
31 hereby Appeal to the SUPREME COURT OF NEVADA, from the final Judgment entered in
32 its entirety, entered October 18, 2013 dismissing Plaintiffs' Complaint with prejudice and
33 entering Judgment in favor of Defendants and each of them.

CV12-00571
A. DECHAMBEAU ETAL. VS. STEPH 3 Pages
District Court 11/14/2013 04:08 PM
Washoe County
\$2515
N100011

1
2 Pursuant to NRS 1239B.030 the undersigned certifies no Social Security numbers are contained in this document.

3 Dated this 14th day of November 2013.

4 

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I, Nan V. Adams, certify that on the 14th day of November, 2013, I caused to be

_____ FASCIMILE to the following number: _____

 CERTIFIED MAIL, RETURN RECEIPT REQUESTED

A true and correct copy of the within document: NOTICE OF APPEAL, Case No.

Margo Piscevich, Esq.
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In the
SUPREME COURT
For the
STATE OF NEVADA

Electronically Filed
Apr 18 2014 01:31 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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