

**Exhibit “11”**

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1 4185  
2 STEPHANIE KOETTING  
3 CCR #207  
4 75 COURT STREET  
5 RENO, NEVADA  
6

7 IN THE SECOND JUDICIAL DISTRICT COURT  
8 IN AND FOR THE COUNTY OF WASHOE  
9 THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

10 --oOo--

11 A. DECHAMBEAU, et al.,	)	
	)	
12 Plaintiffs,	)	
	)	
13 vs.	)	Case No. CV12-00571
	)	
14 STEPHEN BALKENBUSH, et	)	Department 7
15 al.,	)	
	)	
16 Defendants.	)	

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18 TRANSCRIPT OF PROCEEDINGS  
19 MOTION FOR SUMMARY JUDGMENT

20 September 24, 2013

21 2:00 p.m.

22 Reno, Nevada

23  
24 Reported by: STEPHANIE KOETTING, CCR #207, RPR  
Computer-Aided Transcription

1 APPEARANCES:

2 For the Plaintiff:

3 CHARLES KOZAK, ESQ.  
4 Attorney at Law  
5 Reno, Nevada

6 For the Defendant:

7 PISCEVICH & FENNER  
8 By: MARGO PISCEVICH, ESQ.  
9 499 W. Plumb Lane  
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1                   RENO, NEVADA, September 24, 2013, 2:00 p.m.

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4                   THE CLERK:   CV12-00571, A. Dechambeau, et al.  
5   versus Stephen Balkenbush. Matter set for oral arguments on  
6   motion for summary judgment. Counsel, please state your  
7   appearance.

8                   MR. KOZAK:   Charles Kozak representing the  
9   Dechambeau family.

10                  MS. PISCEVICH: Margaret Piscevich representing  
11   Mr. Balkenbush and his firm Thorndal Armstrong and he's also  
12   present with me.

13                  THE COURT:   Thank you very much. I appreciate  
14   counsel showing up on such short notice, but we're coming up  
15   to a pending trial date and I felt it was important to  
16   explore this motion. On August 14th, 2013, defendant filed a  
17   motion for summary judgment pursuant to NRCP 56. And for  
18   purposes of today's hearing, I'd like to focus on the  
19   underlying medical malpractice action.

20                  As Mr. Kozak, you can correct the Court, but as I  
21   read your complaint and the file, you assert that Dr. Smith's  
22   conduct fell below the standard of care. You identified a --  
23   well, your expert, actually, Dr. Seiffert --

24                  MR. KOZAK:   Seiffert.

1           THE COURT:  -- alleges that Dr. Smith failed to  
2     diagnose a cardiac tamponade, failed to perform a timely  
3     pericardial centesis, failed to determine the cause of the  
4     ventricular tachycardia, failed to request a cardiac consult  
5     or a surgical consult and failed to order a transthoracic  
6     echocardiogram in a timely manner.  I think the allegation  
7     was that the equipment had to be called for, it wasn't within  
8     the emergency room or the surgical unit where the decedent  
9     was being operated on.

10           Of course, with respect to the defendant  
11     Balkenbush, the allegations are that Mr. Balkenbush failed to  
12     conduct his -- excuse me -- the plaintiffs' expert with  
13     respect to the legal malpractice is a Jerry Gillock, who  
14     opined that Mr. Balkenbush failed to conduct timely  
15     discovery, failed to obtain another expert once Dr. Morady --  
16     is that it, Ms. Piscevich?

17           MS. PISCEVICH:  Morady.

18           THE COURT:  Morady withdrew his opinion, changed  
19     his opinion, that Mr. Balkenbush failed to take Dr. Kang's  
20     deposition before his death, failed to obtain the EPS tape.  
21     And this is somewhat confusing is on one hand Mr. Balkenbush  
22     is accused of malpractice for failing to obtain the EPS tape  
23     and on the other hand there's an allegation that the EPS tape  
24     was irrelevant and that Mr. Balkenbush shouldn't have delayed

1 discovery in order to obtain the EPS data. We were somewhat  
2 confused as to what form this was in, whether it was a tape.  
3 I know there was a proprietary information and how it was  
4 transmitted is a mystery, but I don't think it's relevant to  
5 our disposition here.

6           Also, the plaintiff alleges Mr. Balkenbush failed  
7 to investigate the code by failing to take the deposition of  
8 percipient nurses, or such, in the surgical unit. However,  
9 of some concern in looking at Dr. Seiffert's deposition is  
10 Dr. Seiffert does not question the propriety of the  
11 diagnosis, nor does he question the propriety of the  
12 procedure itself. And of some concern, and this is something  
13 I'd like you to address, Mr. Kozak, there appears to be no  
14 expert on causation.

15           Second allegation of the defendant's motion for  
16 summary judgment is that under the analysis of the medical  
17 malpractice suit, the plaintiff cannot support a legal  
18 malpractice suit. Mr. Balkenbush, apparently this is  
19 uncontested, discussed the case with Mrs. Dechambeau, that it  
20 was dismissed with his client's consent and that the expert,  
21 Mr. Gillock, did not find any causation that has any tie from  
22 Mr. Balkenbush's actions or inactions to damages suffered by  
23 Ms. Dechambeau.

24           And then, finally, the third point was that the

1 defendants allege that the plaintiffs cannot maintain their  
2 claim for punitive damages. There was no opposition to that  
3 in the plaintiffs' responsive pleadings, and so, Ms. Clerk,  
4 the claim for punitive damages is dismissed.

5 THE CLERK: Thank you.

6 THE COURT: On September 3rd, 2013, the plaintiff  
7 filed its opposition to the defendants' motion for summary  
8 judgment and assert that there are two questions of fact,  
9 which preclude the granting of the motion for summary  
10 judgment.

11 The first question plaintiff proposes is, was  
12 Dr. Smith negligent by failing to timely perform the  
13 pericardial centesis? And, secondly, was Mr. Balkenbush  
14 negligent in failing to prosecute the medical malpractice  
15 lawsuit given the evidence in the record that Dr. Smith's  
16 actions fell below the standard of care. And there is an  
17 ancillary issue regarding Dr. Kang's statement to his lawyer  
18 and his lawyer's letter to Mr. Balkenbush. As the defendants  
19 put it in their pleadings, it presents a rather painfully  
20 obvious evidentiary issue. And, finally, the plaintiffs  
21 argue that the defendants' arguments involve factual  
22 questions of credibility, I imagine, between Dr. Seiffert and  
23 Dr. Smith.

24 On September 6th, 2013, the defendants filed their

1 reply in support of the motion for summary judgment alleging  
2 that the opposition fails to raise a genuine issue of  
3 material fact, that there was no contest for the punitive  
4 damage claim, and we've dealt with that, and there was no  
5 means of establishing causation in the underlying medical  
6 malpractice suit, that the plaintiff offered no evidence to  
7 suggest how a different course of conduct would have improved  
8 the outcome, and that the plaintiff failed to meet their  
9 burden in the underlying medical malpractice action. So, Ms.  
10 Piscevich, it's your motion.

11 MS. PISCEVICH: Thank you, your Honor. Well, I  
12 was going to start with punitive damages, because that was  
13 easy, now it's very easy. This case is based on one simple  
14 premise, Mr. Balkenbush and his client had an agreement when  
15 she came in to see him that he would locate the very best  
16 expert that he could and he did by locating Dr. Morady. And  
17 in doing so, he explained to his client that this case would  
18 rise or fall on Dr. Morady.

19 And if you look at the complaint, and I need to go  
20 over that just a little bit, because in paragraph 12 and 13,  
21 it is alleged that on August and June of 2010, Mr. Balkenbush  
22 dismissed the case when the actual dismissal was on May 5th,  
23 2010, without informing the plaintiffs and without obtaining  
24 their permission. And these allegations go throughout the



1 entire complaint. And, of course, Mr. Gillock, on page 71,  
2 indicated in his deposition that that did not occur.

3 Question, but do you believe he had his client's permission  
4 to dismiss the case when he spoke with her? I believe that  
5 he had his client's permission to dismiss the case when he  
6 dismissed it based upon his representations to her.

7 Question, I guess I need to ask this a different way. Are  
8 you going to be giving some kind of opinion that it was below  
9 standard of care, because Mr. Balkenbush did not obtain his  
10 client's permission to dismiss the case? Answer, no. So  
11 that's not an issue in this case? Answer, correct.

12 Then in paragraph 14 and 15 of the complaint, it  
13 says that Mr. Balkenbush was negligent because he failed to  
14 inform Ms. Dechambeau of the reason for the dismissal.

15 Now, Mr. Gillock indicates on page 76 of his  
16 deposition, and we were talking about he believes there was  
17 sufficient facts for this case against Dr. Smith to go to the  
18 jury. And I said, and I asked him, I said, well, even though  
19 -- question, even though Dr. Morady changed his opinion?  
20 Answer, I think that Dr. Morady changing his opinion might  
21 not have been fatal, but Dr. Morady changing his opinion when  
22 he did affected the likelihood that the plaintiff could have  
23 prevailed. So that's paragraph 14 and 15 of the complaint.

24 If you go to paragraph 16, he did not conduct

1 written discovery. Well, he did do Rule 16.1 disclosures and  
2 all of the parties did that. In this case, it's a medical  
3 malpractice case, he had the records and he had the expert  
4 reviews. Now, that's mandatory in a medical malpractice  
5 case. And, of course, they're saying, well, you should have  
6 done more, which I'll discuss in a minute. He did not -- he  
7 would have violated the standard of care if he had not  
8 obtained the medical records and had not obtained an expert.  
9 In fact, the complaint would have been dismissed.

10 In paragraph 18, he said he didn't take the  
11 doctor's depositions who were present in the OR. That's  
12 true, but his counsel in this case had a good working  
13 relationship and agreed to do it after the experts reviewed  
14 all of the records and the EPS tape was missing.

15 And Mr. Gillock in his deposition says in this  
16 case, and I was asking him about the understanding about the  
17 documents, he said, it looked -- quote, so it looked like  
18 they were going to set the depositions after they exchanged  
19 the expert reports even though they were looking at a July  
20 trial date? Well, the expert reports, your Honor, were  
21 exchanged on March 20th, 2010. That's three and a half  
22 months before trial, so there was plenty of time.

23 THE COURT: And both sides agreed.

24 MS. PISCEVICH: Yes.

1 THE COURT: That there was plenty of time.

2 MS. PISCEVICH: Both sides agreed. And I asked  
3 the question, but was it your understanding they were going  
4 to set the depositions after the exchange of the reports and the  
5 review of the EPS tape or the Prupa disk, whatever it's  
6 called. Answer, they were going to do some depositions of  
7 the experts afterwards.

8 And then he goes on to say on page 45 of his  
9 deposition, and was it your understanding from reading the  
10 depositions of the attorneys in the underlying case that the  
11 depositions of the defendant doctors were to be taken after  
12 Dr. Morady reviewed the EPS tape? Answer, that's what they  
13 said and I agree it's the representations. I agree it's  
14 timely. I disagree that it would conform with the standard  
15 of care required of an attorney handling the case. The case  
16 was filed in 2007. Assuming Dr. Morady did not change his  
17 mind, do you have any doubt these depositions would have been  
18 taken? Answer, I have no reason to doubt they would have  
19 been taken.

20 So we have the deposition which I'm going to talk  
21 about a little bit later.

22 THE COURT: But do we even have to get to the  
23 legal malpractice claims if there's --

24 MS. PISCEVICH: Yes and no, and I'll tell you why

1 when I get to causation. I do believe there's a question of  
2 fact on the legal malpractice, but I don't believe that's  
3 relevant to this motion on causation.

4 THE COURT: Exactly. I think this motion rises  
5 and falls on the medical malpractice, the underlying medical  
6 malpractice.

7 MS. PISCEVICH: Yes and no, your Honor, and let me  
8 just kind of keep going through the allegations and I'll  
9 explain why.

10 THE COURT: All right.

11 MS. PISCEVICH: That paragraph 20, he didn't  
12 attempt to verify the authenticity of the EPS tape or explore  
13 spoliation of the evidence. Mr. Gillock basically said that  
14 that wasn't necessary. He would certainly assume it was  
15 authentic. And his testimony is, are you contending the EPS  
16 tape or the Prupa disk or whatever it is, is not authentic?  
17 Is not what? Authentic. I'm not saying it's authentic. I  
18 haven't looked at it and I wouldn't understand if I did. But  
19 they obtained it directly from Renown, you would assume it's  
20 authentic? Answer, of course.

21 And so then the next allegation is the delay in  
22 the pericardial centesis and there was no chance for the  
23 plaintiffs to pursue this with other counsel that was  
24 competent to handle medical malpractice, and it was again

1 dismissed without their permission. We know that's untrue.  
2 We know it was dismissed with permission. And that's really  
3 the worst allegation of the complaint.

4           And then in paragraph 24, talks about he failed to  
5 keep his plaintiffs informed. Well, on page 51 of the  
6 deposition, Mr. Gillock testifies that he is not -- he does  
7 not believe that there was a violation. I said, are you  
8 contending that there was a violation of the standard of care  
9 with respect to the communications with the client? Answer,  
10 no. Dismissed without consulting, we know that didn't  
11 happen, failed to investigate, send interrogatories and  
12 requests for admissions, failed to provide plaintiffs the  
13 opportunity to obtain new counsel, failed to investigate the  
14 authenticity of the EPS tape and of course all of these  
15 actions were so outrageous it should give rise to punitive  
16 damages.

17           So what we have in this setting is not the medical  
18 malpractice case. That's really not the issue in this case.  
19 Dr. Seiffert says that he believes that Dr. Smith did the  
20 pericardial centesis correctly, the procedure itself. He  
21 believes based upon the records that it can't withstand  
22 scrutiny. Unfortunately for Dr. Seiffert, the records and  
23 the time line and there's three different ones, are  
24 different.

1           THE COURT: The pericardial centesis was never  
2 timed.

3           MS. PISCEVICH: Exactly. It was never charted.  
4 So if you go by the codes, the codes from 12:39 to 12:54, and  
5 the drop in blood pressures at 12:39, the CPR is initiated at  
6 12:39:50. So then you have the other issues going on and the  
7 stat echo is paged at 12:44. Stat echos are not required by  
8 the standard of care to be in the room. The pericardial  
9 centesis tray is, which is actually documented at 16 --  
10 excuse me -- at 13:36. It's just crazy, you know, 40 minutes  
11 after the procedure. The echo is at bedside at 12:48, which  
12 is perfectly within standard to get it there in four minutes.

13           So according to the anesthesia record, there was a  
14 V-tach 20 minutes before this drop in blood pressure. V-tach  
15 didn't occur and that's on the Prupa disk.

16           Then he notes a ten-minute procedure, 12:50 is the  
17 cardiac arrest, 13:00 is the echo. So he's got it in ten  
18 minutes. By 14:00 --

19           THE COURT: When you say he, is this Dr. Kang?

20           MS. PISCEVICH: Yes, his records. So there's  
21 just, the record -- and of course, every doctor testifies  
22 that the records on anything when there's a code is done  
23 after the fact except for recording of the code and the code  
24 person has a --

1 THE COURT: She's right there.

2 MS. PISCEVICH: That's her job. And the 12:39 and  
3 the 12:54 match. So that's the only thing that matches and  
4 Dr. Kang's don't.

5 And we know that at 1:46, there was a report given  
6 to the CIC, or the intensive care unit, and at that point,  
7 Dr. Smith talks with the family. So we know the time is  
8 wrong and we know that on 1:36, we know that the procedure  
9 was over, so by definition. The only person in the room is  
10 Dr. Smith, who says, I did it promptly, I did it like I was  
11 supposed to.

12 But the reason that I'm saying that the actual  
13 medicine is really not the issue is that you have to look at  
14 causation in this case. Okay. Let's talk about it. Lack of  
15 written discovery or depositions of the percipient witnesses  
16 or experts. We know there was an agreement to do that. We  
17 know that there is no evidence if they took the depositions  
18 of Dr. Morady, that he would not have changed his mind. He  
19 could have gotten that disk within 30 days of the filing of  
20 the complaint. He could have gotten that disk within six  
21 months, he could have gotten that disk within a year or two  
22 years, he would have changed his mind.

23 And he changed his mind not only on the EPS tape  
24 or the Prupa disk, but he also testified in his written

1 questions, if you may recall his expert deposition was taken  
2 by written questions, there were, quote, other reasons,  
3 unquote, and that's right in the deposition transcript.

4           If you look at that, there is no evidence that Dr.  
5 Morady would never have changed his mind. Not only that,  
6 Dr. Smith's testimony corroborated the informal information  
7 that the parties had exchanged.

8           Then we go to the rest of it as a standard of care  
9 requiring interrogatories and depositions and all of that.  
10 These rules are permissive rules. So they've come up after  
11 the fact in hindsight is really exactly what's happened. And  
12 there's no testimony, if you took the depositions or you send  
13 interrogatories, it was going to change Dr. Morady's  
14 position. There's no testimony to that at all.

15           And then we go to he should have filed a motion to  
16 bring in a new expert. He should have allowed this  
17 opportunity. Well, this is totally speculative. This  
18 disclosure took place, then the tape was exchanged. We're  
19 now about three and a half months from trial. By the time it  
20 gets reviewed, we're about two and a half months from trial.

21           So we already know there's been one continuance.  
22 We already know the experts have been disclosed. I do not  
23 believe the defense counsel would have ever stipulated to  
24 bring in a new witness, nor do I believe they would have ever



1 stipulated to a continuance. So then you have to determine  
2 and predict what a trial judge would do. All of this is  
3 totally speculative. You have to have testimony that this  
4 occurred and there is no written testimony about this.

5           Plaintiffs are contending that they would have  
6 achieved a better result if Mr. Balkenbush had conducted more  
7 discovery and did a more thorough preparation. This is  
8 totally speculative. There's no evidence to the contrary and  
9 it's based on hindsight.

10           At the time, and I'll talk about the medicine in  
11 one second, but at the time, Dr. Morady changed his mind and  
12 in case was going to rise and fall on Dr. Morady after the  
13 fact they went and found an expert, because they have to to  
14 get through the next round of the case. They have to try the  
15 case within the case. But the real issue is causation.  
16 There was no other expert at the time.

17           The burden is for the plaintiff to establish that  
18 the investigation or the depositions would have disclosed  
19 something that would have made Dr. Morady not change his mind  
20 and that the use of this information would have produced a  
21 better result.

22           And so the discovery in the malpractice issue is  
23 the failure to respond timely. Well, Dr. Smith said he did,  
24 Dr. Seiffert said he didn't. That's what I'm saying, this

1 really not about the medicine, per se, it's about the  
2 underlying case and whether they can prove causation, which  
3 we claim they cannot.

4 THE COURT: Doesn't that raise a genuine issue of  
5 material fact?

6 MS. PISCEVICH: No, it does not, not for the legal  
7 malpractice. That's what I'm trying to explain. It boils  
8 down to whether or not any of these things that they contend  
9 would have changed Dr. Morady's mind. There's no evidence  
10 that would have changed Dr. Morady's mind, none.

11 So that's where we're coming from. And it doesn't  
12 matter after the fact. We're talking about the time this  
13 case came down, did Mr. Balkenbush violate the standard of  
14 care by saying the doctor changed his mind, it's my  
15 recommendation we dismiss this case. She agreed. He even  
16 offered to allow Dr. Morady to speak with her and she turned  
17 that down.

18 Now, it would have been a different case if she  
19 said, Steve, I would really like another attorney to look at  
20 that. Steve, do you think we can get a different doctor?  
21 Steve, do you think there's anything else we can do? He  
22 would then have an obligation to go to the next step. But  
23 when he said, this is what Dr. Morady said, this is what he  
24 did, that's what an ethical lawyer does. If their expert

1 changes, then you dismiss the case.

2 Now, sure, I'm sure you could go find another  
3 expert somewhere a year or two later to say, oh, you know, I  
4 believe the records and not Dr. Smith. Everybody else  
5 believed Dr. Smith and he's the only one who was present.  
6 And it's very clear from Mr. Navratril's letter, and I'll  
7 talk about it today, because it's in the record, but I'm not  
8 going to allow it to be in trial, that's another evidentiary  
9 issue, but he's not even critical of Dr. Smith.

10 I mean, in the letter he talks about the timing,  
11 and he said, Dr. Smith has successfully cannulated the  
12 pericardium and had withdrawn 300 ccs of blood. This is by  
13 12:54. Dr. Kang believed the staff involved and reacted  
14 exceedingly quick and efficiently during the arrest. He does  
15 not feel that the resuscitation was prolonged at all. He was  
16 tending to his responsibilities during the code.

17 Dr. Smith was preparing to perform the pericardial  
18 centesis prior to the arrival of the echo technician. He  
19 deferred to Dr. Smith, which he should, he didn't have  
20 privileges for this. Dr. Kang did not have an exact  
21 recollection the time it was started, only that the procedure  
22 was completed by 12:54, according to his recall against the  
23 records. Well, his records are dead wrong. He has it at  
24 13:00, so he's going by the code sheet, which is probably the

1 best record.

2           So I do believe that in the underlying case  
3 there's an issue of fact that he has to prove before he can  
4 go forward with the legal malpractice case. I don't think  
5 there's a legal malpractice case, because there's no  
6 causation. There's no testimony that if Mr. Balkenbush would  
7 have done anything different from Mr. Gillock or anyone else,  
8 that there would have been a different result. That's why I  
9 kind of went through all of these particular elements.

10           There's, even Mr. Gillock agrees there was plenty  
11 of time to do the depositions. He believes that there was a  
12 lapse of time. Well, White, Meany and Wetherall had the file  
13 for approximately eight months. And so it came back and  
14 Mr. Balkenbush had the deposition -- excuse me -- the  
15 complaint timely filed in September of '07. Then there was  
16 some health issues and so the depositions and all of the  
17 other things were starting to be scheduled.

18           And there's a lot of activity that's not in this  
19 record, but the substitution of counsel wasn't filed until  
20 April 2nd of 2007 and then the complaint was filed in  
21 September of 2007 before the statute. There was the early  
22 case conference, there was discovery that was done, and then  
23 the plaintiff's depo wasn't set until February of '10,  
24 because she had moved to Arizona and had some health issues.

1 And then from there, they agreed to go ahead and exchange  
2 expert reports.

3 But in February of that year, both Mr. Navratril  
4 and Mr. Lemons sent e-mails or letters to Mr. Balkenbush  
5 saying, I think this is why you don't have a case. And  
6 Dr. Smith did not testify any different than that letter,  
7 absolutely did not.

8 And so let's assume his deposition was taken.  
9 Fine. You still have the same evidence. So we get back to  
10 this standard of what was occurring and what a lawyer should  
11 do when faced with this dilemma that you have one of the  
12 preeminent experts in the country on this and he changes his  
13 mind.

14 So that's really the issue. It doesn't matter  
15 what happens in hindsight. She can come back and say, well,  
16 you should have done A, B and C, but she didn't ask for that.  
17 The deal was, we'll hire the best expert we can find, this  
18 case rises or falls on this expert. Mrs. Dechambeau agreed  
19 with that. He told her the doctor changed his mind. And  
20 there's no evidence presented at all in this case that Dr.  
21 Morady would have changed his mind, none.

22 And so that really doesn't matter. I understand  
23 what we have to do in the case if it should go forward, but  
24 the reason we're here is I don't believe this case should go

1 forward, because nothing inappropriate occurred when Dr.  
2 Morady changed his mind. He wouldn't. Assuming everything  
3 had been done a year earlier or two years earlier or six  
4 months earlier, it's not going to change that from happening.

5           And anybody that says, well, she could have done  
6 A, B or C, that's totally speculative. This was what  
7 occurred and this is what happened. And Dr. Morady had  
8 information available to him from Mr. Balkenbush about the  
9 contentions and then he got the EPS tape. And if there had  
10 been a ventricular tachycardia as reported by Dr. Kang,  
11 Dr. Smith literally would have violated the standard of care  
12 and nobody would refute that, but that wasn't there. So now  
13 we have to go on, quote, he delayed in doing the procedure,  
14 and there's no evidence other than the records which are  
15 inconclusive.

16           So that's what I'm saying, the med mal is really  
17 not the issue for this motion. The issue is what was the  
18 understanding of the parties? What did he do and did he do  
19 something correct? And I think when your expert changes your  
20 opinion, and you've got the top, you're done. And that's  
21 what this case is about, not the underlying case at this  
22 time. That's a different case.

23           Let's go to the next step. Let's give the  
24 plaintiff the benefit of the doubt. We tried the medical

1 malpractice case and jury says, yeah, I agree with Dr.  
2 Seiffert, I think Dr. Smith made a mistake. They still have  
3 to go to the legal malpractice and what's that? Should he  
4 have dismissed the case? That's going to be the issue.  
5 That's the prime allegation in this complaint, should he have  
6 dismissed the case?

7           We still have to go to that. We don't need even  
8 the medicine to go to that. We've got all the facts for  
9 that. Everybody has been deposed regarding the legal  
10 malpractice case. There is no case. There is nobody that  
11 testified if he'd have done A, B, C and D or done this  
12 earlier, there would have been a different outcome and that's  
13 the requirement.

14           You have to have the legal relationship, which we  
15 stipulate there was one. You have to have a violation of the  
16 duty of a lawyer. We disagree on that issue, of course. You  
17 have to have a breach of that duty. We say there wasn't one.  
18 You have to have causation. And then damages, of course,  
19 Mr. Gillock doesn't have an opinion on damages. Mr. Gillock  
20 doesn't have an opinion on causation. That's why we're  
21 really here and that's the basis of this motion.

22           I will tell you, I agree in the underlying case  
23 there will be questions of fact on the medicine, but I don't  
24 think that's the reason we're here today. I contend we're

1 here because you can't prove the legal malpractice case based  
2 upon the testimony we have today and that's the facts of this  
3 case today. All of that discovery has been done. If you  
4 have any questions, I'll try to answer them.

5 THE COURT: No. Thank you very much,  
6 Ms. Piscevich.

7 MS. PISCEVICH: Thank you.

8 (Discussion off the record.)

9 MR. KOZAK: Do you want me to approach the bench?

10 THE COURT: No, go ahead to the podium and do your  
11 argument.

12 MR. KOZAK: Thank you, your Honor. Well, I'm glad  
13 that Ms. Piscevich concedes that the underlying medical case  
14 has issues of fact, because it certainly does.

15 The question here is and it's a narrow one and it  
16 is a finite question of fact, the standard of care is when a  
17 patient is undergoing an ablation procedure and they suddenly  
18 have a cardiac arrest, the first thing that the  
19 electrophysiologist has to do is consider that this is a  
20 cardiac arrest caused by a tamponade. Which means that he  
21 has to take a needle, insert it in the pericardial sack,  
22 extract the blood so the pulse can resume. If he doesn't do  
23 that, the patient is going to be without oxygen and those  
24 minutes go by very quickly. That's why Neil Dechambeau died



1 on the operating table or very shortly thereafter, because  
2 the pericardial centesis was not done immediately. It wasn't  
3 done until 12:54.

4           Why do we know that? We know that by the very  
5 nature of the procedure itself. Once that pressure is  
6 released from the pericardial sack, the heart begins pumping  
7 almost instantly. So when was the pulse restored? 12:54:53,  
8 that's when the heart started pumping again. Okay. So what  
9 do we know according to medical science and according to Dr.  
10 Seiffert? It wasn't did not under 12:53.

11           Now, if you look at Dr. Kang's records, yes,  
12 they're skewed, but one thing that isn't skewed is the period  
13 of time between when the patient went into cardiac arrest and  
14 when the pulse was restored. It stays consistent. He has a  
15 different time, but the space of the time is consistent.

16           Then if you look at the letter that Mr. Navratril  
17 sent to Mr. Balkenbush, he says right in that letter, I have  
18 now reconciled that time. I've now looked at the medical  
19 records and I concede that my records were wrong, the code  
20 record is correct.

21           So now he knows, and this is notice to the world,  
22 that this is what happened. And if you look at that, and I'm  
23 sure if Dr. Morady was questioned about that letter, he would  
24 have to concede if that letter is true and correct, Dr. Smith

1 was negligent.

2 THE COURT: But he wasn't questioned about that.

3 MR. KOZAK: Well, he wasn't, but he should have  
4 been.

5 THE COURT: By whom?

6 MR. KOZAK: By Mr. Balkenbush.

7 THE COURT: All right.

8 MR. KOZAK: Mr. Balkenbush had that letter the day  
9 before he had that conversation with Dr. Morady wherein Dr.  
10 Morady told me he was going to withdraw. If I'm  
11 Mr. Balkenbush and I have a letter sent to me by Dr. Kang's  
12 lawyer and he lays it out and I don't discuss with him, well,  
13 Dr. Morady, don't you think you can reconsider your opinion  
14 if you know what Dr. Kang said happened in the operating  
15 room? I assure you, Dr. Morady probably and the inference  
16 would be very strong to a jury that he would have changed his  
17 opinion, Dr. Morady is going to testify we should have the  
18 opportunity to cross examine him on that.

19 THE COURT: Well, Dr. Kang had no privileges to  
20 perform a pericardial centesis.

21 MR. KOZAK: I'm not going with that at all.

22 THE COURT: I read that letter and it's not quite  
23 as stark as you seem to indicate.

24 MR. KOZAK: I think Dr. Seiffert will testify

1 otherwise, that that letter clears up the last vestige of any  
2 doubts about Dr. Smith's failure to do timely what he should  
3 have done.

4 THE COURT: All right. I wouldn't fight over this  
5 hill, because whether or not there will be some -- a lot of  
6 objections to that.

7 MR. KOZAK: Of course, and we fully expect to  
8 brief those and, in fact, we already have. And we expect  
9 that evidence will be allowed. If not here, somewhere else.

10 THE COURT: Okay.

11 MR. KOZAK: Our complaint with Mr. Balkenbush is  
12 that instead of waiting around for three years to get the EPS  
13 tape, which was turned out to be irrelevant, he should have  
14 gotten --

15 THE COURT: Why is it irrelevant? It was pivotal  
16 in turning his expert from plaintiff to defense. How can  
17 that be irrelevant? It's critical.

18 MR. KOZAK: Because the doctor found there was no  
19 VT, so it wasn't relevant to any issue in the case.

20 THE COURT: Other than the fact of whether or not  
21 malpractice took place.

22 MR. KOZAK: See, there's the other issue.

23 THE COURT: Which is?

24 MR. KOZAK: When was the pericardial centesis

1 performed? And Dr. Morady said if that pericardial centesis  
2 was performed after the stat echo arrived in the operating  
3 room, it was too late to save Mr. Dechambeau, and that was  
4 beneath the standard of care. He should have done the  
5 pericardial centesis before he sent out for the stat echo.

6 If you look at the Kang letter, the Kang letter  
7 says right there, they did resuscitation, Dr. Smith called  
8 for the stat echo while the resuscitation was being done, the  
9 stat echo arrives, Dr. Smith is preparing to the pericardial  
10 centesis, it takes him four minutes to get it cannulated and  
11 get the blood pressure restored. That's flat-out negligence.  
12 That's completely contrary to the standard of care.

13 THE COURT: What if his expert, the preeminent  
14 expert in the nation says that that is not beyond the  
15 standard of care?

16 MR. KOZAK: He doesn't say that, your Honor. He  
17 never says that. He never says why he changed his mind. He  
18 never addresses the other issues in the case, which is when  
19 was the pericardial centesis performed? Except in his  
20 initial affidavit. In his initial affidavit, he says it was  
21 performed too late. But he never explains why he changed his  
22 opinion about that.

23 THE COURT: Why didn't you ask him in the  
24 deposition why he changed it?

1           MR. KOZAK: Well, we tried. We tried to get him  
2 to say, but he wouldn't say. He just wouldn't say. He was  
3 very evasive.

4           THE COURT: Well, I mean, he was just answering  
5 your questions.

6           MR. KOZAK: Not very forthrightly and not very  
7 candidly, but that's not our burden.

8           THE COURT: All right. Okay.

9           MR. KOZAK: So that's basically our case. I mean,  
10 what we're saying is when you're notified by Dr. Kang's  
11 lawyer that Dr. Kang supports a case of negligence against  
12 Dr. Smith.

13          THE COURT: How are you going to get that into  
14 evidence?

15          MR. KOZAK: Pardon me?

16          THE COURT: How are you going to get that into  
17 evidence?

18          MR. KOZAK: One, it's a business record. It was  
19 in Mr. Navratril's records, it's in Mr. Balkenbush's records.  
20 It's notice to Mr. Balkenbush.

21          THE COURT: The business records require that  
22 these documents be held in the regular course of business,  
23 that they're routinely maintained by an individual whose  
24 authority is -- who is given authority to maintain these

1 accurately.

2 MR. KOZAK: That's right.

3 THE COURT: The basis is business records?

4 MR. KOZAK: That's right. One of them. Also  
5 notice was an exception to the hearsay rule. It was notice  
6 to Mr. Balkenbush of what Mr. Kang would have said, if  
7 called. And here's the other thing, if Mr. Kang had been  
8 deposed, Dr. Kang had been deposed right away and he  
9 testified consistently with what he says -- what his attorney  
10 said he would testify to, this case is basically over.

11 THE COURT: Isn't that hearsay on hearsay?

12 MR. KOZAK: Well, it's --

13 THE COURT: Go ahead.

14 MR. KOZAK: You're right, it's hearsay on hearsay,  
15 but there are exceptions. Not only that, this notification  
16 to Mr. Balkenbush shows why he was negligent. He should have  
17 taken Dr. Kang's deposition way back, and if Dr. Kang had  
18 testified consistent with what his lawyer said he would  
19 testify to, this case is over.

20 Here's the other problem, experts are entitled to  
21 rely on these kinds of documents and that's clearly --

22 THE COURT: Documents between attorneys?

23 MR. KOZAK: Experts, medical experts, they can  
24 rely on reports that are hearsay.

1 THE COURT: Correct.

2 MR. KOZAK: And this is hearsay, as you say, but  
3 Dr. Seiffert can rely on it. It's a report of what Dr. Kang  
4 would say if he was called to testify under oath.

5 THE COURT: All right. I understand.

6 MR. KOZAK: That's all we have, your Honor.

7 THE COURT: Thank you, Mr. Kozak. Ms. Piscevich.

8 MS. PISCEVICH: Thank you. With respect to this,  
9 first of all, there's no evidence of delay, there's only  
10 supposition based on the records, and nobody said there was a  
11 delay. Dr. Smith testified that there was no delay.

12 THE COURT: And Dr. Seiffert disagreed with that  
13 testimony.

14 MS. PISCEVICH: Right. And I asked him if he  
15 thought he was lying and he said, no. He said, no. He said,  
16 I just disagree. And he's the only one who was in the room.

17 THE COURT: Your position, then, is even if that  
18 raises a genuine issue of material fact, it's not material to  
19 the motion for summary judgment based on the legal  
20 malpractice.

21 MS. PISCEVICH: Correct. And what I'm talking  
22 about, and I do agree with Mr. Kozak in one situation, the  
23 duty of the doctor is, number one, to recognize the  
24 complications. That's number one. He did that. Number two,

1 as quickly as he can do pericardial centesis. He did that.  
2 In this case, 300 ccs of blood was taken out, that's a cup  
3 and a half. Okay. You use a syringe to do that. Okay. You  
4 don't have to be successful. That's not required of the  
5 standard of care.

6 Now, unfortunately, Dr. Morady was not taken, his  
7 deposition was not taken in a normal manner. And you're very  
8 well aware of this, and I even opposed that technique so they  
9 could get all of Dr. Morady's testimony. Yes, Dr. Morady  
10 gave an affidavit, and, yes, he thought he was correct. And  
11 then he saw the EPS tape and he received additional  
12 information and he said, I'm wrong. I'm wrong.

13 And why would Dr. Morady, just if you want to talk  
14 about actual of curiosity, he believed that Dr. Kang's  
15 records were correct. He thought there was a V-tach. There  
16 was no V-tach. Why would he have any credence in what Dr.  
17 Kang said when he can't even get the records correct?

18 So then we're talking about Dr. Morady doesn't  
19 have an opinion about why he changed his mind. It is not my  
20 burden to put on the evidence in this case why Dr. Morady  
21 change his mind. Mr. Kozak took a deposition of Dr. Morady.  
22 He did it by written interrogatories over my objection. He  
23 never asked that question.

24 In fact, one of the questions was, did you change



1 your mind solely on the EPS tape? And he said to the court  
2 reporter, can I ask a question? And the court reporter said  
3 no. He said, I did not change my mind solely on the EPS  
4 tape. That's all the information that is in that deposition,  
5 because there was no follow-up.

6 The VT is a huge issue in this case, because  
7 that's what was the initial reason for the malpractice.  
8 After the fact, they came up with supposition, supposition  
9 that somehow Dr. Smith had delayed when Dr. Smith said he  
10 didn't. This is a fellowship trained doctor. This is  
11 someone who has done this for 20 years.

12 So in the initial affidavit, yes, Dr. Morady will  
13 say, I gave this affidavit. That's not even an issue in this  
14 case. He also say, I changed my mind. And you know what,  
15 all of this talk about Dr. Kang, bottom line is, he didn't  
16 know when the pericardial centesis was done. Nobody knows  
17 when it was done except for Dr. Smith and there's no  
18 testimony to contradict that.

19 Dr. Seiffert said he did it correctly. Well, if  
20 he did it correctly, he did it timely. Dr. Seiffert says,  
21 well, I think these records, which he agrees don't match  
22 anything, well, I think I'm going to follow the records and I  
23 just believe that Dr. Smith did this wrong. Even though he  
24 agrees he did the procedure correctly and he agrees that he

1 recognized the procedure and he has to agree -- he can't --  
2 he can't say Dr. Smith lied and that's what he would have to  
3 do and he didn't say that. He didn't say that. He thought  
4 Dr. Smith was telling the truth under oath. And I assume  
5 every other expert is going to rely on Dr. Smith's expert  
6 saying he did it correctly. So we've got supposition at best  
7 in this case.

8           And then if you go to the next step, we're right  
9 back where we started from, did Mr. Balkenbush do the right  
10 thing in dismissing this case, when his expert changed his  
11 mind and you ride in and you ride out with that expert?  
12 That's what this case is about. And there is no legal  
13 malpractice in this case regardless of the medical  
14 malpractice, but there's no evidence of medical malpractice,  
15 because of the written questions sent by plaintiffs' counsel  
16 to Dr. Morady. They never even asked him, why did you change  
17 your mind?

18           They said the only reason, these questions were  
19 very specific, the only reason you changed your mind was the  
20 EPS tape? And he said, and it's attached in the pleadings,  
21 that was not the only reason. So there we are. We have no  
22 medical malpractice and we have no legal, but I think the  
23 legal is more important than the medical.

24           So you may obviously agree that the medical is

1 more important than the legal, but like I said, assuming  
2 everything goes perfectly, Mr. Balkenbush did the right  
3 thing, his expert changed. And he would have changed three  
4 years earlier, two years earlier, one year earlier. The  
5 statute of limitations had still run. It didn't matter. He  
6 changed his opinion and he changed his opinion based upon  
7 what Dr. Smith did, how he was trained and the EPS tape. It  
8 was a very relevant document in the underlying case -- excuse  
9 me -- piece of evidence, not a document, it's a tape.

10 I'm respectfully requesting, I realize that the  
11 punitive damages has been dismissed, that this case be  
12 dismissed.

13 THE COURT: Thank you, Ms. Piscevich. Mr. Kozak,  
14 let's set the medical malpractice aside, let's talk about the  
15 legal malpractice. I don't want to cut you off if there's  
16 other items you want to talk about.

17 MR. KOZAK: That's fine. Yeah, the legal  
18 malpractice. Okay. If Mr. Balkenbush had gotten the EPS  
19 tape thing cleared up, as counsel suggests, six months, a  
20 year, then he would have seen that there is no malpractice  
21 connected with the EPS tape and he could have proceeded with  
22 discovery and got that deposition of Dr. Kang, and Dr. Kang  
23 would have made the case for him, we know that.

24 This is the problem, it did make a difference

1 whether he got the EPS tape six months or a year, because we  
2 now know that there was credible medical expert testimony out  
3 there, i.e., Dr. Seiffert that he could have gotten to  
4 replace Dr. Morady, particularly where Dr. Morady could not  
5 explain why he was changing his opinion. It's not our  
6 burden. Dr. Morady is now their expert. He was our expert.  
7 Now he's their expert. That alone raises a red flag.

8 But Mr. Balkenbush had plenty of time, then, had  
9 he timely done the EPS tape discovery and got that to Dr.  
10 Morady, Dr. Morady said, I'm changing my mind. If he  
11 couldn't come up with an explanation as to why he's changing  
12 his mind as to the timeliness of the pericardial centesis, he  
13 could have gotten another expert. Dr. Seiffert could have  
14 come in or similar experts.

15 THE COURT: Aside from the 20-minute Internet  
16 search.

17 MR. KOZAK: I want to make one other point, judge.

18 THE COURT: Sure.

19 MR. KOZAK: There are expert witnesses reports in  
20 this case other than Dr. Seiffert's. There are expert  
21 witness reports from Dr. Doshi, who is Dr. Kang's expert. He  
22 said that the pericardial centesis wasn't done until after  
23 the static cardiogram arrived and he had made the diagnosis  
24 through the stat echo. That is too late. That's a violation

1 of the standard of care.

2 So it's not just Dr. Seiffert. There's Dr. Doshi.  
3 There's a Dr. Pearl, who said that the pulse was restored as  
4 soon as he did the pericardial centesis. When was the pulse  
5 restored? 12:54:53.

6 THE COURT: Is it the plaintiffs' position that  
7 Mr. Balkenbush had a duty to pursue this legal malpractice,  
8 so long as he found a warm body that would say that Dr. Smith  
9 committed malpractice?

10 MR. KOZAK: No. As soon as he found a credible  
11 expert, such as Dr. Seiffert. Because we have other experts  
12 who are supporting Dr. Seiffert. We have Dr. Doshi, we have  
13 Dr. Pearl. These were experts that were hired by Dr. Kang  
14 and they came in in support of exactly what Dr. Kang said.  
15 They said that the pericardial centesis was not done until  
16 after the stat echo arrived and that is per se negligence,  
17 that's beneath the standard of care.

18 THE COURT: But the testimony that I read in the  
19 record was that Dr. Kang didn't see the pericardial centesis  
20 being performed at all. He was probably too busy pushing  
21 meds.

22 MR. KOZAK: Well, he saw enough.

23 THE COURT: Okay.

24 MR. KOZAK: What he says is the pericardial

1 centesis did not take place until the stat echo arrived in  
2 the room and until they looked in there through the scope and  
3 saw that there was an effusion.

4           When he saw the effusion, that tells you right  
5 there, the blood is still in the pericardial sack. That's  
6 what an effusion is. And that's when the needle went in and  
7 that's when the blood pressure was restored. A jury could  
8 very easily infer in this case that Dr. Smith was negligent  
9 if you give us the benefit of every inference to what the  
10 evidence shows.

11           THE COURT: Let's give you that inference. Let's  
12 just say that a jury may -- let's just say that there's a  
13 genuine issue of material fact as to when the pericardial  
14 centesis was administered and we've got competing testimony.  
15 We've got Dr. Seiffert who says 12:54 and we have Dr. Smith  
16 says as close to 12:36 as humanly possible. I'm resisting  
17 saying, so what?

18           MR. KOZAK: That's all right. I don't mind.

19           THE COURT: Because in terms of Mr. Balkenbush's  
20 position, if he advised Ms. Dechambeau that this case is  
21 going to rise and fall on expert testimony, which most  
22 medical malpractice cases do.

23           MR. KOZAK: Of course.

24           THE COURT: And he promises Ms. Dechambeau that he

1 will scour the ends of the earth and find the most preeminent  
2 cardiologist, I believe it's called electrophysiologist in  
3 the country, and he finds one and she says, great, you know,  
4 we've got this. And they get an affidavit that says, at the  
5 time we filed this complaint, I felt malpractice was taken.  
6 And subsequently, he essentially pulls the rug out from  
7 underneath Mr. Balkenbush by saying, you know what, for  
8 whatever reason, I change my mind, there is no malpractice,  
9 no medical malpractice in this case. Where did  
10 Mr. Balkenbush breach his duty to Ms. Dechambeau?

11 MR. KOZAK: He had the letter, your Honor.

12 THE COURT: Kang's letter. Actually, it's the  
13 lawyer for Dr. Kang who says that Dr. Kang is going to say  
14 something.

15 MR. KOZAK: And that you can rely on this. When I  
16 see a letter like that from -- all we've heard about --

17 THE COURT: Go ahead.

18 MR. KOZAK: All we heard about is how all the  
19 lawyers can rely on everything everybody says one lawyer to  
20 another in this case. The deposition of Ed Lemons and the  
21 deposition of Mike Navratril, we all trust each other. Why,  
22 whatever we said, you can take to the bank, blah, blah, blah.  
23 Okay. Balkenbush gets this letter from Navratril, which  
24 throws Smith under the bus, what does he do with it? Why

1 doesn't he go to Dr. Morady and say, Dr. Morady, here's what  
2 Dr. Kang would testify to if he were under oath. What do you  
3 think Dr. Morady would say? We don't know. But we should  
4 know. He should have done that.

5 THE COURT: I appreciate that.

6 MS. PISCEVICH: May I just say one thing?

7 THE COURT: Sure, if you want to.

8 MS. PISCEVICH: There's been a lot of talk about  
9 Dr. Kang in this argument. Mr. Kozak advised me that he's  
10 not pursuing any claim against Mr. Balkenbush for failure to  
11 pursue the claim against Dr. Kang.

12 THE COURT: I don't see Dr. Kang in any of these  
13 pleadings.

14 MS. PISCEVICH: Exactly. So that's exactly why  
15 I'm not sure why we're arguing about what Dr. Kang said or  
16 didn't say or didn't do.

17 THE COURT: I understand the purpose of that  
18 position.

19 MS. PISCEVICH: I just want to make sure it is  
20 clear on the record that Dr. Kang -- there's no criticism of  
21 Mr. Balkenbush for dismissing Dr. Kang.

22 THE COURT: Okay.

23 MS. PISCEVICH: What he says is irrelevant for  
24 this argument.



1           THE COURT: I understand the purpose for which  
2 plaintiff is relying on Dr. Kang's statement to his lawyers,  
3 contained in his statement to his lawyers made to other  
4 lawyers, and I understand the reason plaintiff is relying on  
5 that letter. Thank you. Mr. Kozak, Ms. Piscevich, anything  
6 further?

7           MS. PISCEVICH: No, your Honor.

8           MR. KOZAK: No, your Honor.

9           THE COURT: Okay. Defense has filed a motion for  
10 summary judgment challenging the evidence produced by the  
11 plaintiff in support for its claim of legal malpractice on  
12 the part of defendant, Stephen Balkenbush, an attorney  
13 representing the plaintiff, Ms. Dechambeau, in an underlying  
14 malpractice action brought against Dr. Smith arising from the  
15 death of her husband, Mr. Dechambeau.

16           Summary judgment is granted when there are no  
17 genuine issues of material fact and that movant is entitled  
18 to judgment as a matter of law. The courts have defined a  
19 genuine issue of material fact as a fact which exists when a  
20 reasonable jury could return a verdict for the nonmoving  
21 party. And, of course, the Nevada Supreme Court has gone on  
22 to caution District Courts to construe all the pleadings and  
23 proof in the light most favorable to the nonmoving party.  
24 While holding that nonmoving party to a standard which will

1 not permit them to build a case on gossamer threads of wings,  
2 speculation or conjecture.

3           Summary judgment should only be entered when there  
4 are no issues of material fact. However, the mere existence  
5 of some alleged factual dispute between the parties will not  
6 defeat an otherwise properly supported motion for summary  
7 judgment, there must be some genuine issue of material fact.  
8 The showing of a genuine issue for trial is predicated upon  
9 the existence of a legal theory, which remains viable under  
10 the asserted version of the facts and which would entitle the  
11 party opposing the motion, assuming that version to be true,  
12 to a judgment as a matter of law.

13           The question to be resolved here is whether  
14 there's sufficient evidence supporting the claimed factual  
15 dispute to require a judge or jury to resolve the parties'  
16 differing versions in this case.

17           Turning first to the underlying medical  
18 malpractice claim, the pivotal issue of fact -- the pivotal  
19 set of facts at issue in the underlying medical malpractice  
20 claim revolves around the administration of the  
21 pericardiocentesis sometime between 12:36 and 12:54.

22           Plaintiff's expert opines that there was nothing  
23 wrong with Dr. Smith's diagnosis. Plaintiff's expert opines  
24 that there was nothing wrong with doctor -- the

1 administration of the pericardiocentesis. The procedure  
2 itself was properly performed by Dr. Smith. The difference  
3 between the two versions, that is, that of Dr. Smith and Dr.  
4 Seiffert is in dispute.

5 The question to be resolved, as the courts have  
6 indicated, is whether there is sufficient evidence supporting  
7 the claimed factual dispute to require a jury or a judge to  
8 resolve the parties' differing versions of the truth.

9 In this particular case, Mr. Balkenbush has  
10 retained a preeminent electro physicist, Dr. Morady, to  
11 resolve the issue as to whether or not Dr. Smith's  
12 administration of the pericardiocentesis fell below the  
13 standard of care. Dr. Morady opined eventually that it did  
14 not fall below the standard of care.

15 Mr. Balkenbush was then faced with several  
16 untenable options at that point. As the plaintiff's expert  
17 Mr. Gillock had pointed out, he could have gone to the  
18 discovery commissioner and sought permission to reopen the  
19 time for disclosures of experts. As the plaintiff suggests  
20 that Mr. Balkenbush could have gone out and attempted to find  
21 yet another expert to say in fact Dr. Smith's conduct fell  
22 below the standard of care.

23 However, if he had done that, clearly, the defense  
24 would have called Dr. Morady who would have testified that he

1 had been initially retained by Mr. Balkenbush and that he had  
2 initially given an opinion that Dr. Smith's conduct fell  
3 below the standard of care, and that after reviewing the EPS  
4 data, determined that a ventricular tachycardia did not occur  
5 and that I believe in Dr. Morady's statement said he would  
6 not have done anything different at that point than what  
7 Dr. Smith did. And that would have left Mr. Balkenbush and  
8 his client attempting to impeach an expert that they had  
9 retained to support their case.

10 So as the defense had pointed out, the medical  
11 malpractice issue is a discreet issue and not controlling in  
12 a determination of whether or not there is a genuine issue  
13 for trial. The trial, the genuine issue focuses on what  
14 Mr. Balkenbush could have or should have done. Plaintiffs  
15 have said that he should have gotten another expert.

16 There's no evidence in the record of any other  
17 expert other than Dr. Seiffert that would have given an  
18 opinion and even Dr. Seiffert's opinion is somewhat  
19 equivocal. Given the fact that he opines that the procedure  
20 was proper and the diagnosis was proper and that the only  
21 matter in dispute is the timing, and based upon the facts in  
22 this case, the records are a mess. There are varying times  
23 that challenge credulity, particularly if you look at Dr.  
24 Kang's records. So that discreet issue is not determinative

1 of this motion. It's what the focus should rightfully be,  
2 what should Mr. Balkenbush have done?

3 Now, the elements of a legal malpractice claim are  
4 an attorney-client privilege, that's number one, and that's  
5 conceded Mr. Balkenbush had an attorney-client relationship  
6 with Ms. Dechambeau. The second is the duty to employ or use  
7 all the skill, training, prudence, diligence that ordinary  
8 lawyers, not extraordinary lawyers, but ordinary lawyers  
9 possess in exercising or performing similar tasks.

10 And I know there has been some allegations in the  
11 records that this was Mr. Balkenbush's first medical  
12 malpractice case as a plaintiff's attorneys. Nonetheless,  
13 the Court has reviewed the deposition transcripts of  
14 Mr. Lemons and Mr. Navratril, who offer no criticism of  
15 Mr. Balkenbush's efforts on behalf of his client,  
16 Ms. Dechambeau.

17 Even the plaintiff's expert, Mr. Gillock, who is  
18 an outstanding attorney, well-respected in the community,  
19 particularly amongst the plaintiff's bar, who has been  
20 practicing law for some 43 years, while he criticized the  
21 fact that Mr. Balkenbush did not aggressively seek to depose  
22 some percipient witnesses, he never was able to point to a --  
23 tie that failure to a different result in this particular  
24 case.

1           The third element is a breach by the attorney of  
2   that duty owed to the client. In this case, Mr. Balkenbush  
3   had by all the evidence here pursued this action and had kept  
4   Ms. Dechambeau apprised of the action, had advised  
5   Ms. Dechambeau that he would hire the best expert in the  
6   country and Mr. Balkenbush hired the best expert in the  
7   country.

8           Mr. Balkenbush advised Ms. Dechambeau that the  
9   case would rise and fall on expert testimony, which is often  
10  the critical point of contention in a medical malpractice  
11  action. So there does not appear -- and Mr. Balkenbush  
12  timely advised Ms. Dechambeau of the change in Dr. Morady's  
13  testimony, which undermined her case.

14          He met with Ms. Dechambeau. He offered to set up  
15  a telephone conference between Ms. Dechambeau and Dr. Morady.  
16  He offered not only to set up the telephone conference, but  
17  to set it up in private and he would step out of the room to  
18  allow her to speak freely and confidentially with Dr. Morady  
19  in a case which can only be described as tragic.

20          The fourth element in a legal malpractice claim is  
21  proximate cause, that is, did Mr. Balkenbush's actions or  
22  inactions cause damages to -- were they the proximate cause  
23  of damages to Ms. Dechambeau? And here in this particular  
24  case, the plaintiff's expert witness is critical to this

1 analysis at least to the analysis of this element.

2 Mr. Gillock could not point to any action or inaction on  
3 behalf of Mr. Balkenbush which caused damages to  
4 Ms. Dechambeau.

5           There was some talk in Mr. Gillock's deposition as  
6 to whether or not Mr. Balkenbush should have pursued a claim  
7 against the hospital and Mr. Gillock was critical of  
8 Mr. Balkenbush for not taking the deposition of the  
9 percipient witnesses, but would that -- or of obtaining the  
10 EPS tape earlier. The question becomes at this stage is,  
11 would that have made any difference? Is there any evidence  
12 in the record to suggest how a different course of conduct by  
13 Mr. Balkenbush would have changed the outcome in this case?

14           Well, had Mr. Balkenbush had obtained the EPS tape  
15 earlier, he would have found that Dr. Morady had changed his  
16 mind earlier, but he would have been in the very same  
17 position then as he was some time later, that is, faced with  
18 a turncoat witness that would gut his case like a trout if he  
19 ever got on the stand if called by the defense.

20           Finally, there's the issue of damages. We've  
21 dealt with the issue of punitive damages.

22           Taking all of these factors into consideration,  
23 the Court finds that there is no genuine issue of material  
24 fact which precludes summary judgment in this case and the

1 case is dismissed. Ms. Piscevich, please prepare the order.

2 MS. PISCEVICH: I will, your Honor.

3 THE COURT: That will be the order.

4 THE CLERK: Your Honor, you want to vacate the  
5 trial date?

6 THE COURT: Vacate the trial date.

7 MS. PISCEVICH: I assume our conference on  
8 Thursday is vacated.

9 THE COURT: Yes.

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1 STATE OF NEVADA       )  
                                  ) ss.  
2 County of Washoe       )

3       I, STEPHANIE KOETTING, a Certified Court Reporter of the  
4 Second Judicial District Court of the State of Nevada, in and  
5 for the County of Washoe, do hereby certify;

6       That I was present in Department No. 7 of the  
7 above-entitled Court on September 24, 2013, at the hour of  
8 2:00 p.m., and took verbatim stenotype notes of the  
9 proceedings had upon the motion for summary judgment in the  
10 matter of A. DECHAMBEAU, et al., Plaintiffs, vs. STEPHEN  
11 BALKENBUSH, et al., Defendants, Case No. CV12-00571, and  
12 thereafter, by means of computer-aided transcription,  
13 transcribed them into typewriting as herein appears;

14       That the foregoing transcript, consisting of pages 1  
15 through 48, both inclusive, contains a full, true and  
16 complete transcript of my said stenotype notes, and is a  
17 full, true and correct record of the proceedings had at said  
18 time and place.

19  
20       DATED: At Reno, Nevada, this 13th day of February, 2014.

21  
22                                   S/s Stephanie Koetting  
23                                   STEPHANIE KOETTING, CCR #207  
24

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

<p>ANGELA DeCHAMBEAU AND JEAN-PAUL DeCHAMBEAU, BOTH INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF NEIL DeCHAMBEAU,</p> <p style="text-align: center;">Appellants,</p> <p style="text-align: center;">vs.</p> <p>STEPHEN C. BALKENBUSH, ESQ.; AND THORND AHL ARMSTRONG DELK BALKENBUSH &amp; EISINGER, A NEVADA PROFESSIONAL CORPORATION,</p> <p style="text-align: center;">Respondents</p>	<p style="text-align: right;">Electronically Filed May 23 2014 10:46 a.m. Tracie K. Lindeman Clerk of Supreme Court</p> <p style="text-align: right;">No. 64463</p>
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**Supplement to Joint Appendix**

<p>Margo Piscevich SBN 000917 Mark J. Lenz SBN 004672 Piscevich &amp; Fenner 499 W. Plumb Ln., Ste. 201 Reno, NV 89509 775-329-0958</p> <p style="text-align: center;"><i>Attorneys for Respondents</i></p>	<p>Charles R. Kozak SBN 11179 3100 Mill Street, Suite 115 Reno, NV 89502 (775) 322-1239</p> <p style="text-align: center;"><i>Attorney for Appellants</i></p>
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Respondents submit their "Supplement to Joint Appendix" as follows:

"Appellant's Joint Index of Exhibits, Vol. I," filed April 18, 2014, indicated at Tab 11 that the "Transcript of Hearing on Motion for Summary Judgment" was to be "supplied by Respondent." Accordingly, said Transcript is attached hereto as "Exhibit "11," numbered Pages 275 through 322.

**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 23<sup>rd</sup> day of May, 2014.

Piscevich & Fenner

By:

  
Mark J. Lenz

SBN 004672

499 W. Plumb Ln., Ste. 201

Reno, NV 89509

775-329-0958

Attorneys for Respondents

## 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:

Document Served:

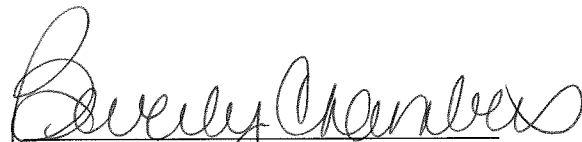
SUPPLEMENT TO JOINT APPENDIX

Person(s) Served:

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

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

DATED this 23<sup>rd</sup> day of May, 2014.

  
Beverly Chambers

## **EXHIBIT LIST**

Exhibit "11" - Transcript of Oral Argument, pp. 275-322