IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELA DECHAMBEAU AND JEAN-PAUL DECHAMBEAU, BOTH INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF NEIL DECHAMBEAU, Appellants, VS. STEPHEN C. BALKENBUSH, ESQ.; AND THORNDAHL ARMSTRONG DELK BALKENBUSH & EISINGER, A NEVADA PROFESSIONAL CORPORATION, Respondents	No. 64463

Respondents' Answering Brief

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I. Disclosure Statement (Rule 26.1)

Respondents assert that Thorndahl Armstrong Delk Balkenbush & Eisinger, is a Nevada Professional Corporation having no parent or subsidiary corporation.

II. Jurisdictional Statement

Respondents agree with Appellants' Jurisdictional Statement except for its reference to "JACC and NRS 17.76," neither of which appear to be connected in any way to this case.

III. Statement of the Issues

Respondents disagree with Appellants' "Statement of the Issues," and submit this alternative:

A. Whether the district court properly granted Defendants' Motion for Summary Judgment where Plaintiffs failed to produce any evidence of causation;

B. Whether the district court properly granted summary judgment where Plaintiffs' failed to prove an essential element of their legal malpractice case.

IV. Statement of the Case

This case began as a purported legal malpractice case in which the underlying case was a medical malpractice action. Plaintiffs below alleged that Defendant Stephen Balkenbush mishandled their medical malpractice case. Ironically, the only "mishandling" involved here was that of Plaintiffs' legal malpractice claims.

In the underlying medical malpractice action, Plaintiffs' decedent, Neil DeChambeau, died as the result of cardiac arrest during a procedure known as atrial fibrillation ablation being performed by Dr. David E. Smith. Mr. DeChambeau developed a complication known as tamponade, as a result of blood leaking into the "pericardial sac," causing a build-up of pressure on the heart which, if not relieved, will stop the heart altogether. Relief of that pressure is accomplished by "pericardiocentesis," which involves puncturing the pericardium with a syringe to draw off blood. Dr. Smith testified he timely performed the pericardiocentesis, but Mr. DeChambeau went into cardiac arrest, suffered an anoxic brain injury and died. This is a rare, but known, complication of this procedure.

Plaintiffs then hired Mr. Balkenbush to pursue a medical malpractice claim against Dr. Smith (and potentially others). Knowing that medical malpractice cases require expert opinion to establish the standard of care, breach and causation,

Mr. Balkenbush discussed with Plaintiffs, and they agreed, that Mr. Balkenbush should seek out the most experienced and renowned expert on electrophysiology, and that the case would "rise or fall" on that expert's conclusions with regard to whether or not Dr. Smith's treatment of Plaintiffs' decedent fell below the standard of care. Mr. Balkenbush obtained the services of Dr. Fred Morady, arguably the country's foremost expert on electrophysiology and cardiac ablation. Dr. Morady reviewed the then-available records and opined, based on the records he reviewed, that Dr. Smith's conduct appeared to have fallen below the standard of care. Dr. Morady reserved his right to change or supplement his opinions if additional information was provided.

One of those pieces of information, a piece Dr. Morady specifically requested, was the recorded electronic data from the procedure known as the "EPS" data, or "PRUCKA" data. Obtaining a copy proved to be problematic; but once it was finally obtained, Dr. Morady reviewed it and other records, and determined, contrary to his original opinion, that Dr. Smith's conduct did not fall below standards, and there was no malpractice.

Mr. Balkenbush therefore immediately informed his clients about Dr. Morady's opinion, and offered to have Ms. DeChambeau speak directly with Dr. Morady. She declined that offer, but agreed the case should be dismissed. Thus,

following consultation with his clients, Mr. Balkenbush dismissed the medical malpractice action.

Plaintiffs eventually brought this lawsuit for legal malpractice. Plaintiffs asserted that Mr. Balkenbush:

1. dismissed Plaintiffs' case without informing Plaintiffs;

2. never provided Plaintiffs with a written communication from Dr. Morady explaining why he changed his mind;

3. never explained why he dismissed the case against Dr. Kang;

4. failed to conduct any written discovery;

5. failed to take depositions of defendants and other percipient witnesses; and,

6. failed to verify the authenticity of the EPS data and/or explore spoliation issues relating to the EPS "tape."

Unfortunately for Plaintiffs, discovery in this case negated every one of Plaintiffs' asserted theories. Accordingly, Defendants moved for summary judgment, arguing to the district court that no matter what issues of fact might have survived in the underlying medical malpractice action, Plaintiffs failed to offer any evidence of causation in the legal malpractice case.

Following oral argument, the district court found Plaintiffs to have failed to offer evidence on an essential element of their claim, i.e., causation, and granted Defendants' motion for summary judgment. This appeal followed.

V. Statement of Facts

The district court made the following findings of fact:

> In this legal malpractice action, Plaintiffs allege that Mr. Balkenbush failed to exercise the legal skills necessary to their purported medical malpractice claim against Dr. David Smith and others. Plaintiffs' claim for medical malpractice against Dr. Smith arose out of a heart procedure known as cardiac ablation. During the procedure, (an atrial fibrillation ablation), there was a complication involving a pericardial tamponade. During Dr. Smith's efforts to deal with the complication, Plaintiffs' decedent "coded," i.e. went into cardiac arrest, suffered an anoxic brain injury and died.
>
> On September 5, 2007, Plaintiffs' then-counsel, Mr. Balkenbush, filed a medical malpractice lawsuit against Dr. Smith and others. Attached to the underlying Complaint was the Affidavit of Dr. Fred Morady dated August 29, 2007. Plaintiffs had agreed that Mr. Balkenbush would seek to retain the most preeminent expert in the country on cardiac ablation, and that the case would "rise or fall" on the expert's opinion. Plaintiffs and Mr. Balkenbush hired Dr. Morady to fill that role.
>
> Dr. Morady reviewed the medical records provided to him, and based on that review, initially opined that Dr. Smith's conduct fell below the standard of care. Dr. Morady advised Mr. Balkenbush that he needed to review the "Prucka" recording, also called the "EPS data" noting "there [had] to be one." Mr. Balkenbush was unable to obtain the EPS tape until March, 2010, but upon receipt, Mr. Balkenbush provided it to Dr. Morady for review. After Dr. Morady reviewed it, he told Mr. Balkenbush that he had "changed his opinion," and that he no longer believed that there was any malpractice in the action by Dr. Smith.

> Mr. Balkenbush advised Plaintiffs of Dr. Morady's change of opinion, and offered to have them speak directly and confidentially to Dr. Morady, which they declined. Plaintiffs agreed to dismiss their case, and Mr. Balkenbush filed the appropriate dismissal. Subsequently, Plaintiffs brought this action alleging legal malpractice against Mr. Balkenbush.
>
> At the close of discovery, Defendants moved for summary judgment on the ground there was no genuine dispute as to any material issue of fact, and Defendants were entitled to judgment as a matter of law. Specifically, Defendants challenged the existence of any evidence that would support a conclusion that had Mr. Balkenbush done something different it would have resulted in a different outcome. Defendants also challenged Plaintiffs' ability to prove by a preponderance of evidence that they would have prevailed in their underlying medical malpractice action.[1]

The district court's synopsis of the facts was sufficient for purposes of deciding the motion for summary judgment. The district court was, however, provided with ample undisputed material facts from which to make that synopsis. Defendants offered the following in connection with their Motion for Summary Judgment:

> 1. In this legal malpractice action, Plaintiffs allege that Mr. Balkenbush failed to exercise the legal skills necessary to their purported medical malpractice claim against Dr. David Smith and others.[2]
>
> 2. Plaintiffs' claim for medical malpractice against Dr. Smith arose out of a heart procedure known as cardiac ablation.

[1] Joint Appendix, Vol. 4, pp. 260-261. The Court may note that the Joint Appendix is missing page numbers 171 through 179, although it is not missing any content. There would appear to be no reason to renumber the following pages.

[2] JA p. 8 [Complaint ¶24]

During the procedure, (an atrial fibrillation ablation), there was a complication involving a pericardial tamponade.[3]

3. During Dr. Smith's efforts to deal with the complication, Plaintiffs' decedent "coded," i.e. went into cardiac arrest, likely from a pericardial effusion.[4] Plaintiffs' decedent suffered an anoxic brain injury and died.

4. On September 5, 2007, Plaintiffs' then-counsel, Mr. Balkenbush filed a medical malpractice lawsuit against Dr. Smith and others.[5]

5. Attached to the underlying Complaint was the Affidavit of Dr. Fred Morady dated August 29, 2007.[6]

6. Mr. Balkenbush considered Dr. Morady to be "one of the preeminent electrophysiologists" in the country.[7]

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

> *- I believe to a reasonable degree of probability that the care provided by David Smith, M.D. was negligent and breached the standard of care owed to Neil DeChambeau in the following particulars:*
> *a) David Smith, M.D., failed to timely diagnosis that Neil DeChambeau was experiencing cardiac tamponade.*
> *b) David Smith, M.D., failed to timely perform a pericardiocentesis procedure on*
> *Neil DeChambeau.*
> *c) After Neil Dechambeau experienced* ***ventricular tachycardia*** *on September 7,*

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3 JA pp. 43, 44 [(Deposition of Dr. Smith), p. 7, lns. 22-25; p. 8, lns. 1-2].
4 JA p. 48 [Depo of Dr. Smith, p. 26, lns. 6-10].
5 JA pp. 58-64
6 JA pp. 73-76
7 JA p. 87 [Depo of S. Balkenbush, p. 32, ln. 24; p. 33, lns. 1-2].

> *2006 at approximately 12:22 p.m., the cause of* ***ventricular tachycardia*** *should have been determined before any additional radiofrequency ablation was performed.*
> *d) At the time David Smith, M.D., observed Neil DeChambeau to exhibit no pulse,*
> *he should have immediately requested a surgeon to review the condition ofNeil DeChambeau but failed to do so.*
> *e) A transthoracic echocardiogram was not ordered until approximately 12:44 p.m.*
> *on September 7, 2006 and did not arrive until approximately 12:49 p.m. The transthoracic echocardiogram was performed too late to benefit Neil DeChambeau.*
> *All of the aforementioned conduct of David Smith, M.D. caused Neil DeChambeau to suffer irreversible brain damage and death.*[8]

Dr. Morady had not, at that time, been provided with the "Prucka" recording, also called the "EPS" data, which provides an important record of the procedure.[9]

8. Dr. Morady advised Mr. Balkenbush that he needed to review the EPS tape – "there [had] to be one."[10]

9. Despite efforts to do so, Mr. Balkenbush was unable to obtain the EPS tape until March, 2010, approximately four months before trial.[11]

10. Upon receipt of the EPS tape, Mr. Balkenbush provided it to Dr. Morady for review; and after Dr. Morady reviewed it, he told Mr. Balkenbush that he had "changed his opinion."[12]

11. Specifically, Dr. Morady told Mr. Balkenbush he "didn't believe that there was any malpractice in the action by Dr. Smith." [13]

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8 JA p. 75 (emphasis added)
9 JA p. 47
10 JA p. 85
11 JA p. 85 [p. 25, lns. 11-12].
12 JA p. 87

12. Dr. Morady also advised Mr. Balkenbush that "he would not have done anything differently [from Dr. Smith regarding the pericardiocentesis procedure]…."[14]

13. Mr. Balkenbush did not consider obtaining another expert opinion from a different electrophysiologist about whether Dr. Smith had committed malpractice because he believed Dr. Morady to be the preeminent electrophysiologist in the country, the time for designating experts had expired, and because when he discussed the case with his clients at its inception, they agreed that the case would "rise or fall based upon that expert's opinion."[15] .

14. Dr. Morady testified that after reviewing the EPS data, he no longer stood by his earlier opinions that Dr. Smith failed to diagnose cardiac tamponade or timely perform a pericardiocentesis procedure.[16] He noted specifically that the EPS data showed an "atrial flutter and ***not ventricular tachycardia*** as noted on the record of the anesthesiologist during the procedure."[17] He also noted the pericardiocentesis was performed ***before*** the transthoracic echocardiogram was done.[18]

15. Plaintiffs allege that Mr. Balkenbush's legal malpractice occurred when he allegedly dismissed the case "without consulting with Plaintiffs,"[19] on the ground that Plaintiffs' own expert had reversed his medical opinion upon being shown the "EPS" data.[20] Dr. Morady advised Mr. Balkenbush that there was, in fact, no malpractice involved in the treatment of Plaintiffs' decedent.[21]

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13 JA p. 87
14 JA p. 87
15 JA p. 87
16 JA p. 98, 104 [Depo of Dr. Morady upon Written Questions]
17 JA p. 99 (emphasis added)
18 JA p. 104
19 JA p. 8
20 JA p. 5
21 JA p. 87

16. Specifically, Plaintiffs alleged:

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

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

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

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

C. Defendants failed to provide legal services reasonably required to investigate the merits of Plaintiffs' case. In a wrongful death case involving medical malpractice, failure to take depositions of the treating physicians and other physicians who were present in the operating room where the fatal injury occurred violates the acceptable legal standard of care for attorneys handling such cases. Furthermore, Defendants were negligent in not asking Interrogatories, failing to make any Requests for Admissions or using any or the normal discovery tools expected of litigation attorneys handling a medical malpractice case.[22]

[22] JA pp. 4, 8

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

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

18. Mr. Gillock testified at deposition as follows, with respect to the alleged bases (in italics) for their malpractice claims:

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

Q Are you contending that there was a violation of the standard of care with respect to the communication with the clients?
A No.[24]

b. *Defendants dismissed Plaintiffs case without consulting with Plaintiffs and obtaining their consent before entering into an agreement with opposing counsel and dismissing Plaintiffs case with prejudice…*

Q I guess I need to ask this a different way. Are you going to be giving some kind of an opinion that it was below standard of care because Mr. Balkenbush did not obtain his client's permission to dismiss this case?
A No.
Q So that's not an issue in this case?
A Right.[25]

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23 JA p. 126 [Gillock Depo, p. 70, lns. 19-25; p. 71, lns. 1-3)].
24 JA p. 120
25 JA p. 125

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

> Q And what was your understanding toward the end of the case what the parties were going to do, the attorneys? What was the discovery plan?
>
> A The discovery plan, if there was a plan, as evidenced by some correspondence and e-mails, was going to be that they were going to exchange expert witness reports, and -- under the expert disclosures, which they did in March of 2010.
>
> And I'm not sure. It's not real clear where they were going from there.
>
> So, it looked like they were going to set depositions after they exchanged expert reports, even though they were looking at a July trial date.
>
> Q Well, I have done that. But, you get plenty of time to do the depositions. I'm not worried about that.
>
> But, is it your understanding they were going to set the depos after the exchange of the report and the review of the EPS tape or the Pruka disk, whatever it's called?
>
> A They were going to do some depositions of the experts afterwards.
>
> Q And the parties?
>
> A Well, I'm not sure where you're getting that information. But, Mr. Lemons said yes, of the parties. But, I don't think Mr. Balkenbush did. I'd have to look and see.[26]

d. […not investigating the Code.]

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[26] JA pp. 117-118

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

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

A You mean how would it have changed the death?

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

A It wouldn't have.[27]

19. Mr. Gillock did not testify about causation.

20. Plaintiffs' expert Dr. Siefert testified that, at the time of his deposition in this case, he had not reviewed the EPS data because he did not believe it was "worth [his] time" to do so.[28]

21. Dr. Siefert did not testify that any conduct by Dr. Smith caused anything. He contended only "that Dr. Smith did the timing of the procedure incorrectly."[29]

22. Dr. Siefert testified that his opinion was based on his review of the medical records, as were the opinions of the other experts in the underlying case. However, all agreed that the "timeline" in the records was incorrect.[30]

23. Dr. Siefert testified that if the sequence or order of events were as described by Dr. Smith in his deposition, then there was no breach of the standard of care.[31] He does not believe that Dr. Smith's testimony is corroborated by the medical record; but agrees that he himself was not present.[32]

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27 JA p. 123

28 JA p. 135

29 JA p. 150

30 JA pp. 147,148

31 JA p. 149

32 JA pp. 137, 138, 150

24. Dr. Seifert did not "find anything inappropriately done by any of the technicians or nurses in the catheter lab," nor "any inappropriate care on the floor."[33]

The district court heard oral argument on Defendants' Motion for Summary Judgment on September 24, 2013. The district judge expressed "some concern, and this is something I'd like you to address, Mr. Kozak, there appears to be no expert on causation."[34] Plaintiff's counsel did not address the court's concern. Instead, he tacitly conceded, by avoiding mentioning, that he had no expert to testify about causation. The Court will search the transcript in vain for any use of the term "causation" by Plaintiff's counsel, or any attempt to direct the court's attention to any portion of the record where any of Plaintiff's experts opined about causation in the legal malpractice case.[35]

VI. Summary of Argument

The district court properly granted summary judgment in Defendants' favor upon finding Plaintiffs to have failed adequately to oppose summary judgment. Plaintiffs' admitted most of their theories were not supported by any facts, but more importantly, their own expert could not and did not link as causative any conduct by Mr. Balkenbush.

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33 JA p. 145
34 JA p. 279
35 JA pp. 297 - 322

VII. Argument

A. The district court properly determined that Plaintiffs failed to produce any evidence of causation.

At oral argument on the Motion for Summary Judgment, Judge Flanagan expressed his "concern" that Plaintiffs had no expert to testify that anything Mr. Balkenbush did or did not do was a proximate cause of any of Plaintiffs' damages.[36] Judge Flanagan noted with particularity that he would "like [Mr. Kozak] to address"[37] the issue of causation. Not only did Plaintiffs' counsel fail to address the district court's concern, he also failed to point out to Judge Flanagan where, in any deposition transcript, exhibit or any other document, the court might find something from which it could infer that Mr. Balkenbush's conduct proximately caused any damages to Plaintiffs.

As noted below, causation is an essential element of a claim for legal malpractice. *See, e.g., Mainor v. Nault*, 120 Nev. 750, 774, 101 P.3d 308 (2004). Defendants having informed the court of this particular basis for their Motion for Summary Judgment,[38] Plaintiffs were not permitted to "rest upon the mere allegations or denials of [their] pleadings," but rather were obligated to set forth

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36 JA p. 279

37 *Id.*

38 JA pp. 23, 24, 29, 31, 35,

specific facts showing a genuine issue for trial…." NRCP 56(e). Plaintiffs failed to meet that burden, and the district court properly granted summary judgment.

If Plaintiffs had any evidence or argument to the contrary, one would have expected to see it either in their Opposition to the summary judgment motion, the transcript of the oral argument, or in their Opening Brief in this appeal. But Plaintiffs so assiduously avoid even mentioning "causation" as to imply it is a shibboleth of some kind.

Plaintiffs' Opening Brief mentions "Causation," but not as an element of their legal malpractice claim. They assert: "[Defendants] are of the position that there can be no legal malpractice claim without causation in the underlying medical malpractice claim." [Op.Br. p. 12]. As indecipherable as this statement seems, it at least acknowledges causation as an element of something. Had counsel inquired, he would have obtained a clearer understanding of "proximate cause." Defendants' "position" is in compliance with the law, i.e., there can be ***neither*** legal nor medical malpractice absent proof of causation. It is an essential element of both.

Plaintiffs assert four (4) sets of "material facts in dispute," purporting to establish that "Balkenbush committed legal malpractice while handling the DeChambeau's medical malpractice lawsuit:

1. *He failed to "conduct necessary discovery:"* [Op.Br. p.7]. This is one of the allegations in the Complaint. By "necessary discovery," Plaintiffs mean "formal written discovery," "depositions of percipient witnesses," and "expert witness depositions." [Op.Br. pp.7-9]. Plaintiffs concede they had the medical records. Plaintiffs' expert, Mr. Gillock, testified that Balkenbush's failure to conduct this discovery was "below the standard of care,"[39] but did not say what it caused. Instead, he agreed that if the EPS data had turned out to be immaterial or irrelevant, he had no doubt that the necessary depositions "would have been taken."

Plaintiffs also assert that Mr. Balkenbush failed to take the depositions of Dr. Smith and Dr. Kang, and that both were necessary to "identify the players" and provide "information necessary for accurate [expert] reports." [Op. Br. p.8]. Mr. Gillock testified he "thought that that should have been information that he got either by answers to Interrogatories or deposition. And I thought that those constituted, uh, negligence."[40] Once again, Mr. Gillock makes no mention of causation, nor do Plaintiffs, in their Opening Brief.

Finally, Plaintiffs assert that "[t]aking expert depositions after Dr. Morady's review of the EPS tape would not be timely and was beneath the standard of care." [Op. Br. p. 8]. While that is a paraphrase of what Mr. Gillock testified, Plaintiffs

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39 JA p. 115

40 JA p. 115

avoid any discussion of the undisputed evidence that taking the expert's depositions after Dr. Morady's review was precisely what counsel had agreed upon.[41] They also fail to ascribe any causation to the allegation.

2. *He failed to "Prosecute while in search of Red Herring evidence." [Op. Br. p.9]*.

This is puzzling and illogical. Plaintiffs take the position, both now and at summary judgment," that the "PRUCKA" [or EPS] tape was nothing more than a 'red herring' which provided no further relevant information …." [Op. Br. p. 10]. The assertion prompted Judge Flanagan to respond, "Why is it irrelevant? It was pivotal in turning his expert from plaintiff to defense. How can that be irrelevant? It's critical."[42]

And now in their Opening Brief Plaintiffs admit unequivocally that "the EPS tape only revealed that there was ***no 'ventricular tachycardia'*** present at 12:22 p.m., such that Dr. Smith was within the standard of care in proceeding with the operation." [Op. Br. p. 9 (emphasis added)]. Given Dr. Morady's initial opinion that in the presence of VT, its cause "should have been determined before any additional radiofrequency ablation was performed,"[43] The existence of VT during the procedure was a major component of Plaintiffs' case against Dr. Smith. And

41 JA p. 234
42 JA p. 300.
43 JA p. 75

once Dr. Morady reviewed the EPS tape and determined ***no*** VT existed, but the indication was "atrial flutter and not ventricular tachycardia,"[44] he properly notified Mr. Balkenbush that his opinion had to change.[45] Thus, Judge Flanagan's question was indisputably to the point, and provided its own answer – the EPS data was anything but a "red herring." And again, Plaintiffs fail now, as before, to ascribe any causation to this alleged "delay."

3. *He failed to inform Dr. Morady about "Adverse Percipient Witness Testimony." [Op. Br. p. 10]*

Plaintiffs' theory is that had Dr. Morady been given the anticipated adverse witness testimony of Dr. Kang, also a defendant in the underlying case, he would have changed his post-EPS-review opinion back to his pre-EPS-review, thus salvaging Plaintiffs' claims against Dr. Smith. "Had Dr. Morady been aware that Dr. Kang had witnessed Dr. Smith perform the pericardiocentesis at 12:54 p.m. he would undoubtedly not have withdrawn as an expert." [Op. Br. p.18]. For this gross speculation, Plaintiffs rely on an April 21, 2010 correspondence from Dr. Kang's counsel to Mr. Balkenbush. Plaintiffs engage in some extensive re-telling

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[44] JA p. 99

[45] Dr. Morady testified to the importance of the EPS data in changing his opinion, but he also testified that his "change in opinion wasn't based on review of only that electrophysiology recording," but also on his opinion that the pericardiocentsis was timely performed before the echocardiogram. JA p. 99. And of course, given the decision by Mr. Kozak to use a Rule 32 deposition, no follow-up was possible.

of Dr. Kang's recollection of events. Dr. Kang purportedly told his counsel, who then told Mr. Balkenbush, that he "believe[d], but cannot state for certain, … that Dr. Smith was preparing to perform the pericardiocentesis ***prior to the arrival*** of the echo technician."[46] Plaintiffs' retelling states: If Dr. Kang were to have testified, he would have said that Dr. Smith was "preparing" to do the pericardiocentesis ***as the stat echo was arriving***…." [Op. Br. p. 11]. The difference between "prior to" and "as-arriving" is obvious in character, if not so much in time; but the real questions here are:

(A). Evidentiary – Dr. Kang was deceased at the time of the summary judgment hearing; his counsel's letter to Mr. Balkenbush was complete hearsay, conveyed by hearsay, not under any exception.

(B). Speculation – Plaintiffs have fabricated an anticipated response by Dr. Morady to the supposedly adverse testimony of Dr. Kang, i.e., he would have immediately reinstated his first opinion. Ironically, because of the frankly stupid manner in which Plaintiffs' counsel took the deposition of Dr. Morady, i.e., on written questions, he could not ask any follow-up or different questions than those he put to paper prior to the deposition. Review of Dr. Morady's 14-minute deposition will disclose that Mr. Kozak never asked Dr. Morady what he would have done faced with such testimony by Dr. Kang. He ought not now be heard to

[46] JA p. 241 (emphasis added)

testify about what some other doctor would have done with a new piece of information. And, yet again, Plaintiffs point to no evidence discussing or linking causation to this purported infraction.

4. *Balkenbush's dismissal of the DeChambeau's Claims*

Why Plaintiffs believe this is still an issue is incomprehensible. Their expert, Mr. Gillock, testified that Mr. Balkenbush "had his client's permission to dismiss the case when he dismissed it," and that the dismissal was no longer "an issue in this case."[47] And again, Mr. Gillock says nothing about causation.

Thus, none of the "material facts in dispute" listed above are material in themselves, nor can they maintain materiality in the face of Plaintiffs' failure to offer evidence on causation. Their failure to produce evidence (or much in the way of argument) of facts supporting an essential element of their claim renders all other facts, disputed or not, immaterial. *See, e.g.*, *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382 (1998) ("where an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper.").

B. The district court properly found that Plaintiffs had failed to prove an essential element of their case.

The required elements of a legal malpractice claim

[47] JA p.126

> are: (1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being the proximate cause of the client's damages; and (5) actual loss or damage resulting from the negligence.

Mainor v. Nault, 120 Nev. 750, 774, 101 P.3d 308 (2004).

As noted above, the district court found that Plaintiffs failed to produce evidence of causation, an essential element of their claim. While no Nevada case has addressed the issue of whether expert testimony is required in a legal malpractice action to prove causation, [*See, Allyn v. McDonald*, 112 Nev. 68, 72, 910 P.2d 263 (1996)], Plaintiffs here have not offered ***any*** evidence to show causation. Moreover, this is not a *res ipsa* legal malpractice issue that is clearly within the knowledge of an ordinary lay person. Explaining to a jury how dismissing a case with your client's permission after their expert electrophysiologist changes his opinion caused your clients to incur damages would tax the capability of even the strongest of experts. Or how deciding not to do written discovery in a medical malpractice case in which you already have the entire medical chart, caused your former clients to incur damages. Causation in this context begs for expert testimony to explain it to the jury. Other jurisdictions so hold: *see, e.g., Tener v Short Carter Morris, LLP*, 01-12-99676-CV (Tex.App. – Houston [1st Dist.] 3-27-2014) ("Generally, expert testimony is required to prove

causation in a legal malpractice suit."); *Meyer v. Purcell*, 405 S.W.3d 572 (Mo.App. E.D. 2013); *Laramie v. Stone*, 160 N.H. 419 (2010). Accordingly, the district court properly granted summary judgment in Defendants' favor.

C. Plaintiffs waived their claim for punitive damages.

Plaintiffs failed, in the district court, to present any argument or evidence to support their putative claim for punitive damages. Plaintiffs appear to be asking this Court to reinstate that claim and set aside the district court's ruling that "the DeChambeaus waived punitive damages." [Op. Br. p. 4]. The Court will search in vain for any reference, argument, or fact, in either Plaintiffs' Opposition to the Motion for Summary Judgment,[48] or at oral argument,[49] directed to the punitive damages issue. Issues neither raised below nor supported in an appellant's opening brief are waived as a matter of law. *See, e.g., Marcuse v. Del Webb Communities*, 123 Nev. 278, (n.21), 163 P.3d 462 (2007); *Powell v. Liberty Mutual Fire Ins. Co.*, 127 Nev. __, 252 P.3d 668 (2011).

VIII. Conclusion

Plaintiffs' failed to produce or allude to any evidence in opposition to Defendants' Motion for Summary Judgment, that any conduct or omission by Mr.

[48] JA pp. 152-170
[49] JA pp. 275-322

Balkenbush proximately caused Plaintiffs to incur damages. In spite of the district court's clear prompting to Plaintiffs' counsel to address causation, Plaintiffs neglected to do so. Accordingly, based on Plaintiffs' failure to establish that essential element, the district court properly granted summary judgment in Defendants' favor.

WHEREFORE, Defendants/Respondents request relief as follows:

1. For an Order dismissing Plaintiffs' Appeal, and affirming the judgment of the district court;

2. for such other and further relief as the Court deems appropriate in the circumstances.

IX. Certification

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I also certify, pursuant to NRAP 28.2(a)(4), that the foregoing complies with the formatting requirements of Rule 32(a)(4) – (6) and the type-volume limitations of Rule 32(a)(7)(A)(ii), in that it contains 5,513 words.

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 27th day of May, 2014.

Piscevich & Fenner

By: Mark J. Lenz
Digitally signed by Mark J. Lenz
DN: cn=Mark J. Lenz, o=Piscevich & Fenner, ou, email=mlenz@pf-reno.com, c=US
Date: 2014.05.27 10:12:21 -07'00'

Mark J Lenz
Attorneys for Defendants/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, and addressed to the following:

Document Served: Respondents' Answering Brief

Person(s) Served:

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

_____ Hand Deliver
____X_____ U.S. Mail
_____ Overnight Mail
_____ Facsimile (775)
____X___ Electronic Filing

DATED this 27th day of May, 2014

_/s/ _____
Beverly Chambers