Code: 3795
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE 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,

vs.

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

Defendants.

Case No. CV12-00571

Dept. No. 7

Reply in Support of Motion for Summary Judgment

Defendants submit their Memorandum of Points and Authorities in support of their "Motion for Summary Judgment," filed August 14, 2013, as follows:

Memorandum of Points and Authorities

I. Reply Argument

A. Plaintiffs' Opposition fails to raise a material issue.

Defendants' Motion for Summary Judgment asserted that Plaintiffs could not establish the elements of their underlying medical malpractice claim, could not maintain their legal malpractice claim, and could not maintain a claim for punitive damages. The Court may note at the outset that Plaintiffs' Opposition makes no mention of the punitive damages issue, and that issue is thereby waived. *Resolution Trust Co. v. First Am. Bank*, 155 F.3d 1126 (9th Cir. 1998) (issues not raised before the court are forfeited).

As to the other issues, Defendants asserted that Plaintiffs have no means of establishing causation in the underlying case. Their Opposition simply sidesteps the question by offering innuendo and sophistry in place of any actual facts, as set forth more fully below. The Opposition makes a complex patchwork by liberally merging facts and opinions. And as to legal malpractice, Plaintiffs offer the somewhat curious notion that Dr. Morady will not be able to qualify as an expert witness. Plaintiffs nowhere offer any material disputes for trial.

In *Wood v. Safeway*, 121 Nev. 724, 120 P.3d 1026 (2005), the Court reiterated the requirement for avoidance of summary judgment:

> By its very terms [the summary judgment standard] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.
> . . . [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

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Id. at 730, (citation omitted).

Plaintiffs' "Statement of Undisputed Facts," while misnamed (since most of them are either disputed or not facts), does not identify any ***genuine*** issues of ***material*** fact. The reason for that is, of course, that once Plaintiffs have failed to establish an essential element of their claim, all other facts become immaterial:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp.. v. Catrett, 477 U.S. 317, 322, 323, 106 S.Ct. 2548 (1986).

Plaintiffs' so-called "Statement of Undisputed Facts" is a curious amalgam of fiction, fantasy and flummery, but it contains little in the way of facts. For example, Plaintiffs assert in Fact No. 1 that "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." [Opp. p. 2, lns. 2-5]. Plaintiffs provide citations to their attached exhibits to support this assertion. Plaintiffs should be more careful, however, not to make such determined efforts to deceive the Court.

First, neither of the cited deposition passages refers to the "standard of care" for anyone, much less for an electrophysiologist. Second, Plaintiff provides no testimony, expert or otherwise, that suggests that ***all*** cardiac arrests during ablation procedures require immediate pericardiocentesis. In fact, Plaintiffs do not refer to ***any*** medical expert testimony to establish the standard of care for an electrophysiologist performing an ablation procedure.

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Plaintiffs' statements of "fact," whether categorized as "disputed"or "undisputed," are seldom actual facts, and less often material. "Fact" No. 1 is set forth above, and is a legal opinion. Fact No. 2 is mostly factual, but not supported by the reference to the "Exhibit "C" Code Note. Oddly, Plaintiffs term the EPS study "irrelevant" while at the same time relying heavily on the Code Note (Exhibit "C") which notes "History Immediately Prior to Event" as "EPS Study (with) Ablation." Immediate prior history would seem to be relevant rather than otherwise. Under the *Celotex* standard, summary judgment in Defendants' favor is warranted. Even if they could prove the underlying case, they have no expert to testify as to causation.

1. Plaintiffs offer no evidence to suggest how some different course of conduct would have improved the outcome.

Plaintiffs' Opposition erroneously suggests two issues of material fact remain to be tried: (1) "whether Dr. Smith performed the pericardiocentesis before or after he ordered the stat echo;" and (2), "whether Mr. Balkenbush met acceptable standards of legal services given the weight of evidence that existed against Dr. Smith...." [Opp. p. 8, lns. 11-17]. Taking the issues in reverse order, the question of "whether Mr. Balkenbush met acceptable standards of legal services" would appear to be a legal, rather than a factual, issue. Either way, however, Plaintiffs have not met their burden of proof under the summary judgment standard.

Plaintiffs' latest theory is that Mr. Balkenbush "should have recognized the irrelevance of the EPS tape and not wasted almost three years for his expert Dr. Morady to review irrelevant evidence." [Opp. p. 9, lns. 23-25]. Plaintiffs' assertions that the EPS or "Prucka" data is "irrelevant" are deliberately aimed at deceiving the Court. Plaintiffs state:

> The EPS or "PRUCKA" tape ***had no influence*** on the underlying medical malpractice lawsuit.

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[Opp. p. 9, ln. 14; *citing* "Exhibit F, Navrotil (*sic*) Depo at p. 50, L23-P51 L8].

Review of the cited reference discloses that Plaintiffs have fabricated their assertion. Mr. Navratil (who represented only Dr. Kang, the anesthesiologist, in the underlying action) testified that the PRUCKA tape "didn't matter to ***my*** defense," and "had no relevance to the opinions" of ***his*** experts. [Opp. Exh. "F," p. 51, lns. 4-8 (emphasis added)]. The leap from Mr. Navratil's specific testimony to Plaintiffs' "the tape had no influence" is pure fantasy. The EPS data had such influence on the case as to stop it in its tracks.

Bearing that in mind, Plaintiffs turn to attack their former medical expert witness, Dr. Morady. First they suggest that "it is likely that Dr. Morady's testimony will not get to the jury because he cannot withstand an "offer of proof" that his opinions are based on reliable or trustworthy scientific evidence." [Opp. p. 12, lns. 8-10; *citing Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-594 (1993)]. This astonishing assertion is nothing more than a legal meringue, derived from Plaintiffs' counsel's ill-advised attempt to use NRCP 31 to obtain Dr. Morady's testimony, by "Deposition on Written Questions," a procedure so arcane and cumbersome as to have not been used in Nevada jurisprudence in decades, and never for an expert deposition.

Plaintiffs' reliance on *Daubert* is askew, since Nevada does not follow it. *See, Higgs v. State*, 126 Nev.Adv.Op. No. 1, 222 P.3d 648 (2010) (declining to adopt standard of admissibility in *Daubert*, and holding that NRS 50.275 provides the standard for admissibility in Nevada). Plaintiffs then complain that Dr. Morady "now opines that the pericardiocentesis was [timely] performed..., but gives no basis for his change of opinion." [Opp. p. 12, lns. 15-17]. Plaintiffs' counsel does not, however, point out to the Court just where, in his never-before-attempted use of Rule 31, he asked that question, because he ***never asked it.*** He chose a procedure that expressly prevented him from asking any follow-up questions, and should not now be heard to

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complain that Dr. Morady did not answer the un-asked questions. Plaintiffs, who have no medical training, assert that the EPS data is "irrelevant;" yet Dr. Morady, Professor of Internal Medicine, McKay Professor of Cardiovascular Disease at the University of Michigan Health System's Samuel and Jean Frankel Cardiovascular Center, whose CV is over 120 pages long, considered the EPS data to be not only relevant but an important reason for his change of opinion. [See, Exhibit "5" to Defendants' Motion for Summary Judgment, p. (his change of opinion "wasn't based on review of only that electrophysiology recording].

Accordingly, given that their theory of liability against Mr. Balkenbush is now reduced to a claim of "wasting time" waiting for Dr. Morady to review "irrelevant" evidence, summary judgment in favor of Defendants is warranted, if not mandatory. First, they have no expert witness who has testified that Mr. Balkenbush' alleged "waste of time" caused anything. Mr. Gillock, Plaintiffs' attorney-expert, fails even to mention the word "cause" in his testimony. Plaintiffs do not even address how some different conduct on Mr. Balkenbush' part would have achieved a better outcome. Logically, of course, Plaintiffs' suggestions fail to answer that question.

Assume that Mr. Balkenbush had "identif[ied] that the timing of the pericardiocentesis was the key issue," and pursued discovery on this issue. Plaintiffs first make the ludicrous suggestion that Mr. Balkenbush should have informed Dr. Morady that Dr. Kang was going to testify against Dr. Smith, and that once Dr. Morady heard that, he would not have withdrawn as an expert. [Opp. p. 10, lns. 6-9]. This is simply false. Plaintiffs' self-perceived prescience as to how Dr. Morady must think is of no relevance. Plaintiffs have no facts, evidence or mind-altering pharmaceuticals sufficient to make this line of reasoning believable. Why anyone would believe that the anticipated testimony of an adverse co-defendant would influence a plaintiff's

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expert enough to abandon his opinions is impossible to articulate. It is nearly a plaintiff's dream to have defendants sniping at one another.

Once Dr. Morady determined that the EPS data and other information confirmed that Dr. Smith had performed the procedure at the correct time and sequence, Mr. Balkenbush should have, according to Plaintiffs, abandoned Dr. Morady as an expert and found another, such as Dr. Siefert. Doing so would leave Plaintiffs' expert witness cadre utterly exposed to defendants' destructive cross examination, thereby jeopardizing Plaintiffs' entire case against Drs. Smith and Kang.

Plaintiffs' other suggestion is that Mr. Balkenbush "had a duty to prosecute [the lawsuit]" "with or without Dr. Morady." [Opp. p. 10, lns. 26-28]. This must be a typo, since pursuing a medical malpractice action without any expert testimony is itself malpractice. Following either course would invariably have weakened Plaintiffs' case, likely resulting in a far worse outcome. In short, Plaintiffs have no facts or evidence to show that some different course of conduct would have improved the outcome.

Plaintiffs' last-gasp effort is directed at discovery allegedly not done. [Opp. pp. 10, 11]. Plaintiffs assert that Mr. Balkenbush "should have immediately deposed Dr. Kang," but fail to offer testimony on what that failure caused. They assert that Mr. Balkenbush "excessively relied on the opinions of one particular medical expert, … Dr. Morady," [Opp. p. 10, ln. 12] without evidence establishing either a standard of care or breach or causation. They assert that Mr. Balkenbush failed to "diligently conduct discovery to reconcile inconsistencies in the medical records," but fail to provide evidence that that would have changed Dr. Morady's opinion, or allowed Mr. Balkenbush to achieve a different outcome.

Even if Mr. Balkenbush had done all the additional discovery suggested by Mr. Gillock, Plaintiffs' expert, Plaintiffs offer no opinion explaining how such additional discovery would

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have changed the outcome. And as noted in Defendants' motion, the rules ***permit,*** but do not require, any discovery beyond Rule 16.1. Both sides had the key evidence, the medical record, which is indispensable in a medical malpractice case. Additional written discovery would likely have been redundant; and Mr. Gillock conceded that the depositions could all have been taken in the last two months before trial. In short, Plaintiffs cannot establish an essential element of their claim, i.e., causation, thus rendering all other issues immaterial.

2. Plaintiffs fail to meet their burden in the underlying case.

Plaintiffs claim to be "able to present testimony and medical experts showing that Dr. Smith's actions fell below the standard of care." [Opp. p. 1, lns. 8, 9]. The burden on Plaintiffs at this stage, however, is not to be "able" to present evidence at trial, but rather to actually present it now, in response to summary judgment:

> Once the moving party has met its burden, the party opposing the motion may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.

NRCP 56.

Review of Plaintiffs' Opposition will establish that Plaintiffs have failed to meet that burden. Plaintiffs begin by suggesting they have evidence, in the form of a "communication from Dr. Kang, now deceased, to his attorney Michael Navratil, in which he indicts Dr. Smith for not having performed the pericardiocentesis immediately after Neil Dechambeau's cardiac arrest as he said he did." [Opp. p. 1, lns. 11-14]. Assuming Plaintiffs could surmount the painfully obvious evidentiary issues, i.e., privilege and hearsay, the assertion nonetheless begs the question, "what communication?" "Where is it?" If Plaintiffs are referring to what they attached as Exhibit "G" to their Motion, the Court will look in vain for any "indictment" or criticism of Dr. Smith. To the contrary, Dr. Kang reportedly said he "was satisfied Dr. Smith was

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conducting a cardiac work up of the situation...." He also said he "did not have an exact recollection of the time [pericardiocentesis] was started, only that it was complete by 12:54 ...." [Opp. Exh. "G"]. Plaintiffs fail to explain how any disclosure in Exhibit "G" is an "indictment" of Dr. Smith; and while Exhibit "G" may not be "inadmissible solely because it is evidence of transactions or conversations with or the actions of a deceased person," [NRS 48.075] such hearsay statements must still fall within a statutory exception to inadmissibility. *See, e.g., Lopez v. State*, 105 Nev. 68, 769 P.2d 1276 (1989).

IV. Conclusion

Plaintiffs Opposition fails to demonstrate any genuine issue of material fact remaining for trial. Plaintiffs still cannot establish the elements of the underlying medical malpractice claim. Their inability to do so renders their legal malpractice claim a nullity. At the end of discovery, Plaintiffs have no viable theory of liability left. They have no cognizable evidence of causation, and no expert testimony or other evidence establishing causation. Finally, they have no evidence or argument to support a claim for punitive damages.

WHEREFORE, Defendants request relief as set forth in their Motion for Summary Judgment; and such other and further relief as the Court deems appropriate in the circumstances.

AFFIRMATION
Pursuant to NRS 239B.030

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

Dated this 6th day of September, 2013.

PISCEVICH & FENNER

By: _____
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CERTIFICATE OF SERVICE

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

Document Served: Reply in Support of Motion for Summary Judgment

Person(s) Served:

Charles R. Kozak
1225 Tarleton Way
Reno, NV 89523

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DATED this 6th day of September, 2013.

Beverly Chambers

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Docket Number 64463

In the

SUPREME COURT

For the

STATE OF NEVADA

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 II

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TABLE OF CONTENTS

11. Transcript of Hearing on Motion for Summary Judgment .....
to be supplied by Respondent