IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND RIAD KHOURY, Appellant, vs. MARGARET SEASTRAND, Respondent.	Supreme Court Case No. 64702 Supreme Court Case No. 65007 Supreme Court Case No. 65172

APPEAL

from the Eighth Judicial District Court, Clark County
The HONORABLE JERRY WEISE, District Court Judge
District Court Case No. A-11-636515-C

APPELLANT RAYMOND RIAD KHOURY'S OPENING BRIEF

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ISSUES PRESENTED

Appellant Raymond Khoury ("Khoury") presents the following issues for review:

1. Whether the district court abused its discretion allowing Seastrand's treating physicians to offer opinions previously undisclosed by report, in records, or in deposition, and without authoring an expert report;

2. Whether the district court abuse its discretion allowing Seastrand's expert neurosurgeon to offer previously undisclosed opinions exceeding the scope of his professional expertise, training, and qualifications;

3. Whether the district court abused its discretion by precluding admission of evidence regarding treatment on a medical lien and/or the sale or purchase of Seastrand's medical liens;

4. Whether the district court erred in precluding evidence regarding the amounts actually paid for the Plaintiff's medical treatment;

5. Whether the district court abused its discretion when it denied a motion for mistrial following Plaintiff's counsel's use of the term "claim" during opening statement; and, when the court failed to remedy or instruct the jury regarding counsel's use of the word "claim";

6. Whether the district court abused its discretion by failing to grant Khoury's motion for mistrial regarding indoctrination of the jury through repeated reference to a specific verdict amount during *voir dire*;

7. Whether the district court erred in striking, for cause, numerous prospective jurors who demonstrated a willingness to consider the facts and law and award a fair verdict based upon the evidence;

8. Whether the district court abused its discretion in awarding costs in the amount of $75,015.61;

9. Whether the district court erred in denying Khoury's Motion for New Trial.

STATEMENT OF THE CASE

This appeal arises from a jury verdict, an order granting fees and costs, and an order denying a motion for new trial in a motor vehicle negligence action seeking damages for personal injuries. EIGHTH JUDICIAL DISTRICT COURT; THE HONORABLE JERRY A. WIESE, District Judge.

Plaintiff/respondent Margaret Seastrand sued defendant/Appellant Raymond Khoury for injuries she claims resulted from a car accident on March 13, 2009. During trial, Khoury never disputed that he caused the accident; instead, he challenged the medical causation and the extent of Seastrand's injuries. After deliberations, the jury awarded Seastrand $719,770.00.

Khoury moved for a new trial pursuant to NRCP 59(a), claiming that the judge abused his discretion, resulting in an unfair trial for Khoury. The district court further abused its discretion when it denied Khoury's motion for new trial, when the court failed to consider the impropriety of plaintiff's *voir dire*, the prejudicial impact of undisclosed opinions from plaintiff's expert and treating physicians, and harm resulting from the preclusion of evidence pertaining to liens. Accordingly, this Court should reverse the order denying a new trial, remanding this matter for a new trial.

STATEMENT OF THE FACTS

A. THE ACCIDENT.

This case stems a minor rear-end automobile collision allegedly causing injuries to Seastrand. (I-JA-0001-3.) On March 13, 2009, Seastrand drove east on Craig Road approaching the intersection of Rancho Drive in Las Vegas, Nevada, stopping at a red light in the right turn lane. (XIV-JA-2593.) Mr. Khoury stopped behind Seastrand. (XVI-JA-2987.) After completely stopping, Mr. Khoury removed his foot from the brake and began to slowly roll forward. (*Id.* at 2988.)

Realizing that Seastrand's vehicle remained stopped, Khoury attempted to stop, but he bumped into Seastrand's vehicle. (*Id*.)

Seastrand, complaining of neck and back injuries from the low-speed accident, was transported to Mountain View Hospital and released the same day. Plaintiff received extensive treatment to both her neck and back during the ensuing months and years, including numerous MRIs, epidural injections, and other treatments, ultimately culminating in lumbar and cervical surgeries.

B. PROCEDURAL BACKGROUND.

1. *Discovery and Disclosure of Physicians and Expert Witnesses*.

Seastrand filed her Complaint in this matter on March 8, 2011, alleging negligence and negligence per se against Defendant. (I-JA-006-8.) Before trial, Khoury stipulated to liability, leaving for trial the issues of medical causation, proximate cause, and damages. (XVI-JA-2984-5.)

Medical records revealed Seastrand's pre-accident complaints of "numbness and tingling bi-laterally in both arms" and shooting pain down her left arm on October 27, 2008. (V-JA-0826.) A subsequent cervical x-ray demonstrated conditions partially consistent with spinal abnormalities at C5-C6. (*Id*. at 0828.)

Khoury's retained medical experts assessed these findings in their reports, laying the foundation for their causation testimony at trial. Dr. Siegler's report dated July 12, 2012, opines that these symptoms indicate that Seastrand's disc findings pre-existed the subject incident. (II-JA-0184.) Dr. Schifini's report dated August 25, 2012, notes that these pre-accident symptoms indicate that any injury sustained by Seastrand in the accident only temporarily exacerbated her pre-existing condition. (*Id*. at 0193; 0197.)

Seastrand disclosed many of her treating physicians as potential witnesses at trial, including Drs. Muir and Grover. (I-JA-0015-16.) Seastrand's description

about these treating physicians' anticipated testimony lacked required helpful specificity:

> "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 physicians 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."

(I-JA-0016). The witness description neither states intent to offer causation opinions at trial, nor that these physicians would offer opinions addressing reasonableness of other providers' treatment. Seastrand never identified her treating physicians as experts in any expert witness designation. (I-JA-0020-23.) Both Drs. Muir and Grover never authored expert reports complying with *NRCP 26,* setting forth their opinions or detailing whatever records they reviewed.

Seastrand disclosed Dr. Jeffrey Gross as her expert witness (I-JA-0021.), for these purposes:

> "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."

(*Id*.) While this description laid the foundation for Dr. Gross's causation opinions, pertinently, Dr. Gross' expert description neglects to identify his expertise or intention to testify regarding cardiology. (*Id*.)

Dr. Gross issued four expert reports, disclosed throughout discovery and prior to trial (*See generally* XIX-JA-3622-60; XX-JX-3662-98), never expressing causation opinions regarding Seastrand's treatment in October 2008, despite acknowledging her then commensurate complaints of radiating pain into her arms, with accompanying cervical x-rays demonstrating disc space narrowing, osteophytic spurring, and spondylytic encroachment at the C5-C6 level. (XX-JA-3684.) Dr. Gross reached causation opinions in his initial report dated August 7, 2012, without ever reviewing the records from October 2008. (XIX-JA-3623; 3650.)

Khoury's counsel deposed Dr. Gross on March 18, 2013. During his deposition, Dr. Gross never offered either causation opinions regarding the complaints, treatment, and conclusions from October 2008.

2. *Motions in Limine*.

Khoury filed numerous pre-trial motions *in limine*, including motions to admit evidence of medical liens and lien purchases (III-JA-0365-74; IV-JA-0588-97.); to limit damages to amounts actually paid on behalf of Seastrand (III-JA-0546-56.); and, to Limit the Testimony of Plaintiff's Treating Physicians to the opinions in their medical records and depositions. (II-JA-0335-43.) Seastrand filed an Omnibus Motion in Limine, including seeking to allow *voir dire* questions regarding verdict amounts (II-JA-0133-4.), and to allow treating physicians to testify as experts regarding causation and reasonableness of other providers' treatment without authoring expert reports. (*Id.* at 0134-40.)

The court denied Khoury's Motion to Admit Evidence of Liens, ruling that it considered liens as collateral sources. (VI-JA-0967-69 ; 1015-19; *also* XXIV-JA-4733-38.) The court precluded Khoury from asking questions regarding treatment received or provided on a lien. (*Id.*)

The court denied Khoury's Motion to Admit Evidence of Amounts Billed versus Amounts Paid, ruling that if Plaintiff offered a doctor to testify that the amounts billed were reasonable, the Plaintiff could offer the amounts billed. As to the amounts paid, and any write offs due to liens, the court considered such evidence a collateral source and inadmissible. (VI-JA-1019-25; *also* XXIV-JA-4733-38.)

The Court considered Khoury's Motion to Limit Treating Physicians to the Opinions Stated in their Clinical Charts and Depositions, and Seastrand's competing motion, allowing the treating doctors to testify consistent with the contents of their charts. If new testimony arose which a party considered a reasonable inference from the chart or the deposition, the court would consider its admissibility. The court also concluded that doctors could offer previously undisclosed opinions in defense of their treatment. (VI-JA-0956-964; 0997-1006; *also* XXIV-JA-4733-38.)

Regarding Seastrand's motion to permit *voir dire* questions regarding verdict amounts, the court ruled that inquiries related to verdict amounts based on specific hypothetical facts would be permitted pursuant to EDCR 7.70. Parties could each propose one verdict number during *voir dire*, provided the party never linked the verdict amount to hypothetical facts. (VI-JA-0949-56; *also* XXIV-JA-4733-38.) The court allowed Seastrand to address jurors' reactions to that number, and the reasons for their reactions, specifically restricting Seastrand from proposing multiple verdict amounts to drive jurors higher. (*Id*.)

3. *Jury Voir Dire and Selection*.

Trial went from July 15, 2013, through July 26, 2013. (*See* VI-JA-1078—XVII-JA-3420.) *Voir dire* lasted nearly three days. (*See* VI-JA-1078—9JA-1692.) Plaintiff asked questions which inflamed and incensed the jurors, despite

objections, ultimately making one juror cry and causing another juror to denounce Plaintiff's counsel.

Plaintiff's counsel informed the jurors that Seastrand sought a verdict in excess of $2,000,000.00:

> "So I believe in brutally honesty [sic] 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.
>
> [. . .]
>
> So who here is a little uncomfortable, even if it's just a little bit, with what just said?"

(VII-JA-1190.) Several prospective jurors expressed initial hesitancy at awarding $2,000,000.00, concerned it seemed excessive; however, most prospective jurors acknowledged that without knowing any facts about the case, they lacked perspective to consider such a large award. Prospective Jurors 034 and 033, offered statements on the hypothetical verdict:

> "PROSPECTIVE JUROR NO. 034: I think it's excessive.
>
> MR. CLOWARD: Mr. Walker, I appreciate it. Tell me why you feel that way.
>
> PROSPECTIVE JUROR NO. 034 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. 34: If there was a death involved, possibly. But I don't know the case so I really can't say.

> MR. CLOWARD: Sure. Mr. Walker, I appreciate that, I really do. And you know, is there anyone else that feels that way, Mrs. Agnor.
>
> PROSPECTIVE JUROR NO. 033: Patty Agnor, 033. I think–I agree. I think it's excessive because 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."

Numerous jurors expressed similar feelings. Prospective juror no. 001 stated that he agreed that "**without knowing the facts** of $2 million just for a car accident just seems excessive." (VII-JA-1193.)(emphasis added) Notwithstanding the juror's clear qualification and his concern about the absence of facts, Seastrand's counsel twisted the juror's words and misleadingly phrased a closed-ended question to trick him into overstating the breadth of his concern:

> "MR. CLOWARD: Seems excessive. You have a hard time just with the thought of that?
>
> PROSPECTIVE JUROR NO. 001: Yes."

(*Id*.) Even jurors who seemed most opposed to awarding as much as $2,000,000.00 explained their hesitation was because they lacked facts about the case. Upon counsel's further inquiry with prospective juror 034–and over defense counsel's previous EDCR 7.70 objection (VI-JA-952-56.), Seastrand's counsel continued to press the juror for answers to a question impossible to give without more facts:

> "PROSPECTIVE JUROR NO. 034: I can't even say. It's . . . 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 that 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.
>
> [. . .]

> **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 1216-17.) (emphasis added) Much like juror 034, juror 033 expressed hesitancy at the thought of awarding $2,000,000.00, ultimately expressing how she based her hesitancy on the absence of the facts of the case:

> "PROSPECTIVE JUROR NO. 33: I think I would have a hard time awarding 2 million, but I didn't see her stand. I didn't see her walk. I didn't—you know, there was no interaction or anything to see her, how she can function. I don't know."

(*Id.* at 1218.)

Seastrand's counsel subsequently returned to each of the prospective jurors with several leading vague questions, designed to trap the jurors into agreeing that they could not be objective, without any explanation, after gathering their initial impressions about a verdict in excess of $2,000,000.00. Over defense counsel's continuing objections (*id.* at 1214-15.), the court permitted Seastrand's counsel to ask leading questions to each prospective jurors who expressed hesitance at awarding $2,000,000.00.

Seastrand's counsel never asked the opinions of the prospective jurors but he told them their own feelings about large verdicts and damages for pain and suffering, couched in his loaded words, seeking validation without clarification. Each of these questions focused on the juror's feelings, not on their willingness to consider the evidence and fairly deliberate. Numerous prospective jurors reiterated that the questions were difficult to answer without knowing 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. 034: 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. 034: 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. 034: Right.
>
> MR. CLOWARD: And nothing that I say or Mr. Jaffe says . . . is going to change your mind, right?
>
> PROSPECTIVE JUROR NO. 034: 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.**"

(*Id.* at 1219-20.) (emphasis added) This same series of leading questions was presented to other prospective jurors, who stated that they felt jurors like him would "make the right decision at the end", before Seastrand's counsel walked him down the path of questions to create the appearance of bias. (*Id.* at 1223, 1229-32.) Khoury's counsel renewed his objection to the entire line of questioning. (*Id.* at 1234-39.) Seastrand's counsel challenged eight prospective jurors for cause. (*Id.* at 1239-40; 1294-1302.)

Khoury's counsel traversed the challenged prospective jurors. In response to open-ended questions, many of the challenged jurors demonstrated a willingness to consider the facts and evidence, follow the law, and deliberate based upon the facts presented to them. (*Id.* at 1304-22.) Likewise, several of the challenged jurors clarified that they were unbiased, unopposed to an award of pain and suffering, never pre-judged the case as frivolous, never predetermined the case to place either party ahead, and remained willing to consider the evidence to award reasonable and fair damages, including pain and suffering damages. (*Id.*)

The court dismissed three jurors for cause. (*Id.* at 1327-30.) Seastrand's counsel followed up with some jurors not dismissed for cause, immediately

challenging one about perceived different responses to Khoury's counsel's questions. (*Id.* at 1339.) The juror elucidated that Seastrand's counsel improperly preyed on emotions and asked questions designed to elicit desired responses, while Khoury's counsel expressed interest in fact-based responses:

> "PROSPECTIVE JUROR NO. 008: The way you asked the question was based on feeling. The way [Mr. Jaffe] asked was based on fact.
>
> MR. CLOWARD: Sure.
>
> PROSPECTIVE JUROR NO. 008: And evidence, and proof, and if it sounds like I gave two different answers, I apologize for that. But I . . . answered your question the way you asked the question, and I answered [Mr. Jaffe's] question the way he asked it.
>
> [. . .]
>
> MR CLOWARD: It's hard to know, isn't it, until you hear the facts? That's the one frustrating part about this is we can't tell you anything about the case. You know, both Mr. Jaffe and I would love to do that. Go ahead.
>
> PROSPECTIVE JUROR NO. 008: 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. 008: Why was that even said? And I think that's why I'm having trouble now.
>
> MR CLOWARD: How come you're—why do you feel that you're having trouble?
>
> PROSPECTIVE JUROR NO. 008: I feel frustrated right now.
>
> MR CLOWARD: Sure. I know this process is frustrating. I'm sorry about that.
>
> PROSPECTIVE JUROR NO. 008: And I feel like I've already answered your questions. I feel like I'm done."

(*Id.* at 1336-39.) As one juror pointed out the next day (VIII-JA-1450), Seastrand's counsel's relentless badgering about potential verdict amounts reduced Juror 008 to tears.

Juror 053, a new prospective juror, agreed with Juror 008, explaining that the $2,000,000.00 concept, without any evidence to justify it, was the problem:

> PROSPECTIVE JUROR NO. 53: So I agree with her as well, that $2 million kind of like—it's 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 biased just because of a number that's thrown out before the actual case is being brought to us.

(*Id.* at 1339.) Seastrand never challenged Juror 53 for cause, despite voicing the same opinion that two challenged jurors expressed.

The trial court denied a number of Seastrand's challenges at the close of the first day. Seastrand's jury consultant, an attorney, argued outside the presence of the jury, overtly threatening the court that the judge committed reversible error by not striking all challenged jurors for cause. (*Id.* at 1364-75.) Once Seastrand's counsel badgered this juror virtually to tears, it became increasingly important for Seastrand to manufacture a basis for the court to dismiss both her and one other juror, moreso than the other challenged jurors. (*Id.* at 1369-72.) Seastrand's counsel submitted a bench brief on the issues and threatened the Court to reconsider its refusal to strike the two jurors. (*Id.* at 1364-75).

The following morning, the Court, "in an abundance of caution" reversed itself and granted the Plaintiff's challenge for cause as to the five remaining challenged jurors (VIII-JA-1410-27.), relying on *Jitnan v. Oliver*, 127 Nev. ___, 254 P.3d 623 (2011), citing how each of these jurors, at one point, expressed concern about the $2,000,000.00 figure. (*Id*.) The court ruled that this meant they never unequivocally stated that they could apply the law. (*Id*.) Notably, the court conducted no new *voir dire* of the jurors, basing this decision on the same information as the previous day. (*Id.*)

Once the court seated new jurors, prospective Juror No. 003 explained that the entire $2,000,000.00 issue constituted a "bait and switch," and that Seastrand's counsel put the cart before the horse, confusing the jury by repeatedly referencing

$2,000,000.00. (*Id.* at 1443-44.) The focus on $2,000,000.00 detracted from the process of finding an impartial jury:

> "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."
>
> [. . .]
>
> 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. 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 1442-44.) Juror 003 further asserted that Seastrand's counsel never sought open-minded jurors, but sought jurors willing to award a large damages verdict despite 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?
>
> PROSPECTIVE JUROR NO. 003: 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 1445-46.) This exchange occurred before the remaining venire members. (*Id.* at 1447.) The Court took a brief recess, and retained Mr. Fitzgerald, outside the presence of the other jurors to discuss his feelings:

> "PROSPECTIVE JUROR NO. 003: 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.
>
> . . .
>
> 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 1450-56.) Juror 003 confirmed that the jurors recognized Seastrand's counsel's bullying and indoctrination tactics, likening them to beating quiz answers repeatedly into their minds. Unsurprisingly, the court ultimately dismissed Juror 003, because he felt insulted and felt he could not afford Plaintiff a fair trial (*Id.* at

1456-57.), meaning the court struck ten jurors stricken for cause at Seastrand's counsel's request.

4. *Trial Opening Statements*.

Seastrand's counsel commented during his opening statement, contrasting Seastrand's current suit with two prior accidents:

> "But you'll hear from [Seastrand] and she'll tell you, yeah, in that [previous accident] I was the passenger and I wasn't hurt. I went to the ER and the ER physicians checked me out, and then I went to a holistic doctor one or two times and then I didn't have any problems. ***I didn't make a claim***. I didn't do anything like that." (Emphasis supplied).

(IX-JA-1752.) Khoury's counsel objected and following both a bench conference and completion of Seastrand's counsel's opening statement, moved for a mistrial:

> "MR. JAFFE: It's my position we're entitled to a mistrial. Cloward made a comment to the jury in his opening statement that she did not file a claim for the 1981 rollover and it was implying that there was a claim filed in this case. Well, a claim is uniquely an insurance term. And when he says, well, she didn't go and file a claim for that, the implication is that she did for this and that this is an insurance case, which is in direct violation of the law.
>
> We've signed a stipulation which has been entered by the Court previously as an order that insurance is not to be mentioned. He has now violated that order. He has invoked insurance into this case. I'm asking for a mistrial, sir.
>
> THE COURT: When you came up to the bench, I looked at the record.
> . . . .
> He did mention the word claim one time. I didn't want to emphasize that to the jury because I thought that would just draw additional attention to it. The fact that it was mentioned once in passing I don't think it rises to the level of a mistrial that requires us to retry the case or pick a new jury. I don't know that they even appreciate the legal significance of the word claim but I understand your position.
>
> MR. JAFFE: But especially when during voir dire when so many jurors were talking about insurance claims and insurance matters, especially early on in the voir dire, I think all it does is bring them right back to that and reemphasize that point and brings front and center that this is an insurance issue.

> Thank you, Your Honor.
>
> THE COURT: I understand your position. Motion for mistrial is denied.

(*Id.* at 1759-62.)

5. *Evidence at Trial.*

a. Dr. Jeffrey Gross' Testimony.

Dr. Gross offered new and previously undisclosed opinions regarding Seastrand's treatment and pain prior to the subject accident. Specifically, Dr. Gross offered new testimony regarding Seastrand's visit to her primary care physician on October 27, 2008, about four months before the subject accident. On that date, Plaintiff presented to Dr. Kermani complaining of chest pain, numbness and tingling in her left arm. (XX-JA-3700.) Dr. Gross testified that on October 27, 2008, the primary finding was atypical chest pain; that a cervical x-ray revealed age related changes at the C5-6 level; and, muscle spasm as an incidental finding. (XI-JA-2139-47.) Dr. Gross offered these opinions anticipating defense experts discussing these causation implications, without previously disclosing any such opinions, in any format.

Dr. Gross exceeded his disclosed parameters, despite objections both that Dr. Gross lacked qualifications to offer a cardiology opinion and that Seastrand never disclosed this opinion. The court permitted Dr. Gross to offer a completely new opinion regarding causation of Plaintiff's symptoms:

> "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."

(XI-JA-2148-49.) Khoury made a record of the sidebar 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.

(XI-JA-2150-53.)

b. Dr. William Muir's Testimony.

Seastrand called Dr. William Muir to testify, one of Plaintiff's treating physicians, and the surgeon who performed her cervical. As discussed, *supra*, Seastrand never disclosed Dr. Muir or issued a report from him as an expert. Notwithstanding, the court permitted Dr. Muir to offer new opinions regarding the reasonableness and necessity of treatment provided by 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 feelings –

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."

(X-JA-1937-38.) Khoury's counsel objected, noting that Seastrand never disclosed Dr. Muir as an expert, requiring the court to preclude any opinion on the propriety of Dr. Belsky's treatment, particularly since Plaintiff retained and disclosed two experts to comment upon that treatment. (X-JA-1964-69.) The Court ruled that Dr. Muir's defense of Dr. Belsky was a defense of his work. (*Id*.)

Khoury's counsel made a formal record of the sidebar objections:

> "THE COURT: Okay. We're off the -- or we're on the record outside the presence of the jury. Mr. Jaffe, you wanted to make a record on the objection that I overruled?
>
> MR. JAFFE: Yes, Your Honor. I believe it's inappropriate for Dr. Muir to be commenting upon propriety of treatment rendered by other doctors. He is not here as a -- as an expert, and he was never disclosed as an expert on those topics. He never issued a report, but those were topics addressed by two defense experts. So I believe it was inappropriate to allow him to comment upon the propriety of treatment rendered by Dr. Belsky. And that was the basis of that objection."

(X-JA-1964-69.) The court ruled that, "the new 16.1 language and the comments" entitled a treating physician to defend his own care and treatment. (*Id*.) Because Dr. Muir relied upon Dr. Belsky's workup, the court allowed his previously undisclosed opinions regarding the reasonableness of her treatment. (*Id*.)

Subsequent to his opinions regarding Dr. Belsky's treatment, Dr. Muir further offered testimony regarding the causal relation between the subject incident and Seastrand's symptoms, treatment, and surgeries:

> "Q. Doctor, just a couple of other questions. I would like to know on a more likely than not basis, to a reasonable degree of medical probability, was the treatment provided by you as a direct result of the automobile crash of March, 13, 2009?
>
> A. It was.
>
> Q. Okay, And even more than that, to a reasonably degree of medical certainty, was the treatment that you provided as a direct result of the March 13th, 2009, crash?
>
> A. Yes.

> Q. So more likely than not, Margies' need for the neck and back surgeries, for the fusions was caused by the March 13th, 2009, crash.
>
> A. Yes. And the symptoms that she had after the accident were directly related to those, to the automobile accident."

(X-JA-1962-63.) On cross-examination, Dr. Muir confirmed that during his treatment of Seastrand and up to the time of his deposition, he never saw any medical records from Dr. Kermani, including those records and x-rays pertaining to Seastrand's October 27, 2008 treatment for radiating pain in her arms and any other pre-accident records. (X-JA-1981-2; 1988.) Dr. Muir never prepared a report setting forth his causation opinions.

6. *Verdict and Post-Trial Motions*.

The jury returned a verdict in the amount of $719,770.00. (XVIII-JA-3420E.) Thereafter, Seastrand filed a Memorandum of Costs & Disbursements, seeking $125,238.01 (XIX-JA-3421-33.), and filed a Motion for Attorney's Fees. Khoury opposed the motion and counter-moved to re-tax costs. (XXII-JA-4226-52.) The Court denied Seastrand's Motion for Fees, awarded $75,015.61 in costs, and denied Khoury's countermotion. (XXIV-JA-4675-77.)

Khoury timely moved the court for a New Trial, based upon the court's numerous harmful errors and repeated abuse of discretion; addressing preclusion of lien evidence, striking of jurors for cause; allowing Seastrand's repeated use of a specific verdict amount during voir dire; allowing new and undisclosed opinions from Seatrand's treating and expert physicians; and, various other errors. (XIX-JA-3572-XXII-JA-4225.) The district court denied the Motion for New Trial, (XXIV-JA-4686-4729), and entered the Order on February 18, 2014. (XXIV-JA-4730-32.)

SUMMARY OF THE ARGUMENT

Several justifications exist for a new trial, based on the district court's abuse of discretion. Each of these abuses on its own justifies a new trial; when considered collectively, the abuses provide ample basis. The court failed to consider the extreme harm which Khoury suffered from the Seastrand's experts' testimony: Dr. Muir, without authoring a report, offered new opinions to justify Dr. Belsky's treatment, and causation opinions tying the injuries, symptoms, and treatment to the accident; and, Dr. Gross offered new, undisclosed causation opinions discussing Seastrand's pre-accident symptoms pertaining to her cervical spine, despite repeated objections.

The court further abused its discretion by permitting plaintiff's counsel to indoctrinate the jury with repeated and constant references to a $2,000,000.00 verdict. The court compounded the prejudice, committing reversible error by striking, for cause, several prospective jurors who complained that plaintiff's counsel confused them, despite expressing willingness to consider the facts and evidence and award a fair verdict. The court also refused to clarify the term "claim," improperly denying requests for a mistrial.

Finally, the court's abused its discretion ruling that liens are a collateral source, and its corresponding preclusion of any lien-related evidence, combined with refusal to allow amounts paid, precluding Khoury from introducing evidence of the true value of Seastrand's treatment, as well as evidence of Dr. Muir's and Dr. Grover's bias. These errors and abuses, individually and collectively, provide the basis for a new trial.

LEGAL ARGUMENT

A. THE DISTRICT COURT ABUSED ITS DISCRETION BY ALLOWING PLAINTIFF'S TREATING PHYSICIANS TO OFFER PREVIOUSLY-UNDISCLOSED OPINIONS OPINIONS AT TRIAL.

1. *Standard of Review*.

"A district court's decision to admit expert testimony is reviewed for an abuse of discretion." *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005). "The district court's decision will not be overturned absent 'a clear abuse of discretion.'" *Id.* (internal quotation marks and citation omitted). This Court recently limited the scope of a treating physician's opinions is to those opinions "formed during the course of treatment." *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46, 1 (Amended Opinion)(2014). Specifically, this Court stated:

> "While a treating physician is exempt from the report requirement, this exemption only extends to opinions [that] were formed during the course of treatment. **Where a treating physician's testimony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements**."

Id. *citing Goodman v. Staples the Office Superstore, L.L.C.*, 644 F.3d 817, 826 (9th Cir.2011) (internal quotations omitted) (emphasis added). The trial court abuses its discretion when it permits a physician to so testify.

2. *Treating Physicians Must Adhere to the Expert Standard for Causation Opinions and for Opinions Outside the Scope of their Treatment, which Dr. Muir Violated to Khoury's Prejudice.*

The court abused its discretion permitting Plaintiff's treating physicians to testify as experts without providing the required reports pursuant to *FCH1*. In *FCH1*, the plaintiff's treating doctors offered causation opinions which this Court ultimately deemed improper. Specifically, Dr. Schifini, over objections, offered

opinions stemming from his review of Seastrand's medical records, despite never reviewing the records during the course of treatment and despite never providing an expert report elucidating his opinions and the records he reviewed. *FCH1, LLC* at 6. Therein, Dr. Kidwell offered specific opinions during trial regarding the mechanism of Seastrand's injury, and Dr. Shannon "'causally related' his initial injury" to the plaintiff's treatment. *Id*. at 7.

This Court held that the court abused its discretion by allowing Dr. Schifini to testify without an expert witness report, and that even if Dr. Schifini reviewed records from other providers in the course of treating the plaintiff, he could only address the opinions he formed from the documents he disclosed. *Id*. citing NRCP 16.1 drafter's note (2012 amendment); *also Washoe Cnty. Bd. of Sch. Trustees v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (discovery's purpose is 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.")

The Court further held that once Drs. Kidwell and Shannon offered opinions pertaining to the causation of plaintiff's injuries and/or the causal relation of the plaintiff's treatment to the injuries, "they should have been subject to the [NRCP 16.1(a)(2)(B)]'s disclosure standards." *Id*. citing *Brooks v. Union Pac. R. Co*., 620 F.3d 896, 900 (8th Cir. 2010); *also* NRCP 16.1(a)(2)(B).) Allowing them to offer these opinions without requiring them to disclose expert reports was an abuse of discretion. *Id*.

Other jurisdictions also require treating doctors to provide expert reports in order to testify outside their own observations and treatment of a plaintiff. *See e.g., Albough v. United States*, slip copy, 2008 WL 686701 (S.D. GA 2008) (requiring expert disclosure to allow a treating physician to testify in areas outside of diagnoses, treatment, and other observations)); *Griffith v. N.E. Ill. Reg'l Commuter R.R.Corp.,* 233 F.R.D. 513, 516 (N.D. Ill. 2006) ("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"); *Allen v. Parkland School Dist.*, 230 Fed. App. 189 (3rd Cir. 2008) (doctor witnesses must ordinarily be disclosed as expert witnesses to provide testimony outside of medical treatment); *Widder v. City of Springfield*, 108 F.3d. 1977 (6th Cir. 1997) (physicians must be disclosed as experts to offer testimony outside of opinions obtained by treating individual patients); *Hoggan v. J.B. Hunt Transp. Inc.*, 12 F.3d 1100 (7th Cir. 1993) (where a doctor provides forensic opinions, rather than opinions developed during treatment, they must be properly disclosed as expert witnesses); *Wreath v. United States*, 161 F.R.D. 448 (D. Kan. 1995) (same).

This trial court permitted Dr. Muir, over objections, to offer opinions regarding the reasonableness of treatment provided by Dr. Marjorie Belsky; specifically, whether simultaneous facet injections and transforaminal epidural injections were appropriate. Dr. Muir opined that the simultaneous injections constituted an "adequate workup" of the patient. (X-JA-1938).

Dr. Muir's never disclosed these opinions, either in his deposition, his records, or in an expert report. Seastrand expressly used these new and unanticipated opinions to rebut defense experts. The court abused its discretion allowing Dr. Muir to offer these opinions without an expert report.

Seastrand will wrongly claim that Dr. Muir's offered opinions in defense his integrity, responding to Dr. Schifini's opinions, despite ample opportunity to author a rebuttal report, without doing so. Dr. Schifini's initial report, dated August 25, 2012, contained criticisms about Dr. Belsky's treatment. (II-JA-0191-0203.) Dr. Belsky also issued a rebuttal report responding to Dr. Schifini's

opinions (II-JA-0349-50.); however, Dr. Belsky never testified at trial, despite Seastrand's counsel promising to call her during the opening. For whatever reason, she never testified, so to counter Dr. Schifini's opinions, Seastrand utilized an illegal, back-door approach to admit these opinions through Dr. Muir.

The trial testimony in defense of Dr. Belsky's treatment, particularly where Khoury disclosed expert opinions on her treatment, had been addressed in discovery by two other experts. Dr. Muir's testimony thwarted the type of treating physician opinion allowed during trial, absent pretrial expert disclosure, operating as an abuse of the court's discretion.

Dr. Muir also improperly causally related his treatment, including neck and back surgeries and Seastrand's post-accident symptoms, to the subject accident. (X-JA-1962-3.) The court abused its discretion, because Muir never issued any extra reports addressing these opinions, similar to Dr. Kidwell's and Dr. Shannon's conduct in *FCH1*. Dr. Muir should have complied with expert obligations.

Dr. Muir's failure to comply with expert requirements, combined with the court's refusal to enforce this mandate, unduly prejudiced Khoury. Specifically, this error by the court allowed a completely unexpected witness to opine about a topic never previously anticipated or addressed. Khoury's counsel could not have known to prepare to address this point with Dr. Muir, and was left to "wing it", despite preparing as follows: a) obtaining all of Dr. Muir's records to learn his opinions in advance; b) depose Dr. Muir, to learn all of his opinions in advance; c) serve written discovery to obtain all expected expert witness testimony and opinion testimony of treating physicians, including Dr. Muir, in advance; and, d) move *in limine* to prevent this precise ambush at trial. During that *in limine* argument, Khoury's counsel asserted that everything possible was done to obtain all of the treating physicians' opinions in advance, and to allow those physicians to exceed

their opinion stated in records, depositions, or discovery, violated Khoury's due process rights. (VI-JA-0959-61.)

That is exactly what occurred. Khoury's counsel anticipated Dr. Belsky testifying in defense of Dr. Schifini's opinions, as disclosed, not Dr. Muir. By allowing Dr. Muir to testify on this topic with undisclosed opinions, it prejudiced Khoury's counsel, who engaged in every possible method of learning Dr. Muir's opinions in advance of trial, and had absolutely no reason to anticipate this testimony. The court effectively limited Khoury's counsel from cross-examining a point made by Khoury's expert by erroneously allowing Dr. Muir's testimony. This Court having clarified this point in *FCH1*, Khoury now asserts that this error warrants a new trial.

B. THE DISTRICT COURT ABUSED ITS DISCRETION, ALLOWING SEASTRAND'S EXPERT NEUROSURGEON TO OFFER PREVIOUSLY-UNDISCLOSED OPINIONS, INCLUDING OPINIONS OUTSIDE THE SCOPE OF HIS EXPERTISE, TRAINING, AND QUALIFICATIONS.

1. *Standard of Review.*

"A district court's decision to admit expert testimony is reviewed for an abuse of discretion." *Morsicato*, 121 Nev. at 157, 111 P.3d at 1115. Where an expert never demonstrated any specialized knowledge, expertise, or training in a particular area, that expert is not qualified, and must be prevented from opining about a particular area. *Perez v. State*, 129 Nev. ___, ___, 313 P.3d 862, 869 (2013) (citing *Kelly v. State*, 321 S.W.3d 583, 600–01 (Tex.App.2010)). The district court commits error by admitting the expert's testimony when it is outside the scope of his knowledge. *See Perez*, 313 P.3d at 869.

2. *NRPC 26 Requires Timely and Appropriate Disclosure of Expert Opinions, Include an Ongoing Duty to Supplement.*

Khoury learned for the first time during Dr. Gross' testimony of his expert opinion causally relating the numbness and tingling Plaintiff experienced prior to

the subject accident "to the heart or anxiety", rather than to degenerative discs. (XI-JA-2139-47.) Dr. Gross and Plaintiff's other expert and treating physicians never disclosed any expert opinions relating those symptoms to heart problems or anxiety. The court erroneously permitted this ambush testimony.

Seastrand violated Nevada's rules requiring disclosure of expert opinions by report during discovery, directly and in the spirit of due process; but, certainly before trial. She failed to "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 disclosure of all trial evidence, and disclosure about the substance of experts' testimony timely in the course of litigation. Parties must disclose written reports prepared by their experts containing, *inter alia*, "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 16.1(a)(1); NRCP 26(b)(4). Seastrand failed to timely disclose cardiac experts and produce initial expert reports. NRCP 16.1(a)(2)(C).

Seastrand's violation includes failure to supplement or correct disclosures, including expert disclosures, "if the party learns that in some material respect the information disclosed is incomplete or incorrect[.]" NRCP26(e)(1). That failure "extends both to information contained in the report and to information provided through deposition of the expert." *See id.* Supplemental or modified expert opinions must be disclosed by the time pretrial disclosures are due, at least 30 days before trial. NRCP26(e)(1); *see* NRCP16.1(a)(3)(C).

Nevada courts consider Seastrand's violation a significant enough issue, such that they enacted specific rules to mandate expert discovery and disclosure obligations. Courts may impose various penalties, including the exclusion of evidence, for failure to comply, and when violation of the discovery rules

prejudices the opposing party, courts should never permit exceptions to these rules. Allowing Seastrand's flagrant violation of the rules prejudiced Khoury, warranting a new trial.

NRCP16.1(a)(2)(B), required Seastrand to affirmatively inform Khoury about the substance of their experts' testimony timely 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). Rule 16.1(a)(2)(C) requires expert disclosures at least 90 days before the discovery deadline; or, if intended solely as a rebuttal report, production 30 days after disclosure by the other party.

The courts properly exclude untimely disclosed expert opinions at trial. Rule 37 sanctions the failure to timely disclose expert opinions under Rule 16.1 or 26(e), such that the offending party "is not ... permitted to use the evidence at trial, unless the failure is justified or harmless". NRCP 37(c)(1). The court may also impose financial sanctions, including attorneys' fees for failure to disclose; or, dismissal of the action (*Id.*; also *Young v. Johnney Ribeiro Bldg., Inc.* 106 Nev. 88, 92, 787 P2d. 777, 779 (1990). Courts routinely exclude late or unseasonable supplemental expert material, particularly when the offense compromises 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 *Wilson*, the plaintiff suffered severe burns when her sweatshirt caught fire. (*Id*. at 13.) Over a month after discovery closed, and in anticipation of trial, Plaintiff's expert disclosed a video depicting the flare-up of a sample sweatshirt when lighted. (*Id*. at 18-19.) Five months later, another Plaintiff expert disclosed a second video tape addressing the flammability of the shirt. (*Id*. at 19.) At trial, defense counsel objected to the belated and untimely disclosure of the videos. (*Id*.)

The 1st Circuit U.S. Court of Appeals, citing Rule 37(c)(1), held that parties must seasonably supplement experts opinions, which "carries with it the implicit authority of the district court to exclude such materials when not timely produced, even if there was no rigid deadline for production." (*Id*. citing *Williams v. Monarch Machine Tool Company, Inc.*, 26 F.3d 228, 230 (1st Cir. 1994)).

This Court similarly precluded a plaintiff from introducing testimony from one of her physicians regarding ailments undisclosed until shortly before trial. *Leiper* v. *Margolis*, 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. *Federal Deposit Insurance Corp.* v. *Wrapwell Corp.*, 2000 WL 1576889,*3 (S.D.N.Y. 2000).

Dr. Gross provided an initial report and three supplemental reports, including one as recently as eight weeks before trial started. (XX-JA-3697-8.) Dr. Gross never revealed his opinions regarding Seastrand's pre-accident symptoms, writing four reports and giving a deposition.

3. *Seastrand Neither Provides Substantial Justification for Dr. Gross' Undisclosed Opinions, Nor That the New Opinions Were Harmless.*

Seastrand wrongly argued during trial that Khoury sustained no prejudice, asserting that Dr. Gross never changed his prior causation opinion, despite his new undisclosed basis supporting those opinions. This argument defies logic, and seeks to undermine the entire discovery process, because the new opinions actually raised a new causation position never previously articulated. Seastrand fails to establish either substantial justification for the untimely disclosed evidence, or an absence of harm from its admission at trial, violating NRCP 37(c)(1).

Dr. Gross included opinions stemming from the medical records dated October 27, 2008, in his September 29, 2012 report. (XX-JA-3683-84.) Dr. Gross never offered any pre-trial opinions addressing causation regarding the symptoms raised in October 2008, much less that they were cardiac or anxiety related. (*Id*.) The court failed to exclude these new opinions, even where Dr. Gross had reviewed these documents as of September 29, 2012 and could have included these opinions in one of his subsequent reports.

With the information available to Dr. Gross for nearly a year prior to trial, his ambush opinions substantially prejudiced Khoury. The cardiologic testimony exceeds Dr. Gross's neurosurgical expertise, as Dr. Gross concocted an explanation for the causation issue regarding Seastrand's visit in October 2008, omitted in his prior reports. To accept Seastrand's reasoning would be akin to sanctioning any medical expert disclosed giving any causation opinions at trial, to offer new, previously-undisclosed opinions, provided those opinions ultimately aligned with the expert's prior causation opinions. Accepting this position guts the requirements to disclose all foundations for opinions.

Khoury suffered undue prejudice by the court allowing Dr. Gross' new, previously undisclosed opinions. Khoury's counsel had to rebut those opinions without preparation, despite having deposed him during discovery. Khoury lost the opportunity to retain a cardiologic expert to counter Dr. Gross. Alternatively, Seastrand could have called Dr. Kermani or Seastrand's treating cardiologist to address the treatment in October 2008.

Allowing this testimony harmed Khoury by prejudicially undercutting Khoury's opening statement. Seastrand learned during opening statements that Khoury planned to raise a causation issue regarding Plaintiff's medical visit in October 2008. (XI-JA-02153-4.) By allowing Dr. Gross to exceed disclosed opinions, the Court enabled Dr. Gross, and consequently Seastrand, to violate

expert disclosure rules, untimely rebutting Khoury's causation analysis relative to the treatment in October 2008. The Court left Khoury without adequate recourse to rebut Dr. Gross by permitting introduction of his undisclosed opinions exceeding his areas of expertise to explain Seastrand's significant causation problem, prejudicing Khoury by denying him the opportunity to rebut Dr. Gross' ambush opinions. This forced Khoury to manufacture a rebuttal with previously retained experts. The court abused its discretion, to Khoury's prejudice.

C. THE DISTRICT COURT ABUSED ITS DISCRETION BY PRECLUDING KHOURY FROM INTRODUCING EVIDENCE OF PLAINTIFF'S TREATMENT ON LIENS.

The district court erroneously precluded admission of all evidence regarding medical liens at trial, unduly considering liens a collateral source under *Proctor v. Castelletti*. 112 Nev. 88, 911 P.2d 853 (1996). Liens are not a collateral source, and they demonstrate admissible evidence of bias.

1. *Standard of Review.*

This Court reviews the trial court's decision to admit or exclude evidence for abuse of discretion, and will overturn upon a showing of abuse. *Frei ex rel. Litem v. Goodsell*, 129 Nev. Adv. ___, ___, 305 P.3d 70, 73 (2013). The right to confront and cross examine witnesses includes the right to inquire and examine a witness about the bias and motivation behind their testimony. In *Delaware v. Fensterer*, 474 U.S. 15, 19, 106 S.Ct. 292 (1985), the U.S. Supreme Court found that a cross-examiner is not only permitted to delve into a witness' story to test the witness' perceptions and memory, but [also] ... allowed to impeach, i.e., discredit, the witness.

Nevada deems evidence of witness bias or interest relevant and never collateral to the controversy. *Lobato v. State*, 120 Nev. 512, 96 P.3d 765 (2004). In *Lobato*, this Court noted:

> "Although district courts have wide discretion to control cross-examination that attacks a witness's general credibility, a trial court's discretion is ... narrow[ed] where bias [motive] is the object to be shown, and an examiner must be permitted to elicit any facts which might color a witness's testimony. Generally, the only proper restriction should be those inquiries which are repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness."

Id. at 520.

2. *Liens Are Not Collateral Sources.*

Liens fail to fall within the parameters of collateral sources of payment under Nevada law rendering them inadmissible at trial. *Proctor* considered admissibility of plaintiff's disability insurance. *Proctor*, 112 Nev at 90. The district court allowed evidence of disability insurance, presuming the insurance was probative of the plaintiff's malingering. *Id*. at 89. On appeal, Nevada followed the United States Supreme Court, adopting "a per se rule against the introduction of collateral source evidence" due to its' prejudicial effect substantially outweighing its probative value. *Id*.

Proctor focused on protecting the plaintiff from being prejudiced as a result of "already receiv[ed] compensation." *Id*. Conversely, liens are not "already received compensation;" a lien is a doctor's financial interest in the litigation's outcome.

3. *Liens Demonstrating the Bias of Seastrand's Treating Physicians Must Be Admissible.*

Seastrand's providers acquired a financial interest in her case, given the liens. Consequently, a medical provider treating via lien becomes a quasi-contingent witness. Consistent with *Lobato*, courts in other jurisdictions permit defendants to impeach treating physicians by showing bias or financial interest by introducing evidence of medical liens. *Craigmiles v. Egan*, 618 N.E.2d 1242, 1253

(Ill. App. Ct. 1993); *Moore v. Jock*, 1991 WL 355138, *2 (Ohio App. 10 Dist. 1991) (the defendant demonstrated the possibility of financial bias at trial when the plaintiff's treating chiropractor conceded that the plaintiff still owed approximately $1,000 for services rendered and that the chiropractor had liened that amount on any judgment awarded the plaintiff); *Dorsey v. Greene*, 922 So.2d 12, 128 (Ala.Civ.App. 2005) (medical liens may demonstrate the medical provider's bias arising from his financial interest in the plaintiff's outcome).

Seastrand's treating medical providers—including Dr. Muir and Dr. Grover, each of whom testified on Seastrand's behalf at trial—acquired a financial interest in the outcome of her case, consistent with *Craigmiles*. (III-JA-0371; 0444-62.) By accepting medical liens instead of immediate payment, those treating physicians effectively placed a bet on their right of compensation for the services they rendered, on a judgment favorable to Seastrand. This financial interest arguably resulted in bias favoring Seastrand, potentially influencing their testimony and opinions, including the need for untimely explanatory supplemental opinions favoring Seastrand. Failure to allow introduction of liens and these related arguments unduly prejudiced Khoury and improperly misled the jury, violating NRS 48.035, given those witnesses' judicially protected bias.

The court prejudicially precluded Khoury this proper avenue of exploration concerning witness bias. This financial relationship required necessary questioning about the existence of liens, their amount, and how the lienholder acquired a financial interest in the litigation outcome. The court abused its discretion by precluding this questioning.

D. THE DISTRICT COURT ABUSED ITS DISCRETION BY PERMITTING SEASTRAND TO CLAIM THE ENTIRE AMOUNT BILLED FOR HER TREATMENT INSTEAD OF THE AMOUNT PAID.

1. *Standard of Review.*

This Court reviews the trial court's decision to admit or exclude evidence for abuse of discretion, and will overturn upon a showing of abuse. *Goodsell*, 305 P.3d at 73 (2013). Generally, all relevant evidence is admissible. NRS 48.025(1). A plaintiff can recover as past medical damages no more than the amount accepted by his medical providers as payment in full for their services. *Howell v. Hamilton Meats and Provisions, Inc.*, 52 Cal. 4th 541, 550-51 257 P.3d 1130, 1134 (Cal. 2011). Accordingly, any evidence of the amount actually paid is relevant, highly probative, and admissible.

2. *Amounts Billed But Unpaid Are Not Subject to the Collateral Source Rule, as Plaintiff Incurs No Liability for Those Amounts.*

Plaintiff treated with several providers on a lien, and some doctors holding liens sold them for less than the actual billed amount. (III-JA-0371; 0444-62.) Therefore, Seastrand incurred no obligation for the unpaid portion written down from the sale. The court improperly precluded the reduced amount at trial; or, it should have allowed introduction of actual amounts paid. Evidentiary limitations should not apply to unpaid amounts billed. The court should have allowed Khoury to utilize this evidence to question the reasonable value of the care provided, since the amounts received evidences the true value of that care.

The California Supreme Court addressed in *Howell* the admissibility of amounts billed for medical treatment versus amounts paid for treatment, where, the plaintiff sustained serious injuries in a vehicular accident. The defendant conceded liability, but disputed the amount of past medical damages claimed. (*Id*. at 548.) The defendant moved *in limine* to exclude evidence of those portions of the plaintiff's medical bills that neither the plaintiff nor his health insurer paid, due to agreements between the insurer and the providers for reduced payments as full

payment for services rendered. *Id*. The trial court denied the motion and allowed the plaintiff to present the full amount billed as his past medical damages, but later reduced the jury award by the billed, but unpaid amount upon defendant's motion. *Id*. at 549-50, 257 P.3d at 1133-34.

The appellate court reversed the reduction, as violating California's collateral source rule. *Id*. at 550-51, 357 P.3d at 1134. The California Supreme Court held that **a plaintiff can recover as past medical damages no more than the amount accepted by his medical providers as payment in full for their services**. ***Id.*** (Emphasis added). The Supreme Court of Pennsylvania similarly held:

> "[W]here, as here, the exact amount of expenses has been established by contract and those expenses have been satisfied, there is no longer any issue as to the amount of expenses for which the plaintiff will be liable. In the latter case, the injured party should be limited to recovering the amount paid for the medical services."

Moorhead v. Crozer Chester Medical Center, 765 A.2d 786, 789 (Pa. 2001).

Khoury moved *in limine* to limit Seastrand's presentation of medical special damages to the amounts actually paid to her treating medical providers, irrespective of the source, as full payment for their services. Khoury reiterates that this position comports with the collateral source rule, because this action does not constitute a consequential reduction of the amount Plaintiff's damages recovery. As explained in *Howell*, "[b]ecause [reduced damages] do not represent an economic loss for [Plaintiff], they are not recoverable in the first instance." *Howell*, 52 Cal. 4th at 548, 357 P.3d at 1133.

3. *Seastrand Must Only Be Permitted to Recover the "Reasonable Value of her Medical Care Which Is "Necessarily Incurred."*

Nevada's Pattern Jury Instructions instructs jurors to award Seastrand only "the reasonable value of medical expenses [s]he has necessarily incurred as a result

of the accident." Nev. J.I. 5PIC.1(1). The amount recoverable by Seastrand, should only have included those amounts paid by Seastrand or paid on her behalf, because Seastrand could never be liable for the unpaid amounts. As stated in *Howell*, "to award more [would be] to place [her] in a better financial position than before the tort was committed." *Howell*, 52 Cal. 4th at 553, 257 P.3d at 1136, *citing Hanif v. Housing Authority*, 200 Cal.App.3d 635, 640-641, 246 Cal.Rptr. 192 (1988); *see also* Restatement (Second) of Torts, § 911, comment h, pp. 476-477 (although the measure of recovery for services rendered is usually their reasonable value, "[i]f the person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him."). Seastrand received the full claimed amount of damages, placing her in a better financial position than before the tort occurred, violating Nev. J.I. 5PID.1(1), and resulting in a denial of justice to Khoury, who must overcompensate Seastrand.

4. *The court erred, preventing Khoury from challenging reasonableness by contrasting the doctors' bills with the true market value for those services*

The court denied Khoury the right to introduce evidence of the true market value of the medical services rendered, despite allowing Seastrand to proffer testimony that the rates charged in this case were typical. The court denied Khoury the opportunity to contrast that evidence and effectively challenge the true value of those services against Seastrand misleading the jury to demonstrate the much higher rates that appeared on plaintiff's medical bills. In order to establish true market value, Khoury sought to introduce evidence of the amounts doctors accept day-in and day-out for the services they perform. (III-JA-0546-87.) This is the real value of medical services, not an amount appearing on a bill that is never in fact paid or received.

The district court expressly refused to allow Khoury to cross-examine Seastrand's physicians regarding the rates they normally charge or accept, because such a discussion would touch generally on collateral sources. (XXIV-JA-4737.) Conversely, this information, if admitted, would have provided the jury with necessary background in making its determination and, as discussed above, does not run afoul of the collateral source rule.

The proper measure of recovery is not any amount billed for a service, but rather the service's reasonable value. *See Six Flags over Texas, Inc. v. Parker*, 759 S.W.2d 758, ___ (Tex. App. 1988) (finding that the amount charged on a bill is not, in and of itself, proof of the reasonable value of the services rendered); *Kashner v. Geisinger Clinic*, 638 A.2d 980 (Pa. Super. 1994); GERALD W. BOSTON, STEIN ON PERSONAL INJURY DAMAGES § 7:2 (3d ed. updated 2006) ("The proper measure of damages is not the actual medical expenditures or liability incurred."), *citing Smith v. Syd's, Inc*., 570 N.E.2d 126 (Ind. App. 1991), *reversed in part on other grounds by* 598 N.E.2d 1065 (Ind. 1992). Khoury is entitled to present evidence showing that the reasonable value of a service is not in fact the amount reflected on the bill. In order for the jury to reach and determine "reasonable value," a defendant must be allowed to challenge the reasonableness of the amount billed. *See Bandel v. Friedrich*, 584 A.2d 800 (N.J. 1991); *Klein v. Harper*, 186 N.W.2d 426 (N.D. 1971); *Kashner*, 638 A.2d 980 (Pa. Super. 1994); *Konopka v. Montgomery Ward & Co*., 58 S.E.2d 128 (W. Va. 1950). By failing to allow this exchange, the district court essentially forced the jury to assume that the amount billed was itself the "reasonable value" of the service rendered, muting Khoury on this central issue. This was a highly prejudicial error that can only be remedied by a new trial.

In order to make an accurate assessment of reasonable value, the fact finder must be permitted to consider other relevant evidence, apart from the billed

amount, including the amounts charged and received by other members of the medical community, including those very providers. *Anticaglia v. Lynch,* (Civ. A. No. 90C-11-175, 1992 WL 138983, at *6 (Del. Super. Mar. 16, 1992) (stating that resolving the factual issue of what constitutes a reasonable medical charge includes consideration of charges made by other members of the profession for the same service). Had Khoury been permitted to submit such evidence, the jury would have been able to observe how little relation the amount billed in this case bore to the true market value of the services provided.

5. *In order to establish true market value, defendant should have been permitted to examine the witnesses regarding the amount doctors are typically paid for Seastrand's claimed procedures.*

One type of evidence relevant to establishing reasonableness is evidence that someone was willing to pay the amount charged, which is "premised upon the concept that one would not pay an unreasonable bill." *Smith v. Syd's, Inc.,* 598 N.E.2d at 1066; *Kashner,* 638 A.2d at 983 ("[T]he amount that was actually paid to the GMC for Mrs. Kashner's medical services may be relevant in determining the reasonable value of those services" as well as "the relative market value of those services."). In determining the reasonable value of medical expenses, the amount accepted as payment is thus a much more accurate reflection of reasonable market value than the amount appearing on the bill. *See* generally, RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 12 (4th ed.1992) ("The economic value of something is how much someone is willing to pay for it or, if he has it already, how much money he demands for parting with it"). The district court erroneously barred Khoury from presenting any such evidence, even general evidence of insurance rates, thereby effectively denying Khoury the opportunity to contest reasonableness. (XXIV-JA-4733-38.)

In the medical services market, the prevailing market rate is strongly, and perhaps solely, determined by the price the government and private insurance companies pay for the services. Plaintiff may argue that the price paid by the insurance company represents a contracted-for discount from the market rate, to which defendant has no claim. This reflects a fundamental misunderstanding of the medical services market. A realistic understanding of this truth leads to the conclusion that evidence of such prices should be admissible as evidence of reasonableness. *See, e.g., Anticaglia* 1992 WL 138983, at *5 (recounting testimony of insurance company representative at trial as to how companies determine reasonable rates by comparing prices charged by doctors in similar areas for similar services); *Erbes v. Union Elec. Co.,* 353 S.W.2d 659, 667 (Mo. 1962) (allowing testimony of insurance manager as to how much company was willing to pay for services and the reasonableness of the charges received). In fact, in this particular market, this may well be the only way to accurately address the question of reasonableness.

As one economist has explained:

> "If your stated fee for a procedure is $5,000, but no insurer is paying more than $2,500, what will you charge an out-of-pocket patient or someone with a medical savings account? . . . If you're willing to take $2,500, that's your fee."

Mark Crane, *Getting Peanuts*, MED. ECON. 145-46 (Sept. 1997). This compelling comment explains that the insurance rates develop the standard of value in the medical community. Khoury should have been permitted to present this testimony to the jury, as the sole determiner of reasonable value, to reach its conclusion on this factual point presented to it as recoverable damages.

There is no basis for stretching the collateral source rule to cover the district court's ruling. There is no precedent for excluding all discussion regarding the

general downward pressure that medical insurance has on the market price of medical services. Here, Khoury sought to introduce evidence of the reasonable price of the treatments Seastrand received based in part on evidence of what insurance companies are generally willing to pay for such treatments. Such evidence goes directly to the true reasonable value of medical services, and need not reveal any information as to payments made by a collateral source in this particular case.

The court must vacate accompanying awards of pain and suffering where special damages must also be vacated. It is commonly understood that "special expenses are the core of every injury claim." 23 AM. JUR. PROOF OF FACTS 3d §243 (updated 2006). Indeed, "once special damages are proven, general damages will be presumed." *Cf. K-Mart Corp. v. Washington*, 109 Nev. 1180, 1194, 866 P.2d 274, 284 (1993) (slander action).[1] As opposed to speculative general or future damages, "the dollar amounts can be stated specifically and precisely." 23 AM. JUR. PROOF OF FACTS 3d §243. Medical specials are "tangible, comprehensive and objective." *Id.*

As a practical matter, the quadrupled increase in the medical specials promised an exponentially larger general damage award. Specials are "a crude estimate of the degree of injury and suffering." Paul D. Rheingold, MASS TORT LITIGATION § 14:26, *How Values Are Attached to Cases*. Special damages are a "yardstick" for determining other general damages:

> "Often more important, [special damages] provide the framework against which to argue the subjective damages for pain, suffering, and loss of enjoyment of life. Because the jury can understand and relate to these exact dollar amounts, they become a yardstick to measure the magnitude of the total injury."

23 AM. JUR. PROOF OF FACTS 3d §243. "Juries tend to be disproportionately more generous with awards of pain and suffering as the amount of special damages increases." 6 AM. JUR. *Trials* § 963. A new trial is necessary, in which the court allows Khoury to contest the reasonableness of the past medical damages.

E. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO GRANT A NEW TRIAL FOLLOWING COUNSEL'S DISCUSSION OF "CLAIM".

1. *Standard of Review.*

The decision whether to grant or deny a motion for mistrial is within the trial court's discretion. *Owens v. State,* 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980). This Court will overturn on appeal where it is clear that the trial court abused its discretion in denying the motion for mistrial. *Id.* (citing *Smith v. State*, 110 Nev. 1094, 1102-03, 881 P.2d 649, 654 (1994)). A mistrial may be granted for improper remarks counsel makes in opening statement. "Counsel should, of course, be accorded latitude by the trial court in making his opening statement, but . . . when he makes a statement through accident, inadvertence or misconception which is improper and patently harmful to the opposing side, it may constitute the basis for the ordering of a mistrial[.]" *Maggio v. City of Cleveland*, 151 Ohio St. 136, 140-41, 84 N.E.2d 912, 915 (1949).

Evidence of liability insurance is largely inadmissible. NRS 48.135(1). "[E]vidence as to insurance coverage is inadmissible and prejudicial to a defendant and the admission of such testimony or argument of counsel disclosing insurance coverage is reversible error." *Langley v. Turner's Express, Inc.*, 375 F.2d 296, 297 (4th Cir. 1967) (citing *Bowie v. Sorrell*, 209 F.2d 49, 50 (4th Cir. 1963)); *see also* Fed. R. Evid. 411. This common-sense rule applies as "there is a danger to the

defendant that the jury may award damages without fault or inflate damages once it learns that there is insurance coverage to pay the jury's verdict." *Langley*, 375 F.2d at 297.

2. *"Claim" is uniquely an insurance term; the trial court abused its discretion by failing to grant a mistrial or issue a curative instruction after Seastrand's Counsel's reference to "claim" in his opening statement.*

"'Claim' is almost a term of art in insurance law; it is generally understood by laypersons as something that precedes a 'suit.'" *Hartford Fire Insurance Co. v. Macri*, 6 Cal. Rptr. 2d 13, 18 (Ct. App. 1992) (CROSBY, A.J., dissenting) *overruled on other grounds* 4 Cal. 4th 318, 842 P.2d 112 (1992). *See also Putnam Resources v. Pateman*, 757 F. Supp. 157, 162 (D.R.I. 1991) (recognizing "claims outstanding" as a term of art within the insurance industry); *Savage v. Grange Mutual Insurance Co.*, 158 Or. App. 86, 95, 970 P.2d 695, 699 (1999) (recognizing "covered claim" as an insurance term of art in the context of Oregon insurance statute).

Seastrand's counsel unduly prejudiced Khoury by referencing "claim" during his opening statement. (IX-JA-1752). Khoury moved for a mistrial, which the court denied. (*Id.* at 1759-62). Khoury acknowledges that mentioning insurance in opening statement may not automatically implicate a mistrial; however, this Court must consider the trial court's failure to cure the improper reference to insurance, and the irremedial context in which counsel raised liability insurance. *See Chavez v. Chenoweth*, 89 N.M. 423, 426, 553 P.2d 703, 706 (1976) (noting that counsel's reference to insurance was "improper," but refusing to grant a mistrial where "the time in the trial when the reference occurred and the trial court's prompt admonition was sufficient to eliminate any prejudicial effect from the reference"); *Gainer v. Storck*, 169 Cal. App. 2d 681, 686-87, 338 P.2d 195, 198 (1959) (refusing to grant mistrial after reference to insurance based on trial court's

"prompt" admonition to the jury not to consider references to insurance). "[T]he mere mention of the word 'insurance' in the trial of a case is not fatal, but **the context in which it is laid is of controlling importance**." *Corbett v. Borandi*, 375 F.2d 265, 271 (3d Cir. 1967). (Emphasis supplied).

Plaintiff's counsel's reference to "claim" irreparably prejudiced Khoury's fair trial, particularly without a curative instruction. V*oir dire* involved hours of discussion about $2,000,000.00, including numerous references to "insurance" by members of the jury, prompting Khoury's counsel to emphasize during a bench conference that many venire members and the *voir dire* was moving toward a discussion of insurance. (VII-JA-1202-03.) One juror noted specifically that "If your insurance doesn't cover everything that is incurred in an accident, I just feel that it's–it's too excessive." (*Id.* at 1191). Another likewise noted that he had been in two accidents and that insurance covered him both times. (*Id.* at 1193.)

Seastrand's counsel's reference to "claim" signaled jurors that the $2,000,000.00 Seastrand sought was insurance money. Seastrand's counsel clearly stated that Seastrand never made a "claim" last time, implying she made a "claim" here, enlightening the jury that Khoury maintained insurance to support the $2,000,000.00 figure Seastrand repeatedly discussed during *voir dire*. (VIII-JA-1450.) The trial court offered no curative instruction following Seastrand's counsel's prejudicial statement.

In the above-referenced cases, the courts consistently noted that any reference to insurance was improper, and that the trial court properly denied the motion for mistrial only after giving a limiting instruction to the jury. While the trial court here noted that it never wanted to comment further upon the issue, the comment's only effect on the jury, without cure, following hours of discussion about $2,000,000.00 during *voir dire*, was undue prejudice. The trial court abused

its discretion by failing to grant the motion for mistrial, thereby warranting reversal.

3. *The Reference to "Claim" Constitutes Reversible Error.*

Khoury is entitled to a new trial, because NRCP 61 notes that errors affecting substantial rights may warrant reversal. *See Wyeth v. Rowatt*, 126 Nev. ___, ___, 244 P.3d 765, 778 (2010). An attorney's comments may require reversal: "when a party objects to purported [attorney] misconduct and that objection is sustained, reversal is warranted only if the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009) (citing *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008)).

Counsel's reference to "claim" was wholly improper, and no commensurate admonition occurred to remove its the ill effects. Khoury notes that "[t]he presumption of integrity of verdicts in civil cases is the rule." *Truckee-Carson Irrigation District v. Wyatt*, 84 Nev. 662, 667, 448 P.2d 46, 50 (1968). Nevertheless, Seastrand's counsel prejudiced Khoury by referencing insurance. The trial court's failure to admonish the jury likely prejudicially contributed towards the verdict against Khoury. This comment could only have prejudiced Khoury, warranting reversal for error affecting his substantial rights.

F. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO GRANT A NEW TRIAL FOLLOWING INDOCTRINATION OF THE JURY BY SEASTRAND'S COUNSEL.

1. *Standard of Review.*

The decision whether to grant or deny a motion for mistrial is within the trial court's discretion. *Owens v. State*, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980). This Court will overturn on appeal where it is clear that the trial court abused its

discretion in denying the motion for mistrial. *Id.* (citing *Smith v. State*, 110 Nev. 1094, 1102-03, 881 P.2d 649, 654 (1994)). Specifically, "[t]he circumstances of a particular case, wherein counsel attempts to influence jurors into thinking big by stating astronomic figures either in *voir dire* examination or opening statement, or both, may require the court to declare a mistrial." *Yount v. Seager*, 181 Neb. 665, 668, 150 N.W.2d 245, 249 (1967).

2. *The Trial Court Improperly Denied the Motion for Mistrial Where the Court Permitted Seastrand's Counsel to Unduly Prejudicially Indoctrinate the Jury.*

The fundamental purpose of *voir dire* is to ensure selection of an impartial jury to hear a case. *People v. Lanter*, 230 Ill. App. 3d 72, 75, 595 N.E.2d 210, 213 (1992). *Voir dire* should not be used to indoctrinate a jury or to impanel one with a particular predisposition. *Id.* Indoctrination occurs when a venire person is questioned using hypothetical questions regarding potential issues before introducing the evidence. *State v. Johnson*, 209 N.C. App. 682, 685, 706 S.E.2d 790, 793 (2011). These hypothetical questions then proceed to confuse the average juror, stake out the juror, or cause the juror to pledge himself to a result. *Id.* EDCR 7.70 specifically requires:

> "The judge must conduct the voir dire examination of the jurors. Except as required by Rule 2.68, proposed voir dire questions by the parties or their attorneys must be submitted to the court in chambers not later than 4:00 p.m. on the judicial day before the day the trial begins. Upon request of counsel, the trial judge may permit counsel to supplement the judge's examination by oral and direct questioning of any of the prospective jurors. The scope of such additional questions or supplemental examination must be within reasonable limits prescribed by the trial judge in the judge's sound discretion.

> 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."

When it becomes evident that a venire member may harbor some bias which should prevent them from participating on a jury, the parties may ask probing questions of the venire person to determine whether they could overcome their bias and rule based upon the instructions given from the court. See *Ruby v. Consol. Rail Corp*., 331 Ill. App. 3d 692, 705-06, 771 N.E.2d 1015, 1026 (2002) (citing *Christian v. New York Central Railroad Co.*, 28 Ill. App. 2d 57, 59, 170 N.E.2d 183 (1960)). Notwithstanding, the questioning may not "run rampant" in the selection of the jury and should not indoctrinate, persuade or control the selection of prospective jurors. *Id.*

The trial transcript demonstrates that Seastrand's counsel thoroughly and unduly prejudicially indoctrinated the jury. He elicited the slightest discomfort when raising the $2,000,000.00 figure and harped on it, producing the bias he sought to develop. Disagreement with a party's position is not bias; refusal to follow the law and fairly deliberate on the facts presented constitutes bias.

Seastrand's counsel improperly implanted a numerical value in the minds of the jury as representative of plaintiffs' damages before the jurors heard or considered any admitted evidence. This unduly prejudicial and improper tactic subverts the process of impanelling a fair and impartial jury by design, under the false guise of learning potential biases. *See generally* Adam D. Galinksky& Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and*

Negotiator Focus, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 657-669 (2001) (hereinafter "*First Offers as Anchors*"); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519 (1996) (defining anchoring as ""the bias in which individuals' numerical judgments are inordinately influenced by an arbitrary and irrelevant number"); Sonia Chopra, *The Psychology of Asking a Jury for a Damage Award*, Plaintiff Magazine (March 2013) (as recognized by the plaintiffs' bar, "[a]nchoring can sway decisions even when the anchor provided is completely arbitrary"); John Malouff & Nicola Shutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491 (1989) (mock juries awarded damages largely based upon what plaintiff's counsel requested); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 329 (June 2001) (describing a mock juror study, which showed that allowing plaintiff's attorney to suggest a punitive damages range produced awards highly concentrated within the suggested range because jurors "base[d] their judgments largely on the anchoring influence [of counsel's suggested amounts]"); *Reid Hastie et al., Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (Aug. 1999) (demonstrating "anchor-and-adjust" phenomenon whereby jurors use award suggested by plaintiff's counsel as starting point and set punitive awards at a compromise figure based on the suggested amount); *cf.* Chris Janiszewski & Dan Uy, *Precision of the Anchor Influences the Amount of Adjustment*, PSYCHOLOGY SCIENCE, Vol. 19, No. 2, 121-127 (2008) (noting that anchoring effects account for a wide variety of numerical judgments, ranging from appraisal of homes, to estimates on risk and uncertainty, and estimates of future performances); Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: Anchoring Effects in Personal Injury Damages*

Awards, 6 J. Experimental Psychol. Applied 91-103 (June 2000) (describing mock juror study in which exaggerated requests for pain-and-suffering damages produced exaggerated awards and concluding that counsel's award recommendations alter jurors' beliefs about what constitutes an acceptable award).

Conversely, if Khoury challenged liability for this rear end collision, he could have then successfully challenged for cause every juror harboring a predisposition that a driver hitting another in the rear must be liable. Clearly, counsel's questioning went far above and beyond the "one number, one time" circumstance that the trial court initially deemed appropriate, and beyond proper bases for challenging for cause. (VI-JA-0949-56). In *Morgan v. Liberty Mutual Insurance Co.*, the court found plaintiff's counsel unduly prejudiced the jury during *voir dire*:

> "But in the guise of determining whether any prospective juror had a reservation about awarding high damages, plaintiff's counsel in voir dire examination repeatedly suggested the amount of the verdict to be reached. Over objection by defense counsel, he was permitted to ask if jurors had any reservations about awarding $4 million."

Morgan v. Liberty Mutual Insurance Co 323 So. 2d 855, 859 (La. Ct. App. 1975) *overruled on other grounds by Harris v. Tenneco Oil Co.*, 563 So. 2d 317 (La. Ct. App. 1990).

Nebraska's Supreme Court noted that "The circumstances of a particular case, wherein counsel attempts to influence jurors into thinking big by stating astronomic figures either in voir dire examination or opening statement, or both, may require the court to declare a mistrial." *Yount v. Seager*, 181 Neb. 665, 668, 150 N.W.2d 245, 249 (1967). Parenthetically, the court in *Yount* refused to overturn the denial of a motion for mistrial based on counsel's reference to damages in opening statement, not laced throughout hours of *voir dire*, as it was here.

Illinois courts noted in *Scully v. Otis Elevator Co.*, 2 Ill. App. 3d 185, 275 N.E.2d 905 (1971) and *Kinsey v. Kolber*, 103 Ill. App. 3d 933, 946-47, 431 N.E.2d 1316, 1325 (1982), that inquiring into a jury's feelings about returning a given number does not necessarily constitute error. Nevertheless, in each of these cases and the cases they cite, counsel mentioned the specific hypothetical figure four and six times, respectively. *Scully* , 2 Ill. App. 3d at198, 275 N.E.2d at 913-14; *Kinsey v. Kolber*, 103 Ill. App. 3d 933, 946-47, 431 N.E.2d 1316, 1325. Nowhere in any of these cases exists the kind of exhaustive, repetitive, badgering and indoctrination to which Seastrand's counsel subjected this jury, even eliciting tears from one juror and reproach from another. Seastrand's counsel's conduct can only constitute indoctrination, and must be prevented. Khoury was denied his fair and impartial jurors.

3. *Assuming, that the trial court properly denied the motion for mistrial, the court substantially erred, misapplying Jitnan v. Oliver in dismissing additional jurors on the second day of voir dire.*

The trial court mistakenly based its decision the second day on *Jitnan v. Oliver*, 127 Nev. ___, 254 P.3d 623 (2011), after denying cause challenges the first day, dismissing several jurors. Seastrand's counsel's trial brief misrepresented *Jitnan*. The trial court's decision here is totally distinguishable from *Jitnan*.

In *Jitnan*, this Court noted:

> "[i]n determining if a prospective juror should have been removed for cause, the relevant inquiry focuses on whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

Id. at 628-29 (internal quotation marks and citations omitted).

> "Broadly speaking, if a prospective juror expresses a preconceived opinion or bias about the case, that juror should not be removed for cause if the record as a whole demonstrates that the prospective juror could lay aside his impression or opinion and render a verdict based on the evidence presented in court."

Id. at 629 (internal quotation marks and citations omitted).

> "Detached language considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state unequivocally that a preconception would not influence her verdict."

Id. Unfortunately, this is not what happened below.

The court decided, out of no more than an abundance of caution, to grant Seastrand's counsel's remaining cause challenges (VIII-JA-1410-27), despite Khoury's counsel's pointed questions to all challenged jurors the previous day, whereby they affirmed that they could award $2,000,000.00 if factually supported. The trial court made no specific findings that any of the challenged jurors had not or could not state unequivocally that their "preconceptions" would not influence their verdicts. (*See Id.*)

Henceforth, Khoury was deprived of his due process right to a fair and impartial jury impanelled; instead, every juror expressing even a whiff of skepticism in a vacuum about $2,000,000.00 was stricken, leaving behind only jurors already predisposed to believe that Seastrand's case warranted a verdict of a particular value, due to hours of indoctrination.

Juror disagreement or skepticism with the hypothetical, as presented by Seastrand's counsel, failed to correlate with bias, prejudice, or inability to follow the law. "It is by no means evidence of partiality or prejudice, that juries sometimes disagree." *People ex rel. Stemmler v. McGuire*, 43 How. Pr. 67, 68 (N.Y. Sup. Ct. 1872). "The mere possibility of a juror's preconceived notion of the

[outcome of the case] is insufficient to undermine a court's confidence in the outcome of a case. *Greene v. Lafler*, 447 F. Supp. 2d 780, 789 (E.D. Mich. 2006). The jury, neither counsel nor the judge, sits in judgment of facts such as whether $2,000,000.00 is appropriate.

> "[i]n a civil case the plaintiff must establish his or her case by a preponderance of the evidence. As stated above, it is exclusively the province of the jury to weigh the evidence and determine where the preponderance lies."

Trustees of Carpenters for Southern Nevada Health & Welfare Trust v. Better Building Co., 101 Nev. 742, 748, 710 P.2d 1379, 1383-84 (1985), SPRINGER, C.J., dissenting.

Seastrand's counsel exceeded bounds by implanting or inventing bias in these jurors and then expelling them for his created faux skepticism; he improperly invaded the province of the jury as finder of fact, violating EDCR 7.70. This, combined with the trial court's failure to prevent the conduct, constituted reversible error. The court abused its discretion by denying Khoury's counsel's motion for a mistrial.

After trial, Khoury filed a motion for new trial, arguing, *inter alia*, that the court erred by permitting jury indoctrination about $2,000,000.00 in damages. (XIX-JA-3599-3602). Seastrand's counsel had less offensive means of determining true bias, if any existed. The court agreed that a jury could potentially be indoctrinated, but naturally disagreed that it allowed indoctrination to occur, denying Khoury's motion. (XXIV-JA-4723-24). The court's order reflected that the verdict amount was "not based on specific facts or hypotheticals," and that counsel's use of verdict amounts "during voir dire was proper." (XXIV-JA-4730-31).

While "[t]he decision to grant or deny a motion for new trial rests within the sound discretion of the trial court. . . . deference is not owed to legal error." *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. ___, 252 P.3d 649, 657 (2011) (citations omitted). The trial court erred, as a matter of law, by depriving Khoury of his fundamental right to a fair and impartial jury by permitting Seastrand's counsel to indoctrinate the jury. Accordingly, reversal on this basis is warranted.

G. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT AWARDED PLAINTIFF $75,015.61 IN COSTS.

1. *Standard of Review.*

An award of costs to the prevailing party is mandated where damages [are] sought in an amount in excess of $2,500. *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994) citing NRS 18.020(3) and *Day v. West Coast Holdings,* 101 Nev. 260, 264, 699 P.2d 1067, 1070 (1985). NRS 18.005 sets forth the specific definition of costs and delineates those costs which are recoverable. *NRS* 18.005.

2. *The Costs Awarded Were Not Justified under NRS 18.005.*

At a post-trial hearing, the Court denied Seastrand's Motion for Fees, awarded Seastrand $75,015.61 in costs, and denied Khoury's countermotion to re-tax costs. (XXIV-JA-4675-77.) As argued, the expert witness fees awarded far exceeded the per-expert amount permitted under NRS 18.005, as the court awarded more than $1,500 per witness, for more than five experts.

The court further abused its discretion by awarding fees which are not specified under NRS 18.005, such as "Trial Preparation Costs", as well as costs for copies for medical records and other costs which are "a routine part" of the normal

legal overhead. *Bergman v. Boyce*, 109 Nev. 670.679, 856 P.2d 560, 565-66 (1993).

Should this Court remand the case based upon any of the other abuses argued *supra*, the award for costs must be vacated. Regardless, the Court should vacate the award for costs, as the costs awarded constitute an abuse of discretion.

CONCLUSION

For the above reasons, the District Court's rulings should be reversed in their entirety, the verdict vacated, and this case remanded for a new trial.

DATED this 20th day of October, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Word size 14, Times New Roman font.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4 – 6), but does not comply with the type-volume limitations stated in NRAP 32(a)(7), as it contains more than 14,000 words. Nevertheless, I have filed, concurrently herewith, a motion seeking leave to exceed those limitations.

Finally, I hereby certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on it to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of October, 2014.

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NRAP RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Raymond Riad Khoury – Appellant

Hall Jaffe & Clayton, LLP – Raymond Khoury's Appellate Counsel

Margaret Seastrand – Respondent

Richard Harris Law Firm – Respondent's Counsel

DATED this 20th day of October, 2014.

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