IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

Raymond Riad Khoury,

Appellant,

vs.

Margaret G. Seastrand,

Respondent.

No. 64702

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth District Department 30

County Clark County Judge Jerry Wiese

District Ct. Case No. A-11-636515-C

2. Attorney filing this docketing statement:

Attorney Steven T. Jaffe; Jacob S. Smith Telephone (702) 316-4111

Firm Hall Jaffe & Clayton

Address 7425 Peak Drive
Las Vegas, Nevada
89128

Client(s) Raymond Riad Khoury

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Richard Harris; Alison Brasier Telephone (702) 444-4444

Firm Richard Harris Law Firm

Address 801 S. Fourth Street
Las Vegas, Nevada
89101

Client(s) Margaret A. Seastrand

Attorney _____ Telephone _____

Firm _____

Address

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☒ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below:

This action stems from a rear-end auto accident which occurred on March 13, 2009. Raymond Khoury stipulated to liability for the accident, but contested the causation of alleged injuries to Margaret Seastrand.

Trial in this matter commenced on July 15, 2013 and ended on July 26, 2013, with the jury returning a verdict for Plaintiff in the amount of $719,776.00.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Whether the district court erred in allowing Plaintiff to indoctrinate the jury through presentation of and repeated reference to a specific verdict amount during voir dire;
2. Whether the district court erred in striking, for cause, various prospective jurors, where the same jurors had demonstrated a willingness to consider the facts and law and award a fair verdict amount based upon the evidence;
3. Whether the district court erred in precluding the admission of evidence of Plaintiff's treatment on a medical lien;
4. Whether the district court erred in precluding evidence comparing the amounts billed for Plaintiff's medical treatment and the amount actually paid for the same treatment;
5. Whether the district court erred in allowing Plaintiff's expert to offer testimony outside his scope of practice; and
6. Whether the district court erred in allowing Plaintiff's treating physicians to offer opinions which were not previously disclosed in a report, in their records, or in deposition.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Appellant is unaware of any pending proceedings in this court raising the same or similar issues.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: Respondent is unaware of any Nevada case which discusses the applicability of the collateral source rule to medical liens in a personal injury setting.

13. Trial. If this action proceeded to trial, how many days did the trial last? 10

Was it a bench or jury trial? Jury

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice? Respondent does not intend to move for disqualification or recusal of any Justice.

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from Nov 5, 2013

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. Date written notice of entry of judgment or order was served Nov 6, 2013

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☒ NRCP 59 Date of filing Nov 25, 2013

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion N/A - Motion Still Pending

(c) Date written notice of entry of order resolving tolling motion was served N.A.

Was service by:

☐ Delivery

☐ Mail

18. Date notice of appeal filed Dec 24, 2013

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

19. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)	☐ NRS 38.205
☐ NRAP 3A(b)(2)	☐ NRS 233B.150
☐ NRAP 3A(b)(3)	☐ NRS 703.376
☐ Other (specify)	

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The appeal is taken on a final judgment entered by the Eighth District, where the proceeding commenced.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff - Margaret Seastrand
Defendant - Raymond Khoury

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

All parties are parties to this appeal.

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Margaret Seastrand's claims of negligence and negligence per se were resolved with the entry of the verdict on November 5, 2013.

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

24. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Raymond Khoury
Name of appellant

Jan 21, 2014
Date

Clark Count, Nevada
State and county where signed

Jacob S. Smith
Name of counsel of record

Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the 21st day of January, 2014, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Dated this 21st day of January, 2014

Signature

Electronically Filed
03/08/2011 02:32:19 PM
03/08/2011 02:32:19 PM

CLERK OF THE COURT

COMP
SHOSHANA KUNIN-LEAVITT, ESQ.
Nevada Bar No. 011625
CHRISTIAN N. GRIFFIN, ESQ.
Nevada Bar No. 010601
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101
Tel: (702) 444-4444
Email: shoshana@richardharrislaw.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

RAYMOND RIAD KHOURY; DOES 1 through 10; and ROE ENTITIES 11 through 20, inclusive,

Defendants.

CASE NO.: A-11-636515-C
DEPT. NO.: XXX

RICHARD HARRIS LAW FIRM

COMPLAINT

COMES NOW, Plaintiff MARGARET G. SEASTRAND, by and through her counsel, Shoshana Kunin-Leavitt, Esq. and Christian N. Griffin, Esq. of the RICHARD HARRIS LAW FIRM, and for her causes of action against Defendants, and each of them, complains and alleges as follows:

JURISDICTION

1. That at all times relevant herein, Plaintiff MARGARET G. SEASTRAND (hereinafter referred to as "Plaintiff"), is and was a resident of Clark County, Nevada.

///

2. That at all times relevant herein, Defendant RAYMOND RIAD KHOURY (hereinafter referred to as "Defendant KHOURY"), is and was a resident of Clark County, Nevada.

3. All the facts and circumstances that give rise to the subject lawsuit occurred in Clark County, Nevada.

4. That the true names and capacities whether individual, corporate, associate, partnership or otherwise of the Defendants herein designated as DOES 1 through 10 and ROE ENTITIES 11 through 20, inclusive, are unknown to Plaintiff, but are believed to be the owners, course and scope employers and/or family members of the Defendants, who operated the subject motor vehicle, and therefore Plaintiff sues said Defendants by such fictitious names.

5. That Plaintiff is informed and believes and thereon alleges each of the Defendants, including those designated herein as DOE and ROE ENTITIES are legally responsible for the injuries and damages to Plaintiff as herein alleged.

6. That at such time that Plaintiff determines the true identities of the DOE and ROE ENTITIES, Plaintiff will seek leave of this Court to amend this Complaint to set forth the proper names of those Defendants as well as asserting appropriate charging allegations.

7. That on or about March 13, 2009, and at all times mentioned, Defendants, were the owners, employers, family members and/or operators of a motor vehicle, while in the course and scope of employment and/or family purpose, which was entrusted and driven in such a negligent and careless manner so as to cause a collision with the vehicle occupied by Plaintiff.

8. As a result of Defendant's violation of Nevada traffic laws, Defendant KHOURY was negligent per se in causing the subject motor vehicle collision.

///

///

9. As a direct and proximate result, Plaintiff was seriously injured and caused to suffer great pain of body and mind, some of which conditions are permanent and disabling all to their general damage in an amount in excess of Ten Thousand Dollars ($10,000.00).

10. As a direct and proximate result, Plaintiff incurred and will incur expenses for past and future medical care and treatment, all to her special damage in an amount according to proof at trial.

11. As a direct and proximate result, Plaintiff sustained a loss of earnings and earning capacity, all to her special damage in an amount according to proof at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment of this Court, as follows:

1. General damages in an amount in excess of $10,000.00;

2. Special damages for medical and incidental expenses incurred and to be incurred;

3. Special damages for lost earnings and earning capacity;

4. Attorney's fees and costs of suit incurred herein; and

5. For such other and further relief this Court may deem just and proper.

DATED this 29th day of March, 2011.

RICHARD HARRIS LAW FIRM

By: _____

SHOSHANA KUNIN-LEAVITT, ESQ.
Nevada Bar No. 011625
CHRISTIAN N. GRIFFIN, ESQ.
Nevada Bar No. 010601
801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

RICHARD HARRIS LAW FIRM

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11/06/2013 10:10:02 AM
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CLERK OF THE COURT

NJUD
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
Utah Bar No. 12336
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

MARGARET SEASTRAND, Plaintiff, vs. RAYMOND RIAD KHOURY; DOES 1 through 10; and ROE ENTITIES 11 tough 20 inclusive, Defendants.	CASE NO: A-11-636515-C DEPT NO: XXX

NOTICE OF ENTRY OF JUDGMENT

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a Judgment Upon the Jury Verdict was entered in the above entitled matter on the 5th day of November, 2013, a copy of which is attached hereto as Exhibit "1."

DATED this 6th day of November, 2013.

RICHARD HARRIS LAW FIRM

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
ALISON M. BRASIER, ESQ.
Nevada Bar No. 10522
801 S. Fourth Street
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of RICHARD HARRIS LAW FIRM and that on the 10 day of November 2013, I caused the foregoing **NOTICE OF ENTRY OF JUDGMENT** to be served as follows:

[X] by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid; and/or

[X] pursuant to EDCR 7.26, by sending it via facsimile; and/or

[ ] by hand delivery

to the attorneys listed below:

STEVEN T. JAFFE, ESQ.
HALL, JAFFE & CLAYTON, LLP
7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant

An employee of the RICHARD HARRIS LAW FIRM

RICHARD HARRIS LAW FIRM

JGJV
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
ALISON M. BRASIER, ESQ.
Nevada Bar No. 10522
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101
Phone (702) 444-4444
Fax (702) 444-4455
E-Mail: Benjamin@RichardHarrisLaw.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET SEASTRAND, Plaintiff, vs. RAYMOND RIAD KHOURY; DOES 1 through 10; and ROE ENTITIES 11 tough 20 inclusive, Defendants.	CASE NO: A-11-636515-C DEPT NO: XXX

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the court and the jury, the Honorable, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.[1]

IT IS ORDERED AND ADJUDGED that Plaintiff, MARGARET SEASTRAND, have and recover of Defendant, RAYMOND RIAD KHOURY, the following sum:

Past Medical Expenses:	$ 236,794.00
Future Medical Expenses:	$113,725.00
Past Loss of Household Services:	$ 32,996.00

[1] Exhibit 1: Jury Verdict

☐ Voluntary Dis	☐ Slip Dis	☐ Sum Jdgmt
☐ Involuntary (stat) Dis	☐ Slip Jdgmt	☐ Non-Jury Trial
☐ Jdgmt on Arb Award	☐ Default Jdgmt	☐ Jury Trial
☐ Non-Jic Dis (by def)	☐ Transferred	

RICHARD HARRIS LAW FIRM

Future Loss of Household Services:	$183,238.00
Past Physical and Mental Pain, Suffering, Anguish and Disability	$ 85,013.00
Future Physical and Mental Pain, Suffering, Anguish and Disability	$ 68,010.00
Total Damages	**$719,776.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's past damages shall bear Pre-Judgment interest in accordance with Lee v. Ball, 116 P.3d 64, (2005) at the rate of 3.25% per annum plus 2%[2] from the date of service of the Summons and Complaint[3], on June 1, 2011, through July 26, 2013, as follows:

PRE-JUDGMENT INTEREST ON PAST MEDICAL DAMAGES:

06/01/2011 through 07/26/13 = $27,177.04

[(787 days) at (prime rate (3.25%) plus 2 percent = 5.25%)]

[Interest is approximately $4.13 per day]

PRE-JUDGMENT INTEREST ON PAST LOSS OF HOUSEHOLD SERVICES:

06/01/2011 through 07/26/13 = $3,786.98

[(787 days) at (prime rate (3.25%) plus 2 percent = 5.25%)]

[Interest is approximately $4.13 per day]

PRE-JUDGMENT INTEREST ON PAST PHYSICAL AND MENTAL PAIN, SUFFERING, ANGUISH AND DISABILITY:

06/01/2011 through 07/26/2013 = $9,757.01

[(787 days) at (prime rate (3.25%) plus 2 percent = 5.25%)]

[Interest is approximately $4.13 per day]

[2] **Exhibit 2:** Prime Rate as of January 1, 2013

[3] **Exhibit 3:** Affidavit of Service

NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiff is as follows:

MARGARET SEASTRAND is hereby given Seven Hundred Sixty Thousand Four Hundred Ninety Seven and 03/100 dollars ($760,497.03), which shall bear post-interest at the current rate of 5.25% per day, until satisfied.

DATED THIS 1st day of November, 2013.

DISTRICT COURT JUDGE

Respectfully submitted:

RICHARD HARRIS LAW FIRM

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
ALISON M. BRASIER, ESQ.
Nevada Bar No. 10522
801 South Fourth Street
Las Vegas, NV 89101
Attorneys for Plaintiff

RICHARD HARRIS LAW FIRM

EXHIBIT "1"

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
JUL 26 2013
BY ALICE POLCI, DEPUTY

MARGARET G. SEASTRAND,

Plaintiff,

vs.

RAYMOND RIAD KHOURY; DOES 1 through 10; and ROE ENTITIES 11 through 20, inclusive,

Defendant

CASE NO. A-11-636515-C
DEPT NO. XXX

VERDICT

We, the jury in the above-entitled action, find for the Plaintiff, Margaret Seastrand, and against the Defendant, Raymond Khoury, and find that the Plaintiff is awarded the following amounts:

Past Medical Expenses: $ 236,794

Future Medical Expenses: $ 113,725

Past Loss of Household Services: $ 32,996

Future Loss of Household Services: $ 183,238

Past Physical and Mental Pain, Suffering, Aguish and Disability: $ 85,013

Future Physical and Mental Pain, Suffering, Anguish and Disability: $ 68,010

DATED this 26 day of July, 2013.

FOREMAN

EXHIBIT "2"

PRIME INTEREST RATE

NRS 99.040(1) requires:
"When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1, or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, . . . "
Following is the prime rate as ascertained by the Commissioner of Financial Institutions:

January 1, 2013	3.25%		
January 1, 2012	3.25%	July 1, 2012	3.25%
January 1, 2011	3.25%	July 1, 2011	3.25%
January 1, 2010	3.25%	July 1, 2010	3.25%
January 1, 2009	3.25%	July 1, 2009	3.25%
January 1, 2008	7.25%	July 1, 2008	5.00%
January 1, 2007	8.25%	July 1, 2007	8.25%
January 1, 2006	7.25%	July 1, 2006	8.25%
January 1, 2005	5.25%	July 1, 2005	6.25%
January 1, 2004	4.00%	July 1, 2004	4.25%
January 1, 2003	4.25%	July 1, 2003	4.00%
January 1, 2002	4.75%	July 1, 2002	4.75%
January 1, 2001	9.50%	July 1, 2001	6.75%
January 1, 2000	8.25%	July 1, 2000	9.50%
January 1, 1999	7.75%	July 1, 1999	7.75%
January 1, 1998	8.50%	July 1, 1998	8.50%
January 1, 1997	8.25%	July 1, 1997	8.50%
January 1, 1996	8.50%	July 1, 1996	8.25%
January 1, 1995	8.50%	July 1, 1995	9.00%
January 1, 1994	6.00%	July 1, 1994	7.25%
January 1, 1993	6.00%	July 1, 1993	6.00%
January 1, 1992	6.50%	July 1, 1992	6.50%
January 1, 1991	10.00%	July 1, 1991	8.50%
January 1, 1990	10.50%	July 1, 1990	10.00%
January 1, 1989	10.50%	July 1, 1989	11.00%
January 1, 1988	8.75%	July 1, 1988	9.00%
January 1, 1987	Not Available	July 1, 1987	8.25%

*** Attorney General Opinion No. 98-20:**

If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in NRS 99.040 from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store accounts as discussed herein. In the case of open or store accounts, interest may be imposed or awarded only by a court of competent jurisdiction in an action over the debt.

EXHIBIT "3"

AFFT DIST COURT CLARK COUNTY STATE OF NEVADA
CASE NO.: A-11-636615-C DEPT. XXX
Richard Harris Law Firm
Shoshana Kunin-Leavitt, Esq.
801 S. 4th St.
Las Vegas, NV 89101
State Bar No.: 11625
Attorney(s) for: Plaintiff(s)

Margaret G. Seastrand,

Plaintiff(s)

vs

Raymond Riad Khoury; et al.

Defendant(s)

Date:
Time:

AFFIDAVIT OF SERVICE

Vicky Peltier, being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of the: Summons & Complaint

on the 1st day of June, 2011 and served the same on the 1st day of June, 2011 at 7:51PM by:

1. delivering and leaving a copy with the Defendant(s), __ at __.

2. serving the Defendant(s), Raymond Riad Khoury by personally delivering and leaving a copy with Lesley Khoury, Wife, a person of suitable age and discretion residing at the Defendant(s)'s usual place of abode located at 9130 W. Ann Rd., Las Vegas, NV 89149.

3. serving the Defendant(s), __ by personally delivering and leaving a copy at :__.

a. with __ as __ an agent lawfully designated by statute to accept service of process;

b. with __ pursuant to NRS 14.020 as a person of suitable age and and discretion at the above address, which address is the address of the registered agent as shown on the current certificate of designation filed with the Secretary of State.

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
NORMA P. MCMAHAN
Appt No. 93-3447-1
My Appt. Expires June 30, 2013

State of Nevada, County of Clark

SUBSCRIBED AND SWORN to before me on this 2nd day of June, 2011

Notary Public

Affiant - Vicky Peltier #:R-058000
Legal Process Service License # 604

WorkOrderNo 1104672

Legal Process Service, 626 S. 8th Street, Las Vegas, NV 89101 (702) 471-7255

MNTR
STEVEN T. JAFFE
sjaffe@lawhjc.com
Nevada Bar No. 007035
JACOB S. SMITH
jsmith@lawhjc.com
Nevada Bar No. 010231

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CLERK OF THE COURT

HALL JAFFE & CLAYTON, LLP
7425 PEAK DRIVE
LAS VEGAS, NEVADA 89128
(702) 316-4111
FAX (702) 316-4114

Attorneys for Defendant
Raymond R. Khoury

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

RAYMOND RIAD KHOURY; DOES 1 through 10; and ROE ENTITIES 11 through 20, inclusive,

Defendants.

CASE NO. A-11-636515-C
DEPT NO. XXX

DEFENDANT'S MOTION FOR NEW TRIAL

Date of Hearing: _____

Time of Hearing: _____

Defendant, Raymond Khoury, by and through his attorneys of record, Hall Jaffe & Clayton, LLP, hereby submits his Motion for New Trial.

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This Motion is brought under NRCP 59(a) and NRCP 59(e), and is made and based upon the pleadings and papers on file herein, the court record of the trial in this matter, the Memorandum of Points and Authorities submitted herewith, and any oral argument that the Court may entertain in this matter.

DATED this 25 day of November, 2013.

HALL JAFFE & CLAYTON, LLP

By _____
STEVEN T. JAFFE
Nevada Bar No. 007035
JACOB S. SMITH
Nevada Bar No. 010231
7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant
Raymond R. Khoury

NOTICE OF MOTION

TO: MARGARET G. SEASTRAND, Plaintiff; and

TO: RICHARD A. HARRIS, ESQ., her attorney of record.

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing **DEFENDANT'S MOTION FOR NEW TRIAL** on for hearing before the above-entitled Court on the 9 day of Jan. 2014, at the hour of 9:00am, or as soon thereafter as counsel may be heard.

DATED this 25 day of November, 2013.

HALL JAFFE & CLAYTON, LLP

By _____
STEVEN T. JAFFE
Nevada Bar No. 007035
JACOB S. SMITH
Nevada Bar No. 010231
7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant
Raymond R. Khoury

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

This case stems from an undisputed liability auto accident which occurred on March 13, 2009 at the intersection of Craig Road and Rancho in Las Vegas, Nevada. While Defendant Raymond Khoury does not deny that he caused a minor accident, Plaintiff alleges that, on that date, she suffered serious and disabling injuries as a result of the collision.

Plaintiff treated with several physicians for her alleged accident-related injuries, including undergoing a cervical fusion procedure with Dr. William Muir ("Dr. Muir.") and a lumbar fusion procedure with Dr. Yevgenly Khavkin ("Dr. Khavkin"). Neither Dr. Muir nor Dr. Khavkin issued any formal reports as part of their treatment.

Plaintiff retained and disclosed Dr. Jeffrey Gross as an expert neurosurgeon in the case. Dr. Gross issued an initial report and three (3) supplemental reports throughout discovery. Defendant deposed Dr. Muir and Dr. Khavkin, and Dr. Gross to get their opinions with respect to their treatment of Plaintiff and the causation of her injuries. At trial, Plaintiff's doctors were permitted to offer new, previously-undisclosed opinions, which significantly prejudiced Defendant. Specifically, Dr. Gross was permitted to offer opinions which go beyond his proffered and recognized medical expertise; Dr. Muir was permitted to offer new causation opinions which differed from those he gave at his deposition; and Dr. Grover was permitted to step into the shoes of Dr. Khavkin and testify in his place, despite the fact that Defendant had no reason to depose Dr. Grover in discovery.

Defendant was also significantly prejudiced at trial by not being able to introduce any evidence of Plaintiff's treatment on a lien. Indeed, much of Plaintiff's treatment with Dr. Muir, Dr. Khavkin, and Dr. Gross, as well as treatment she received from numerous other doctors, was provided on a lien. Plaintiff sought to be able to introduce evidence of these liens at trial, but was prohibited from doing so by the Court.

Trial in this matter took place from July 15, 2013 through July 26, 2013, before the honorable Jerry Wiese. During jury *voir dire*, Plaintiff employed tactics which unfairly indoctrinated the jury as to the amount the jury must consider awarding. Plaintiff's *voir dire* tactics also forced the jurors to check their logic and personal experience at the door, as any juror who expressed even a remote hesitation at

awarding at least two-million dollars was repeatedly and constantly hounded by Plaintiff's counsel—to the point of tears in one case—impressing upon the remaining jurors that a two-million dollar verdict was not an option. Ultimately, all of the jurors who expressed any hesitation at awarding such a large verdict without knowing more about the case—even where they had expressed that they would be willing to consider the facts and award such an amount if the evidence supported such a verdict—were stricken for cause.

The jury returned a verdict in favor of the Plaintiff and against the Defendant, awarding total damages in the amount of $719,770.00. Defendant Raymond Khoury now moves this court for a new trial as to each and every count in the Plaintiff's Complaint. Defendant also moves the court for an amended or altered verdict reflecting the difference between the amounts billed for Plaintiff's medical treatment as opposed to the amounts accepted in satisfaction of those bills.

II. PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS

A. Procedural History

Plaintiff filed her Complaint in this matter on March 8, 2011 alleging negligence and negligence per se against Defendant. During Discovery, Plaintiff disclosed a number of her treating physicians as potential witnesses at trial, including Dr. Muir, Dr. Grover and Dr. Khavkin. Plaintiff only provided the most general of descriptions as to what testimony these treating physicians would offer :

> 24. William S. Muir, M.D.
> And/or Person(s) Most Knowledgeable
> 653 N. Town Center Drive #210
> Las Vegas, Nevada 89144
>
> [. . .]
>
> 30. Yevgeniy Khavkin, M.D.
> Jaswinder Grover, M.D.
> And/or Person(s) Most Knowledgable
> Nevada Spine Clinic
> 7140 Smoke Ranch Road, Suite 150
> Las Vegas, NV 89113
>
> [. . .]
>
> The above medical providers are expected to testify to Plaintiff s injuries, diagnosis, treatment and prognosis, as well as the authenticity of their medical records and bills. Plaintiffs treating physicianss are expected to offer testimony regarding the Plaintiffs diagnosis, treatment and prognosis for any and all services rendered as a result of the injuries sustained in the accident.

> Plaintiffs treating physicians will not prepare expert reports, but will rely upon medical records generated as a result of the treatment for Plaintiffs injuries. The doctor will opine, to a reasonable degree of medical probability, that the medical treatment was reasonable and necessary.

See Plaintiff's First Supplemental Disclosure, attached as **Exhibit A**. Notably, Plaintiff's treating physicians were never disclosed as experts on her initial designation of expert witnesses, nor were they disclosed on any of her four (4) supplemental expert disclosures.

Dr. Gross, on the other hand, was disclosed as an expert witness with the following description of his anticipated testimony and opinions:

> 1. JEFFREY GROSS, M.D.
> 27882 Forbes Road, Suite 100
> Laguna Niguel, California 92677
> Tel: 949-364-6888
>
> Dr. Gross is a board certified neurosurgeon and is expected to provide expert testimony relating to his review of Plaintiff s medical records, opinions regarding his past medical care and/or treatment, and his opinions regarding her potential need for future care and/or treatment, including the treatment and medical reasonableness of other medical providers. He will also provide opinions regarding the causation of Plaintiffs injuries and the necessity and reasonableness of Plaintiffs past and future medical expenses.

See Plaintiff's Initial Expert Designation, attached as **Exhibit B**. The witness description given for Dr. Gross contains absolutely no information stating that he would be offering opinions with respect to cardiologic medicine. Dr. Muir also issued four (4) expert reports which were disclosed in discovery. *See* Expert Reports of Dr. Gross dated August 7, 2013, August 28, 2013, September 29, 2013, and May 13, 2013, attached as **Exhibit C**, **Exhibit D**, **Exhibit E**, and **Exhibit F**, respectively. Nowhere in any of Dr. Gross's reports does he offer any causation opinions with respect to the October 27, 2008 complaints and subsequent x-ray findings. Moreover, nowhere in any of Dr. Gross's reports does he address Dr. Schifini's opinions regarding secondary gain.

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Defendant deposed Dr. Gross on March 18, 2013. During his deposition, Dr. Gross did not offer any causation opinions with respect to the October 27, 2008 complaints and subsequent x-ray findings, nor did he address Dr. Schifini's opinions regarding secondary gain.

B. Relevant Trial Testimony

1. Testimony of Dr. Gross

At trial, Dr. Gross offered new and previously undisclosed opinions regarding Plaintiff's treatment and pain complaint prior to the subject accident. Specifically, Dr. Gross offered new testimony regarding a visit Plaintiff made to her primary care physician on October 27, 2008, just over four (4) months before the subject accident. On that date, Plaintiff presented to Dr. Kermani complaining of chest pain and numbness and tingling in her left arm. *See* 10/27/08 records from Dr. Kermani, attached as **Exhibit G**. Dr. Gross testified that the primary finding was atypical chest pain, and that a cervical x-ray which revealed age related changes to the spine at C5-6 level of the neck and muscle spasm as merely an incidental finding. *See* Dr. Gross Trial Testimony Part 1 at 40:25-41:5, attached hereto as **Exhibit H**. However, Dr. Gross did not stop there. Despite objections of counsel–that Dr. Gross is not qualified to offer a cardiologic opinion and that this opinion was not previously disclosed–Dr. Gross was permitted to offer a completely new opinion regarding the causation of Plaintiff's symptoms. Consider Dr. Gross' testimony:

> Q. Okay. Doctor, let me ask a question: So based on those findings of the X ray -- well, first off, are those findings abnormal for someone who at the time would have been Ms. Seastrand's age and her gender?
>
> A. No, not at all.
>
> Q. So let me ask a question: More probable that those findings were -- that the numbness and tingling was coming from the neck or more probable that it was from the heart event for which she had a positive stress test?
>
> MR. JAFFE: Objection -- objection, Your Honor. Two areas. Number 1, this is an undisclosed opinion. Number 2, it's getting into an area beyond his expertise.
>
> MR. CLOWARD: Judge, may we approach.
>
> (Whereupon a brief discussion was held at the bench.)
>
> THE COURT: All right. The objection's overruled. I'm going to re-ask the question. So it says: Let me ask a question: Is it more probable those findings were -- of the numbness

and tingling were coming from the neck or more probable it was from the heart event for which she had a positive stress test?

THE WITNESS: Thank you. It is more probable that the arm symptoms are unrelated to the neck and more likely related to the heart or anxiety or both.

See **Exhibit H** at 41:6–42:8. Outside the presence of the jury, Defense counsel made a record of the objections to Dr. Gross's testimony:

MR. JAFFE: Your Honor, at this time, I would like to make a record regarding the three issues that have been discussed at sidebar this morning. Most prominently, the most recent one where Dr. Gross just before this break was allowed to express an opinion as to the cause of the plaintiff's symptoms and treatment in October through December 2008. My opinion is twofold: No. 1, it is an undisclosed opinion; no. 2, it goes into areas beyond his expertise.

With respect to the expertise issue, he just testified that it related to the heart, and he's not here as a cardiologist. He has not been offered as a cardiologist. He is not testifying as a cardiologist. He's not an expert in cardiology. He's not trained as a cardiologist. He has no background or experience in cardiology. And I believe it's entirely inappropriate for him to give what was now undeniably a cardiologic opinion.

Second, he just was allowed to testify regarding the causation for treatment in late 2008 that has never been disclosed. And, Your Honor, I would like leave to make court -- as Court exhibits all three of Dr. Gross's records -- or reports rather from August 7, 2012, August 28th, 2012, and the third from September 29, 2012.

THE COURT: You can make them Court exhibits. That's fine.

MR. JAFFE: I'm going to have clean copies brought in, because the only copy I've got is one that I've got marked up. In his third report, the -- the September 2012 report, that is the first time he saw these October and December 2008 records. He had already rendered a causation opinion regarding this accident. But at no time did he ever render a causation opinion, even in that third report, regarding the need for the plaintiff to have been seen for that treatment to exclude it as an issue related to the 2009 motor vehicle accident.

All he said in that report by way of his opinions was, Discussion. I review -- in review of these additional records, I have identified areas of disagreement with defense participants. I have provided the reasons and basis for my disagreement and my opinions being supported by the medical facts, medical knowledge, and applied clinical logic. My opinions are given within a reasonable degree of medical probability.

In that report, he does not discuss the causation for why the plaintiff was seen in late 2008. It is different for him to defend his opinion than to go beyond that and give an affirmative opinion in a completely new medical area, that is, that late 2008 treatment. My experts did address it in their reports.

My experts did put it in their opinions. Dr. Gross did not. And he was now allowed to give a completely new opinion simply because Mr. Cloward saw that I'm making a point of this in my opening, and he's got no expert who's discussed it. His experts have never seen this report or these records other than Dr. Gross having seen it in time for his third report, and now he was allowed to give a new opinion. I believe that was entirely improper.

See **Exhibit H** at 43:12-45:25.

In addition to his previously undisclosed cardiologic opinions, Dr. Gross also offered previously undisclosed opinions regarding secondary gain and the opinions of Defendant's expert, Dr. Schifini. Just as with the cardiologic opinions, Dr. Gross' opinions on secondary gain were permitted over the objections of counsel:

> Q. So I have a question: Margie told you that she was doing well when she saw you?
>
> A. She was improving.
>
> Q. She was improving. Now, you're aware that Dr. Schifini has suggested that Margie has something called secondary gain.
>
> A. I saw that.
>
> Q. Whereby, you know, that would suggest or imply that, you know, she is exaggerating her symptoms for financial gain in this lawsuit.
>
> A. That's his idea.
>
> Q. Okay. And let me ask a question: Would you expect someone with this term financial -- "secondary gain," you know, this exaggeration, would you expect them to report to you that they were doing better or improving?
>
> MR. JAFFE: Objection, Your Honor. This is I believe an undisclosed opinion now.
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> MR. CLOWARD: I don't think it is, Judge.
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> MR. JAFFE: Let me double check.
>
> THE COURT: Come up, guys.
>
> (Whereupon a brief discussion was held at the bench.)
>
> THE COURT: Objection's overruled. Doctor, the question is: Let me ask you a question: Would you expect someone with this term "secondary gain," you know, this exaggeration, would you expect them to report to you that they were doing better or improving?
>
> THE WITNESS: The answer's no.
>
> MR. CLOWARD: Q. Why not?
>
> A. People who exhibit secondary gain tend to amplify, exaggerate pain. Those patients complain of more pain or worsened pain. Ms. -- Ms. Seastrand complained of improvement. So the improvement doesn't go along with any support for the -- the doctor's opinion on secondary gain being in play here.

See **Exhibit H** at 28:24-30:12.

2. Testimony of Dr. William Muir.

Also at trial, Plaintiff called Dr. William Muir to testify regarding the cervical fusion he performed. Dr. Muir was one of Plaintiff's treating physicians. He was never disclosed as an expert, and did not issue an expert report. Notwithstanding these facts, Dr. Muir was permitted to offer new opinions with respect to the reasonableness and necessity of the treatment provided by another medical provider, Dr. Marjorie Belsky:

> Q. Okay. Now there was a criticism that Dr. Belsky doing the facet joint in addition to the transforaminal epidural injections would be inappropriate. Do you have any feeling –
>
> MR. JAFFE: Objection, Your Honor. May we approach?
>
> THE COURT: Sure
> (Whereupon a brief discussion was held at the bench.)
>
> THE COURT: Objection's overruled.
>
> Q. Dr. Muir, Now, do you feel that there was an adequate workup of the patient prior to getting to you?
>
> A. Yes.

See Day 4 Trial Transcript at 29:23-30:13, attached hereto as **Exhibit I**. Defense counsel objected, noting that Dr. Muir was not disclosed as an expert, and therefore should not have been on the stand offering commentary on the propriety of treatment rendered by Dr. Belsky, particularly where Plaintiff had retained and disclosed two (2) experts to comment upon that same treatment. *Id.* at 56:18-24. Defendant's objections were overruled, as the Court held that Dr. Muir's defense of Dr. Belsky was a defense of his own work. *Id.*

C. Relevant Motions in Limine

Defendant filed numerous pre-trial motions regarding the admissibility of certain evidence. Among those motions were Defendant's Motion to Admit Evidence of Liens; Defendant's Motion to Admit Evidence of Amounts Billed vs. Amounts Paid; and Defendant's Motion to Limit the Testimony of Plaintiff's Treating Physicians, specifically seeking to limit them to the opinions in their medical records and depositions. Additionally, Plaintiff filed a Motion to Allow Voir Dire Questioning

regarding verdict amounts[1]. The hearing on these motions took place on June 11, 2013. At this hearing, the court ruled on each of these motions, respectively.

On Defendant's Motion to Admit Evidence of Liens, the Court Ruled that it would preclude reference to all collateral sources, and that it included liens as a collateral source. *See* MIL Hearing Transcript, attached as **Exhibit J**, at pp. 49-51; 97-101.

On Defendant's Motion to Admit Evidence of Amounts Billed vs. Amounts Paid, the court denied the motion, ruling that, if Plaintiff was able to put up a doctor to testify that the amounts billed were reasonable, the Plaintiff could offer up the amounts billed. As to the amounts paid, i.e. any write offs due to liens, the court ruled that any such evidence was a collateral source and was not admissible. *Id.* at 104-106.

On Plaintiff's Motion to Allow the Introduction of Verdict Amounts during Voir Dire, the court ruled that EDCR rule 7.70 is linked to verdict amounts based on specific hypothetical facts, and ruled that Plaintiff would be permitted to propose one verdict number during voir dire, and then follow up on the jurors' reasons for their reactions to that number. The court specifically stated that Plaintiff would not be permitted to propose multiple verdict amounts to see which jurors would go the highest. *Id.* at 35-38.

Finally, on Defendant's Motion to Limit Treating Physicians to the Opinons Stated in their Clinical Charts and Depositions, the Court granted the motion in part, holding, however, that if there is some new testimony which a party thinks was a reasonable inference from the chart of the deposition, the parties would approach the bench to discuss its admissibility. *Id.* at 87-88.

D. Jury Voir Dire

Jury voir dire at trial lasted nearly three (3) days. Throughout the process, Plaintiff was permitted to ask questions which inflamed and incensed the jurors, ultimately reducing one juror to tears and causing another juror to lash out at Plaintiff's counsel. Plaintiff's counsel informed the jurors that he would be seeking a verdict in excess of two million dollars:

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[1] Defendant incorporates each of these motions and all arguments and replies in support of the same by reference herein.

> Can I get a commitment is there can everybody raise their hands for me, if you agree too just be brutally honest and share the way you feel can I get everybody to give me that commitment. Thank you. Thank you very much. So I believe in brutally honesty as well. I'm going to be brutally honest with you folks right now. I'm going to say something that's a little uncomfortable for me to say. **My client is suing for in excess of $2 million**, and that's, you know, that's that's what it is, and I'm putting that out there, I'm just going to be brutally honest about that. [...] But I want to talk about that right now. So who who here is a little uncomfortable even if it's just a little bit about what just said?

See Day 1 Trial Transcript, attached as **Exhibit K**, at 104:16-105:7. Several of the prospective jurors expressed an initial hesitancy at awarding 2 million dollars, stating that it seemed excessive. However most of these prospective jurors acknowledged that there part of the reason they felt that was because they did not know any facts about the case, and that there were circumstances for which they would consider such a large award. Consider the following statements from some of the prospective jurors:

> PROSPECTIVE JUROR NO. : I think it's excessive.
>
> THE COURT: Name and badge number.
>
> PROSPECTIVE JUROR NO. : sorry Gary Walker badge No. 34.
>
> THE COURT: Thank you.
>
> MR. CLOWARD: Mr. Walker, I appreciate it. Tell me why you feel that way.
>
> PROSPECTIVE JUROR NO. : we all pay insurance everybody knows in Nevada we pay higher rates than most people in the United States. If your insurance doesn't cover everything, that is incurred in an accident, I just feel that it's -- it's too excessive I mean, you can't ask for a golden pot when you haven't really earned it.
>
> MR. CLOWARD: Sure.
>
> PROSPECTIVE JUROR NO. : **if there was a death involved, possibly**. But I don't know that the case so I really can't say.
>
> MR. CLOWARD: Sure. Mr. Walker, I appreciate that, I really do. And you know, is there there anyone else that feels that way, Mrs. Agnor.
>
> PROSPECTIVE JUROR NO. : Patty Agnor 033. I think I agree. I think it's excessive because I'm sure I can't remember his name, I'm sure he didn't mean to do this, if it was -- **if it was a death, maybe it would be a little bit more to pay that kind of money**, but he I'm sure he didn't mean to -- to cause the accident.

Exhibit K at 105:10-106:13 (emphasis added). Numerous other jurors had similar feelings in the absence of any facts of the case:

> MR. CLOWARD: Okay. Mr. Unger, 006. Tell me your thoughts.
>
> PROSPECTIVE JUROR NO. : well, I agree with the people who have also spoken with similar I was in two car accidents rear ended both times and did not pursue legal action

against the person insurance covered some work that I needed for neck help but other than that, I didn't believe in pain and suffering. I had employees who have been in car accidents who I have gone after a lot of money in accidents, for pain and suffering, and for medical expenses that I thought were at the time I couldn't Judge my employees, **but I thought it was above and beyond, what the incident was**.

MR. CLOWARD: Okay. Thank you Mr. Unger. Sir, Mr. Runz.

PROSPECTIVE JUROR NO. : 001.

MR. CLOWARD: Tell me your thoughts.

PROSPECTIVE JUROR NO. : I agree, **without knowing the facts** of $2 million just for a car accident just seems excessive.

Id. at 107:16-108. Mr. Runz clearly qualified his concern, basing it on the absence of facts. However, Plaintiff's counsel then went on to twist Mr. Runz's words beyond what he had said:

MR. CLOWARD: Seems excessive you have a hard time just with the thought of that.

PROSPECTIVE JUROR NO. : yes.

Id. at 108:9-11. Even some of the jurors who had seemed most opposed to awarding an amount as large as 2 million dollars made it clear that the greatest source of their hesitancy was based on the fact that they did not know anything about the case:

MR. CLOWARD: Mr. Walker. Just one question would you agree with me that regardless of what the evidence is you personally would not be willing to insert an amount above $2 million into the verdict form? Is that a fair statement.

MR. JAFFE: Your Honor again I have to object, Rule 7.70 prohibits questions touching on the verdict a juror would return based upon hypothetical facts.

THE COURT: We already discussed this in the pre trial motion it's overruled.

MR. CLOWARD: You agree that's a fair statement.

PROSPECTIVE JUROR NO. : I don't even know what the statement is any more I'm sorry.

MR. CLOWARD: That happens a lot. A lot of things are lost in translation. You would agree you have expressed you were the first person to raise your hands-on $2 million. When I said that you, you know, you raised your hand and I appreciated that Mr. Walker I appreciated your brutal honesty, because I want to get a fair fight. Especially the question is you agree with me that you would not award you would have a hard time you would not award fundamentally an amount above $2 million regardless of of what the evidence showed just based on your beliefs and your core values.

PROSPECTIVE JUROR NO. : I can't even say. It's -- is it -- I don't know that it's up to me to award anybody anything. You're asking me something that I don't have I can't give somebody $2 million. **You're asking me to make a judgment. I don't know. I don't**

> **know the facts of the case. I can't tell you what my answer's going to be on Thursday.**
>
> MR. CLOWARD: Okay. I'm just trying to follow-up because earlier you indicated that, you know, you you would not be able to award an amount above 2 million. When I said.
>
> PROSPECTIVE JUROR NO. : I -- you're asking for something that I can't answer. I don't know. I just said I think it's ridiculous amount that that you're asking for. That's all I said. That's the only thing that I did say. **I can't tell you whether I would give that amount or not. I have no idea. I don't know the facts of the case.**

Id. at 129:2-130:22. Much like Mr. Walker, Ms. Agnor expressed hesitancy at the thought of awarding 2 million dollars, but ultimately made it clear that her hesitancy was based on the fact that she did not know what physical limitations Plaintiff was claiming:

> MR. CLOWARD: Let me ask Mrs. Agnor, you shared an opinion earlier you would have a hard time awarding an amount above $2 million.; is that correct.
>
> PROSPECTIVE JUROR NO.: correct.
>
> MR. CLOWARD: Okay. And [without] knowing anything about the facts of the case, you agree with me that you would you would have a hard time that would be something that you would just due to your fundamental beliefs your core beliefs you would have a hard time doing is that true.
>
> PROSPECTIVE JUROR NO. : I think so unless that person was **physically disabled** or missing a limb, or.
>
> MR. CLOWARD: Sure.
>
> PROSPECTIVE JUROR NO. :**couldn't go on with life in a normal way**.
>
> MR. CLOWARD: Sure. And you saw my client in the courtroom earlier. Correct?
>
> PROSPECTIVE JUROR NO.: right.
>
> MR. CLOWARD: Do you feel that you have already made an opinion regarding her ability or disability one way or another, and it would be hard for to award an amount above 2 million.
>
> PROSPECTIVE JUROR NO. : I think I would have a hard time awarding 2 million, but why I see her stand why I see her walk, you know, **there was no interaction or anything to see how she can function. I don't know**.

Id. at 131:5-132:10.

After gathering their initial impressions about a verdict in excess of 2 million dollars, Plaintiff's counsel came back to each of the prospective jurors with a myriad of leading questions, essentially designed to walk the jurors into a trap to get them to agree that they could not be objective. Despite objections of counsel, Plaintiff's counsel was permitted to ask these leading questions to each of the

prospective jurors who had expressed some hesitance at awarding two million dollars. In doing so, Plaintiff's counsel was not so much asking the opinions of the prospective jurors as he was telling them their feelings about large verdicts and damages for pain and suffering. Consider the following statements:

> MR. CLOWARD: [. . .] Ms. Vera I wanted to ask you you also indicated you you share the same view on pain and suffering. You have fundamental kinds of core values, beliefs, regarding pain and suffering you agree with that.
>
> PROSPECTIVE JUROR NO. : uh-huh.
>
> MR. CLOWARD: Is that a yes?
>
> PROSPECTIVE JUROR NO. : yes.
>
> MR. CLOWARD: [. . .] So, but regarding just this one narrow issue of of pain and suffering, you agree like Mr. Evans that, you know, if you brought a case, and you knew your attorney was going to ask for pain and suffering, you would feel uncomfortable having a juror with your same frame of mind sitting on, you know, a case that you were asking for that.
>
> PROSPECTIVE JUROR NO. : yes.
>
> MR. CLOWARD: Okay. And that's just because you have core beliefs and values that you have had for a long time and that's just.
>
> MR. JAFFE: Your Honor, may we approach?
>
> THE COURT: Sure.
> (Whereupon a brief discussion was held at the bench.)
>
> THE COURT: Go ahead.
>
> MR. CLOWARD: Mrs. Vera, so back to, you know, your beliefs and your opinions, those are those are beliefs that you have you had for prior to just wake up today you would agree.
>
> PROSPECTIVE JUROR NO. : yes.
>
> MR. CLOWARD: You had those for a long time.
>
> PROSPECTIVE JUROR NO. : yes.
>
> MR. CLOWARD: And you know nothing that I'm going to say or nothing that Mr. Jaffe is going to say or your neighbor is going to say is going to change the way that you have those beliefs and those values right.
>
> PROSPECTIVE JUROR NO. : correct.
>
> [...]

> MR. CLOWARD: [. . .] And you you would agree with me that just on this very narrow just on pain and suffering, just on that issue alone, you -- you would not be a good fit for this specific case right.
>
> PROSPECTIVE JUROR NO. , correct.
>
> MR. CLOWARD: Okay. And the parties on that just on just that specific issue wouldn't have a fair fight on just that specific issue the defendant would start just a little bit ahead of the plaintiff, you agree with that right.
>
> PROSPECTIVE JUROR NO. : I agree.

Id. at 123:14-125:22. Another excerpt from the transcript lays out the series of leading "questions" Plaintiff's counsel asked each prospective juror who had demonstrated reservations about pain and suffering or a damages award exceeding 2 million dollars. Each of these questions were specifically focused on the juror's feelings, and not on their willingness to consider the evidence and be fair. Even so, a number of the prospective jurors reiterated that the series of questions was difficult to answer without knowing any facts about the case:

> MR. CLOWARD: Would you agree with me that you know, just on this specific issue, just the amount that we have talked about just that specific issue, you would not be a good fit for this particular case on just that specific issue.
>
> PROSPECTIVE JUROR NO.: correct.
>
> MR. CLOWARD: Okay. And you agree that the parties wouldn't start on a fair or on not a fair, but at a level field on that specific issue.
>
> PROSPECTIVE JUROR NO.: right.
>
> MR. CLOWARD: And that's because you have these beliefs and these core values that you're fine to have, but you've had those and you didn't form those today right.
>
> PROSPECTIVE JUROR NO.: right.
>
> MR. CLOWARD: And nothing that I say or Mr. Jaffe says or you know your neighbor says or a fellow juror says is going to change your mind right.
>
> PROSPECTIVE JUROR NO. : I would doubt it, **but like was already brought up we don't know what happened. We don't know any of the situation that has happened**.
>
> MR. CLOWARD: Sure. But just the preliminary, you know, without knowing any of the facts it would be difficult for you and you wouldn't want someone with your frame of mind on a hypothetical jury if it was and you against the plaintiff right.
>
> PROSPECTIVE JUROR NO.: right.

Id. at 133:12-134:14. This same series of leading questions was presented to Mr. Runz, who stated that he felt jurors like him would "make the right decision at the end" before Plaintiff's counsel walked him down the path of questions to create the appearance of a bias. *Id.* at 136:16-138:19. Also, Mr. Frasier was posed the same questions, and gave similar answers. *Id.* at 145:11-146:19. Plaintiff moved to strike

Plaintiff challenged several of the prospective jurors for cause, including Mr. Frasier, Mr. Evans, Mr. Walker, Mr. Runz, Ms. Vera, Ms. Ong, Mr. Jueng, and Ms. Agnor. The parties stipulated to dismiss Mr. Bulason. Following these challenges for cause, Defense counsel finally had an opportunity to ask questions of the prospective jurors. Notably, many of the jurors Plaintiff's counsel moved to strike demonstrated a willingness to consider the facts and the evidence, and make an award based upon the information presented to them. Consider the statements of Ms. Agnor when posed more open-ended questions:

> MR. JAFFE: So Ms. Agnor, if I can talk to you for a couple of minutes.
>
> PROSPECTIVE JUROR NO. : okay.
>
> MR. JAFFE: Now, I was a little confused before, and I want to make sure I understand one thing correctly. When Mr. Cloward was asking you questions about whether you would feel uncomfortable bothered, or could not accept a 2 million-dollar pain and suffering request, that they would be making okay, does that mean that you could never award pain and suffering in a case if there was some that you found to exist.
>
> PROSPECTIVE JUROR NO. : oh, no, no. I think if someone's deserves a reward, not a reward, not a reward, but.
>
> MR. JAFFE: A verdict.
>
> PROSPECTIVE JUROR NO. , right. Or even for pain and suffering, or missed work compensation, medical bills, of course they're entitled to whatever their whatever they miss out on.
>
> [. . .]
>
> MR. JAFFE [. . .]Judge Wiese at the the end of the trial is going to give every juror an instruction he's going to read instructions and tell you about how to view certain -- the evidence you have heard, how to structure your award to -- to make your award, and what you can and cannot award for one of which being pain and suffering. First of all, will you follow the law that Judge Wiese reads if you're selected as a juror?
>
> PROSPECTIVE JUROR NO. : yes if that's the law, you bet.
>
> MR. JAFFE: Okay. And if pain and suffering is allowed, as a measure of damages, will you give the plaintiff as equal a chance to prove her pain and suffering claim whether you want to believe $2 million or not, but you will still at least listen to the law, and if you felt

that pain and suffering was appropriate, render what you would believe to be a fair pain and suffering verdict consistent with the law?

PROSPECTIVE JUROR NO. : of course.

MR. JAFFE: So you can follow the law on pain and suffering.

PROSPECTIVE JUROR NO. : you bet.

MR. JAFFE: So it sounds to me like what you're saying is you can give a fair award on pain and suffering it's just if $2 million is requested, you may not necessarily feel comfortable with that number, but you would give something a different number if you felt it was fair.

PROSPECTIVE JUROR NO. , right. Right. I mean, if she's got $2 million worth of medical bills,.

MR. JAFFE: Different story.

PROSPECTIVE JUROR NO. : different story.

MR. JAFFE: Different story. So in other words, then, when it comes to giving a pain and suffering award you will follow the law and give a number that you would feel would be appropriate based upon the law and the facts and the evidence and everything you hear in the trial.

PROSPECTIVE JUROR NO. : of course.

[. . .]

MR. JAFFE: [. . .] would you give plaintiff an equal point prove her pain and suffering claim.

PROSPECTIVE JUROR NO. : yes.

MR. JAFFE: Just as you will give Mr. Khoury an equal chance to defend against the pain and suffering claim.

PROSPECTIVE JUROR NO. ,: right.

MR. JAFFE: So I guess going into the trial, are each of them on a separate on an equal footing given that you don't know anything yet?

PROSPECTIVE JUROR NO. , right. Yes.

[. . .]
MR. JAFFE: Now, given that how you said you are you would be a fair juror on pain and suffering, would you feel comfortable having a jury made-up entirely of your frame of mind when it comes to obeying the law and giving each side a fair shake when it comes to deliberations?

PROSPECTIVE JUROR NO. : I think so.

MR. JAFFE: So you can be fair to both sides.

PROSPECTIVE JUROR NO. : I think so.

MR. JAFFE: Is that what you would want if you were sitting at one of these tables and picking a jury.

PROSPECTIVE JUROR NO. : [sure] you bet.

MR. JAFFE: So in other words, you would feel comfortable having jurors like yourself, deliberating on your case because they would be fair?

PROSPECTIVE JUROR NO. : exactly. Because that's what the law is.

Id. at 214:10-219:12. Several of the other jurors who Plaintiff had challenged for cause, also clarified that they were not biased, and were not opposed to an award of pain and suffering, had not pre-judged the case as frivolous, had not placed either Plaintiff or Defendant ahead in their minds, and would be willing to consider the evidence and award reasonable and fair damages, including pain and suffering damages. *Id.* at 219:12 - 233:5. These included Ms. Vera, Mr. Runz, Mrs. Ong, and Mr. Frasier.

Mr. Evans, Mr. Walker, and Mr. Jeung were dismissed for cause, and the parties stipulated to the dismissal of Mr. Bulason. Plaintiff's counsel followed up with some of those jurors who were not dismissed for cause. He immediately questioned Ms. Vera about her seemingly different responses to Defense counsel's. Ms. Vera made it clear that Plaintiff's counsel was preying on emotions, while Defense counsel was interested in fact-based responses:

MR. CLOWARD: I just want I want a fair fight that's it. You know.

PROSPECTIVE JUROR NO. : and and I I want to do my duty.

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NO. : the way you asked the question was based on feeling, the way the other attorney asked was based on fact [. . .] and evidence, and proof, and if it sounds like I gave two different answers, I apologize for that. But I asked I answered your question the way you asked the question, and I answered the other attorney's question the way he asked it.

Id. at 245:4-18. Ms. Vera went on to explain how frustrating it was to have dollar figures thrown out without any facts to support them:

MR. CLOWARD: [. . .] I just want to know, if you think that your views, you know, the facts might be colored just a little bit based on your beliefs and values?

MR. JAFFE: Your Honor same objection.

PROSPECTIVE JUROR NO. : I don't know.

THE COURT: Overruled.

> MR. CLOWARD: Sure it's hard to know isn't it? Till you hear the the facts that's the one frustrating part about this we can't tell you anything about the case Mr. Jaffe and I would move to do that go ahead.
>
> PROSPECTIVE JUROR NO. : well if you can't tell us anything about the case why was the amount of money brought up.
>
> MR. CLOWARD: Sure.
>
> PROSPECTIVE JUROR NO. : why was that even said and I think that's why I'm having trouble now.
>
> MR. CLOWARD: How come you're why.
>
> PROSPECTIVE JUROR NO. : I feel frustrated right now.

Id. at 246:16-247:11. Indeed, Ms. Vera was actually reduced to tears over the constant badgering by Plaintiff's counsel.

One of the new prospective jurors, Mr. Darianani, agreed with Ms. Vera, pointing out that the 2 million dollar figure–without any evidence to justify it–was the real elephant in the room.

> PROSPECTIVE JUROR NO. : **So I agree with her as well that $2 million is making us biased,** but we don't know what the exact facts are, because it could be completely different when we find out the facts. But I don't think it's fair for us to be bias just because of a number that's thrown out before the actual case is being brought to us.

Id. at 247:1-7.

Following the close of the first day, Plaintiff's jury consultant made a records outside the presence of the jury effectively threatening the Court with an appeal and stating that the court committed reversible error by not striking Ms. Vera and Ms Agnor for cause. *Id.* at 281. Notably, once Plaintiff's counsel had badgered Ms. Vera to the point of tears, it became increasingly important to Plaintiff that she and Ms. Agnor be dismissed, even moreso than the other challenged jurors. *Id.* at 284:18-25. Plaintiff's submitted a bench brief on the issues and requested that the Court reconsider.

The following morning, the Court, "in an abundance of caution" granted the Plaintiff's challenge for cause as to Mr. Frazier, Mr. Runz. Ms. Vera, Ms. Ong., and Ms. Agnor. *See* Day 2 Trial Transcript, at 17:24-18:3, attached hereto as **Exhibit L**. The Court based its decision on *Jitnan v. Oliver,* 254 P.3d 623 (2011), citing the fact that each of these jurors had, at one point, expressed concern over a 2 million dollar verdict. *Id.*

Once new jurors were seated, prospective Juror No. 003, Mr. Fitzgerald, pointed out that the entire issue of 2 million dollars was "putting the horse before the cart" and confusing the jury. The focus on the verdict amount the jurors would consider was detracting from the process of finding an impartial jury. Consider Mr. Fitzgerald's statements:

> PROSPECTIVE JUROR NO. 003: After reflection of what happened yesterday, I think it's a personal assault on our integrity and this whole notion of belaboring the point about money to the exclusion of thinking about guilt versus no guilt, fault versus no fault, I think that's a personal affront and I take exception to that.
>
> [. . .]
>
> After thinking about this whole notion of money -- belabored, I think, was the point used by the fellow at the other desk – it's almost to the point of bait and switch. We forget about, you know, having an open mind, open ears, and a closed mouth until we get into the jury room. You know, reflection, keeping an open mind, I took that -- what you told us yesterday, instructed, the notion of patriotism, the notion of our civic duty quite well. I understood that message. But this whole notion of belaboring and overemphasis on money is just a bait and switch between getting us off the point of guilt versus no guilt, fault versus no fault, listening to the merits of the case, and I just think it's a product of getting the horse way too far in front of the cart. I take exception to that. I think it's an insult not only to my intelligence but everybody in the front, the back row, and all the people back there. That's after reflection last evening.
>
> [. . .]
>
> PROSPECTIVE JUROR NO. 003: Okay. One thing I think that most would probably kind of understand is -- there's two parts to this case. We find if there's any fault or who the winner and the loser is, and then the second is the compensation of money. You haven't instructed us yet that we're the one that's to decide the amount of money. Maybe that's your job to do that. You haven't instructed us about that. **It's almost to the point to who's supposed to decide what amount of money? And, like I said, that's just to create a confusion. And, like I said, I take that as a personal affront to my intelligence and to everybody else here**.

Id. at 35:1- 38:1. Mr. Fitzgerald went on to point out that Plaintiff's counsel was not looking for open minded jurors, but was looking for jurors who were willing to award a large damages verdict before knowing anything about the facts:

> MR. CLOWARD: [. . .]Are you upset with me? The fact that I -- me personally -- the fact that I spent so much time on that issue yesterday?
>
> A. I understand both you attorneys got to give the best of your ability to represent your client. I take no exception to that. That being the point. I don't like the idea of getting the horse far too far in front of the cart because I think the cart, that's what we're supposed to decide here. The first thing is what I'll call guilt versus not guilty or whatever. And to talk about money too much in front of that decision I think belittles what we're supposed to do and what we learned in civics class about having an open mind to what you two have to present to us as potential jurors.

Id. at 38:20- 39:9. The Court took a brief recess, and held Mr. Fitzgerald back outside the presence of the other jurors to discuss his feelings:

> Mr. Fitzgerald, we just have a little bit of a concern that -- you made a statement a little while ago that based on your reflection last night it was going to be difficult for you to give a fair hearing to us today.
>
> PROSPECTIVE JUROR NO. 003: That's correct.
>
> THE COURT: Or during the next couple of weeks. Can you explain that a little bit?
>
> PROSPECTIVE JUROR NO. 003: Yes, Your Honor. I feel --
>
> THE COURT: You can sit.
>
> PROSPECTIVE JUROR NO. 003: I'll stand. Thank you.
>
> THE COURT: Okay.
>
> PROSPECTIVE JUROR NO. 003: You know, I appreciate what you taught us yesterday, the civics lesson, the notion of patriotism. Some of us don't, you know, have too many encounters with the legal system, the justice system. I'm one of those people. I don't hang around with criminals or drug people or anything like that. I don't have too many dealings with attorneys. So, you know, obviously like you told us, instructed us, keep your ears open, keep your mind open, and keep your mouth shut until it comes to the jury room, and I took that seriously. **But this whole notion of putting this issue of money and belaboring the point over and over again and picking on, I think, that first group of four or six jurors that were dismissed, it was my impression that just insulted their intelligence almost to the point where this one lady I think it was Ms. Vera or Verda was almost in tears yesterday. And, like I said, I think that was an overemphasis on money** to the point of exclusion of this notion of what I'll call guilt or not guilty or however the first phase goes here, that money was the issue to the exclusion of the first step. And based on our civic responsibility and lessons to give a fair hearing, I think it just usurped the whole process. It left a very bad taste in my mouth last evening at home when I had a chance to think about it.
>
> THE COURT: Okay.
>
> PROSPECTIVE JUROR NO. 003: In fact, I probably should have spoken up a little bit earlier yesterday because I sensed, in my mind, that that was somewhat of a bullying tactic and I take offense to that.
>
> [. . .]
>
> THE COURT: Now, the reason that there's been a lot of discussion about the numbers is because of the fact, I think that as Mr. Cloward said, he's going to be asking for a number in excess of $2 million and that's a big number.
>
> PROSPECTIVE JUROR NO. 003: May I respond to that, Your Honor?
>
> THE COURT: Not yet. Not yet. The reason that there's been some discussion about that is because there are some people that cannot keep an open mind as it relates to a certain

number. And I think there were several people that said that regardless of what the facts were, they would have a hard time with a number like $2 million.

[. . .]

PROSPECTIVE JUROR NO. 003: I hear what you're saying.

THE COURT: Okay.

PROSPECTIVE JUROR NO. 003: I respect that. But, you know, these are my life experiences and, like I say, **I found that insulting to these people's intelligence, much less mine. And to belabor the point over and over again was pedantic. It's like something you do to a grade school student. You beat it into their mind and say we're going to have a quiz on Friday so stay alert. Here's the answers to the quiz. I find that insulting as an adult**.

Id. at 42:1-49:21. Mr. Fitzgerald made it clear that the jurors recognized the bullying and indoctrination tactics being used by Plaintiff, and likened Plaintiff's tactics to having the answers to a quiz repeatedly beaten into their minds. He was ultimately dismissed because he felt insulted, and felt he could no longer give Plaintiff a fair trial.

Following a two-day trial, the jury returned a verdict in favor of the Plaintiff and against the Defendant, awarding total damages in the amount of $719,770.00. Plaintiff's Judgement was entered on November 6, 2013. This motion now follows:

III. LEGAL ARGUMENT

A. Defendant is Entitled to a New Trial Based on The Admission of Previously-Undisclosed Expert and Treating Physician Opinions.

Defendant is entitled to a new trial based on the previously undisclosed opinions from Plaintiff's expert relating to the causation of Plaintiff's injuries. Our system of civil justice is founded on the premise that a party be given sufficient notice of evidence to be presented at trial. The discovery rules are designed "to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial." *Washoe County Bd. of Sch. Trustees* v. *Pirhala,* 84 Nev. 1, 5, 435 P.2d 756, 758 (1968). "'Gamesmanship' and actions designed to minimize adequate notice to one's adversary have no place within the principles of professionalism governing the conduct of participants in litigation." *Collins* v. *CSX Transp., Inc.,* 441 S.E.2d 150, 153-54 (N.C. Ct. App. 1994). The discovery rules are designed to make trials "fair contest[s] with the basic issues and

facts disclosed to the fullest practicable extent." *U.S.* v. *Proctor & Gamble,* 356 U.S. 677, 682 (1958) (internal quotation marks omitted).

Fair disclosure is an issue of constitutional dimension. "A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful." *City of West Covina* v. *Perkins,* 525 U.S. 234, 240 (1999). The right to a hearing is but a "snare and a delusion" if the party is not allowed "sufficient time to prepare his evidence." *Riglander* v. *Star Co.,* 90 N.Y.S. 772, 776 (N.Y. App. Div. 1904). Defendants are entitled to know the nature of plaintiff's claims against them and the evidence supporting those claims with sufficient time before trial to be able to rebut them.

In this case, the letter and spirit of the rules of discovery failed. The evidence relating to plaintiff's October 27, 2008 treatment changed radically during trial. This harm to defendant's due process rights was exacerbated by this court's rulings which allowed this previously undisclosed testimony to be introduced hamstrung defendant's ability to rebut the testimony from Dr. Gross.

1. **The Court Erred in Admitting Previously-Undisclosed Opinions at Trial.**

a. Defendants are Entitled to Adequate Notice of Evidence to Be Used Against Them.

During trial, defendant learned for the first time that Dr. Gross would offer an expert opinion that the numbness and tingling Plaintiff was experiencing in her left arm prior to the subject accident were more likely "related to the heart or anxiety" than to the degenerative discs discovered in an x-ray taken as a result of Plaintiff's chest and arm complaints. Never before had Dr. Gross or any of Plaintiff's other expert or treating physicians disclosed any expert opinions indicating that those symptoms were more likely related to heart problems or anxiety than to her degenerative neck. The court erred in refusing to exclude this surprise testimony.

The rules of discovery, and the rules' underlying spirit of due process, required that such opinions be disclosed by expert report during discovery-or, at least sometime before trial. The discovery rules "provide for timely and appropriate disclosure of opinions so as to allow the opposing party an opportunity to fully explore those opinions." *Baird* v. *Adeli, M.D.,* 573 N.E.2d 279, 286 (Ill. Ct. App.1991). NRCP Rule 16.1, for example, requires the parties to disclose all evidence to be used at trial and to inform each other about the substance of their experts' testimony early in the course of litigation.

Parties must disclose written reports prepared by their experts that contain, among other items, "a complete statement of all opinions to be expressed and the basis and reasons therefore; [and] the data or other information considered by the witness in forming the opinions ... " NRCP Rule16.1(a)(1); *see also* NRCP 26(b)(4). A litigant is obligated to disclose experts and produce initial expert reports at least 90 days before the discovery cut-off date. NRCP 16.1(a)(2)(C).

Parties also have a duty to supplement or correct disclosures, including expert disclosures, "if the party learns that in some material respect the information disclosed is incomplete or incorrect[.]" NRCP 26(e)(1). With respect to expert testimony, the duty to supplement "extends both to information contained in the report and to information provided through deposition of the expert." *See id.* Additions or changes to expert opinions must be disclosed by the time pretrial disclosures are due, that is, at least 30 days before trial. NRCP 26(e)(1); *see* NRCP 16.1(a)(3)(C).

b. Evidence Not Timely Produced Must Be Excluded

Nevada courts consider expert discovery a significant enough issue that specific rules have been enacted to mandate the way expert discovery and disclosures are to be handled by the parties. Various penalties, including the exclusion of evidence, may be imposed for failure to comply with these rules. In the case where the violation of the discovery rules would prejudice the opposing party, no exceptions to these rules should be permitted. Allowing a party to flagrantly violate the rules and prejudice the opposing party, as happened here, must be corrected by awarding a new trial.

Under 16.1(a)(2)(B), parties have an affirmative duty to inform each other about the substance of their experts' testimony early during the course of litigation. *See also* NRCP 26(b)(4). "The report shall contain a complete statement of all opinions to be expressed **and the basis and reasons therefore**; the date or other information considered by the witness in forming the opinions . . . [etc.]. *See* NRCP 16.1(a)(2)(B). The disclosure need not be made at the time of the early case conference, but Rule 16.1(a)(2)(C) requires that such expert reports be made at least 90 days before the discovery cut-off date, or, if the reports is intended solely as a rebuttal report, then the production must be made 30 days after disclosure by the other party.

The sanction for failing to disclose evidence according to the rules is exclusion at trial. Rule 37 makes clear that if a party fails to disclose information required under Rule 16.1 or 26(e), the party "is

not ... permitted to use the evidence at trial," unless the failure is justified or harmless[2]." Supplemental expert material is regularly excluded where the supplement "comes too late to be 'seasonable,'" and would compromise the other party's pretrial preparation. *See, e.g., Wilson* v. *Bradlees of New England, Inc.*, 250 F.3d 10,20 (1st Cir. 2001). In *Leiper* v. *Margolis,* for example, the plaintiff was not entitled to introduce testimony from one of her physicians concerning plaintiff's ailments that were not disclosed until shortly before trial. 111 Nev. 1012, 1014-1015,899 P.2d 574,575 (1995). "All parties have an interest in reaching finality with respect to discovery so that they can assess the strengths and weaknesses of their position, as well as their adversary's position" with sufficient time before trial to plan accordingly. *Fed. Deposit Ins. Corp.* v. *Wrapwell Corp.*, 2000 WL 1576889,*3 (S.D.N.Y. 2000). Providing a supplemental medical report 30-days before trial is of no value to a defendant if the report does not contain the new or amended opinions of the expert.

2. Plaintiff Cannot Shirk the Disclosure Requirements Simply By Stating that the New Opinions Did not Change Her Expert's Prior Causation Opinions.

During trial, plaintiff argued that because the new testimony by Dr. Gross did not change his prior causation opinions, his new basis for those opinions did not constitute an unfair surprise. This argument is completely nonsensical, and seeks to undermine the entire discovery process.

The fact that Dr. Gross's new, previously-undisclosed opinions were being offered in support of his prior causation opinion does not somehow make those opinions less prejudicial to Defendant. To the contrary, in offering this previously-undisclosed testimony–cardiologic testimony which falls outside of Dr. Gross's neurosurgical expertise–Dr. Gross was allowed to concoct an explanation for the fact that he had essentially glossed-over Plaintiff's October 27, 2008 visit his prior reports. If Plaintiff's reasoning were to be accepted, any medical expert disclosed to give causation opinions could, at trial, come up

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[2] NRCP 37(c)(1) provides:

> A party that without substantial justification fails to disclose information required by Rule 16.1 or 26(e)(1) ... is not, unless such failure is harmless, permitted to use the evidence at trial. . .

The court may impose additional sanctions for failure to disclose, including attorneys' fees caused by the failure, *id.*, or even dismissal of the action, *see Young* v. *Johnney Ribeiro Bldg., Inc.* 106 Nev. 88, 92, 787 P2d. 777, 779 (1990).

with any number of new, previously-undisclosed opinions, so long as those opinions ultimately supported the expert's prior causation opinions. This simply does not make sense, as it would undercut the entire basis for expert reports and expert depositions. Allowing Dr. Gross to offer new, previously undisclosed opinions significantly prejudiced Defendant, as Defendant did not have the experts necessary to properly rebut those opinions.

Allowing this testimony further prejudiced Defendant unfairly by undercutting the information shared in Defendant's opening statement. Indeed, through observing Defendant's opening statement, Plaintiff's counsel learned that Defendant planned to raise an issue regarding Plaintiff's October 27, 2008 doctor's visit. *See* **Exhibit H** at 47:7-16. By allowing Dr. Gross to provide new, previously-undisclosed opinions, the Court enabled Plaintiff to explain-away the October 27, 2008 visit without any rebuttal from Defendant.

Accordingly, as these opinions by Dr. Gross were previously undisclosed, Defendant's objection should have been upheld, and Dr. Gross should have been precluded from offering this testimony.

3. Plaintiff Cannot Shirk the Disclosure Requirements Simply By Claiming Treating Physicians are Experts.

During trial, Plaintiff argued that Dr. Muir's new opinions regarding Dr. Belsky's treatment were not required to be disclosed prior to trial because they were in defense of his own treatment. Nevertheless, these were new opinions, which were not formulated during his treatment of the Plaintiff, and were not disclosed in an expert report or in his deposition. Dr. Muir was not disclosed as an expert. However, even assuming he was, he should have been required to disclose his opinions regarding Dr. Belsky's treatment in an expert report.

Even though an medical expert is also a treating physician, a report is still required whenever the doctor's treatment is procured in connection with the litigation. 10 FED. PROC. § 26.50 ("Identity and Report of Treating Physician"). The question is "whether the treating physician developed his relationship with plaintiff-and his opinions-close in time to the litigation or at the request of counsel." *Kirkham* v. *Societe Air France,* 236 F.R.D. 9 (D.D.C. 2006). Here, the record demonstrates that plaintiff saw many of the treating physicians, including Dr. Muir and Dr. Belsky, with an eye toward litigation.

While the Nevada Supreme Court has yet to address the issue of when a treating physician's opinion crosses the line into the realm of expert opinion that must be disclosed, the better-reasoned decisions confronting the issue hold that testimony regarding causation, prognosis and future treatment must be disclosed in a pre-trial report. *See, e.g., Griffith* v. *Northeastern Illinois Regional Commuter Railroad Corp.*, 233 F.R.D. 513 (N.D. Ill. 2006); *Kirkham,* 236 F.R.D. 9. The reason for this is well-founded, as the treating physician's treatment and impressions, aside from the investigative question of causation or the predictive issue of future treatment, would already be included in the medical records:

> When a treating physician's testimony is limited to his observation, diagnosis and treatment, the medical records provide a significant amount of information about the physician s likely testimony. However, the medical records alone provide little or no information about any opinions the physician may render regarding what caused the injury, or whether tile plaintiff will be unable to work in the future.

Griffith, 233 F.R.D. at 518. In this case, the opinion that Dr. Belsky's injections and pre-operative workup were properly performed is precisely the type of opinion which requires disclosure.

The opinion was also heavily reliant on the work done by other doctors. *"A treating physician who bases his or her opinion on the medical records of another physician, not just his own examination of the patient, is required to prepare an expert report.* " 10 FED. PROC. § 26.50. Here, the opinion regarding Dr. Belsky's treatment was based largely on his review of Dr. Belsky's records. The trial testimony in defense of her treatment–particularly where the attacks on her treatment had been addressed in discovery by two other experts, was *not* the type of treating -physician opinion that may be slipped into trial, exempt from the requirement of pretrial disclosure. The court erred in allowing the previously undisclosed opinions of Dr. Muir.

4. <u>If Dr. Gross's New Opinions Had Been Disclosed During Discovery or At Least 30-Days Prior to Trial, Defendant Could Have Sought Relief to Rebut Those Opinions.</u>

As set forth in detail above, Dr. Gross took the stand and offered new opinions with respect to Dr. Schifini and to Plaintiff's prior alleged heart condition. In withholding these opinions until trial, Plaintiff deprived Defendant of the opportunity to adequately rebut these opinions.

Had Dr. Gross's new opinions been disclosed 30-days prior to trial, as required under the Rules, Defendant would have moved the court for leave to retain a neurosurgeon and/or a cardiology expert to rebut those opinions through an expert report.

In allowing Dr. Gross to introduce these previously undisclosed opinions at trial, the Court erred and left Defendant without adequate recourse to rebut. Dr. Gross was permitted to offer opinions well beyond his training and expertise, and explain away a significant causation problem with Plaintiff's case.

B. Plaintiff Is Entitled to a New Trial Based on the Improper Voir Dire

1. Plaintiff's Counsel Indoctrinated the Jury and Baited them into expressing Non-Existent Biases 'Bias Baiting" During Voir Dire.

The Nevada Supreme Court has made it clear that the purpose of voir dire is not to ferret out the amount a juror is willing to award, but to determine whether a prospective juror can consider the evidence and render an impartial verdict:

> The importance of a truly impartial jury, whether the action is criminal or civil, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country. The voir dire process is designed to ensure--to the fullest extent possible--that an intelligent, alert, and impartial jury which will perform the important duty assigned to it by our judicial system is obtained. **The purpose of voir dire examination is to determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she sees them, to the law given.**

Whitlock v. Salmon, 104 Nev. 24, 27, 752 P.2d. 210, 212 (1988). A more recent Nevada case reiterates this point, while also noting that the court should limit any attempted indoctrination during voir dire, and "focus on the acquisition of information concerning a bias or ability to apply the law." *Lamb v. State*, 251 P.3d 700, 707-08.

In the case at hand, numerous prospective jurors were stricken for cause based on an alleged bias for not being willing to consider an award of 2 million dollars in the absence of any facts. These prospective jurors included Mr. Frazier, Mr. Runz. Ms. Vera, Ms. Ong, and Ms. Agnor. Nevertheless, as set forth above, each of these jurors stated, upon being asked, that they would be willing to award pain and suffering damages, and that they would consider the evidence impartially and make an award based on their interpretation of the evidence. They demonstrated the exact willingness to consider the evidence and the impartiality required of them under *Lamb*. Notably, neither the *Lamb* nor *Whitlock* decisions

state that a juror must be willing to award a certain amount of damages without knowing anything about the facts. To the contrary, they state that a prospective juror must be willing to render a fair and impartial verdict based upon the facts presented. Each of these prospective jurors demonstrated a willingness to to just that.

Plaintiff will likely argue again what was argued at trial–that by showing a reluctance to award 2 million dollars, a bias was exposed which would have rendered the jury impartial. This is simply not the case. As demonstrated clearly by the comments of the jurors, they were manipulated, bullied, and tricked into appearing biased via "bait and switch" tactics used by Plaintiff's counsel. Even the court acknowledged that Plaintiff's counsel attempted to appeal more to the feelings of the prospective jurors than their knowledge, views, and biases.

Ultimately, after expressing even the sligtest hesitation about a 2 million dollar verdict, each of these jurors was fed leading question after leading question by Plaintiff's counsel, with the specific intent of creating a bias which did not exist.

Ultimately, the court erred in granting Plaintiff's challenges for cause based on the responses to these baited and leading questions. As argued at trial, these stricken jurors had not demonstrated any preconceived bias which would "prevent or substantially impair" their performance as jurors. *Jitnan v. Oliver*, 254 P.3d 623 (2011). Rather, these prospective jurors had demonstrated that their declarations, when taken as a whole, indicated that they would be fair and impartial.

2. Plaintiff's use of Specific Verdict Amounts Was In Violation of Local Rules.

The Eighth Judicial District's Local Rules provide as follows:

> The following areas of inquiry are not properly within the scope of voir dire examination by counsel:
>
> (a) Questions already asked and answered.
>
> (b) Questions touching on anticipated instructions on the law.
>
> (c) Questions touching on the verdict a juror would return when based upon hypothetical facts.
>
> (d) Questions that are in substance arguments of the case.

EDCR 7.70. This rule makes it clear that questions which are, in substance, arguments of the case are prohibited, as are questions touching on a verdict a juror would return based upon hypothetical facts. Plaintiff was permitted to violate both aspects of this rule.

First, Plaintiff was permitted to tell the jurors that they she would be asking for an award in excess of 2 million dollars. The use of an allegedly accurate verdict amount, in and of itself, touches on the arguments of the case, in violation of EDCR 7.70(d). Indeed, by telling the jurors he is going to be asking for "in excess of 2 million dollars", Plaintiff is arguing that his client has been harmed in that amount. Plainly and simply, that is an argument of the case.

However, Plaintiff also, violates the spirit of EDCR 7.70 (c) when proposing a verdict amount. Consider, for example, if Plaintiff were not in the courtroom during voir dire, and Plaintiff's counsel asked a juror if she would be willing to award 2 million dollars to someone who was not dead, missing any limbs, or severely disabled. This would be a direct violation of EDCR 7.70(c) as it would be a potential verdict amount touching on hypothetical facts. In other words, it would be asking the jurors if they could award a certain amount if they were to assume that certain information were true.

Now consider the fact that Plaintiff was in the courtroom, and the jurors were able to observe the fact that she is not dead, noticeably dismembered, or severely disabled. In asking if a juror is willing to award 2 million dollars in damages, Plaintiff's counsel is asking the jurors exactly the same thing as the hypothetical question above. Just as with the above hypothetical, he is asking them if they can award a certain amount based upon certain information. The only difference is that, in the second scenario, the jurors already know the information to be true based on observing the Plaintiff.

Should one question be permitted, and another be prohibited, when the information being given to the jury is exactly the same? The fact of the matter is that, by being permitted to discuss potential verdict amounts with the jury, Plaintiff is essentially permitted to throw a big number out, and attempt to create a bias where a bias does not exist. In throwing out the number 2 million dollars, Plaintiff is allowed to pounce on any juror who expresses concern over such a large number. And where a juror expresses even the slightest hesitation about that number, Plaintiff, before Defendant ever has a chance to discuss the concerns with Plaintiff, then has an opportunity to convince that juror, through the use of leading questions, that she is biased, even where no bias exists.

Ultimately, Plaintiff should not have been permitted to use specific verdict numbers, as such violates EDCR 7.70. However, as Plaintiff was permitted to reference a specific verdict amount, the Court, then, should not have permitted Plaintiff to strike jurors who, despite some reluctance at the thought of a 2 million dollar verdict–and without knowing anything about the case other than that the Plaintiff was not severely disabled, dismembered, or dead–remained willing to consider the facts and evidence presented and award a fair and reasonable verdict.

IV. CONCLUSION

For the foregoing reasons, the court should grant a new trial.

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HALL JAFFE & CLAYTON, LLP

By _____
STEVEN T. JAFFE
Nevada Bar No. 007035
JACOB S. SMITH
Nevada Bar No. 010231
7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant
Raymond R. Khoury