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Attorneys for Defendant
Raymond R. Khoury

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

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

Defendants.

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

DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 7: TO ADMIT ALL EVIDENCE OF PURCHASE OF LIENS AND EVIDENCE OF THE AMOUNTS FOR WHICH LIENS WERE PURCHASED

Date of Hearing: June 6, 2013
Time of Hearing: 9:00 a.m.

Defendant, Raymond Khoury ("Khoury"), by and through his attorneys of record, Hall Jaffe & Clayton, LLP, hereby submits his Reply in Support of his Motion for an order, *in limine*, admitting all evidence of the purchase of medical liens, including evidence of the amounts for which the liens were purchased.

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This Reply is made and based upon the pleadings and papers on file herein, the Memorandum of Points and Authorities submitted herewith, and any oral argument the Court may entertain at the hearing on this matter.

DATED this 31st day of May, 2013.

HALL JAFFE & CLAYTON, LLP

By _____
STEVEN T. JAFFE
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Attorneys for Defendant
Raymond R. Khoury

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. This Court should admit evidence of the purchase of Plaintiff's liens and amount purchased as this information shows the true and reasonable value of the medical services rendered.

Plaintiff has confused the issue of the admissibility of Plaintiff's unpurchased liens with those liens which have been purchased by a third-party. As set forth in Defendant's Motion in Limine Number 3, Plaintiff's unpurchased liens are certainly admissible as evidence of bias. Defendant incorporates the facts, arguments, and authority cited in that Motion and his Reply to that motion herein. However, not only are liens themselves admissible, but evidence of purchase and the purchase amounts of any of those liens is admissible to show the reasonable value of her medical expenses.

Here, Plaintiff's medical providers have treated on a lien. However, by selling those liens, Plaintiff's medical providers have likely accepted an amount lower than the original lien value. In doing so, Plaintiff's medical providers have essentially established that the original lien value is actually higher than the reasonable value of the services incurred–the value which they accepted for the rights to the lien.

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Accordingly, Defendant must be allowed to introduce evidence of the purchase and the purchase amount of the liens, to show the jury the actual reasonable value of the medical expenses incurred.

In the alternative, Plaintiff must be limited to claiming special damages in the amount of the lien purchases, and not the original liens. This is addressed more fully in Defendant's Motion in Limine Number 4 and the Reply in support thereof, both of which Defendant incorporates herein by reference.

In short, allowing Plaintiff recover the higher claimed amount as damages, will place Plaintiff in a better financial position than she was in before the alleged tort was committed. Such a result would amount to a denial of justice by unfairly penalizing Defendant and making him liable for costs for which Plaintiff herself was never liable. Even if the question of liability is ultimately decided against Defendant, he should not be required to overcompensate Plaintiff by paying her more than is necessary to put her in the same financial position she occupied prior to her injury.

II. CONCLUSION

Based on the foregoing, Defendant respectfully requests that this Court issue an order, *in limine*, admitting evidence of the liens purchased and the amounts for which they were purchased.

DATED this 31st day of May, 2013.

HALL JAFFE & CLAYTON, LLP

By _____

STEVEN T. JAFFE
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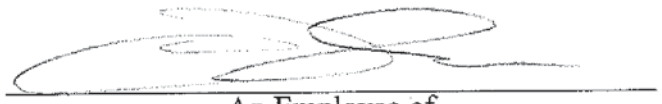
7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant
Raymond R. Khoury

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that service of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 7: TO ADMIT ALL EVIDENCE OF PURCHASE OF LIENS AND EVIDENCE OF THE AMOUNTS FOR WHICH LIENS WERE PURCHASED** was made on the 31st day of May, 2013, by depositing a true and correct copy of the same by U.S. Mail in Las Vegas, Nevada, addressed, stamped, and mailed to the following:

Richard A. Harris, Esq.
RICHARD HARRIS LAW FIRM
801 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff



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DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

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

Defendants.

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

DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 4: TO LIMIT PLAINTIFF'S PRESENTATION OF PAST MEDICAL SPECIAL DAMAGES AT TRIAL TO AMOUNTS ACTUALLY PAID BY OR ON BEHALF OF PLAINTIFF

Date of Hearing: June 6, 2013
Time of Hearing: 9:00 a.m.

Defendant, Raymond Riad Khoury, by and through his counsel of record, Hall Jaffe & Clayton, LLP, hereby moves *in limine* for an Order limiting Plaintiff's presentation of past medical special damages at trial to those amounts actually paid either by Plaintiff or on her behalf as compensation in full for the treatment rendered to Plaintiff by her treating medical providers.

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This Motion is made and based upon the Memorandum of Points and Authorities attached hereto, the papers and pleadings on file herein, and any oral argument the Court may entertain at the hearing on this matter.

DATED this 30th day of May, 2013.

HALL JAFFE & CLAYTON, LLP

By _____
STEVEN T. JAFFE
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7425 Peak Drive
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Attorneys for Defendant
Raymond R. Khoury

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. Neither *Proctor* nor Nevada statutory law prohibit this Court from limiting Plaintiff's presentation of her medical special damages to those amounts actually paid out.

In his original Motion, Defendant established that the collateral source rule has no bearing on those amounts billed by Plaintiff's medical providers but for which Plaintiff never incurred liability. This is due to pre-existing agreements between Plaintiff's medical providers and her health insurer under which Plaintiff's medical providers agreed to accept lesser amounts as payment in full for their services. Thus, Plaintiff should be limited to recovering those amounts for which he has incurred actual liability, *i.e.* the amounts accepted by his medical providers as payment in full for their services.

In support of Plaintiff's opposition, Plaintiff cites to the Nevada Supreme Court's decision in *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853 (1996). Plaintiff correctly asserts that the *Proctor* court established a *per se* rule that "[bars] the admission of a collateral source of payment for an injury into evidence for any purpose." *Id.* at 90, 911 P.2d at 854 (emphasis added). However, amounts billed by medical providers but not paid by Plaintiff or her insurance carrier are not affected by this rule, because they are not "collateral

sources of payment." They are not " payment" by definition, as no one ever paid or was responsible for paying those amounts. They are admissible despite the collateral source rule.

While no Nevada case or statute expressly supports this position, no statute or published opinion expressly rejects it, either. The California Supreme Court, however, has expressly adopted the position advocated by Defendant. In a well-reasoned and exhaustive opinion, the California Supreme Court considered and rejected in turn each of the arguments raised by Plaintiff in his Opposition, ultimately finding not only that the collateral source rule does not prevent the admission of evidence of the amounts actually accepted by Plaintiff's medical providers, but that Plaintiff is limited to recovering only those amounts. ***Howell v. Hamilton Meats and Provisions, Inc.***, 52 Cal.4th 541, --- P.3d ----, 2011 WL 3611940, *1 (2011).

Plaintiff contends that this Court should ignore the fact that California has adopted the minority rule, but the truth is that the Nevada Supreme Court often takes its lead from its sister court in California, and this Court should do so now. In fact, Nevada's collateral source rule, as established by the Nevada Supreme Court in *Proctor* and cited in Plaintiff's Opposition, is taken directly from *Hrnjak v. Graymar, Inc.*, 4 Cal.3d 725, 94 Cal.Rptr. 623, 626, 484 P.2d 599, 602 (1971), a decision of the California Supreme Court, as cited above.[1] Just as the Nevada Supreme Court adopted the California Supreme Court's definition of the collateral source rule in 1996, this Court should adopt the California Supreme Court's position here and limit Plaintiff's presentation of medical special damages to those amounts that were actually paid out either by her or on her behalf.

Despite Ms. Seastrand's assertions, ***Tri-County Equipment and Leasing v. Klinke***, 286 P.3d 593, 595-596 (Nevada 2012) is inapposite to the issue of whether or not Ms. Seastrand should be limited to present evidence of only medical specials paid. Unlike the case at bar, in ***Tri-County***, the Nevada Supreme Court dealt with payments made to a plaintiff through worker's compensation. The Court affirmed workers' compensation payments are admissible as an exception to the collateral source rule. ***Id*** at 595-596. While the Court solicited briefing from the parties on the applicability of the collateral source rule to medical

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[1]The collateral source rule, as defined in Proctor, provides "that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." ***Proctor v. Castelletti***, 112 Nev. 88, 90 n. 1, 911 P.2d 853, 854 n.1 (1996) (*quoting* ***Hrnjak v. Graymar, Inc.***, 4 Cal.3d 725, 94 Cal.Rptr. 623, 626, 484 P.2d 599, 602 (1971)).

provider discounts in other types of cases, it expressly did not rule on the issue. ***Id***. At 597. Specifically, the Court stated:

> Because the amount of workers' compensation payments actually paid necessarily incorporates the written down medical expenses, it is not necessary to resolve whether the collateral source rule applies to medical provider discounts in other contexts.

Id. Therefore, the Court did not hold that evidence of medical insurance "writedowns" are within the collateral source rule. ***Id.***

Ms. Seastrand's reliance on Justice Gibbons non-binding concurring opinion in ***Tri-County*** is also unavailing. Even if Justice Gibbons concludes that evidence of "discounts" or "write-downs" fall within the collateral source rule, the majority of the Court did not join in that opinion. Moreover, Defendant is not attempting to introduce any evidence of "write-downs " to the jury. In fact, Defendant will not present any evidence of the fact that Ms. Seastrand's medical bills were paid by a third party. Rather, Defendant requests that Ms. Seastrand simply be limited to presenting her claimed damages as the amount of bills that were paid by her or on her behalf. Those amounts represent the true value of the services she obtained not some arbitrary amount billed. The collateral source rule is not implicated.

B. The Growing Trend Permits Introduction of the Amounts Accepted by Plaintiff's Medical Providers as Proof of the Reasonable Medical Expenses Incurred by Plaintiff.

The Pennsylvania Supreme Court, like the California Supreme Court, considers the amount paid and accepted by a plaintiff's medical providers to be the amount the plaintiff is entitled to recover as compensatory damages. ***Moorehead v. Crozer Chester Medical Center***, 564 Pa. 156, 162, 765 A.2d 786, 789 (2001) (*overruled on other grounds by* ***Northbrook Life Ins. Co. v. Com.***, 597 Pa. 18, 949 A.2d 333 (2008)). The Florida Supreme Court considers a plaintiff to be fully compensated by an award that equals the amount paid to the medical provider by the plaintiff and his insurer. ***Goble v. Frohman***, 848 So.2d 406, 410 (Fl.App. 2 Dist. 2003) (*decision approved in its entirety by* ***Goble v. Frohman***, 901 So.2d 830, 833 (Fla. 2005)). Similarly, the Idaho Supreme Court has said that medical cost write-offs are not recoverable by a plaintiff as damages because the plaintiff has incurred no liability for that amount. ***Dyet v. McKinley***, 139 Idaho 526, 529, 81 P.3d 1236, 1239 (2003) (quoting ***Kastick v. U-Haul Co. of Western Michigan***, 292 A.D.2d 797, 798, 740 N.Y.S.2d 167, 169 (2002)).

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The Supreme Courts of Kansas, Ohio, Indiana, and Massachusetts have taken a more moderate approach, admitting evidence of the lower amount paid alongside the higher amount billed in order to provide the jury with a more accurate picture in determining the reasonable value of the medical services received by the plaintiff. ***See Martinez v. Milburn Enterprises, Inc.***, 290 Kan. 572, 233 P.3d 205 (2010); ***Robinson v. Bates***, 112 OhioSt.3d 17, 857 N.E.2d 1195 (2006); ***Stanley v. Walker***, 906 N.E.2d 852 (2009); and ***Scott v. Garfield***, 454 Mass. 790, 912 N.E.2d 1000 (2009). Outside of the various court systems, at least 21 states have modified or abolished the collateral source rule. ***Robinson v. Bates***, 112 Ohio St.3d 17, 22, 857 N.E.2d 1195, 1200 (2006).

Defendant respectfully requests that this Court recognize a growing trend in tort law to avoid allowing the Plaintiff to receive a windfall by collecting as damages monies that, under a strict reading of this State's collateral source rule, he was never entitled to in the first place. At a minimum, Defendant requests that the Court permit Defendant to introduce evidence of the lower amounts accepted by Plaintiff's medical providers as payment in full for their services alongside the full amounts billed that Plaintiff will inevitably introduce so that the jury will be fully informed when making its damage award (should Plaintiff prevail at trial). Otherwise, "[i]f the higher stated medical bill, an amount that never was and never will be paid, is admitted without evidence of the lower reimbursement rate, the jury is basing their verdict on 'mere speculation or conjecture," since "[t]he difference between the stated bill and the paid charges...is purely fictional as a true charge." ***Martinez***, 290 Kan. at 611, 233 P.3d at 229 (internal quotations omitted). Such a result would work a clear injustice against Defendant.

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II. CONCLUSION

Accordingly, this Court should grant Defendant's Motion and restrict Plaintiff's presentation of her medical special damages at trial to those amounts actually paid out either by her or on her behalf, or at least permit Defendant to temper Plaintiff's presentation of her medical special damages with evidence of the amounts accepted by her medical providers as payment in full.

DATED this 30th day of May, 2013.

HALL JAFFE & CLAYTON, LLP

By _____

STEVEN T. JAFFE
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Nevada Bar No. 010231
JACOB B. LEE
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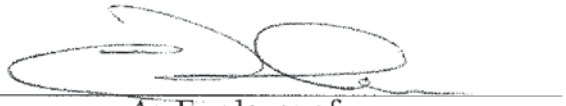
Attorneys for Defendant
Raymond R. Khoury

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that service of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 4: TO LIMIT PLAINTIFF'S PRESENTATION OF PAST MEDICAL SPECIAL DAMAGES AT TRIAL TO AMOUNTS ACTUALLY PAID BY OR ON BEHALF OF PLAINTIFF** was made on the 30th day of May, 2013, by depositing a true and correct copy of the same by U.S. Mail in Las Vegas, Nevada, addressed, stamped, and mailed to the following:

Richard A. Harris, Esq.
RICHARD HARRIS LAW FIRM
801 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff



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Attorneys for Defendant
Raymond R. Khoury

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

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

Defendants.

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

DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 3: TO ADMIT EVIDENCE OF MEDICAL LIENS

Date of Hearing: June 6, 2013
Time of Hearing: 9:00 a.m.

Defendant, Raymond Khoury ("Khoury"), by and through his attorneys of record, Hall Jaffe & Clayton, LLP, hereby submits his Reply in Support of Motion for an Order, *in Limine*, to admit evidence of Plaintiffs's medical liens.

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This Reply is made and based upon the pleadings and papers on file herein, the Memorandum of Points and Authorities submitted herewith, and any oral argument the Court may entertain at the hearing on this matter.

DATED this 30th day of May, 2013.

HALL JAFFE & CLAYTON, LLP

By _____
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7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant
Raymond R. Khoury

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. Evidence of the Medical Liens is Admissible to Demonstrate Plaintiff's Treating Physician's Contingent Interest in Her Case.

While Defendant agrees that, pursuant to ***Proctor v. Castelletti***, 112 Nev. 88, 90 n. 1, 911 P.2d 853, 854 n. 1 (1996), all references to liability insurance (and Medicare) should be excluded, Plaintiff's request to exclude all evidence of medical liens because it is nothing more than an attempt to show a physician's bias falls outside the "collateral source rule" pronounced in is ***Proctor***. The mere fact that a party treats on a medical lien is not necessary indicative of the fact that they do not have medical insurance. Indeed, the undersigned has seen many situations where medical providers treat patients on a lien despite the fact that the patient has medical or other insurance that would cover the cost of treatment. Here, some of Plaintiff's "treating providers" are owed substantial sums of money, which they have agreed to incur on a lien basis.

Evidence regarding a witness' bias or interest in testifying in a certain manner is, in fact, relevant and is not collateral to the controversy for purposes of exclusion. ***Lobato v. State***, 120 Nev. 512, 96 P.3d 765 (2004). In ***Lobato***, the Nevada Supreme Court noted that:

> 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.

Lobato at 520. 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.

Given these types of financial arrangements between Plaintiff and her "treating providers," there can be little doubt that the providers have actually acquired an interest in the case. As a result, these individuals have become "contingent" witnesses. In the event that Plaintiff were to recover nothing, these "contingent" witnesses stand to receive nothing for all of the time and services they have provided. If, on the other hand, Plaintiff prevails, these "contingent" witnesses stand to receive far more money, for the exact same time and services, than they would otherwise have received if they had simply treated other patients and submitted their bills to a medical or other insurance carrier, or if they had even provided treatment on a cash-up-front basis.

For these reasons, it is entirely appropriate to question "contingent" witnesses about the existence of a lien, the amount of the lien and the fact that the "contingent" witness has, in fact, acquired an interest in the outcome of the litigation. As such, Defendants' motion, which requests admission of lien information only, should be granted. In the event that the Court is inclined to deny this motion, it should enter a reciprocal order excluding any evidence of the amounts paid to Defendants' expert witnesses.

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II. CONCLUSION

Based on the foregoing, Defendant respectfully requests that this Court admit evidence of Plaintiff's Medical liens to rebut any claims that she could not afford treatment, to show the bias of the medical providers, and for any other purpose the Court determines to be reasonable.

DATED this 30th day of May, 2013.

HALL JAFFE & CLAYTON, LLP

By _____

STEVEN T. JAFFE
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7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant
Raymond R. Khoury

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that service of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 3: TO ADMIT EVIDENCE OF MEDICAL LIENS** was made on the 30th day of May, 2013, by depositing a true and correct copy of the same by U.S. Mail in Las Vegas, Nevada, addressed, stamped, and mailed to the following:

Richard A. Harris, Esq.
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801 S. Fourth Street
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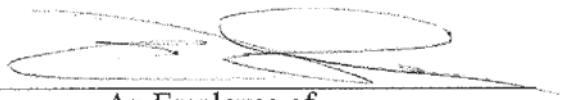
Attorneys for Plaintiff



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DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

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

Defendants.

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

DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 1: TO LIMIT PHYSICIANS TO OPINIONS STATED IN THEIR CLINICAL RECORDS, DEPOSITIONS, AND/OR EXPERT REPORTS, IF ANY

Date of Hearing: June 6, 2013
Time of Hearing: 9:00 a.m.

Defendant, Raymond Khoury ("Khoury"), by and through his attorneys of record, Hall Jaffe & Clayton, LLP, hereby submits Reply in Support of Motion in Limine No. 1 for an Order, in limine limiting Plaintiff's treating physicians to opinions stated in their clinical records, depositions, and/or expert reports, if any.

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This Reply is made and based upon the pleadings and papers on file herein, the Memorandum of Points and Authorities submitted herewith, and any oral argument the Court may entertain at the hearing on this matter.

DATED this 30th day of May, 2013.

HALL JAFFE & CLAYTON, LLP

By _____
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Raymond R. Khoury

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

Ms. Seastrand does not dispute that she failed to disclose any documents or records from her treating physicians regarding future care medical care. Ms. Seastrand does not dispute that she failed to provide any costs or computations of future medical care. Ms. Seastrand also does not dispute that, other than Dr. Belsky, Plaintiff's treating physician expert never produced any written expert reports, other than their own clinical records.

Despite this, it is apparent that Ms. Seastrand may attempt to have her treating physicians to improperly opine outside their own medical treatment, and testify as to "additional opinions" that may be made known to them while they are sitting at the trial. However, none of Ms. Seastrand's medical doctors experts in this case have any opinions concerning Ms. Seastrand's future care during their treatment of her. To allow them to do so, at the time of trial, blatantly contradicts the purpose of Nevada's expert disclosure rules and is by definition "trial by ambush."

For example, Dr. Muir testified that he has not seen Ms. Seastrand since March 5, 2010. *See* Dr. Muir Deposition at 63:7-10, attached hereto as **Exhibit "A"**. At the time of his deposition, had not reviewed any

of Plaintiff's records for her subsequent lumbar treatment and lumbar fusion surgery with a different doctor. *Id.* at 15:9-16:7; 54:1-6. Indeed. Dr. Muir testified that he had only reviewed the medical records leading up to and through his treatment of Ms. Seastrand. *Id.* As Dr. Muir has not been provided any information other than his records and the records leading up to his treatment of Ms. Seastrand, and his role is solely a treating doctor, he must be limited to those opinions contained in his clinical records.

This same limitation must apply equally to any of Ms. Seastrand's treating physicians. Ms. Seastrand cannot have the benefit of not producing a report from her treating doctors, and at the same time, then having these doctors expert testify to any and all topics under the sun. If Ms. Seastrand intended her treating doctors to testify as to matters outside their own treatment, they must produce an expert report detailing those opinions. For example, other courts have held that treating physicians opinions based on outside sources, such as IME reports, trigger the expert report requirement. *See* ***Shapardon v. West Beach Estates***, 172 F.R.D. 415, 417 (D.Haw.1997). As soon as a treating doctor opines as to materials generated outside his course of treatment, he is no longer a treating physician, but rather converted into a specially retained for the purpose of litigation. Permitting such testimony from a physician who was only ever identified and disclosed as a "treating physician" would unjustly permit Ms. Seastrand to circumvent the disclosure requirements of NRCP 16.1(a)(2)(B) and would prejudice Defendant at trial with undisclosed opinions.

This limitation does not only apply to future prognostications, but also to any medical opinions by Ms. Seastrand's treating doctors which were not contained in their clinical records or expressed in their depositions. While her treating physicians may be to express opinions as to causation and diagnosis based on their own treatment of the patient, the scope of a treating physician's expert opinion testimony is not unfettered. As the court in ***Elgas v. Colorado Belle Corp.***, 179 F.R.D. 296, 298-299 (D.Nev.1998) stated, "if a physician, even though he may be a treating physician, is specially retained or employed to render a medical opinion based on factors that were not learned in the course of the treatment of the patient, then such a doctor would be required to present an expert written report." ***Elgas***, 179 F.R.D. at 298 n.2, *quoting Hall v. Sikes*, 164 F.R.D. 46–48–49 (E.D.Va.1995).[1] Thus, exemption for treating physicians from the report

[1] *See generally* ***Piper v. Harnischfeger Corp.***, 170 F.R.D. at 175 (citing cases that support the requirement that a treating physician must acquire the opinions through treatment of a patient); ***Shapardon v. West Beach Estates***, 172 F.R.D. 415, 417 (D.Haw.1997) (concluding that treating physicians' opinions based upon information received from outside sources, such as an independent medical examination report, would trigger the report requirement of Rule 26(a)(2)(B)).

writing requirements of N.R.C.P. 16.1(a)(2) only applies to testimony about matters that were within the scope of Ms. Seastrand's treating physicians' care or treatment. As none of her treating physician provided expert reports pursuant to N.R.C.P. 16.1(a)(2), their testimony at trial must be limited to the opinions that were part of the treating physician's ordinary care of her.

In addition to the 9th Circuit Court of Appeals[2], federal courts in other jurisdictions apply this same limitation to treating physician who do not produce written reports pursuant to Fed. R. Civ. P. 26(a)(2), or, similarly, N.R.C.P. 16.1(a)(2). Federal case law holds that to the extent that the source of the facts which form the basis for a treating physician's opinions derive from information learned during the actual treatment of the patient, as opposed to being subsequently supplied by an attorney involved in litigating the case involving the condition or injury, then no comprehensive written report signed by the witness is required. ***Sullivan v. Glock, Inc.***, 175 F.R.D. 497 (D.MD.1997). In other words,

> [t]o the extent that the treating physician testifies only as to the care and treatment of his/her patient, the physician is not to be considered a specially retained expert notwithstanding that the witness may offer opinion testimony under Fed.R.Evid. 702, 703, and 705. However, **when the physician's proposed opinion testimony extends beyond the facts made known to him during the course of the care and treatment of the patient and the witness is specially retained to develop specific opinion testimony, he becomes subject to the provisions of Fed.R.Civ.P. 26(a)(2)(B)**.

Wreath v. U.S., 161 F.R.D. 448 (D.Kan.1995)(emphasis added).[3] In defining the limitations imposed on the testimony of treating physicians, the Sixth Circuit noted:

> when the nature and scope of the treating physician's testimony strays from the core of the physician's treatment, Rule 26(a)(2)(B) requires the filing of an expert report from that treating physician. The determinative issue is the scope of the proposed

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[2] ***Goodman v. Staples The Office Superstore, LLC*** 644 F.3d 817, 826 (9th Cir. 2011)

[3] *See e.g.*, ***Albough v. United States***, slip copy, 2008 WL 686701 (S.D. GA 2008) (requiring expert disclosure in order to allow a treating physician to testify in areas outside of diagnoses, treatment, and other observations of Flores); ***Griffith v. N.E. Ill. Reg'l Commuter R.R.Corp.***, 233 F.R.D. 513, 516 (N.D. Ill. 2006) (precluding purported expert testimony of doctor based upon future care where no expert disclosure was made); ***Allen v. Parkland School Dist.***, 230 Fed. App. 189 (3rd Cir. 2008) (recognizing that doctor witness must ordinarily be disclosed as an expert witness if he or she intends to provide testimony outside of medical treatment); ***Widder v. City of Springfield***, 108 F.3d. 1977 (6th Cir. 1997) (also recognizing general rule that physician must be disclosed as an expert in order 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) (recognizing that where a doctor provides forensic opinion, rather than opinion developed during treatment of a patient, doctor must be properly disclosed as an expert witness)

> testimony. Under this purposive reading of Rule 26, a **report is not required when a treating physician testifies within a permissive core on issues pertaining to treatment, based on what he or she learned through actual treatment and from the plaintiff's records up to and including that treatment**.

Fielden v. CSX Transportation, Inc., 482 F.3d 866, 870-71 (6th Cir.2007)(internal citations and quotations omitted)(emphasis added).

II. CONCLUSION

Here, there is no dispute that Ms. Seastrand's treating physicians were not "specially retained", and are not, therefore, exempt from the report requirements of N.R.C.P. 16.1(a)(2). However, as these doctors are treating physicians of Ms. Seastrand, they should not be allowed to render medical opinions based on factors that were not learned in the course of their respective treatment of her. Defendant respectfully requests this Court limit the scope of Ms. Seastrand's treating physicians to information and opinions contained in the clinical records and deposition testimony to the extent such information and opinions were part of these physicians' respective care.

DATED this 30th day of May, 2013.

HALL JAFFE & CLAYTON, LLP

By _____

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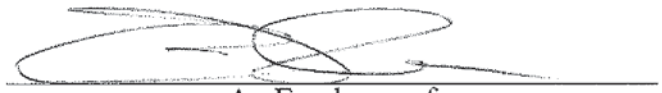
CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that service of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 1: TO LIMIT PHYSICIANS TO OPINIONS STATED IN THEIR CLINICAL RECORDS, DEPOSITIONS, AND/OR EXPERT REPORTS, IF ANY** was made on the 30th day of May, 2013, by depositing a true and correct copy of the same by U.S. Mail in Las Vegas, Nevada, addressed, stamped, and mailed to the following:

Richard A. Harris, Esq.
RICHARD HARRIS LAW FIRM
801 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff



An Employee of
HALL JAFFE & CLAYTON, LLP

EXHIBIT "A"

DISTRICT COURT
CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND, Plaintiff,	)	
vs.	)	Case No. A-11-636515-C
RAYMOND RIAD KHOURY; DOES 1 through 10; and ROE ENTITIES 11 through 20, inclusive, Defendants.	)	

DEPOSITION OF WILLIAM SQUIRES MUIR, MD
Taken on Tuesday, November 27, 2012
At 4:02 o'clock p.m.
At 653 North Town Center Drive, Suite 210
Las Vegas, Nevada 89144

Reported by: Ann Salisbury, RPR, CCR 185

Q. So that would be the further subjective symptoms, correct, or subjective reporting?

A. Yes, it is.

Q. By the way, I forgot to ask you, what did you do to prepare for today's deposition?

A. I reviewed my medical records.

Q. Have you ever reviewed her deposition?

A. No.

Q. Have you ever reviewed records of any other providers?

A. Yes.

Q. What other providers' records have you reviewed?

A. Let me refer to my notes.

Nevada Imaging Centers, their MRI report on the cervical spine on 4/3/09; Nevada Imaging Centers, MRI --

Q. Actually just -- I just want the providers' names. You don't need to run down each particular record. I just want to know what providers.

A. Well, these are providers and that they were the MRI scans.

Q. I understand. But Nevada Imaging Centers, I understand you've reviewed some of their records?

A. Yes.

Q. I just want the names of the facilities. I don't need a chronological list of each record.

A. Marjorie Belsky, MD; Russell Shah, MD -- both for the cervical and lumbar -- Summerlin Hospital; Quest Laboratories; Surgery Center of Southern Nevada; Radar Medical Group, that's Dr. Shah's. And I believe that's the extent.

Q. Did you speak with or meet with anybody at all to prepare for today's deposition?

A. No.

Q. Have you reviewed any medical reports submitted by the defense in this case?

A. No.

Q. And I believe you said you have not received or reviewed Ms. Seastrand's deposition transcript?

A. Correct.

Q. How about depositions of any other witnesses in the case?

A. No.

Q. Depositions of any experts or treating providers?

A. No, other than -- oh, depositions, no.

Q. Okay. How about have you spoken with anybody from Mr. Harris' office or met with anybody from Mr. Harris' office to prepare for today's deposition?

Q. You've certainly never seen any records from Dr. Grover or any of his other practitioners or clinics, right?

A. No, I -- regarding this patient?

Q. Yes.

A. No.

Q. You treated her lumbar spine, correct?

A. Yes.

Q. What were her subjective reports and complaints related to the lumbar spine?

A. At what particular date?

Q. Initially.

A. I'm referring to my initial evaluation on 8/24/09. She complained at that time of worsening, constant, severe, aching, and stabbing pain on both sides radiating down the legs and the feet. And I believe it's principally on the right leg more than the left. She complained of severe low back pain again with limitations of activities of daily living and pain with certain activities, as we discussed before.

Q. Okay. So she complained about both axial and radicular pain?

A. Yes.

Q. And, I'm sorry, were there other radicular symptoms that she complained about? If you mentioned

with her?

A. I would have discussed all of them.

Q. So anterior/posterior and just the posterior approach?

A. Well, looking at my notes, without going through all these, I discuss -- you know, here's the note that -- that I was trying to find. It's 3/5/10, under Treatment options.

Q. So that would have been the last time you saw her?

A. Yes. Says due to the degree of -- due to the degree and ongoing severity of her back pain, she's a candidate for an L4-S1 fusion. However, she's also a candidate for a spinal cord stimulator, which would address the back and the leg pain. The other option would be continue medications and hope that she'd improve with time.

After lengthy discussion, the patient would like to proceed with a lumbar fusion. And then if a patient chooses a lumbar fusion, I discuss with all my patients the pros and cons of an anterior/posterior approach, unless one is much better than the other for a particular patient.

Q. Did you -- which approach did she opt, the anterior/posterior?

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND, Plaintiff, vs. RAYMOND RIAD KHOURY; DOES I-X, and ROE CORPORATIONS I-X, inclusive, Defendants.	CASE NO.: A-11-636515-C DEPT. NO.: XXX **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 7: TO ADMIT ALL EVIDENCE OF PURCHASE OF LIENS AND EVIDENCE OF THE AMOUNTS FOR WHICH LIENS WERE PURCHASED** Date of Hearing: June 6, 2013 Time of Hearing: 9:00 a.m.

Plaintiff Margaret Seastrand ("Margie"), by and through her attorneys of record, the RICHARD HARRIS LAW FIRM, hereby submits her **OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 7: TO ADMIT ALL EVIDENCE OF PURCHASE OF LIENS AND EVIDENCE OF THE AMOUNTS FOR WHICH LIENS WERE PURCHASED**.

This Opposition is based on the following Memorandum of Points and Authorities, the papers pleadings on file, and any oral argument entertained by this Court.

Docket 64702 Document 2014-37331

MEMORANDUM OF POINTS AND AUTHORITIES[1]

I. STATEMENT OF FACTS

On March 13, 2009, Margie was injured when Defendant Khoury negligently rear-ended her vehicle while she was stopped at a red light. As a result of Defendant's negligence, Margie was forced to undergo years of medical treatment, including cervical and lumbar fusion surgeries. Margie's past medical specials total over $433,000.

Some of Margie's medical treatment was billed through medical liens. And, some of her medical providers subsequently sold those liens to outside companies. Importantly, however, the amount for which the lien was sold does not change Margie's financial obligation — she is still liable for the entire amount billed under the lien. A transfer of the lien does not reduce the bill she ultimately owes. Introduction of information regarding the sale of liens related to Margie's treatment is irrelevant to the value of the services or the extent of damages she incurred. Accordingly, this information must be excluded at trial.

II. LEGAL ARGUMENT

Plaintiff incorporates by reference her Opposition to Defendant's Motion No. 3 and Motion No. 4, which address similar issues regarding the general admissibility of liens and the reduction of Plaintiff's medical specials to amounts accepted by her providers.

A. "True and Reasonable" Value of Services is NOT Determined by the Amount Ultimately Accepted by the Provider.

Defendant argues that if Margie's medical providers sold their liens for a reduced amount, the reduced amount should be considered the "true and reasonable value" of the

[1] Similar arguments are contained in Plaintiff's MIL #12 and Plaintiff's Oppositions to Defendant's Motion #3 and #4.

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services rendered. The Nevada Supreme Court has already rejected this position with regard to using health-insurance "write-downs" in the same manner.

Once again, Defendant's Motion relies on the out-of-state, non-binding decision by the California Supreme Court in Howell v. Hamilton Meats & Provisions, Inc.[2] and urges the Court to apply this **non-binding** standard in our case. And, again, Defendant fails to acknowledge the guidance recently provided by the Nevada Supreme Court — indicating that it rejects the standard created by Howell and that the collateral source rule applies to third-party "write-downs."[3]

In Tri-County Equipment & Leasing, LLC v. Klinke, the Nevada Supreme Court confirmed that the per se exclusion of collateral source evidence included exclusion of evidence regarding contractual "write-offs" negotiated by third-parties (which is the same as negotiated reductions by lien purchasing companies).[4] While the majority opinion in Tri-County Equipment did not specifically address payments made by third-parties, in the concurring opinion, Justice Gibbons provided insight into this area of the collateral source rule. Justice Gibbons indicated: "**I conclude that Nevada's collateral source rule bars the admission of evidence showing medical provider discounts or 'write downs**.'"[5] He further noted:

> The focal point of the collateral source rule is not whether an injured party has "incurred" certain medical expenses. Rather, it is whether a tort victim

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[2] 257 P.3d 1130 (Cal. 2011).

[3] Tri-County Equipment & Leasing, LLC v. Klinke, 2011 WL 1620634 (Nev. 2011).

[4] 286 P.3d 593, 597 (Nev. 2012).

[5] Id. (emphasis added).

Plaintiff acknowledges that this concurring opinion is not binding on the Court. However, it provides the only available insight into the Nevada Supreme Court's position on this issue.

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> has received benefits from a collateral source that cannot be used to reduce the amount of damages owed by a tortfeasor.[6]
>
> **As a result, evidence of write-downs creates the same risk of prejudice that the collateral source rule is meant to combat.**[7]

If any of Margie's treating physicians accepted less than the amount billed as full payment for their services, such a scenario is no different than a provider accepting a "write-down" from an insurance company. It is a business decision by the provider. It is has no impact on the "value" of the service or the damages incurred. Further, this transfer of the lien to another company does not reduce Margie's financial obligation — it simply changes the payee. Thus, the damage "incurred" remains the same regardless of the business decisions of her providers.

In February of this year, Nevada's federal District Court applied the rationale of Tri-County Equipment, holding:

> The collateral source rules makes the tortfeasor liable for the full extent of the damages caused, no matter how much the victim actually pays. **That a medical provider ultimately accepts less than a billed amount, whether from an insurance company or from the victim directly, is not relevant to whether the tortfeasor is liable for the full value of the harm he has caused** . . . . For the purposes of damages against a tortfeasor, medical expenses are measured by the extent of harm caused, **not by the medical expenses incurred and/or paid**. Defendants' citations to cases from other states having different collateral source rules are not helpful.[8]

[6] Id. at 598 (quoting Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316, 322 (Va.2000)).

[7] Id. (citing Acuar, 531 S.E.2d at 322) (emphasis added).

[8] Alexander v. Wal-Mart Stores, Inc., 2013 WL 427132 (D.Nev. 2013) at *4 (quoting Gresham v. Petro Shopping Ctrs., LP 2012 WL 5198481 (D.Nev. 2012)) (emphasis added).

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In recent opinions, numerous courts have agreed that plaintiffs are entitled to recover for the reasonable value of their medical expenses, **not** the amount paid by a third-party.[9]

For example, in Haselden v. Davis,[10] the South Carolina Court of Appeals rejected the defendant's argument that the amount Medicaid paid for medical expenses was conclusive evidence of the reasonable value of medical service received.[11] The Haselden court held that the amount Medicaid paid toward medical treatment was only *one measure* of the reasonable value of the medical service, and affirmed the trial court's decision to allow the plaintiff to introduce evidence of the costs that would have been paid for treatment if she had not been a Medicaid patient.[12] Other courts agree.

In Olariu v. Marrero, the defendant argued that the plaintiff should not be able to recover for medical expenses that were written off by the plaintiff's medical care providers.[13] The court held that, "Georgia does not permit a tortfeasor to derive any benefit from a reduction in damages for medical expenses paid by others, whether insurance companies or beneficent boss

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[9] See, e.g., Pipkins v. TA Operating Corp., 466 F. Supp. 2d 1255 (D.N.M. 2006) (holding that New Mexico law provides that contractual write-offs are considered collateral source benefits); Lindholm v. Hassan, 369 F. Supp. 2d 1104 (D.S.D. 2005) (holding that "a benefit directed to the injured party should not be shifted so as to become a windfall for the tortfeasor"); Leitinger v. Dbart, Inc., 736 N.W.2d 1 (Wis. 2007) (holding that evidence of amount actually paid by plaintiff's health insurer was inadmissible under collateral source rule); Bynum v. Magno, 101 P.3d 1149 (Hawaii 2004) (holding that collateral source rule prohibited reducing plaintiff's damage award to reflect discounts given); Hardi v. Mezzanotte, 818 A.2d 974 (D.C. 2003) (holding that write-offs may be recovered by plaintiff because the plaintiff paid for the insurance benefit); Rose v. Via Christi Health Sys., 78 P.3d 798 (Kan. 2003) (holding that defendant was not entitled to limit damage award by portion of medical bills that were written off); Robinson v. Bates, 828 N.E.2d 657 (Ohio Ct. App. 2005) (holding that the collateral source rule applies to any written-off amount agreed to by a plaintiff's health-care provider and insurer); Arthur v. Catour, 803 N.E.2d 647 (Ill. Ct. App. 2004) (holding that collateral source rule applied to full amount billed even though insured paid discounted amount by agreement with provider).

[10] 534 S.E.2d 295, 304 (S.C. Ct. App. 2000).

[11] Id. at 304.

[12] Id. at 304-05.

[13] 549 S.E.2d 121 (Ga. App. 2001).

or helpful relatives."[14] Therefore, the Olariu court concluded, the defendant is not entitled to use a third party's write off of medical expenses as a set-off against the plaintiff's recovery.

In Williamson v. Odyssey House, Inc.,[15] the court held that a plaintiff's recovery is not limited to the actual amount that has been paid or will be paid for medical services, but is instead measured by the reasonable value of such services. The court reasoned that in light of New Hampshire's collateral source rule, **the reasonable value of medical services is the proper measure of damages, regardless of the amount paid for those services**.[16]

In Bynum v. Magno,[17] the Hawaii Supreme Court held that the collateral source rule prohibits reducing a plaintiff's damages award to reflect discounted Medicare and Medicaid payments. The court instructed that allowing this reduction "is contrary to this jurisdiction's long established approach to allowing an injured plaintiff to recover for the 'reasonable value of the medical services.'"[18] The court further reasoned that allowing this type of reduction would create an inequitable scenario where similarly injured plaintiffs would be entitled to differing damages awards based upon "the type of their insurance coverage, and not upon the nature of their injuries."[19] This inevitable injustice must be avoided.

In Acuar v. Letourneau, the Virginia Supreme Court held that the plaintiff was allowed to present evidence of the full value of his reasonable medical expenses, without any reduction

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[14] Id. at 123 (citing Bennett v. Haley, 132 Ga. App. 512 (1974)).

[15] 2000 WL 1745101 (D.N.H. 2000).

[16] Id.

[17] 101 P.3d at 1162.

[18] Id.

[19] Id.

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for the amounts written off by his health care providers.[20] The court reasoned that the focal point of the collateral source rule is not whether an injured party has incurred certain medical expenses, but whether a tort victim has received benefits from a collateral source that cannot be used to reduce the amount of damage owed by a tortfeasor.[21] The court further stated that, based upon the collateral source rule, the defendant cannot deduct from any benefits the plaintiff derived from contractual arrangements with his health care provider, whether those benefits took the form of medical expense payments or amounts written off.[22]

To permit Plaintiff only to recover for the amount accepted by her providers for her treatment would be unfairly prejudicial to Margie. She is still obligated to pay the full amount billed under the lien. If Defendant were only held liable for the amounts accepted by the provider, Margie would be prohibited from recovering the reduction amount that her providers unilaterally decided to accept. Ultimately, Margie is left holding the bag and Defendant receives a windfall. The Nevada Supreme Court has already advised against this type of outcome.

> When medical costs are written down, one party is likely to receive a windfall. **If one party must receive a windfall as a result of the write-downs, it should be the plaintiff and not the tortfeasor**.[23]

This Court should carry out the Nevada Supreme Court's intent and decline to follow the non-binding standard Defendant wants applied — and that our Supreme Court has already rejected.

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[20] 260 Va. 180, 193 (2000).

[21] Id.

[22] Id.

[23] Tri-County Equip. & Leasing, LLC, 286 P.3d at 599 (citing Lopez v. Safeway Stores, Inc., 129 P.3d 487, 496 (Ariz.Ct.App.2006) ("Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer"); Restatement (Second) of Torts § 920A cmt. B (1979) ("a benefit that is directed to the injured party should not be shifted so as to become a windfall to the tortfeasor")) (emphasis added).

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The single decision by Judge Cadish in support of Defendant's position must be dismissed by this Court. It is an unpublished ruling from the Eighth Judicial District Court and it has no binding authority over this Court. And, it is in direct contradiction to the Nevada Supreme Court's position in Tri-County Equipment. Accordingly, the commentary provided by Judge Cadish in that non-binding, unrelated case must be dismissed. Further, other Nevada courts have squarely rejected the rationale provided in Judge Cadish's ruling — relying upon the **binding** authority of the Nevada Supreme Court.[24]

B. Information Regarding Lien Purchase Amounts Should be Excluded Based the Unnecessary Confusion it Will Bring.

As discussed above, the amounts that Margie's doctors ultimately accepted as payment for their services based on negotiations with outside companies fails to provide any probative insight into the facts at issue. Even if this information was somehow relevant — which Plaintiff contends it is not — a trial within a trial would be necessary to explain the "in's and out's" and "how's and why's" of negotiated rates and the financial/business decisions the providers have to make when determining what to accept in satisfaction for services. Moreover, as Defendant's Motion evidences, Defendant is unsure as to the amounts accepted by providers who sold their liens — and which providers have actually sold their liens. Presentation of this complicated financial and billing information would do nothing more than confuse the jury and inevitably waste unnecessary judicial time and resources. Accordingly, this information must be excluded under NRS § 48.035.

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[24] See Alexander, 2013 WL 427132; see also Gresham 2012 WL 5198481.

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III. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court deny Defendant's Motion #7.

DATED this 23rd day of May 2013.

RICHARD HARRIS LAW FIRM

By: _____

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of RICHARD HARRIS LAW FIRM and that on the 24 day of May 2013 I caused the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 7: TO ADMIT ALL EVIDENCE OF PURCHASE OF LIENS AND EVIDENCE OF THE AMOUNTS FOR WHICH LIENS WERE PURCHASED** to be served as follows:

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

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

[ ] by hand delivery

to the attorneys listed below:

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND, Plaintiff, vs. RAYMOND RIAD KHOURY; DOES I-X, and ROE CORPORATIONS I-X, inclusive, Defendants.	CASE NO.: A-11-636515-C DEPT. NO.: XXX **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 4: TO LIMIT PLAINTIFF'S PRESENTATION OF DAMAGES AT TRIAL TO AMOUNTS ACTUALLY PAID BY OR ON BEHALF OF PLAINTIFF** Date of Hearing: June 6, 2013 Time of Hearing: 9:00 a.m.

Plaintiff Margaret Seastrand ("Margie"), by and through her attorneys of record, the RICHARD HARRIS LAW FIRM, hereby submits her **OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 4: TO LIMIT PLAINTIFF'S PRESENTATION OF DAMAGES AT TRIAL TO AMOUNTS ACTUALLY PAID BY OR ON BEHALF OF PLAINTIFF**. This Opposition is based on the following Memorandum of Points and Authorities, the papers pleadings on file, and any oral argument entertained by this Court.

RICHARD HARRIS LAW FIRM

MEMORANDUM OF POINTS AND AUTHORITIES[1]

I. STATEMENT OF FACTS

On March 13, 2009, Margie was injured when Defendant Khoury negligently rear-ended her vehicle while she was stopped at a red light. As a result of Defendant's negligence, Margie was forced to undergo years of medical treatment, including cervical and lumbar fusion surgeries. Margie's past medical specials total over $433,000.

This matter is set on the Court's July 1, 2013 trial stack.

II. LEGAL ARGUMENT

A. Defendant's Motion Fails Substantively based on the Collateral Source Rule.

Defendant seeks to limit Plaintiff's damages in this case to the amount "actually paid by or on behalf of" Margie because her providers may have accepted less than the full amount charged in satisfaction of the bill. Certainly, Defendant's *interpretation* of Plaintiff's medical bills is not the proper measure of damages, and is hardly the legal standard for determining admissibility at trial.

Defendant's Motion relies primarily on the out-of-state, non-binding decision by the California Supreme Court in Howell v. Hamilton Meats & Provisions, Inc.[2] and urges the Court to apply this **non-binding** standard in our case. Tellingly, however, Defendant fails to recognize the Nevada Supreme Court's clear position regarding the "collateral source rule" and the guidance recently provided by the Nevada Supreme Court — indicating that it rejects the

[1] Similar arguments are offered in Plaintiff's MIL #12.

[2] 257 P.3d 1130 (Cal. 2011).

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standard created by Howell and that the collateral source rule applies to third-party "write-downs."[3]

1. The Collateral Source Rule Applies to "Write-Downs."

In Proctor v. Castelletti,[4] the Nevada Supreme Court adopted a *per se* rule barring the admission of a collateral source of payment for an injury into evidence **for any purpose**.[5] Nevada's collateral source rule states that if an injured party received compensation for his injuries from a source wholly independent of the tortfeasor, such payment should **not** be deducted from the damages the plaintiff would otherwise collect from the tortfeasor.[6] Collateral source evidence should not be admitted in any circumstance, because of the potential that the jury will misuse the evidence in a manner that is prejudicial to the plaintiff.[7] The Nevada Supreme Court, in Proctor, unambiguously held that:

> While it is true that this rule eviscerates the trial court's discretion regarding this type of evidence, we nevertheless believe that **there is no circumstance in which a district court can properly exercise its discretion in determining that collateral source evidence outweighs its prejudicial effect**.[8]

It is indisputable that payments by health insurance constitute compensation for Plaintiff's injuries received from a third party, wholly independent of Defendants. Therefore, according to the Nevada Supreme Court, there is **absolutely no circumstance** in which this

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[3] Tri-County Equipment & Leasing, LLC v. Klinke, 2011 WL 1620634 (Nev. 2011).

[4] 112 Nev. 889, 911 P.2d 853 (1996).

[5] Id. at 854, 90.

[6] Id. at n.1.

[7] Id. at 854, 91.

[8] Id. (emphasis added).

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Court could exercise its discretion and permit evidence regarding the payments made by Margie's health insurance.

In Tri-County Equipment & Leasing, LLC v. Klinke, the Nevada Supreme Court confirmed that the per se exclusion of collateral source evidence included exclusion of evidence regarding contractual "write-offs" negotiated by third-parties.[9] While the majority opinion in Tri-County Equipment did not specifically address payments made by third-parties, in the concurring opinion, Justice Gibbons provided insight into this area of the collateral source rule. Justice Gibbons indicated: "**I conclude that Nevada's collateral source rule bars the admission of evidence showing medical provider discounts or 'write downs.'**"[10] He further noted:

> The focal point of the collateral source rule is not whether an injured party has "incurred" certain medical expenses. Rather, it is whether a tort victim has received benefits from a collateral source that cannot be used to reduce the amount of damages owed by a tortfeasor.[11]
>
> **[The write-downs] constitute "compensation or indemnity received by a tort victim from a collateral source to the tortfeasor** . . . .[12]
>
> **As a result, evidence of write-downs creates the same risk of prejudice that the collateral source rule is meant to combat.**[13]

[9] 286 P.3d 593, 597 (Nev. 2012).

[10] Id. (emphasis added).

Plaintiff acknowledges that this concurring opinion is not binding on the Court. However, it provides the only available insight into the Nevada Supreme Court's position on this issue.

[11] Id. at 598 (quoting Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316, 322 (Va.2000)).

[12] Id. (quoting Schickling v. Aspinall, 235 Va. 472, 369, S.E.2d 172, 174 (Va.1998)). (emphasis added).

[13] Id. (citing Acuar, 531 S.E.2d at 322) (emphasis added).

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If any of Margie's treating physicians accepted less than the amount billed as full payment for their services — through payment by health insurance or a lien purchasing company — such a scenario is no different than a provider accepting a "write-down" from an insurance company. It is a business decision by the provider. It is has no impact on the "value" of the service or the damages incurred. "Write-off" amounts — regardless of who the write-off goes to — are an outside benefit to Plaintiff and are inadmissible at trial.

In February of this year, Nevada's federal District Court applied this standard, holding:

> The collateral source rules makes the tortfeasor liable for the full extent of the damages caused, no matter how much the victim actually pays. That a medical provider ultimately accepts less than a billed amount, whether from an insurance company or from the victim directly, is not relevant to whether the tortfeasor is liable for the full value of the harm he has caused . . . . For the purposes of damages against a tortfeasor, medical expenses are measured by the extent of harm caused, not by the medical expenses incurred and/or paid. Defendants' citations to cases from other states having different collateral source rules are not helpful.[14]

In recent opinions, numerous courts have agreed that plaintiffs are entitled to recover for the reasonable value of their medical expenses, **not** the amount paid by a third-party.[15]

[14] Alexander v. Wal-Mart Stores, Inc., 2013 WL 427132 (D.Nev. 2013) at *4 (quoting Gresham v. Petro Shopping Ctrs., LP 2012 WL 5198481 (D.Nev. 2012)).

[15] See, e.g., Pipkins v. TA Operating Corp., 466 F. Supp. 2d 1255 (D.N.M. 2006) (holding that New Mexico law provides that contractual write-offs are considered collateral source benefits); Lindholm v. Hassan, 369 F. Supp. 2d 1104 (D.S.D. 2005) (holding that "a benefit directed to the injured party should not be shifted so as to become a windfall for the tortfeasor"); Leitinger v. Dbart, Inc., 736 N.W.2d 1 (Wis. 2007) (holding that evidence of amount actually paid by plaintiff's health insurer was inadmissible under collateral source rule); Bynum v. Magno, 101 P.3d 1149 (Hawaii 2004) (holding that collateral source rule prohibited reducing plaintiff's damage award to reflect discounts given); Hardi v. Mezzanotte, 818 A.2d 974 (D.C. 2003) (holding that write-offs may be recovered by plaintiff because the plaintiff paid for the insurance benefit); Rose v. Via Christi Health Sys., 78 P.3d 798 (Kan. 2003) (holding that defendant was not entitled to limit damage award by portion of medical bills that were written off); Robinson v. Bates, 828 N.E.2d 657 (Ohio Ct. App. 2005) (holding that the collateral source rule applies to any written-off amount agreed to by a plaintiff's health-care provider and insurer); Arthur v. Catour, 803 N.E.2d 647 (Ill. Ct. App. 2004) (holding that collateral source rule applied to full amount billed even though insured paid discounted amount by agreement with provider).

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For example, in Haselden v. Davis,[16] the South Carolina Court of Appeals rejected the defendant's argument that the amount Medicaid paid for medical expenses was conclusive evidence of the reasonable value of medical service received.[17] The Haselden court held that the amount Medicaid paid toward medical treatment was only *one measure* of the reasonable value of the medical service, and affirmed the trial court's decision to allow the plaintiff to introduce evidence of the costs that would have been paid for treatment if she had not been a Medicaid patient.[18] Other courts agree.

In Olariu v. Marrero, the defendant argued that the plaintiff should not be able to recover for medical expenses that were written off by the plaintiff's medical care providers.[19] The court held that, "Georgia does not permit a tortfeasor to derive any benefit from a reduction in damages for medical expenses paid by others, whether insurance companies or beneficent boss or helpful relatives."[20] Therefore, the Olariu court concluded, the defendant is not entitled to use a third party's write off of medical expenses as a set-off against the plaintiff's recovery.

In Williamson v. Odyssey House, Inc.,[21] the court held that a plaintiff's recovery is not limited to the actual amount that has been paid or will be paid for medical services, but is instead measured by the reasonable value of such services. The court reasoned that in light of

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[16] 534 S.E.2d 295, 304 (S.C. Ct. App. 2000).

[17] Id. at 304.

[18] Id. at 304-05.

[19] 549 S.E.2d 121 (Ga. App. 2001).

[20] Id. at 123 (citing Bennett v. Haley, 132 Ga. App. 512 (1974)).

[21] 2000 WL 1745101 (D.N.H. 2000).

New Hampshire's collateral source rule, **the reasonable value of medical services is the proper measure of damages, regardless of the amount paid for those services.**[22]

In Bynum v. Magno,[23] the Hawaii Supreme Court held that the collateral source rule prohibits reducing a plaintiff's damages award to reflect discounted Medicare and Medicaid payments. The court instructed that allowing this reduction "is contrary to this jurisdiction's long established approach to allowing an injured plaintiff to recover for the 'reasonable value of the medical services.'"[24] The court further reasoned that allowing this type of reduction would create an inequitable scenario where similarly injured plaintiffs would be entitled to differing damages awards based upon "the type of their insurance coverage, and not upon the nature of their injuries."[25] This inevitable injustice must be avoided.

In Acuar v. Letourneau, the Virginia Supreme Court held that the plaintiff was allowed to present evidence of the full value of his reasonable medical expenses, without any reduction for the amounts written off by his health care providers.[26] The court reasoned that the focal point of the collateral source rule is not whether an injured party has incurred certain medical expenses, but whether a tort victim has received benefits from a collateral source that cannot be used to reduce the amount of damage owed by a tortfeasor.[27] The court further stated that, based upon the collateral source rule, the defendant cannot deduct from any benefits the

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[22] Id.

[23] 101 P.3d at 1162.

[24] Id.

[25] Id.

[26] 260 Va. 180, 193 (2000).

[27] Id.

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plaintiff derived from contractual arrangements with his health care provider, whether those benefits took the form of medical expense payments or amounts written off.[28] The amounts written off are as much of a benefit for which the plaintiff paid as are cash payments made by his health insurance carrier.[29] The write offs constitute compensation received by a tort victim from a source collateral to the tortfeasor.[30]

These decisions make sound judicial sense. Defendant should not be permitted to circumvent the collateral source rule. If Defendant is permitted to deduct medical charges that have been written off, he will benefit from a collateral source. In essence, Defendants will be benefiting from insurance contracts Plaintiff executed — and paid premiums for. But for Plaintiff's insurance and health care agreements, Defendant would not derive a benefit. The medical expenses written off are a benefit to Plaintiff, just as medical expenses actually paid by the insurance company. Pursuant to the collateral source rule, Defendant is not entitled to **any** benefits Plaintiff derived from a collateral source.

The collateral source rule requires that a tortfeasor assume **full** responsibility for the loss he has caused. Defendant is not entitled to "reap the benefit" of Plaintiff's eligibility for third-party health benefits. Nevada's Supreme Court — along with several other jurisdictions — permits Plaintiff to recover the reasonable value of her medical expenses, which is **not** dictated by the amounts her health insurance has been able to contract with the providers — or reduced amounts an outside company was able to negotiate.

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[28] Id.

[29] Id.

[30] Id.

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To permit Plaintiff only to recover for the amount of medical expenses actually paid would violate the collateral source rule. If Plaintiff is only permitted to recover for medical expenses actually paid it, would create a windfall for Defendant, and Defendant would profit from the benefits derived from a third-party — insurance benefits for which Plaintiff paid premiums to secure. The Nevada Supreme Court has already advised against this type of outcome.

> When medical costs are written down, one party is likely to receive a windfall. **If one party must receive a windfall as a result of the write-downs, it should be the plaintiff and not the tortfeasor**.[31]

This Court should carry out the Nevada Supreme Court's intent and decline to follow the non-binding standard Defendant wants applied — and that our Supreme Court has already rejected.

2. Information Regarding "Write-Offs" Should be Excluded Based the Unnecessary Confusion it Will Bring.

As discussed above, the amounts that Margie's doctors ultimately accepted as payment for their services based on contracted amounts with Margie's health insurance or negotiations with outside companies fails to provide any probative insight into the fact at issue. Even if this information was somehow relevant — which Plaintiff contends it is not — a trial within a trial would be necessary to explain the "in's and out's" and "how's and why's" of negotiated rates and the financial/business decisions the providers have to make when determining what to accept in satisfaction for services. Presentation of this complicated financial and billing information would do nothing more than confuse the jury and inevitably waste unnecessary

[31] Tri-County Equip. & Leasing, LLC, 286 P.3d at 599 (citing Lopez v. Safeway Stores, Inc., 129 P.3d 487, 496 (Ariz.Ct.App.2006) ("Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer"); Restatement (Second) of Torts § 920A cmt. B (1979) ("a benefit that is directed to the injured party should not be shifted so as to become a windfall to the tortfeasor")) (emphasis added).

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judicial time and resources. Accordingly, this information must be excluded under NRS § 48.035.

III. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court deny Defendant's Motion #4.

DATED this 23d day of May 2013.

RICHARD HARRIS LAW FIRM

By: _____

Richard A. Harris, Esq.
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Joshua R. Harris, Esq.
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801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

RICHARD HARRIS LAW FIRM

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of RICHARD HARRIS LAW FIRM and that on the 8th day of May 2013 I caused the foregoing **OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 4: TO LIMIT PLAINTIFF'S PRESENTATION OF DAMAGES AT TRIAL TO AMOUNTS ACTUALLY PAID BY OR ON BEHALF OF PLAINTIFF**

to be served as follows:

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

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

[ ] by hand delivery

to the attorneys listed below:

Steven T. Jaffe, Esq.
Jacob S. Smith, Esq.
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An employee of the RICHARD HARRIS LAW FIRM

RICHARD HARRIS LAW FIRM

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

RAYMOND RIAD KHOURY; DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO.: A-11-636515-C

DEPT. NO.: XXX

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 3: TO ADMIT EVIDENCE OF MEDICAL LIENS

Date of Hearing: June 6, 2013
Time of Hearing: 9:00 a.m.

Plaintiff Margaret Seastrand ("Margie"), by and through her attorneys of record, the RICHARD HARRIS LAW FIRM, hereby submits her **OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 3: TO ADMIT EVIDENCE OF MEDICAL LIENS**. This Opposition is based on the following Memorandum of Points and Authorities, the papers pleadings on file, and any oral argument entertained by this Court.

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RICHARD HARRIS LAW FIRM

Docket 64702 Document 2014-37331

MEMORANDUM OF POINTS AND AUTHORITIES[1]

I. STATEMENT OF FACTS

On March 13, 2009, Margie was injured when Defendant Khoury negligently rear-ended her vehicle while she was stopped at a red light. As a result of Defendant's negligence, Margie was forced to undergo years of medical treatment, including cervical and lumbar fusion surgeries. Margie's past medical specials total over $433,000.

This matter is set on the Court's July 1, 2013 trial stack.

II. LEGAL ARGUMENT

A. Liens are Protected Under the Collateral Source Rule.

According to the collateral source rule, the jury is precluded "from reducing Plaintiff's damages on the ground that he received compensation for his injuries from a source other than the tortfeasor."[2] The purpose behind this well-settled rule is clear: if the jury believes that a plaintiff's medical bills were already paid or if the jury believes that a plaintiff's medical bills will be reduced or altogether forgiven, the jury is less likely to compensate the plaintiff for the full value of these expenses.[3]

Plaintiff acknowledges that when treatment occurs under a lien, monetary compensation is not being provided for Plaintiff's benefit. However, a transfer of valuable services is being conferred upon the Plaintiff without pre-payment for those services. This transfer of services is a benefit being conferred upon the Plaintiff from a source other than the tortfeasor and should be considered collateral source compensation (thru services) to Plaintiff. The collateral source

[1] Similar arguments are contained in Plaintiff's MIL #12.

[2] Proctor, 112 Nev. at 90 n.1, 911 P.2d at 854 n.1.

[3] See id.

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rule does not apply solely to payments by insurance companies — it applies to gifts by generous family members or any other source that outside of the tortfeasor that benefits the plaintiff. This period of delay — where medical treatment has been provided with no payment — should be considered a collateral benefit conferred by the doctors for Plaintiff's benefit.

Moreover, it is undisputed that evidence of health insurance is strictly precluded at trial.[4] If Defendant is permitted to discuss lien agreements during trial, the jury will clearly be made aware that no health insurance exists or that health insurance did not cover all of Margie's medical treatment. This is no different than Defendant directly injecting collateral source information into the trial through a backdoor method — thus, violating the collateral source rule.

Any medical and other treating expenses paid by lien or by private health insurance is not relevant and must be excluded. Such evidence (1) violates the collateral source rule; (2) would be unduly prejudicial to Plaintiff; and (3) would not assist the trier of fact with any appropriate determinations in this case. The jury must determine issues of liability, causation, and damages. How Margie's medical treatment will ultimately be paid is not relevant or probative to any of these issues and must be precluded on that basis alone.[5]

According to the collateral source rule, the jury is precluded "from reducing Plaintiff's damages on the ground that he received compensation for his injuries from a source other than the tortfeasor."[6] The purpose behind this well-settled rule is clear: if the jury believes that a

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[4] See NRS § 48.135(1).

[5] See NRS §48.015; § 48.025.

[6] Proctor v. Castelletti, 112 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996).

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plaintiff's medical bills were already paid (through health insurance) or if the jury believes that a plaintiff's medical bills will be reduced or altogether forgiven (through lien), the jury is less likely to compensate the plaintiff for the full value of these expenses.[7]

To eliminate this potential bias, the Nevada Supreme Court recently adopted "a **per se** rule barring the admission of a collateral source of payment for an injury into evidence **for any purpose**."[8] Thus, there is no longer any discretion to find that the relevance of collateral source evidence outweighs its prejudicial effect.[9]

Limiting a jury's knowledge of collateral source information — like a medical lien — is of paramount importance and makes sound judicial sense. The obligation to pay for medical services rests squarely with the plaintiff, regardless of the outcome at trial. A lien merely allows a plaintiff to wait until the conclusion of the trial to make payment. Information about any liens, therefore, is far more prejudicial than probative since a reasonable jury could erroneously conclude that a doctor could reduce the lien or entirely waive payment — thus violating the collateral source rule.[10]

Further, Defendant will presumably seek to ask questions of Margie's doctors regarding lien reductions. Regardless of whether the doctors choose to reduce their medical bills, this type of questioning goes directly to a collateral source benefit that is strictly prohibited from trial discussion. Any potential reduction in the medical bills is entirely speculative. The only certainty is that Margie is obligated to pay the full amount bills under the liens. Any

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[7] See id.

[8] Id. (emphasis added).

[9] See id.

[10] See id.; see also NRS §48.035.

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speculation regarding **potential** future benefit or reduction is pure guesswork and must be excluded on relevancy grounds.[11]

Finally, Defendant asserts that during a prior hearing regarding the *discoverability* of liens, the Discovery Commissioner found that liens were not protected by the collateral source rule. The Commissioner made no such finding — and nothing of the sort is included in her Report and Recommendation.[12] The Discovery Commissioner determined that lien information was discoverable, but made no finding regarding its ultimate admissibility. Any insinuation otherwise must be dismissed.

B. Information Regarding Payments Accepted by Treating Physicians is Inadmissible Under the Collateral Source Rule.

In addition to seeking information about the presence of liens, Defendant also suggests that information regarding the amounts accepted by each medical provider and/or facility that sold its lien to any other entity should be admitted at trial. If a treating physician was already paid for services and/or sold his/her lien in this case, then Defendant's "bias" argument is destroyed. Thus, the intent of this information is to determine if physicians took "write-downs" on the bills in this case. Again, however, evidence of write-downs is inadmissible under the collateral source rule.

In Tri-County Equipment & Leasing, LLC v. Klinke, the Nevada Supreme Court confirmed that the per se exclusion of collateral source evidence included exclusion of evidence regarding contractual "write-offs" negotiated by third-parties.[13] While the majority opinion in

[11] See NRS §48.015.

[12] See Discovery Commissioner Report and Recommendation, attached as Exhibit 1.

[13] 286 P.3d 593, 597 (Nev. 2012).

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Tri-County Equipment did not specifically address payments made by third-parties, in the concurring opinion, Justice Gibbons provided insight into this area of the collateral source rule. Justice Gibbons indicated: "**I conclude that Nevada's collateral source rule bars the admission of evidence showing medical provider discounts or 'write downs**.'"[14] He further noted:

> The focal point of the collateral source rule is not whether an injured party has "incurred" certain medical expenses. Rather, it is whether a tort victim has received benefits from a collateral source that cannot be used to reduce the amount of damages owed by a tortfeasor.[15]
>
> **[The write-downs] constitute "compensation or indemnity received by a tort victim from a collateral source to the tortfeasor** . . . .[16]
>
> **As a result, evidence of write-downs creates the same risk of prejudice that the collateral source rule is meant to combat**.[17]

If any of Margie's treating physicians accepted less than the amount billed as full payment for their services, such a scenario is no different than a provider accepting a "write-down" from an insurance company. It is a business decision by the provider. It is has no impact on the "value" of the service or the damages incurred. "Write-off" amounts — regardless of who the write-off goes to — are an outside benefit to Plaintiff and are inadmissible at trial. Accordingly, information regarding amounts accepted by Margie's treating physicians — and whether any of the liens have been sold —are excluded by the

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[14] Id. (emphasis added).

Plaintiff acknowledges that this concurring opinion is not binding on the Court. However, it provides the only available insight into the Nevada Supreme Court's position on this issue.

[15] Id. at 598 (quoting Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316, 322 (Va.2000)).

[16] Id. (quoting Schickling v. Aspinall, 235 Va. 472, 369, S.E.2d 172, 174 (Va.1998)). (emphasis added).

[17] Id. (citing Acuar, 531 S.E.2d at 322) (emphasis added).

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collateral source rule. To allow otherwise constitutes a disregard of Nevada law and creates reversible error.

The single decision by Judge Cadish in support of Defendant's position must be dismissed by this Court. It is an unpublished ruling from the Eighth Judicial District Court and it has no binding authority over this Court. And, it is in direct contradiction to the Nevada Supreme Court's position in Tri-County Equipment. Accordingly, the commentary provided by Judge Cadish in that non-binding, unrelated case must be dismissed. Further, other Nevada courts have squarely rejected the rationale provided in Judge Cadish's ruling — relying upon the **binding** authority of the Nevada Supreme Court.[18]

C. Evidence of a Lien Fails to Provide Any Insight Into "Bias" or "Interest."

Contrary to Defendant's assertions, the presence of a lien does not magically transform a treating physician into "contingent witness." The lien is enforceable regardless of the outcome of the case. And, regardless of the outcome of the case, Margie is liable for the full amounts charged under the lien. There is no contingency in the contract language of the lien. The lien simply delays payment for the services rendered, nothing more.

Further, in order to counter the prejudice that Defendant's unfounded "bias" argument brings, Plaintiff must be permitted to discuss why a lien was used — because health insurance did not cover all of her medical treatment. Clearly, this information cannot be offered at trial. Thus, the existence of liens must be excluded under the collateral source rule to prevent the (inevitable) reversible error that comes with allowing this type of information at trial.

[18] See Alexander v. Wal-Mart Stores, Inc., 2013 WL 427132 (D.Nev. 2013); see also Gresham v. Petro Shopping Ctrs., LP 2012 WL 5198481 (D.Nev. 2012).

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Finally, Defendant's "bias" arguments necessarily imply that Plaintiff's treating physicians would commit perjury, perform unnecessary treatment, and otherwise commit criminal/unethical conduct simply to "cash in" on Plaintiff's lawsuit. There has been absolutely no evidence of such conduct in this case. If there was, Defendant certainly would have presented it in his Motion. Based on the lack of any evidence in support of its position, Defendant should not be permitted to smear the treating physicians' characters and conduct to advance his self-serving "bias" allegations.

D. Evidence of Liens Should Not be Permitted to Support Arguments that Plaintiff Had Unlimited Access to Medical Care.

Defendant argues that he should be permitted to discuss medical liens if Plaintiff testifies that she did not or cannot seek medical treatment because she lacks the funds for such treatment. Plaintiff has not, and will, not be making any such assertions. Accordingly, there is no basis to admit evidence of medical liens to address this issue.[19]

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III. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court deny Defendant's Motion #3.

DATED this 13th day of May 2013.

RICHARD HARRIS LAW FIRM

By: _____

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Joshua R. Harris, Esq.
Nevada Bar No. 9580
Alison Brasier, Esq.
Nevada Bar No. 10522
801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

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[19] Plaintiff does not concede that evidence of liens would be relevant or admissible if she were making such assertions. However, because it is a moot point in this case, Plaintiff will not provide any further argument or analysis of the issue.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of RICHARD HARRIS LAW FIRM and that on the 9th day of May 2013 I caused the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 3: TO ADMIT EVIDENCE OF MEDICAL LIENS

to be served as follows:

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

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

[ ] by hand delivery

to the attorneys listed below:

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Jacob S. Smith, Esq.
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7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant

An employee of the RICHARD HARRIS LAW FIRM

RICHARD HARRIS LAW FIRM

EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

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

Defendants.

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

DISCOVERY COMMISSIONER'S REPORT and RECOMMENDATIONS

[BEFORE THE DISCOVERY COMMISSIONER]

Hearing Date: December 5, 2012
Hearing Time: 9:00 a.m.

APPEARANCES:

For Plaintiff:
MARGARET SEASTRAND

RICHARD HARRIS LAW FIRM
Alison Brasier, Esq.

For Defendant:
RAYMOND RIAD KHOURY

HALL JAFFE & CLAYTON, LLP.
Jacob S. Smith, Esq.

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CASE NAME: Seastrand v. Khoury
CASE NUMBER: A-11-636515-C

I.

FINDINGS

This matter came on for hearing before the HONORABLE BONNIE BULLA, Discovery Commissioner, on the 5th day of December, 2012 at 9:00 a.m.,on Defendant's Motion to Compel Discovery Responses and Production of Documents re: Plaintiff's Medical Liens. Defendant filed its Motion to Compel on November 1, 2012, seeking to compel responses to various requests for production and interrogatories pertaining to the Plaintiff's medical liens and treatment on liens. Plaintiff filed her opposition on November 20, 2012, asserting that the requested documents and information were protected under the collateral source rule and were not discoverable. On November 30, 2012, Defendant filed his Reply asserting that the documents and information was arguably both discoverable and admissible, but was certainly discoverable even under the most stringent interpretations of Nevada law.

At the hearing on the matter on December 5, 2012, Jacob S. Smith, Esq. appeared on behalf of Defendant and Alison Brasier, Esq. appeared on behalf of Plaintiff.

The Court, having reviewed the papers and pleadings on file, and having considered the oral argument made by counsel at the hearing on this matter, and having considered the case law and other authority presented in the parties' briefings on this issue, hereby makes the following recommendations:

II.

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED that Plaintiff's Motion for Protection from Defendant's Notice of Plaintiff's Deposition is GRANTED in part and DENIED in part;

IT IS FURTHER RECOMMENDED that Plaintiff must supplement her responses to Defendant's Interrogatories with any and all information in her possession pertaining to the liens and/or lien amounts which correspond with any injuries and/or treatment allegedly arising as a result of the subject accident.

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CASE NAME: Seastrand v. Khoury
CASE NUMBER: A-11-636515-C

IT IS FURTHER RECOMMENDED that Plaintiff must supplement her responses to Defendant's Requests for Production by producing all documentation in her possession pertaining to the liens and/or lien amounts which correspond with any injuries and/or treatment allegedly arising as a result of the subject accident; and

IT IS FURTHER RECOMMENDED that Plaintiff is not obligated to procure any documentation from third-party purchasers of the liens which is not already in her possession.

The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this 11 day of January, 2013.

DISCOVERY COMMISSIONER

Prepared by:
HALL JAFFE & CLAYTON, LLP

By
STEVEN T. JAFFE
JACOB S. SMITH
7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant
Raymond R. Khoury

Approved as to Form and Content:
RICHARD HARRIS LAW FIRM

By
RICHARD A. HARRIS
ALISON BRASIER
801 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

CASE NAME: Seastrand v. Khoury
CASE NUMBER: A-11-636515-C

IT IS FURTHER RECOMMENDED that Plaintiff must supplement her responses to Defendant's Requests for Production by producing all documentation in her possession pertaining to the liens and/or lien amounts which correspond with any injuries and/or treatment allegedly arising as a result of the subject accident; and

IT IS FURTHER RECOMMENDED that Plaintiff is not obligated to procure any documentation from third-party purchasers of the liens which is not already in her possession.

The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this _____ day of January, 2013.

DISCOVERY COMMISSIONER

Prepared by:
HALL JAFFE & CLAYTON, LLP

By_____
STEVEN T. JAFFE
JACOB S. SMITH
7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Defendant
Raymond R. Khoury

Approved as to Form and Content:
RICHARD HARRIS LAW FIRM

By_____
RICHARD A. HARRIS
ALISON BRASIER
801 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

CASE NAME: Seastrand v. Khoury
CASE NUMBER: A-11-636515-C

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

Pursuant to E.D.C.R. 2.34(f) an objection must be filed and served no more than five (5) days after receipt of the Discovery Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the clerk of the court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office. See E.D.C.R. 2.34(F)

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Plaintiffs/Defendants at the following address on the _____ day of _____, 2012.

X Placed in the folder of Plaintiffs'/Defendants' counsel in the Clerk's office on the 17 day of Jan., 2012.13

STEVEN D. GRIERSON, CLERK OF COURT

By _____
DEPUTY CLERK

CASE NAME: Seastrand v. Khoury
CASE NUMBER: A-11-636515-C

ORDER

The Court, having reviewed the above report and recommendatio

ns prepared by the Discovery Commissioner and,

____ The parties having waived the right to object thereto,

__X__ No timely objection having been received in the office of the Discovery Commissioner pursuant to E.D.C.R. 2.34(f),

____ Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

* * *

AND

__X__ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 201__, at ____:____ a.m.

DATED this 15th day of March, 2012.

DISTRICT JUDGE

AB

OPPS
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CLERK OF THE COURT

RICHARD HARRIS LAW FIRM

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

RAYMOND RIAD KHOURY; DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO.: A-11-636515-C

DEPT. NO.: XXX

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 1: TO LIMIT PHYSICIANS TO OPINIONS STATED IN THEIR CLINICAL RECORDS, DEPOSITIONS, AND/OR EXPERT REPORTS, IF ANY

Date of Hearing: June 6, 2013
Time of Hearing: 9:00 a.m.

Plaintiff Margaret Seastrand ("Margie"), by and through her attorneys of record, the RICHARD HARRIS LAW FIRM, hereby submits her **OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 1: TO LIMIT PHYSICIANS TO OPINIONS STATED IN THEIR CLINICAL RECORDS, DEPOSITIONS, AND/OR EXPERT REPORTS, IF ANY.** This Opposition is based on the following Memorandum of Points and Authorities, the papers pleadings on file, and any oral argument entertained by this Court.

Docket 64702 Document 2014-37331

MEMORANDUM OF POINTS AND AUTHORITIES[1]

I. STATEMENT OF FACTS

On March 13, 2009, Margie was injured when Defendant Khoury negligently rear-ended her vehicle while she was stopped at a red light. As a result of Defendant's negligence, Margie was forced to undergo years of medical treatment, including cervical and lumbar fusion surgeries. Margie's past medical specials total over $433,000.

This matter is set on the Court's July 1, 2013 trial stack.

II. LEGAL ARGUMENT

As discussed in Plaintiff's Motion in Limine #10, and as Defendant acknowledges in his Motion, expert reports **are not required** by treating physicians who testify as to their own care, and who testify as to topics such as "causation, future treatment, extent of disability and the like."[2]

Here, Margie's treating physicians intend to testify as to their own treatment, future treatment, causation, and the reasonableness of other medical care and costs associated with the crash. While each of the physicians' multitude of opinions may not be specifically spelled out in his/her medical records, the bases for those opinions certainly are. And, Defendant had the opportunity to depose all of Margie's treating physicians regarding their treatment and their opinions for future care and prognosis. In light of the fact that such testimony is permitted without expert reports, there are no grounds to strike this testimony.[3]

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[1] Similar arguments are contained in Plaintiff's MIL #10.

[2] Piper v. Harnischfeger Corp., 170 F.R.D. 173, 174-75 (D. Nev. 1997).

[3] See id; see also Prabhu v. Levine, 112 Nev. 1538, 1546-47, 930 P.2d 103, 109 (1996); Kirkland v. Union Pacific Railroad 189 F.R.D. 604 (D. Nev. 1999); NRS § 50.275.

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A. **Margie's Treating Physicians Should be Permitted to Testify as to Causation, Diagnosis, Prognosis, Future Treatment, and Extent of Disability—Without a Formal Expert Report.**

Defendant fails to acknowledge that Nevada courts have repeatedly held that treating physicians may testify regarding future prognosis, treatment, and disability without reducing those opinions to a formal report. Contrary to Defendant's assertions, this allowance for treating physicians to provide "future" opinions is not limited by some requirement that the physician examine the patient in the recent past. It simply requires that the opinions were formed during the physician's course of treatment of the patient. If a recent examination of the patient was a requirement to testify regarding future care, then Defendant's medical experts should also be precluded from giving any "future" opinions — they have never examined Margie and relied upon the **same** medical records upon which Margie's treating physicians will base theirs. Clearly, this is not the standard for medical expert testimony, from either retained experts or treating physicians.

No one can predict the future. However, Margie's treating physicians can predict — to a reasonable degree of medical probability — her future prognosis, disability, and likely need for future care based on the extent of the injuries for which they treated her. This is not speculation. This is testimony based on their expertise and treatment of Margie. Accordingly, there is no basis to prevent Margie's treating physicians from opining regarding her future needs.

1. **Treating Physicians are Considered Expert Witnesses regardless of Expert Designation.**

As medical practitioners, there is little doubt that treating physicians possess special knowledge, skill, and training to evaluate medical treatment, the reasonableness of the

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treatment, the cost of the treatment, and the causation of injuries. These attributes qualify the treating physicians as experts at trial.[4]

The Nevada Supreme Court agrees. According to our state's highest court, it makes no difference whether treating physicians are named as expert witnesses.[5] The threshold test is "whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue."[6] Based on the Nevada Supreme Court's decision in Prabhu, and the clear statutory instruction of NRS § 50.275—Margie's treating physicians must be permitted to testify as experts in these areas.

2. Nevada's Federal Courts have Rejected Limitations to Treating Physicians' Testimony.

Nevada's federal courts first dealt with this issue in 1997.[7] In Piper, the defendant sought to strike the plaintiff's treating physicians from testifying at trial because none of the physicians provided expert reports under FRCP 26. The defendant's basis to strike was simple. The defendant argued that treating physicians could testify as to their "factual percipient observations," but any additional observations such as causation and future disability required

[4] See NRS § 50.275.

[5] Prabhu v. Levine, 112 Nev. 1538, 1546-47, 930 P.2d 103, 109 (1996).

[6] Id. (citing Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987)); see also NRS § 50.275.

In Prabhu, a treating physician was identified as a witness during the course of discovery, but was never identified as an expert. The treating physician ultimately provided critical expert testimony at trial. On appeal, defendant contended that he was prejudiced at trial because the treating physician provided expert medical testimony without being disclosed as an expert. The Court determined, however, that a treating physician's expert knowledge was sufficient to overcome any lack of pre-trial disclosure pursuant to NRS § 50.275.

[7] See Piper, 170 F.R.D. at 174.

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an expert report.[8] Because the plaintiff failed to provide the additional observations, the defendant argued that any testimony in those areas must be precluded.

Importantly, the defendant's position was squarely rejected. The Piper Court cogently reasoned that limiting the physicians' testimony to percipient observations made little sense. Treating physicians develop opinions about the plaintiff and the plaintiff's injuries from several areas beyond the percipient medical examination.[9] As long as the opinions were learned during the course of treatment, no expert report was required.

> It is common place for a treating physician during, and as part of, the course of treatment of a patient to consider things such as the cause of the medical condition, **the diagnosis, the prognosis and the extent of disability caused by the condition, if any. Opinions such as these are a part of the ordinary care of the patient** and do not subject the treating physician to the extensive reporting requirements of Fed.R.Civ.P. 26(a)(2)(B).[10]

The Nevada federal court followed up their decision with an identical ruling one-year later in Elgas v. Colorado Belle Corp.[11] In Elgas, the treating physician intended to testify as to

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[8] Id. at 174.

[9] Piper cited several cases as authority for the ruling. See Baker v. Taco Bell Corp., 163 F.R.D. 348, 349 (D. Colo. 1995) (holding that treating physicians are not retained for trial and therefore no expert report required for opinions developed within course of treatment); Wreath v. United States, 161 F.R.D. 448, 449 (D. Kan. 1995) ("Clearly, treating physicians testifying only to the care and treatment afforded to a party were intended to be excluded from the requirements of Fed.R.Civ.P. 26(a)(2)(B)."); Bucher v. Gainey Transportation Service of Indiana, Inc., 167 F.R.D. 387, 390 (M.D. Penn. 1996) ("With respect to the claim that treating physicians do not need to submit expert reports, the plaintiffs are correct in so far as treating physicians are not required to submit expert reports when testifying on their 'opinion as to the cause of an injury based upon their examination, diagnosis and treatment of the patient.'"); Salas v. United States, 165 F.R.D. 31, 33 (W.D.N.Y. 1995) ("The relevant question is whether these treating physicians acquire their opinions as to the cause of the plaintiff's injuries directly through their treatment of the plaintiff."); Mangla v. University of Rochester, 168 F.R.D. 137, 139 (W.D.N.Y.1996) ("Experts are retained for purposes of trial and their opinions are based on knowledge acquired or developed in anticipation of litigation or for trial. A treating physician's testimony, however, is based on the physician's personal knowledge of the examination, diagnosis, and treatment of a patient and not from information acquired from outside sources.").

[10] Id. at 275. (emphasis added).

[11] See 179 F.R.D. 296, 299 (D. Nev. 1998).

several areas, including future care costs, but failed to provide expert materials. The defendant sought to strike that testimony based on the FRCP 26 expert disclosure requirement. But the court's decision remained the same. As in Piper, the court determined that that the key issue was the timeframe in which expert opinions were formed—**not the scope** of the treating physicians percipient observations.

> [The expert disclosure ruling] contemplates two different classes of experts: those retained or specially employed to give testimony in the case [NRCP 16.1 witnesses], and other witnesses who may qualify as an expert but are not retained or specially employed [NRS § 50.275 witnesses].
>
> * * *
>
> Since a treating physician's opinion on **matters such as causation, future treatment, extent of disability and the like are part of the ordinary care of a patient, a treating physician may testify to such opinion without being subject to the extensive reporting requirements of Rule 26(a)(2)(B)**. However, if a physician, even though he may be a treating physician, is specially retained or employed to render a medical opinion based on factors that were not learned in the course of the treatment of the patient, then such a doctor would be required to present an expert written report.[12]

If two prior decisions were insufficient, Nevada's federal courts completed the trifecta one year later by reaffirming its prior holdings in Kirkland v. Union Pacific Railroad.[13] With an identical fact pattern as Piper and Elgas, the court made clear a final time that treating physicians are not subject to the strict expert disclosure requirements if their opinions were framed during the course of treatment.

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[12] Id. at 298; see also Sprague v. Liberty Mut. Ins. Co., 177 F.R.D. 78 (D.N.H. 1998); Matsuura v. E.I. Du Pont De Nemours & Co., 2007 WL 433115 (D. Haw.) (holding same).

[13] See 189 F.R.D. 604 (D. Nev. 1999).

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> Treating physicians can appropriately have opinions as to the cause of an injury, based upon their examination of the patient, or to the degree of injury, or **the extent of disability, in the future**. The **prognosis of the patient** and what tasks a patient will be able to perform are legitimate opinions which come within the parameters of opinions required to be made by treating physicians, without subjecting them to the requirements of Rule 26(a)(2)(B).[14]

The treating physician may testify regarding past and future care needs because the physician must make these determinations in order to assess long-term care needs.[15] And the treating physician may testify as to past and future costs of treatment because the physician is directly involved in patient billing.[16]

This treatment, and the resulting personal knowledge of the physician, should not shock Defendant. Indeed, it is within the normal range of duties for a health care provider to develop opinions regarding causation and prognosis during the ordinary course of the examination. "To assume otherwise is a limiting perspective, which narrows the role of a treating physician."[17]

The Court should not limit the treating physicians in this case. Margie's treating physicians intend to testify as to opinions learned through treatment — nothing more. Accordingly, opinions as to future prognosis and disability and future treatment needs are appropriate without the need for the expert disclosure requirement, even if such information was not contained in their treatment file or elicited during deposition testimony.

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[14] Id. at 608 (citing Baker v. Taco Bell Corp., 163 F.R.D. 348, 349 (D. Colo. 1995)). (emphasis added).

[15] See Zurba v. United States, 202 F.R.D. 590, 592 (N.D. Ill. 2001) (holding that "[t]he fact that a treating doctor proposes to give an opinion regarding the causation and permanency of his patient's injuries does not by itself make him a retained expert for purposes of [the expert disclosure requirement]. Indeed, it is common for a treating physician to consider his patient's prognosis as well as the cause of the patient's injuries").

[16] See Martin v. CSX Transportation Inc., 215 F.R.D. 554, 555 (S.D. Ind. 2003) (court allowed testimony of physicians without expert report when testimony was based on "treatment of plaintiff as well as . . . extent of plaintiff's condition, its cause, permanency, and pain and suffering associated with that condition as well as the necessity and cost of future medical costs").

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3. **Plaintiff's Treating Physicians are NOT Required to Reduce the Cost of Future Medical Care to Present Value.**

Contrary to Defendant's assertions, there is no requirement that Plaintiff's treating physicians reduce the cost of any future recommended care to present value. Tellingly, Defendant failed to provide any case authority in support of his self-serving conclusion. None was cited because none exists. Nevada has never established such requirement. Moreover, even if the future treatment costs were required to be reduced to present value, Plaintiff has disclosed economic expert, Terrence Dinneen, who is qualified to testify as to the methodology for reducing costs to present value.

III. CONCLUSION

Nevada case authority clearly allows Margie's treating physicians to testify regarding the future diagnosis, prognosis, and treatment recommendations related to Margie's injuries — so long as these opinions are based on their treatment of Margie.[18] Based on the foregoing, Plaintiff respectfully requests that this Court deny Defendant's Motion #1.

DATED this 23rd day of May 2013.

RICHARD HARRIS LAW FIRM

By: _____

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[17] Martin, 215 F.R.D. at 557.

[18] See Piper, 170 F.R.D. at 174-75; see also Prabhu, 112 Nev. at 1546-47; Kirkland, 189 F.R.D. 604; NRS § 50.275.

RICHARD HARRIS LAW FIRM

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of RICHARD HARRIS LAW FIRM and that on the 24 day of May 2013 I caused the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 1: TO LIMIT PHYSICIANS TO OPINIONS STATED IN THEIR CLINICAL RECORDS, DEPOSITIONS, AND/OR EXPERT REPORTS, IF ANY**

to be served as follows:

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

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

[ ] by hand delivery

to the attorneys listed below:

Steven T. Jaffe, Esq.
Jacob S. Smith, Esq.
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Las Vegas, Nevada 89128
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An employee of the RICHARD HARRIS LAW FIRM

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Attorneys for Defendant
Raymond R. Khoury

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,

Plaintiff,

vs.

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

Defendants

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

DEFENDANT'S OPPOSITION TO PLAINTIFF'S OMNIBUS MOTION IN LIMINE

Date of Hearing: June 6, 2013

Time of Hearing: 9:00 a.m.

Defendant, Raymond Khoury ("Khoury"), by and through his attorneys of record, Hall Jaffe & Clayton, LLP, hereby submits his Opposition to Plaintiff's Omnibus Motion in Limine.

This Opposition is made and based upon the pleadings and papers on file herein, the Memorandum of Points and Authorities submitted herewith, and any oral argument the Court may entertain at the hearing on this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As a threshold matter, Defendant opposes Plaintiff's motions in *limine* that are nothing more than general statements of the law and do not comport with the intended purpose of filing motions in *limine* in the first place. Indeed, the purpose of filing motions in *limine* is for the Court to determine whether the prejudicial impact of specific evidence outweighs its probative value. *See* ***Anderson v. State***, 92 Nev. 21, 554 P.2d 1200 (1975).

While, on their face, some of Plaintiff's motions in *limine* appear to state unrebuttable propositions of law, Defendant urges this Court to deny such motions as improper and inappropriate because almost all of the motions fail to address the admissibility of any *specific evidence*. *See* NRS 47.080. Instead, the motions are so broad and non-specific that it is nearly impossible for Defendant to directly respond to them. This leaves Defendant guessing at whether there really is any specific evidence that Plaintiff wants to exclude.

Rather than issue such blanket rulings now, the Court should address potential infractions of the rules of evidence and Nevada civil procedure that are currently unforeseeable when such issues arise during the trial. Defendant's counsel is concerned that Plaintiff's counsel will use irrelevant issues that may arise during trial to grandstand before the jury that defense counsel has violated a pre-trial motion in *limine* or otherwise acted improperly, to the Defendant's extreme prejudice. In the vast majority of her motions in limine, Plaintiff has utterly failed to advance ***any*** specific evidentiary issues for the Court's consideration prior to trial. Plaintiff should thus be precluded from doing so in her Reply, when Defendant will not have an opportunity to address those new facts or arguments. To allow such tactics would be to encourage "sandbagging" which would most certainly lead to "trial by ambush."

II. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a motor vehicle accident that occurred on March 13, 2009, in Las Vegas, Nevada. Plaintiff alleges that, on that date, Mr. Khoury negligently operated a motor vehicle in a manner that caused a collision with Plaintiff's vehicle. Plaintiff further alleges that she has suffered serious and disabling injuries as a result of the collision. Trial in this matter is currently scheduled for this Court's July 1, 2013.

Plaintiff has filed an Omnibus Motion in Limine ("OMIL") outlining twenty (20) evidentiary subjects and/or topics which Plaintiff seeks to preclude Defendant, his attorneys and any witnesses from referring to mentioning, either directly or indirectly, or attempting to convey to the jury at trial. Defendant's Oppositions to these motions now follow.

III. LEGAL ARGUMENT

A. Defendant's Point-by-Point Opposition to Plaintiff's Omnibus Motions in Limine

Defendants hereby oppose Plaintiffs' motions in *limine* in the same order that the motions are listed in Plaintiffs' Omnibus Motions in Limine, for ease of reference. The oppositions are as follows:

1. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Hypothetical Medical Questions Designed to Confuse Jury

Ms. Seastrand apparently seeks an Order precluding comments from testifying witnesses as to "non-existent" medical conditions, symptoms, or injuries. Defendant takes issue with this ill-conceived and vague motion for the basic reason that legitimate medical evidence could lead testifying experts to conclude that conditions, symptoms, and injuries of which Ms. Borgna complains pre-existed and/or were a result of new trauma sustained after the accident at issue. For example, Ms. Seastrand's medical records and the deposition testimony of both Ms. Seastrand and her husband provide evidence of two prior auto accidents which caused Ms. Seastrand to sustain injuries to her cervical spine. Moreover, information that existed, but which Ms. Seastrand did not provide to her treating physicians, may cause testifying experts to conclude that her subsequent injury, conditions and symptoms, that had not been specifically reported or diagnosed, are the cause of or contributing factors to the injury Ms. Seastrand now claims to have sustained in the subject accident.

Moreover, Plaintiff's blanket characterization of all hypothetical medical questions as "confusing" is misleading in and of itself. Certainly, circumstances arise in which hypothetical questions do not constitute mere speculation. In those instances, such questions serve a valid purpose and enable a party to get at the basis for a testifying witness' opinions, conclusions and other issues that are squarely at issue in the case. Hypothetical questions, if asked appropriately, are similarly relevant and do not fall within the definition of topics that should be excluded, even though they are relevant (*i.e.*, confusing, misleading, etc.). **NRS 48.035(2).**

This motion must be denied on the basis that Ms. Seastrand's attempt to limit any and/or all mention or potential use of "hypothetical questions" is poorly defined and overly broad, such that it would essentially preclude the legitimate and good faith questioning of experts and other testifying witnesses during trial. There are clearly less extreme ways to address Ms. Seastrand's concerns in this regard, such as objections during trial. Moreover, Defendant does not intend to make such inquiries in the absence of sound factual support and a corresponding good faith basis to do so. For the foregoing reasons, Defendant Raymond Khoury respectfully requests that the Court deny this motion.

2. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude any Suggestion to Jury that There Might Be Related Medical Records Prior to the Subject Accident When No Such Records Exist.

In this motion in *limine*, Plaintiff requests that Defendant be precluded from suggesting that there might be related medical records prior to the subject crash when there allegedly are none. (*See* Plaintiff's OMIL, p. 6.)

Plaintiff's motion seeks a nonsensical result from this Court. According to the motion in *limine*, the Court should assume that the Defendant will engage in improper argument without any evidentiary support. The Court is then asked to head off the supposed hypothetical argument prior to the trial. This is supposed to be done, not by actually considering the rules of evidence and ruling on the admissibility of evidence, but by issuing a blanket prohibition on even the mention of undisclosed records related to Plaintiff's pre-existing injuries and medical treatment. What is most puzzling about Plaintiff's motion in *limine*, is that there actually *are* records documenting Plaintiff's pre-existing injuries.

Under Nevada law, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." **NRS 48.015**. The fact that Plaintiffs are claiming extensive injuries arising out of this accident requires reference to their prior medical records. The existence or non-existence of records indicating prior injuries fits the definition of relevance in Nevada perfectly.

In the present case, the Plaintiff was in two auto accidents many years before the subject accident. Accordingly, there simply was no way for Defendant to have ever collected those records, as they were almost certainly destroyed long ago as a matter of course. At the same time, Plaintiff has made quite a production about the absence of any such records during numerous depositions of Defendants' expert

witnesses. In her motion, Plaintiff argues that allowing Defendant to suggest the absence of medical records will force Plaintiff to prove that a prior injury did not exist. The simple fact that Plaintiff is claiming extensive injuries arising out of this accident requires extensive access to her prior medical records. The existence or non-existence of records indicating prior injuries fits the definition of relevance in Nevada perfectly. It would be entirely unfair to prevent Defendant from making an argument, when hampered by the litigation process, without enforcing a similar limitation on Plaintiff.

It is clear that this motion in *limine* is an attempt by the Plaintiffs to manipulate the system into protecting their refusal to disclose evidence that might contain information pertaining to pre-existing conditions. Once again, Plaintiffs do not identify any specific piece of evidence or argument that they want excluded, submitting only vague and general references to the Court regarding the same. This makes it difficult, if not impossible, for Defendants to directly respond to Plaintiffs. Plaintiffs should be precluded from identifying any specific evidence or arguments in their Reply, as that would prevent Defendants from having any opportunity to respond to the same.

Moreover, in the event that Plaintiffs attempt to suggest, at trial, that the absence of prior medical records somehow proves that they were free of pre-existing injury and/or adverse medical conditions, prior to the subject accident, that argument would be just as speculative as any hypothetical argument Plaintiffs have attempted to attribute to the Defendants in this motion. These tactics must not be tolerated by the Court, and the motion in *limine* must be denied. Alternatively, and importantly, if granted, the motion **must** be enforced reciprocally and the Plaintiffs must not be permitted to suggest, state, argue, or imply that the absence of any records indicates that they had no pre-existing condition(s).

3. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Reference to Attorney-Driven Litigation or "Medical Build-Up" Litigation.

In this motion in *limine*, Plaintiff requests that Defendant be precluded from referring to the case as "attorney-driven litigation," a "medical build-up case," or that Plaintiff sought treatment at the direction of counsel. (*See* Plaintiff's OMIL, p. 7.) The problem with Plaintiff's request is that there exists legitimate evidence of medical build-up and/or attorney driven litigation relating to Plaintiffs' medical special damages.

According to Defendants' timely disclosed expert reports, Defendants intend to comment upon the fact that, according to both Dr. Schifini and Dr. Seigler, the need for a discogram, plasma disc

decompression, and the following lumbar treatment was not medically indicated based on the prior medical work-up which was performed by Plaintiff's treating physicians. Consider Dr. Schifini's testimony when asked about his criticisms regarding Plaintiff's lumbar surgery:

> A. Well, the -- the workup for the lumbar fusion surgery was performed in a way that didn't necessarily lead to the conclusion that a lumbar fusion surgery would have been medically indicated.
>
> And specifically, the injections performed by Dr. Belsky in the form of bilateral L4-5 and L5-S1 transforaminal epidural injections, along with bilateral L4-5 facet injections, produced a decreased pain according to the nursing notes -- not Dr. Belsky's notes -- of an eight out of ten to a seven out of ten as reported by Dr. --Miss Seastrand. The motion segments and most everything that moves in the lumbar spine would have been anesthetized with those injections, assuming Dr. Belsky performed them correctly, and therefore, discogenic pain became a possibility rather than a probability.
>
> **The indication, then, for the lumbar discography was not present**. The indication for plasma disk depression which ultimately failed was not present. And the indication for the ultimate spine surgery seemed to be based on the failure of the previous treatment provided to Miss Seastrand, which was used as the excuse for the fusion **so therefore, the fusion was not necessary either**.

See Deposition of Dr. Schifini at 11:20-12:16, attached as **Exhibit "A"**(emphasis added). This opinion is further supported by Dr. Seigler's testimony:

> Q. Was a lumbar discogram reasonable and appropriate for Mrs. Seastrand based on her pain complaints and the prior workup?
>
> A. I don't believe at that point it was reasonable to perform, no.
>
> Q What should have -- what additional workup do you believe should have taken place before a discogram should have been ordered?
>
> A A systematic approach to diagnosis -- diagnosing pain generators through interventional procedures would have been the most obvious, I would think, if, indeed, it turns out she had facet mediated pain, **then discography would have not been indicated.**
>
> Q In your July report, you indicate that the discography, the plasma disc decompression, and the subsequent lumbar fusion were not medically necessary. Is it your opinion that Dr. Belsky, Dr. Muir, and Dr. Capkin(sic) who performed those procedures performed unnecessary procedures on Mrs. Seastrand?

> A I'm saying the **medical record did not -- did not appear to justify the -- why a plasma disc decompression was utilized. And -- and also the -- and then the subsequent fusion appeared to also be based on problematic data**. So, yeah, based upon the fact that those appear to be problem --the discography and the -- well, actually, the injections and then the -- subsequently the discography and the -- and the treatment, based upon that, was essentially domino effect, yes.

See Deposition of Dr. Seigler at 35:4-36:6, attached as **Exhibit "B"**.

Defendant's experts have testified to a reasonable degree of medical probability that Plaitniff received some procedures which were not medically indicated. In light of this, Defendant respectfully submit that he should be permitted to argue that attorney conduct and/or secondary gain generated unnecessary treatment and increased Plaintiff's medical specials in this case if the facts, demonstrated through reasonable inferences and expert testimony, support such arguments. For these reasons, Defendants respectfully request that the Court deny the instant motion in *limine*.

4. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Reference to Plaintiff's Retention of Counsel.

In this motion in *limine*, Plaintiff requests that Defendant be precluded from referring to when or why they retained counsel. (*See* Plaintiff's OMIL, p. 8.) Although Defendant does not necessarily oppose this particular request, Plaintiff makes a secondary argument under the guise of requesting that such references be precluded at trial, namely that Defendants be precluded from making any arguments at trial regarding Plaintiffs' secondary gain motives. (*See* Plaintiffs' OMIL, p. 9).

Dorland's Illustrated Medical Dictionary provides a somewhat more detailed definition of secondary gain, which it defines as "external and incidental advantage derived from an illness, such as rest, gifts, personal attention, release from responsibility, and disability benefits." Plaintiff asserts that evidence suggestive of secondary gain motives should be precluded at trial because none of ***her*** treating medical providers have expressed any opinions regarding such motives in their treatment records. This argument, however, fails to consider the opinions of Defendants' expert medical witnesses who have, in fact, weighed in on this issue.

In this case, Defendant's expert, Dr. Joseph Schifini, has provided opinions that will support an argument by Defendants that Plaintiff may have been motivated by secondary gain in connection with her injury claims. (*See* **Exhibit "A"** at 28:22-29:5 and 34:4-35:25).

Dr. Schifini also noted many situations where Plaintiff appeared to have attempted to minimize the severity and/or omit information regarding her prior injuries. *Id.* Dr. Schifini, as a board-certified pain specialist, is amply qualified to opine as to whether Plaintiff's subjective complaints could be motivated by the potential for secondary gain. This issue is further addressed infra at § III.A.19 of the instant opposition.

For these reasons, Defendant therefore respectfully submit that they should be permitted to question Dr. Schifini regarding Plaintiff's secondary gain motivations at the time of trial.

5. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Reference as to Plaintiff's Counsel Working with Plaintiff's Treating Physicians on Other, Unrelated Cases.

In this motion in *limine*, Plaintiffs request that Defendants be precluded from referring to the fact that Plaintiffs' counsel worked with Plaintiffs' treating physicians on other unrelated cases. (*See* Plaintiff's OMIL, p. 9.)

By making broad and overly generalized arguments, Plaintiffs seek to prevent Defendants from offering relevant evidence at trial that could be used to impeach Plaintiffs' treating physicians. Plaintiffs have not, however, identified a specific piece of evidence that they wish to preclude in this respect. To the extent that there is evidence of a relationship between Plaintiffs' counsel and Plaintiffs' treating physicians that could, arguably, impact the treating physicians' independence, and such evidence would be highly relevant to the jury in determining the weight that should be given to the physicians' testimonies.

In the same way that any expert witnesses' work history is at least somewhat probative of the issue of testimonial independence, a treating physician's history of accepting referrals from an attorney over an extended period of time is similarly relevant. *See, generally,* ***Niewold v. Fry***, 714 N.E.2d 1082, 1089 (Ill. Ct. App. 1999) (distinguishing ***Cancio v. White***, 697 N.E.2d 749 (Ill. Ct. App. 1998), by finding that it was proper for the defendant's counsel to question the plaintiff's treating physician "concerning bias, partisanship, financial interest, and his relationship to plaintiff's attorney").

In Nevada, evidence regarding a witness' bias or interest in testifying in a certain manner is, in fact, relevant and is <u>not</u> collateral to the controversy for purposes of exclusion. *Lobato v. State*, 120 Nev. 512, 96 P.3d 765 (2004). In *Lobato*, the Nevada Supreme Court noted that

> "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."

Lobato at 520. 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.

This type of evidence is not necessarily dispositive of some kind of "conspiracy" between the doctor and the attorney, but it is a relationship that could potentially impact the doctor's independence with respect to the issues of, for example, medical necessity and causation. The testimony of a doctor should be subjected to the same level of scrutiny as any other witness who steps into a Nevada courtroom, which would include being cross-examined with regard to any bias, partisanship, financial interest, or relationship that might impact the credibility of their testimony. For these reasons, Defendants respectfully request that the Court deny the instant motion in *limine*.

6. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Limit Closing Arguments to Evidence Presented at Trial.

In this motion in *limine*, Plaintiffs request that Defendants' closing argument be limited to the evidence presented at trial. (*See* Plaintiff's OMIL, p. 11.) Plaintiffs' purported concerns, that Defendants will engage in the collateral and improper arguments raised by defense counsel in ***Lioce***, are completely unfounded. Indeed, Plaintiffs' counsel does not cite to a single instance of Defendants' counsel having engaged in the improper arguments referenced in the ***Lioce*** ruling.[1] The reason is simple: Defendants' attorneys understand and respect the boundaries established by the Nevada Supreme Court in the ***Lioce*** decision and are more than capable of making their case by simply referring to the facts, evidence, and testimony accumulated during discovery and at trial, and any logical arguments arising therefrom. **NRS 48.015**, *et seq.*

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[1] This is yet another motion in which there are no specific references to any anticipated argument or testimony in Plaintiffs' motion in *limine*. Given the vagueness and lack of any specificity, Plaintiffs must be precluded from addressing any specific issues in their Reply because Defendants would be precluded from addressing those issues.

Defendants, therefore, request that this Court deny Plaintiffs' instant motion in *limine*. If, however, the Court is inclined to issue any pre-trial Order regarding specific arguments that **both** Plaintiffs' and Defendants' counsel cannot make, Defendants request that the Court apply any such Order reciprocally, requiring that Plaintiffs' counsel likewise refrain from engaging in any jury nullification tactics, thereby precluding the presentation of golden rule arguments, and prohibiting Plaintiffs' counsel from interjecting any personal opinions as to the justness of the case.

7. Limited Opposition to Planitiff's Motion to Preclude the Suggestion of Abuse of Narcotic Pain Medication When There is None.

In this motion in *limine*, Plaintiff requests that Defendant be precluded from suggesting that Plaintiff abused narcotic pain medication. (*See* Plaintiffs' OMIL, p. 13.) Implied in this motion is the preclusion of any reference at all to narcotic pain medication.

Again, by making broad and overly generalized arguments, Plaintiffs seek to prevent Defendant from offering relevant evidence at trial. Plaintiff has not identified any specific piece of evidence that she wishes to preclude in this respect. To the extent that evidence regarding Plaintiffs' use of narcotics arises at trial, however, such evidence would be highly relevant to the jury in determining the weight that should be given to the nature of Plaintiff's pain related to prior injuries or the injuries she allegedly sustained in the subject accident and their claims for general damages.

Accordingly, Defendants submit that they be given wide latitude in arguing the facts and drawing inferences from the evidence introduced at trial. *See* ***Silver v. McFarland***, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993). For these reasons, Defendants respectfully request that the Court deny the instant motion in *limine*.

8. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Allow Voir Dire Questioning Regarding Tort-Reform Exposure.

In Nevada, the trial judge has the absolute right to reasonably control and limit an attorney's participation in voir dire. *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210, (1988). Both the scope of voir dire and the method by which voir dire is pursued remain within the discretion of the district court. *Whitlock* at 213, quoting *Summers v. State*, 102 Nev. 195, 718 P.2d 676 (1986), see also NRS 16.030 (6) (The judge shall conduct the initial examination of prospective jurors and the parties or their attorneys are entitled to

conduct supplemental examinations which must not be unreasonably restricted.)

In her motion in limine on this matter, Plaintiff references two Utah cases, *Barrett v. Peterson*, 868 P.2d 96 (Utah App. 1993) and *Evans By and Through Evands v. Doty*, 824 P.2d 460, 466 (Utah App. 1991), to support such voir dire questioning regarding higher premiums. It should be noted, however, that, in Utah, state trial courts have a mandatory obligation to give plaintiffs the opportunity to poll potential jurors for possible tort reform bias. There is, however, no such obligation in the State of Nevada. *Whitlock* at 213.

> In contrast to [the broad grant of discretion regarding voir dire in Federal Court], state trial courts in Utah **are required** to afford plaintiffs the opportunity to poll potential jurors for possible tort reform bias. See Barrett v. Peterson, 868 P.2d 96, 99-101 (Utah.Ct.App.1993)(holding that tort plaintiffs, after making an initial showing of possible prejudice, are entitled to ask specific first-tier questions and, depending on the answer, then move on to more specific, second-tier questions). Thus Utah law, requiring tort reform voir dire and specifically prescribing the contours of such, conflicts with the broad discretion vested in federal judges to control the scope and extent of voir dire." (Emphasis added).

Utah law specifically requires questioning during voir dire regarding tort reform and specifically prescribes the scope and procedure for such questioning. By contrast, Federal and Nevada law place discretion on voir dire questioning directly in the hands of the trial judge. If this Court is to find that Utah law regarding voir dire questioning instructive in any manner, it should be as to their careful methodology in questioning jurors regarding higher insurance premiums. In considering Plaintiff's motion in limine, the Court must also be mindful of the potential for such discussions to inflict substantial and irreparable prejudice and/or harm upon the Defendant. See *Borkoski v. Yost*, 182 Mont. 28, 594 P.2d 688 (1979):

> It is not our intent to ignore the equal right of a defendant to a fair and impartial jury. Therefore, we further hold that, as a prelude to any questions concerning whether a potential juror has read or heard anything to indicate that jury verdicts for plaintiffs in personal injury cases result in higher insurance premiums for everyone, an attorney must ask certain general introductory questions. These initial questions may be approached from two directions: (1) whether the prospective juror has heard of or read anything (not necessarily related to insurance) which might affect his ability to sit as an impartial juror (as was done by the trial judge in this case); or (2) whether the prospective juror regularly reads any of the magazines or newspapers in which it has been demonstrated that the insurance advertisements or articles had appeared. An attorney may utilize either or both of these approaches. If, however, no positive responses are received to these introductory inquiries, there is no reason to pursue further the line of inquiry we have approved

above."

Borkoski, 594 P.2d at p. 695.

The *Borkoski* court further noted that, in allowing a party to pose questions in voir dire regarding juror exposure to tort reform advertisements, that party **must** also show that it is acting in good faith and "is not merely attempting to impress on the jury the fact that the defendant may be covered by insurance." *Id.*, quoting *Haynes v. County of Missoula*, 163 Mont. at 287, 517 P.2d at 380. Thus, while Plaintiff may be entitled to question jurors as to their exposure to and knowledge of tort reform literature, the Court should also ensure that such questioning does not go beyond the purposes of voir dire, and become an attempt to emphasize that Defendants are covered by liability insurance. The clear danger in allowing this type of voir dire questioning, without serious protective measures in place, lies in the improper suggestion to the jury that Defendants carry liability insurance. As there is no way to raise the issue of tort reform or higher insurance premiums without planting a seed in the minds of the jurors about the Defendant's liability insurance, this Court should deny Plaintiff's motion in limine to allow voir dire questions regarding higher insurance premiums or tort-reform exposure..

9. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Allow Voir Dire Questioning Regarding Verdict Amounts.

With this motion, Plaintiff seeks this Court's permission to "desensitize" the jury with repeated references to multi-million dollar figures during the voir dire process in the hopes that they will be more inclined to award such sums at the conclusion of the trial. Plaintiff has retained all manner of experts in this case, some of whom will testify that Plaintiff's damages total in the millions of dollars. The damages calculations, quite frankly, are incredibly dubious.

By way of example, Plaintiff and her experts will claim lost past and future earning and household services in excess of $630,000.00, even though the evidence establishes that Plaintiff had not earned any income in the 25 years prior to the accident. The evidence also establishes that Plaintiff's fledgling dance and acting academy–formed less than three (3) years prior to the subject accident–continued to grow following the subject accident. Indeed, there is unequivocal testimony from the business owners, including Larry and Jackie Snowden and Ms. Seastrand and her husband, that the business continued to grow following the accident and has continued its growth to the present. This is not argument but, rather, fact as

set forth in the discovery responses, the deposition testimony, and the employment and tax-related documents obtained the case.

As Plaintiff states in the motion, she has every intention of asking the jury to return a verdict for millions of dollars in damages. In voir dire, Plaintiff is going to try to "desensitize" or "condition" the jury to award some huge amount of money by asking them numerous questions about how much money they could or would award. Such questioning would constitute a specific violation of EDCR 7.70. As a result, plaintiff's Motion must be denied, and plaintiff's counsel should be admonished, before voir dire even begins, that there shall be no discussion about verdict amounts during voir dire.

EDCR 7.70 provides as follows:

> "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.

EDCR 7.70 (emphasis added). The above-quoted rule prohibits the exact type of voir dire examination that Plaintiff now seeks to introduce in this case. Pursuant to the plain reading of EDCR 7.70(a) there can be **no** questions about whether or not a juror could or would award millions of dollars. For obvious reasons, Plaintiff neglects to mention this rule in her motion, even though he is undoubtedly aware of it and it is directly "on point." EDCR 7.70(c) is so restrictive about this kind of questioning that it specifically prohibits questions even "touching on" the verdict a juror could or would return based upon hypothetical facts. Indeed, if this Court were to grant Plaintiff's motion, it would essentially be permitting a blatant violation of the Eighth Judicial District Court Rules. This is prejudice which cannot simply be undone by

asking the jury if they would be able to award less than $50.

If Plaintiff is worried about the jury having the information they need in order to determine which types of things, if any, require or merit consideration, the jury instructions will provide the necessary instructions. As a further means of ensuring the integrity of the process, jurors will be instructed to disregard any personal prejudices which conflict with the Court's instructions. Finally, during closing argument, Plaintiff will be afforded every opportunity to explain to the jury its position that the case is worth millions of dollars. It will also have the opportunity to discuss with the jury that personal prejudices, if any, can play no role in the deliberation process. These measures are carefully designed to eliminate any possibility that jurors will produce artificial "caps" on any verdict.

Allowing questions about whether a jury could or would award multi-million dollar verdicts would be patently unfair and prejudicial to Defendants. The sole (and obvious) purpose for such questions is to suggest, before any evidence is put before the jury, that the case has a value of millions of dollars. The true purpose of voir dire is to eliminate jurors with unfair biases. Questions designed to indoctrinate the jury and suggest to them the value of the case violate both the letter and the spirit of the law on the topic of voir dire and require that Plaintiff's motion be denied.

10. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Permit Treating Physicians to Testify as to Causation, Diagnosis, Prognosis, Future Treatment, and Extent of Disability–Without a Formal Expert Report.

With this motion, Plaintiff seeks to allow her treating physicians to testify far beyond the scope they are afforded under NRCP 16.1(a)(2). Defendant filed competing motions in limine which deal with the issues presented in the instant motion. Specifically, Defendant filed Motion in Limine No. 1; To Limit Plaintiff's Treating Physicians to Their Clinical Records, Deposition Testimony, and Expert Reports. *See* Defendant's Motion In Limine Nos. 1, on file herein. Considering Ms. Seastrand's motion is set to be heard at the same time as Defendant's motions, Defendant Raymond Khoury incorporates by reference all arguments and exhibits set forth in the Memorandum of Point and Authorities contained within that Motions in limine as though set forth fully herein.

a. Plaintiff's Treating Physicians Were Not Properly Identified as Experts, and Should Not Be Permitted to Testify Beyond the Scope of Their Clinical Treatment.

NRCP 16.1 (a)(2)(B) requires that an expert retained or employed specifically to provide expert

testimony in a case must provide a written report, curriculum vitae, list of publications authored in the last ten years, and a list of depositions and trials in which that expert has testified as an expert for the last four years. Like all evidence, expert testimony must be relevant to the litigation and the probative value of such testimony must not be substantially outweighed by other considerations, such as "needless presentation of cumulative evidence." **NRS 48.035(2).** The admission of expert testimony lies within the sound discretion of the trial court. *See,* ***Brown v. State***, 110 Nev. 846, 852, 877 P.2d 1071, 1075 (1994).

Plaintiff has made it clear that she intends to solicit testimony from her treating physicians that extends beyond the scope of their personal medical practice and/or their own treatment of Plaintiff. There is no foundation or evidentiary basis to grant a treating physician license to testify as a specifically retained expert when they have not been disclosed as an expert and/or have not provided all necessary NRCP 16.1 disclosures.[2] Accordingly, any testimony by Plaintiff's treating physicians which is beyond the scope of the information contained in their respective clinical records and depositions (and in Dr. Belsky's case, her rebuttal report) should be excluded at the time of trial.

According to NRCP 16.1(a)(2)(a), the requirements to identify the persons who are expected to give expert testimony is **mandatory:**

> *(2) Disclosure of Expert Testimony*
>
> (A) In addition to the disclosures required by paragraph (1), a party **shall** disclose to other parties the identify of any person who may be used at trial to present evidence under NRS 50.275, 50.285 and 50.305.
>
> (B) Except as otherwise stipulated or directed by the Court, this disclosure **shall**, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involved giving expert testimony, be accompanied by a written report prepared and signed by the

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[2] *See e.g.*, ***Albough v. United States***, slip copy, 2008 WL 686701 (S.D. GA 2008) (requiring expert disclosure in order 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) (precluding purported expert testimony of doctor based upon future care where no expert disclosure was made); ***Allen v. Parkland School Dist.***, 230 Fed. App. 189 (3rd Cir. 2008) (recognizing that doctor witness must ordinarily be disclosed as an expert witness if he or she intends to provide testimony outside of medical treatment); ***Widder v. City of Springfield***, 108 F.3d. 1977 (6th Cir. 1997) (also recognizing general rule that physician must be disclosed as an expert in order 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) (recognizing that where a doctor provides forensic opinion, rather than opinion developed during treatment of a patient, doctor must be properly disclosed as an expert witness); ***Wreath v. United States***, 161 F.R.D. 448 (D. Kan. 1995) (same).

> witness. The report shall contain a complete statement of all opinions to be expressed and the basis and the reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualification of the witness, including a list of all publications authored by the witness with the preceding ten years; the compensation to be paid for the study and testimony; and listing of any other cases in which the witness has testified as an expert at trial or by deposition within the proceeding four years.

(Emphasis added.) By using the term "shall," it is readily apparent that the requirements of this Rule cannot be side-stepped in the absence of stipulation or court order—neither of which occurred here.

Eighth District Discovery Commissioners Bonnie Bulla and Chris Beecroft recently co-authored an article outlining the practical application of recent amendments to NRCP 16.1(a)(2). Bonnie A. Bulla and Chris A. Beecroft, Jr., *Required Expert Disclosures under Recent Amendments to NRCP 16.1(a)(2)(B) and (C)*, COMMUNIQUE, MAY 2013 at 18-20. (Attached as **Exhibit "C"**). The article also includes explanation as to what information must be provided for both retained and non-retained experts in initial disclosures. According to Commissioners Bulla and Beecroft, NRCP 16.1(a)(2) now mirrors the federal requirement. The new rule alleviates any surprise at trial by requiring a summary of the facts and opinions about with the treating physician is expected to testify:

> Historically, however, the same disclosure requirements for retained experts did not apply to other types of experts with specialized knowledge. As a result, non-retained experts, such as treating physicians, for example, would often render opinions at trial that had not been timely or fully disclosed. [. . .] With no disclosure requirements for non-retained experts under the old Rule 16.1(a)(2), surprise at trial became unavoidable, often creating unfair advantage for one side or the other.
>
> ***
>
> Federal Courts had previously recognized the lack of fairness presented by he absence of full disclosure requirements for "non-retained" expert and adopted amendments to their rules to address the problem. FRCP 26 now requires that the subject matter and a summary of the facts and opinions which the non-retained expert tiwness is expected to testify about be disclosed, even in the absence of a written report. The recent amendments to NRCP 16.1(a)(2)(B) . . . now mirror these federal requirements. The Nevada rule additionally requires disclosure of the non-retained expert's qualifications and his or her fees for providing testimony at deposition and trial.

Id.

Commissioners Bulla and Beecroft go on to discuss the practical application of the amended Rule:

> While there is no specified format for the manner in which this information should be produced, from a practice standpoint, these additional requirements may be

> satisfied by producing the non-retained expert's *curriculum vitae* and fee schedule. The non-retained expert does not have to prepare the actual disclosure, nor is he or she required to produce documentation. **What is critical is that the non-retained expert's opinions are fully disclosed at the same point in time that the expert disclosures are due**.
>
> Failure to disclose an expert's opinion may result in its exclusion at trial. If, for example, the disclosure is that a physician will testify in accordance with his or her office chart, the chart should encompass all opinions to be given at trial. Since this is often not the case, to avoid exclusion at trial, the attorney should list as part of his or her client's disclosures any additional opinions not specifically identified in the treating physician's medical records.

Id.

Here Plaintiffs' initial expert disclosure did not identify any of her treating physicians as experts, nor does it provide any specific areas of testimony for her treating physicians. *See* **Exhibit "D"**. In sum, not only are Plaintiffs' treating physicians not identified as experts, but their "non-retained expert opinions" have not been fully disclosed.

While Plaintiff's treating medical providers may be qualified to testify to the extent of their own treatment, prognosis and observations of Plaintiff, they should not be allowed to speculate beyond that, especially where there is no such information contained in the doctors' clinical records. Almost all of the documentation provided by Plaintiff's treating physicians to date **pertains specifically to Plaintiff's past treatment**, and does not go into matters of future medical care, reasonableness of future medical treatment, or the standard of care in Clark County. In all likelihood, Plaintiff's treating physicians have no independent recollection of her, as she has not seen them in years. Accordingly, these treating physicians have no idea what the past years have been like for the Plaintiff, and have no idea of the Plaintiff's current medical or physical status. They are in no position to opine on Plaintiff's future care, if any, or what the future may hold for her.

b. Testimony by Plaintiff's treating physicians about future prognostications is prejudicial and speculative.

Plaintiff's medical providers must be precluded from offering opinions as to future medical care or treatment. The law is clear: a medical doctor, who has not been disclosed as an expert pursuant to NRCP 16.1 (a), may not testify in areas outside of his treatment and personal observation of the Plaintiff. *See,* supra FN1. To allow Plaintiff's treating physicians to make determinations regarding the same, or to somehow provide opinion testimony to confirm that Plaintiff's future cost estimates are "reasonable according to the

standard in Clark County Nevada," would be to allow these treating physicians to usurp the role of expert witness accountants and/or economists. Similarly, such testimony would amount to bald damages allegations which, without proper expert testimony must be excluded. *See,* ***Central Bit Supply, Inc. v. Waldrop Drilling & Pump, Ind.*, 102 Nev. 139, 717 P.2d 35 (1986).** Such testimony would amount to a tremendous waste of the jury and this Honorable Court's time and such testimony would only serve to prejudice Defendant.

c. Testimony by Plaintiffs' treating physicians about future prognostications, permanency, or future pain and suffering, is beyond the scope of their treatment of Plaintiff.

In addition, testimony about future prognostications, permanency, or future pain and suffering is outside the scope of any of these treating physicians' treatment of Plaintiff. None of these doctors have provided an expert report in support of this anticipated expert testimony, which is otherwise far afield of their treatment of Plaintiff. An expert report, as required by NRCP 16.1, would specifically require each expert to include "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions." *See,* NRCP 16.1 (a)(2)(B). The chart notes prepared by Plaintiff's treating physicians do not go into matters of reasonableness of future medical treatment, or the standard of the same in Clark County. Plaintiff's treating physicians, therefore, should not be allowed to discuss any future prognostications, including any purported treatment cost estimates, outside the scope of their treatment of Plaintiffs **unless** they are otherwise qualified as experts **and** have been adequately disclosed as experts under the requirements of NRCP 16.1, which they have not. Plaintiff's treating physicians should not be able to offer such testimony because it will add nothing to the jury's understanding of the facts, it would amount to "trial by ambush," and its' prejudicial impact greatly outweighs any probative value. For the above reasons, Plaintiff's Motion must be denied.

11. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Negative Inference for Failing to Call Cumulative Witnesses.

In this motion in *limine*, Plaintiffs request an Order precluding Defendants from offering argument or insinuating that negative inferences should be made based on Plaintiffs' decision not to call cumulative witnesses. (*See* Plaintiff's OMIL, p.22.)

Again, by making broad and overly generalized arguments, Plaintiffs seek to prevent Defendants

from offering potentially relevant evidence at trial or from drawing inferences supported by the evidence or Plaintiffs' prosecution of their claims. And, as with their other generalized arguments, Plaintiffs have not identified any specific cumulative witnesses who will allegedly offer duplicative testimony. Plaintiffs must be precluded from addressing these deficiencies in their Reply as doing so would preclude Defendants from responding to such allegations.

Accordingly, Defendants submit that they be given wide latitude in arguing the facts and drawing inferences from the evidence introduced at trial and request that the motion in *limine* be denied. *See* ***Silver v. McFarland***, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993).

12. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Reference to Collateral Sources.

With this motion, Plaintiff really seeks to exclude all evidence of medical liens, with a passing reference to the exclusion of health insurance. While Defendants agree that, pursuant to *Proctor v. Castelletti*, all references to liability insurance (and Medicare) should be excluded, Plaintiff's request to exclude all evidence of medical liens is a whole other story. Defendant filed competing motions in limine which deal with the issues presented in the instant motion. Specifically, Defendant filed Motion in Limine No. 3: To Admit Evidence of Liens, and Motion in Limine No. 7: To Admit Evidence of Liens Purchased and Amounts Purchased *See* Defendant's Motions In Limine Nos. 3 and 7, on file herein. Considering Ms. Seastrand's motion is set to be heard at the same time as Defendant's motions, Defendant Raymond Khoury incorporates by reference all arguments and exhibits set forth in the Memorandum of Point and Authorities contained within those Motions in limine as though set forth fully herein.

Evidence regarding a witness' bias or interest in testifying in a certain manner is, in fact, relevant and is not collateral to the controversy for purposes of exclusion. *Lobato v. State*, 120 Nev. 512, 96 P.3d 765 (2004). In *Lobato*, the Nevada Supreme Court noted that

> "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."

Lobato at 520. 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.

Here, some of Plaintiff's "treating providers" are owed substantial sums of money, which expenses they have agreed to incur on a lien basis. The mere fact that a party treats on a medical lien is not necessary indicative of the fact that they do not have medical insurance. Indeed, the undersigned has seen many situations where medical providers treat patients on a lien despite the fact that the patient has medical or other insurance that would cover the cost of treatment.

Given these types of financial arrangements between Plaintiff and his "treating providers," there can be little doubt that the providers have actually acquired an interest in the case. As a result, these individuals have become "contingent" witnesses. In the event that Plaintiff were to recover nothing, these "contingent" witnesses stand to receive nothing for all of the time and services they have provided. If, on the other hand, Plaintiff prevails, these "contingent" witnesses stand to receive far more money, for the exact same time and services, than they would otherwise have received if they had simply treated other patients and submitted their bills to a medical or other insurance carrier, or if they had even provided treatment on a cash-up-front basis.

For these reasons, it is entirely appropriate to question "contingent" witnesses about the existence of a lien, the amount of the lien and the fact that the "contingent" witness has, in fact, acquired an interest in the outcome of the litigation. As such, Plaintiff's motion, with respect to lien information only, should be denied. In the event that the Court is even inclined to consider this motion, it should enter a reciprocal order excluding any evidence of the amounts paid to Defendants' expert witnesses. Only then, will there exist a truly level playing field with respect to this issue.

Also, as detailed in Defendant's motions in limine, limiting Ms. Seastrand's medical damages to those amounts actually paid out on her behalf does not implicate the collateral source rule because she never incurred any liability for amounts "billed." ***Howell v. Hamilton Meats and Provisions, Inc.***, 52 Cal. 4th 541, 548, 257 P.3d 1130, 1133 (Cal. 2011). While Ms. Seastrand attempts to claim over $430,000 in special damages, the reality is that Ms. Seastrand never incurred any liability for these charges. Those medical

services were wither provided on a lien, or payment was accepted on Plaintiff's behalf in an amount significantly less than the bill. Specifically, of the approximately $80,000.00 in medical specials which were not provided on a lien, the medical providers have accepted payments on Plaintiff's behalf in an amount totaling only an approximate $39,000.00. In other words, all of Ms. Seastrand's providers either treated on a lien, or accepted a much lesser amount than what was allegedly billed. It is not necessary to disclose the source of either the payments or the write-downs, as the evidence can be presented in terms of what amounts Ms. Seastrand's medical providers accepted as payment for their services. In this manner, there is no conflict with the collateral source rule by giving Ms. Seastrand the benefit of the health coverage she receives (i.e. a lower rate for medical treatment) without deducting the payments made to those providers from her recovery. Id. at 564-65, 257 P.3d at 1144. Moreover, limiting Ms. Seastrand to presenting evidence of the amounts actually paid as past medical expenses does not result in a windfall to Defendant. This is because, in the event Ms. Seastrand were to prevail at trial, Defendant would still be required to pay her the full amount of the loss incurred as a result of her injuries, which is the value of the medical treatment she received.

Finally, evidence of amounts "billed" by Ms. Seastrand's medical providers, but not what they accepted as payment, are not relevant to the issue of damages, or to any other issue in this case. *See* NRS 48.015. "Billed" amounts are not losses incurred by Ms. Seastrand, and have no bearing on this case, because they are not damages and not amounts expended by Ms. Seastrand or on her behalf. ***Howell***, 52 Cal. 4th at 548, 257 P.3d at 1133. Further, the probative value of the amounts "billed" is substantially outweighed by the danger of unfair prejudice and potential to mislead the jury, making them subject to mandatory exclusion. NRS 48.035. Presenting the jury with inflated figures that do not accurately represent Ms. Seastrand's actual losses will result in an inaccurate award of special damages and affect the jury's deliberations over other damages such as pain and suffering.

13. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Reference to Non-Injury by Other Individuals Involved in the Crash.

In this motion in *limine*, Plaintiffs seek to prevent any testimony from Defendant, Raymond Khoury, that he was not injured as a result of the accident. (*See* Plaintiffs' OMIL, p.24.)

All relevant evidence is admissible unless its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury. **NRS §48.025** and **NRS §48.035**. Plaintiffs' motion is one designed to allow them to "have their cake and eat it too." The reality of the situation is that Plaintiff wants to be able to argue that she were injured as a result of the accident, arguing or, at the very least, suggesting that there was sufficient force involved. On the other hand, Plaintiff wants to preclude Defendant from countering those arguments by revealing the complete facts of the case.

Defendant will clearly need to be able to present the jury with the complete facts of the case in order to rebut Plaintiffs' damages allegations and/or testimony. The complete facts of the case, specifically including whether **all** of the parties were injured or not, relates directly to the severity of the impact and is clearly relevant to the issues in this litigation. Moreover, the purported evidence in no way creates any unfair prejudice or confusion of the issues. To the contrary, the failure to allow Defendant to present the jury with a complete set of the facts concerning the accident will unfairly prejudice Defendant and will mislead the jury as to the facts of the case.

At this stage, Defendant cannot predict how Plaintiff will testify and/or what evidence of damages Plaintiffs will present at time of trial. At trial, Defendant must be afforded "wide latitude" to argue facts and draw reasonable inferences from the evidence. *See* ***Jain v. McFarland***, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993) (*citing* ***State v. Teeter***, 65 Nev. 584, 642, 200 P.2d 657, 685 (1948)). Accordingly, Defendant must be allowed to introduce all evidence and information pertaining to injuries sustained in the accident, including the lack thereof. Thereafter, the jury will have an opportunity to decide the value of the claim based upon the totality of the evidence.

For these reasons, Plaintiff's motion in *limine* should be denied.

14. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Exclude Evidence of Prior Unrelated Injuries, Conditions, or Medical Treatment.

With this Motion, Plaintiff seeks to preclude reference to a laundry list of items which she claims are "unrelated" to the injuries at issue in this case. Defendant opposes this motion on the basis that not all of the items listed are completely unrelated. In other words, while unrelated prior conditions should be excluded, prior conditions which are reasonably related must be admissible.

Of the list prior injuries which Plaintiff claims are unrelated to the subject accident, Defendant stipulates that many actually are unrelated, including low blood pressure, bunions, foot and ankle pain,

miscarriages, hysterectomy, breast lmps, abdominal pain, hormone imbalance, endometriosis, ovarian cyst, irritable bowel syndrome, mitral valve prolapse, anxiety, thyroid nodule, and syncope. However, Plaintiff attempts to include various prior injuries which are related to or involve the same body parts which she alleges were injured in the subject accident. These cannot simply be dismisses as unrelated.

Specifically, Plaintiff claims that the neck and back injuries from her two prior automobile accidents in 1981 and 1985 are entirely unrelated to the neck and back injuries she sustained in the subject accident. The basis Plaintiff offers for this is that there is no evidence that she sought any treatment for neck or low back injuries from 1985 to the date of the subject accident in 2009. Even if this were the case–which it is not–that would still preclude these accidents and injuries from being relevant as a latent, pre-existing condition which was made symptomatic by the subject accident. However, that is not even at issue, as there is actually ample evidence that Plaintiff was still suffering from neck and back pain prior to the subject accident.

Indeed, numerous records indicate that Plaintiff was suffering from neck and/or low back pain in the months and years prior to the subject accident. For example, a September 12, 2004 record from Summerlin Hospital indicates that Plaintiff presented following an incident where she hit her head on the hatchback of a car. At that visit, she complained of headaches, **numbness and tingling in her right arm and fingers**, nausea, **neck discomfort**, blurred vision, visual disturbance and pain. *See* Emergency Room Nursing Record, attached as **Exhibit "E"**. At that same visit, Plaintiff reported a medical history of, among other things, migraines and "**chronic neck and back pain**." *Id.*

Similarly, in October of 2008, Plaintiff presented to her primary care physician complaining of chest pain as well as numbness and tingling in both arms. *See* **Exhibit "F"**. After ruling out exertional chest pain, her doctor sent her for a cervical x-ray, which revealed mild rightward flexion of spine compatible with muscle spasm and spondylolytic changes of a mild degree at the C5-C6 level of her spine. *See* x-ray report, attached as **Exhibit "G"**.

Finally, approximately a week after the subject accident, Plaintiff visited a chiropractor. At her first fisit, she was examined by the chiropractor, at which time she reported experiencing intermittent neck pain 2-3 times per month and intermittent low back pain 1-2 times per month. *See* March 20, 2009 Report at pp. 3-4 (Bates Nos. NBCL-0008-09), attached hereto as **Exhibit "H"**. Moreover, there are additional records

which point to the severity of her prior auto accidents and the severity of her prior neck and back injuries.

While Plaintiff would undoubtedly love to sweep away all evidence of her prior neck and back injuries and complaints, the simple fact of the matter is that Plaintiff is alleging injuries to her neck and low back as a direct result of the subject accident. Moreover, she has undergone surgery on both her neck and her low back since the subject accident, and is alleging that the need for those surgeries is directly related to the subject accident. Accordingly, the evidence of her prior automobile accidents and injuries to her neck and low back is not only relevant, but it has great probative value, as it provides the fact finder some insight into Ms. Seastrand's physical condition prior to the subject accident. Any prejudice resulting from the presentation of this evidence is greatly outweighed by the probative value. For these reasons, Plaintiff's motion must be denied.

15. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Reference to Prior Incidents.

As set forth above in section 14 above, Plaintiff's prior accidents are relevant and should be admissible at trial. As discussed immediately above, the medical records indicate that Plaintiff was complaining of neck and low back pain in the months and years leading up to the subject accident. Moreover, the medical records contain information discussing the severity of Plaintiff's neck and back injuries sustained in her prior accident. *See* **Exhibit "E"**,"[Ms. Seastrand] has had two episodes of **significant cervical injury** in the past." *See* **Exhibit "I"** at MVHM 35-37. (Emphasis added)). Moreover, Ms. Seastrand sustained injuries directly to her neck, resulting in neck pain and numbness and tingling in both arms as a result of hitting her head on a hatchback in 2004. *See* **Exhibit "E"**. These cannot simply be excluded because Plaintiff does not like their contents.

As set forth above, the injuries sustained in these prior accidents are relevant, as Plaintiff is claiming injury to the same body parts as a result of the subject accident. Any prejudice to Plaintiff is greatly outweighed by the probative value provided by the evidence of these prior accidents.

16. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude the Responding Police Officer from Providing Biomechanical Opinions.

With this motion, Plaintiff seeks to preclude the testimony of Officer Todd Conn, who responded to the accident scene. However, while Plaintiff has attempted to classify Officer Conn's opinions as

"biomechanical" in nature, in actuality, his opinions are merely his observations as to what he saw and heard at the scene of the accident. These observations are admissible under any circumstances based on this officer being a lay witness as provided under NRS 50.265. As explained by Officer Conn, the notes he makes in the report are the information which he considered important and his "perception of the events that took place." *See* Deposition of Officer Conn at 49:16-50:3, attached as **Exhibit "J"** . He also stated that these perceptions which he includes in the report are important and that he notes them so he can recall them at a later date.

Moreover, Officer Conn had received specialized training in accident inspection and roadway training. Relying on this training, he noted the absence of any roadway marks or bits of vehicle evidencing a high rate of speed or any significant braking prior to impact and concluded that there was only evidence of a "low-speed-impact" collision. *See* **Exhibit "J"** at 41:11-23.

The Nevada Rules of Evidence also provide for the admissibility of present sense impressions. NRS 51.085 provides as follows:

> A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule.

Here, the declarant, Officer Conn, made a statement describing Ms. Seastrand's physical condition in relation to the minimal vehicle damage and the absence of all evidence of any significant impact. He made this statement while observing her condition as she was being loaded into the ambulance. Accordingly, the evidence of Officer Conn's impressions should not now be excluded merely because it is damaging to Plaintiff.

At the very least, assuming the police officer properly lays foundation and authenticates his report at trial, he should be permitted to testify regarding the statement from the parties as these are party admissions pursuant to NRS 51.035.(3)(a). While Officer Conn cannot testify as to his determination of "fault" or whether he issued a citation to Defendant, he should be able to testify about the parties' description of how the collision occurred and any other conversations he may have had with any of the parties or witnesses and any impressions he may have had at the time the report was completed. The mere fact that he is not a doctor or a biomechanical expert should not preclude Officer Conn from expressing his impressions at the time of the accident.

For the foregoing reasons, Plaintiff's motion to exclude the opinions of the responding police officer should be denied.

17. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Reference to Plaintiff's Prior Civil Lawsuit.

With this Motion, Plaintiff seeks to preclude reference to prior civil litigation which is unrelated to the matter at hand. (*See* OMIL at p. 29). Specifically, this case was related to an insurance claim for a property loss at her business. As set forth in Plaintiff's Motion, Defendant has agreed to stipulate to preclude reference to the unrelated litigation, but reserved the right to introduce evidence of Mr. Jerry Busby's prior representation of Ms. Seastrand and her business. Mr. Busby has been listed by Plaintiff as a witness who will allegedly testify as to his knowledge of Plaintiff's physical conditions and limitations.

Nevertheless, as this court is well aware, "a witness may always be asked by the cross-examiner as to his state of mind for or against any of the parties, and he may be examined concerning matters which may evidence his bias or prejudice." ***Van Fleet v. O'Neil*** 192 P. 384, 387 (Nev. 1920). The fact that Mr. Busby and Ms. Seastrand have a prior attorney-client relationship exposes a bias on Mr. Busby's behalf. Plaintiff's worry about a jury's speculation that the prior litigation is or was somehow related to this litigation is easily quelled by a direct question to Mr. Busby on that issue. Nevertheless, the fact that Mr. Busby has previously represented Plaintiff and is now being asked to testify on her behalf is a bias which Defendant has the right to expose to a jury. The probative value of showing the relationship of Mr. Busby and Ms. Seastrand far outweighs any prejudice, especially where Plaintiff can clarify that the prior litigation was not related to the instant matter. For these reasons, Plaintiff's Motion should be denied.

18. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Defendant's Medical Experts from Referring to the Crash as "Minor" or Making Reference to the Property Damage Sustained by the Vehicles.

With this motion, Plaintiff seeks to preclude Defendant's medical experts from referencing the subject accident as "minor" or referencing the property damage of the vehicles. This is simply nonsensical. Reference to the damage sustained by the vehicles is not an opinion, let alone a biomechanical opinion. Moreover, in seeking to preclude any discussion of the vehicle damage, Plaintiff is essentially attempting to undermine Defendant's medical experts ability to discuss medical causation.

Neither Plaintiff's nor Defendant's medical experts will offer biomechanical testimony. That has

been stipulated by the parties. In other words, none of these medical experts will be discussing the forces associated with or generated in the collision, or similar biomechanical factors and opinions. Nevertheless, from a medical standpoint, the medical experts must be able to discuss their opinions as to causation and the mechanism of injury. That can only be done by discussing the nature of the accident.

Plaintiff's treating physicians, for example, have discussed the nature of the accident and the causal relation to Plaintiff's injuries. Certainly Plaintiff doesn't consider this to be a "back-door method [of] implying biomecahnical opinions." *(See* Plaintiff's OMIL at 31:9-10).

Much like Plaintiff's treating doctors are able to discuss the nature of the accident, Defendant's experts must similarly be able to discuss the nature of the accident, causation, and the mechanism of injury. In forming their opinions, these experts have relied on medical records referencing the nature of the accident, photographs of the vehicles involved in the accident, the Plaintiff's and Defendant's descriptions of the accident, the impact, and the resulting damage, and the police report describing the damages to the vehicles as "minor". *See* Exhibit 10 to Plaintiff's motion. Plaintiff cannot now seek to strip these experts of the very information which helped them reach their conclusions.

Plaintiff is free to cross-examine Defendant's experts with respect to their causation opinions and the information used to reach these conclusions. However if Defendant's experts are precluded from discussing the nature of the accident, they are essentially precluded from discussing medical causation. This is extremely prejudicial, and would place them on unequal footing with Plaintiff's treating physicians. The resulting prejudice would be completely unfair to Defendant. For these reasons, Plaintiff's motion should be denied.

19. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Dr. Schifini from Offering Testimony Regarding Alleged Secondary Gain by Plaintiff.

In this motion in *limine*, Plaintiff seeks to preclude any evidence that they may be malingering or engaged in activities motivated by secondary gain at trial. (*See* Plaintiffs' OMIL, p. 31.)

Defendant is entitled to present argument at trial based on reasonable inferences drawn from the facts and evidence presented at trial. It would be wholly inappropriate to limit Defendant's ability to present certain arguments in *limine*, and before he has even had an opportunity to present his case to the jury. Any issues regarding Plaintiff having secondary gain motives, magnifying symptoms, or malingering goes to her

credibility and those topics are ***always*** relevant and at issue, in this and every other case. While Plaintiff is entitled to present evidence and argument at trial that Plaintiff was not a malingerer, symptom magnifier, or manifesting secondary gain motives, she is not entitled, at the same time, to prevent Defendant from drawing reasonable inferences to the contrary if there exists factual support for the inferences.

Here, there exists good cause to permit inquiry about Plaintiff manifesting secondary gain motives. Indeed, Defendant's expert, Joseph Schifini, M.D. testfied that, while Ms. Seastrand was not necessarily malingering, she was, by definition, motivated by secondary gain and that she appeared to have minimized her prior injuries in reporting to her doctors following the subject accident. Consider Dr. Schifini's testimony:

> Q. Okay. If she was still experiencing symptoms after eight weeks, what -- what's your explanation for those ongoing symptoms?
>
> A. I'll replace your word "symptoms" with subjective complaints, and I will indicate to you that Miss Seastrand is a litigant and she has secondary gain issues and reasons to have persistent symptoms that are unrelated to any medical conditions.
>
> [. . .]
>
> Q. Will you be offering any opinions that Mrs. Seastrand is exhibiting secondary gain behaviors?
>
> A. Yes.
>
> Q. And what's that based on?
>
> A. Based on the -- my review of the records. I listed out the subjective complaints far outweigh the objective findings. There appeared to be omissions in her records or minimization of her prior conditions, and then she is a litigant in this particular issue.
>
> The omissions specifically have to do with her longstanding history of low back pain which she did report to the radiology department but failed to report to any other treating physician that I have had the opportunity to review the records.
>
> Q . You -- one of the factors you just listed is that "Mrs. Seastrand is a litigant in this case" --
>
> A. That could be said of anyone involved in cases. It's not specific to her, you know, but it's one of the – the medical legal context definitions of secondary gain is that there's some sort of pending lawsuit or that she's involved in a lawsuit, but again, I don't hold that against her. It's just a fact.

See **Exhibit "A"** at 28:22-29:5 and 34:4-35:25.

Although Plaintiffs' motion goes to great lengths to try to convince the Court that there is no

competent and/or properly qualified expert who can testify to these issues, nothing could be further from the truth. Dr. Schifini, is a board certified anasthesiologist and pain management specialist and is amply qualified to comment upon Plaintiff's behavior. The probative value of such testimony clearly outweighs any prejudicial impact and it should be permitted. Plaintiffs are free to question Dr. Schifini about the testing, either in deposition, or during cross examination at trial, if they have questions about the same.

It is well settled that arguments of counsel are not evidence and do not establish the facts of the case. ***Jain v. McFarland***, 109 Nev. 465, 475-476, 851 P.2d 450, 457 (1993), receded from on other grounds by ***Byford v. State***, 116 Nev. 215, 235, 994 P.2d 700 (2000)).; see ***Lord v. State,*** 107 Nev. 28, 33, 806 P.2d 548, 551 (1991); ***Klein v. State***, 105 Nev. 880, 884, 784 P.2d 970, 972-73 (1989). However, Defendant's counsel is allowed to argue any reasonable inferences from the evidence presented at trial. Id.; ***Klein***, 105 Nev. at 884, 784 P.2d at 973; ***State v. Teeter***, 65 Nev. 584, 642, 200 P.2d 657, 685 (1948). In fact, during closing argument, Defendants' counsel should "enjoy wide latitude in arguing facts and drawing inferences from the evidence." Id.; ***Teeter***, 65 Nev. at 642, 200 P.2d at 685.

Here, Defendant is well aware of Nevada's Rules of Evidence, and Defendants intend to abide by them. Plaintiff's counsel, on the other hand, may assert objections and/or counter-arguments to Defendant's position during the trial. Plaintiff cannot, however, be allowed to prevent Defendant from presenting relevant facts and evidence at trial and from drawing reasonable inferences based upon those facts and evidence. Given the facts and evidence discussed herein, there are ample facts to support reasonable inferences regarding Plaintiff's motives in this case. For these reasons, Plaintiff's motion in *limine* to preclude such arguments must be denied.

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20. Defendant Raymond Khoury's Opposition to Plaintiff's Motion to Preclude Dr. Schifini and Dr. Seigler from Offering Testimony Regarding Plaintiff's Spine Surgeries.

With this motion, Plaintiff seeks to preclude Defendant's medical experts, Dr. Schifini and Dr. Seigler, from offering opinions which are perfectly within the scope of their medical expertise. Plaintiff's basis for this motion–that Dr. Schifini and Dr. Seigler are not spine surgeons–is severely misplaced; neither Dr. Schifini nor Dr. Seigler has criticized the actual fusion surgeries[3]. Rather, Dr. Schifini and Dr. Seigler criticize the **work up** leading to the lumbar surgery, ultimately concluding that the surgery was not medically indicated by the work up. *See* **Exhibit "A"** at 11:20-12:16,; also **Exhibit "B"** at 35:4-36:6. This distinction is critical.

Plaintiff is correct that neither Dr. Schifini nor Dr. Seigler is qualified to perform spine surgery. However, what Dr. Schifini and Dr. Seigler **are** qualified to do–and what they do every day in their medical profession–is work with patients who are complaining of spinal-related pain, including patients who require diagnostic and palliative work up prior to spine surgery. Accordingly, both Dr. Seigler and Dr. Schifini possess the knowledge, experience, education, training, and skill to offer their opinions as to Plaintiff's medical work up and whether that work up indicated a need for a fusion surgery. As board-certified pain-management specialists and anaesthesiologists, Dr. Schifini and Dr. Seigler are both qualified to provide this testimony.

Moreover, while inconvenient to Plaintiff, the testimony of Dr. Schifini and Dr. Seigler is relevant, as it will help assist the trier of fact in determining whether the fusion surgeries performed were medically necessary. Dr. Seigler and Dr. Schifini deal with epidural injections, facet injections, and the other types of palliative and diagnostic treatment received by Plaintiff prior to her fusion surgeries. Accordingly, they possess the specific practice and knowledge which allows them to opine as to those areas.

In sum, Plaintiff's vague and sweeping motion fails to establish any specifics as to why Dr. Schifini and Dr. Seigler should not be able to testify as to the exact same type of medical work up which they perform on a daily basis. Instead, Plaintiff attempts to couch these experts' opinoins as "surgical" critiques,

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[3] It must be noted that Plaintiff's motion is completely devoid of any specific critiques offered by Dr. Schifini or Dr. Siegler with respect to the fusion surgeries. Accordingly, Defendant can only guess as to what critiques Plaintiff is referring in her motion.

when in actuality, they are a critique of the workup and the absence of a medical indication for fusion surgery. For these reasons, Plaintiff's motion must be denied, and Dr. Schifini and Dr. Siegler must be permitted to offer their complete opinions.

IV. CONCLUSION

As set forth above, Defendants respectfully request that this Court issue an Order denying Plaintiffs' Omnibus Motions in *Limine*.

DATED this 23rd day of May, 2013.

HALL JAFFE & CLAYTON, LLP

By _____

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that service of the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFF'S OMNIBUS MOTION IN LIMINE** was made on the 23rd day of May, 2013, by depositing a true and correct copy of the same by U.S. Mail in Las Vegas, Nevada, addressed, stamped, and mailed to the following:

Richard A. Harris, Esq.
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EXHIBIT "A"

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND, Plaintiff, vs. RAYMOND RIAD KHOURY; DOES 1 through 10; and ROE ENTITIES 11 through 20, inclusive, Defendants.	)	CASE NO.: A-10-632218-C DEPT NO.: VIII

DEPOSITION OF JOSEPH J. SCHIFINI, M.D.

Taken on Wednesday, January 16, 2013

At 10:01 A.M.

At 600 South Tonopah Drive, Suite 240

Las Vegas, Nevada

Reported by: DONNA J. ABRAHAMSEN, RPR, NV. CCR NO. 420
CA. CSR NO. 9652, WA. CCR NO. 3262

point don't have any opinions regarding the treatment rendered by those doctors?

A I do not.

Q And, again, in your report, you indicate that you're missing records from March 5 to March 23rd, 2010, and that you haven't received any records since September 2010, which would be -- again be fair to say that you don't have any opinions regarding the treatment rendered during those time periods?

A That's correct.

Q And have you seen any of the records related to her lumbar fusion surgery?

A Other than the postoperative imaging study that was performed, no.

Q So at this point, do you have any opinions regarding the lumbar fusion surgery?

A Yes.

Q I guess, generally what are those? We'll probably get into them in more detail.

A Well, the -- the workup for the lumbar fusion surgery was performed in a way that didn't necessarily lead to the conclusion that a lumbar fusion surgery would have been medically indicated.

And specifically, the injections performed by Dr. Belsky in the form of bilateral L4-5 and L5-S1

transforaminal epidural injections, along with bilateral L4-5 facet injections, produced a decreased pain according to the nursing notes -- not Dr. Belsky's notes -- of an eight out of ten to a seven out of ten as reported by Dr. -- Miss Seastrand. The motion segments and most everything that moves in the lumbar spine would have been anesthetized with those injections, assuming Dr. Belsky performed them correctly, and therefore, discogenic pain became a possibility rather than a probability.

The indication, then, for the lumbar discography was not present. The indication for plasma disk depression which ultimately failed was not present. And the indication for the ultimate spine surgery seemed to be based on the failure of the previous treatment provided to Miss Seastrand, which was used as the excuse for the fusion so therefore, the fusion was not necessary either.

Q Do you have any opinions regarding the success of the lumbar fusion surgery?

A Not necessarily. I mean, it's just Miss Seastrand, I believe, reported some improvement with the -- with the surgery so that's the only record I have reflecting any information regarding the success or lack of success of the surgery.

Q Have you seen any records related to the cervical fusion surgery?

notes that I do not have access to.

Q And that was going to be my follow-up question: You don't know what type of symptoms she was reporting or what the findings were prior to the MRI, is that correct?

A No, I do not.

Q Are you aware of any records or information indicating Mrs. Seastrand had radicular pain to her lower extremities prior to this?

A I am not.

Q Would you agree with me that patients with soft tissue injuries usually do not have persistent radicular symptoms?

A Radicular symptoms are usually not thought to be related to soft tissue injuries, although they can be. Especially if you talk to chiropractors, they feel that soft tissue injuries can cause radicular symptoms, and I assume that's possible, it's not -- not likely.

Q You've indicated that Mrs. Seastrand's injury should have resolved within four to eight weeks, is that correct?

A Yes.

Q Okay. If she was still experiencing symptoms after eight weeks, what -- what's your explanation for those ongoing symptoms?

A I'll replace your word "symptoms" with subjective

complaints, and I will indicate to you that Miss Seastrand is a litigant and she has secondary gain issues and reasons to have persistent symptoms that are unrelated to any medical conditions.

Q All right. If we take it out of the litigation context, if Mrs. Seastrand was patient coming to see you in your clinical practice and after eight weeks she still had subjective complaints, what would you recommend for her? What would you do for her?

A If she came to me after eight weeks, she still had subjective complaints of, what?

Q Well, the same subjective complaints that she has in this case, eight out of ten low back pain.

A I would ask her about her previous history of 26 years of low back pain and find out how that was different than the 26 previous years had been for her.

Q Just so I'm clear. When you say "four to eight weeks," is that four to eight weeks that her symptoms related to the accident should have resolved in four to eight weeks or her symptoms regardless of whether or not they're related to the accident should have resolved in four to eight weeks? If that makes sense.

A I think it probably does. I have to think about it for a minute. I -- I was specifically referring to the soft tissue injuries or musculoligamentous injuries which

Q Will you be offering any opinions that Mrs. Seastrand is malingering?

A No.

Q Will you be offering any opinions that Mrs. Seastrand is exhibiting secondary gain behaviors?

A Yes.

Q And what's that based on?

A Based on the -- my review of the records. I listed out the subjective complaints far outweigh the objective findings. There appeared to be omissions in her records or minimization of her prior conditions, and then she is a litigant in this particular issue.

The omissions specifically have to do with her longstanding history of low back pain which she did report to the radiology department but failed to report to any other treating physician that I have had the opportunity to review the records.

Q You -- one of the factors you just listed is that "Mrs. Seastrand is a litigant in this case" --

A That could be said of anyone involved in cases. It's not specific to her, you know, but it's one of the -- the medical legal context definitions of secondary gain is that there's some sort of pending lawsuit or that she's involved in a lawsuit, but again, I don't hold that against her. It's just a fact.

Q Going along with the secondary gain behavior, is it your opinion that Mrs. Seastrand is intentionally exaggerating her symptoms?

A That wouldn't be the definition of malingering. And I wasn't going to label her as a malingerer because she -- you know, whether it's intentional or unintentional, I don't know but she just appears to be minimizing and/or omitting specific information, but I have no reason to believe that she's doing it intentionally.

Q Do you have any training or experience as a psychologist or psychiatrist?

A Other than the psychiatry rotations that I've done in medical school for 8 or 12 weeks, no.

Q Have you performed any testing on Mrs. Seastrand to determine if she's exhibiting secondary gain behavior?

A Other than reviewing her records, which is not necessarily a form of testing, no.

Q You reviewed the records.

Have any of the other treating physicians or designated experts in this case indicated that Mrs. Seastrand is exhibiting secondary gain behavior?

A Not in the records I've reviewed, no.

Q Okay. You said that she's minimized her prior -- her prior conditions.

What prior medical conditions are you referring

EXHIBIT "B"

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND, Plaintiff, vs. RAYMOND RIAD KHOURY; DOES 1 through 10; and ROE ENTITIES 11 through 20, inclusive, Defendants.	)	CASE NO.: A-10-632218-C DEPT NO.: VIII

DEPOSITION OF JOHN BLACKBURN SIEGLER, M.D.

VOLUME II, PAGES 17 through 46

Taken on Thursday, March 7, 2013

At 2:07 P.M.

At 3195 Saint Rose Parkway, Suite 131

Henderson, Nevada

Reported by: DONNA J. ABRAHAMSEN, RPR, NV. CCR NO. 420
CA. CSR NO. 9652, WA. CCR NO. 3262

the purpose of using it?

A To relax some -- the patient. A lot of times, it can be an anxiety-provoking experience.

Q Was a lumbar discogram reasonable and appropriate for Mrs. Seastrand based on her pain complaints and the prior workup?

A I don't believe at that point it was reasonable to perform, no.

Q What should have -- what additional workup do you believe should have taken place before a discogram should have been ordered?

A A systematic approach to diagnosis -- diagnosing pain generators through interventional procedures would have been the most obvious, I would think, if, indeed, it turns out she had facet mediated pain, then discography would have not been indicated.

Q In your July report, you indicate that the discography, the plasma disc decompression, and the subsequent lumbar fusion were not medically necessary.

Is it your opinion that Dr. Belsky, Dr. Muir, and Dr. Capkin who performed those procedures performed unnecessary procedures on Mrs. Seastrand?

A I'm saying the medical record did not -- did not appear to justify the -- why a plasma disc decompression was utilized. And -- and also the -- and then the subsequent

fusion appeared to also be based on problematic data. So, yeah, based upon the fact that those appear to be problem -- the discography and the -- well, actually, the injections and then the -- subsequently the discography and the -- and the treatment, based upon that, was essentially domino effect, yes.

Q Okay. So it's your opinion that Dr. Belsky, Dr. Muir, and Dr. Capkin all performed unnecessary procedures on Mrs. Seastrand?

A It's my opinion that the medical records I reviewed did not justify the procedures.

Q So in performing those procedures, did Dr. Belsky Dr. Muir, and Dr. Capkin fall below the standard of care?

A I believe it's a deviation from the standard of care to do an epidural and a facet injection at the same time. The provocative discography, I don't believe was -- was justified, but pursuing it constitute a deviation from the standard of care? Yeah. Yeah, I would -- I don't think discography is a presurgical test, and at that point, I -- yeah, I don't think it was reasonable to consider surgery at that point. So, yes.

And the subsequent surgery, I think -- I think if you look at the discogram data in and of itself, surgery wasn't unreasonable, but -- but then when you look at the additional information such as the -- the lack of diagnostic

EXHIBIT "C"

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Clark County Bar Association
Las Vegas, Nevada

Communique - May 2013

COMMUNIQUÉ - MAY 2013 - MAIN ARTICLES

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COVER IMAGE: Graphic design and layout by Steph Abbott.

Required Expert Disclosures under Recent Amendments to NRCP 16.1 (a)(2)(B) and(C)

By Commissioners Bonnie A. Bulla and Chris A. Beecroft, Jr.

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The Nevada Supreme Court recently approved amendments, effective September 30, 2012, to the provisions of NRCP 16.1(a)(2) ("Disclosure of Expert Testimony") concerning what a party to litigation must disclose about their expert witnesses. One principal purpose advanced by these amendments is to improve the timely disclosure of "non-retained" expert opinions in advance of trial. Another purpose was to define the scope of rebuttal evidence.

Retained vs. non-retained experts
As a preliminary matter, disclosure requirements for "retained" or specially hired or employed experts have not changed. See NRCP 16.1(a)(2)(B). Retained experts must still prepare written reports and disclose other information as previously required.

istorically, however, the same disclosure requirements for retained expert witnesses did not apply to other types of experts with specialized knowledge. As a result, non-retained experts, such as treating physicians, for example, would often render opinions at trial that had not been timely or fully disclosed. Where the economics of the case permitted, deposing the treating physician usually alleviated this problem. However, in cases of limited economic value, it was often not practical or reasonable to take every treating physician's deposition. With no disclosure requirements for non-retained experts under the old Rule 16.1(a)(2), surprise at trial became unavoidable, often creating unfair advantage for one side or the other.

To address this increasingly prevalent problem and to foster the public policy that trials be conducted on the merits of the case, on October 26, 2011, ADKT 472 was proposed by Justice Mark Gibbons. Federal courts had previously recognized the lack of fairness presented by the absence of full disclosure requirements for the "non-retained" expert and adopted amendments to their rules to address the problem. FRCP 26 requires that the subject matter and a summary of the facts and opinions which the non-retained expert witness is expected to testify about be disclosed, even in the absence of a written report. The recent amendments to NRCP 16.1(a)(2)(B), adopted as an outgrowth of ADKT 472, now mirror these federal requirements. The Nevada rule additionally requires disclosure of the non-retained expert's qualifications, and his or her fees for providing testimony at deposition and trial.

While there is no specified format for the manner in which this information should be produced, from a practice standpoint, these additional requirements may be satisfied by producing the non-retained expert's curriculum vitae and fee schedule. The non-retained expert does not have to prepare the actual disclosure, nor is he or she required to produce documentation. What is critical is that the non-retained expert's opinions are fully disclosed, at the same point in time that expert disclosures are due.

Failure to disclose an expert's opinion may result in its exclusion at trial. If, for example, the disclosure is that a physician will testify in accordance with his or her office chart, the chart should encompass all opinions to be given at trial. Since this is often

not the case, to avoid exclusion at trial, the attorney should list as part of his or her client's disclosures any additional opinions not specifically identified in the treating physician's medical records.

Although there are also no minimum requirements for what constitutes a non-retained expert's qualifications, such information as confirmation of the non-retained expert's license and date of licensure, area of practice, address, and telephone number should be included in the NRCP 16.1(a)(2) disclosures. Other information, such as the non-retained expert's education, can be accessed on websites of professional organizations and be included in the disclosure.

Finally, there may be certain types of experts whose testimony exceeds the scope of what would be reasonably expected for their areas of expertise. Examples would include a physician who is asked to address multiple physicians' treatments of a plaintiff or who opines about the standard of care in a medical malpractice case. These "hybrid" expert's opinions may effectively turn the non-retained expert into a retained expert, necessitating preparation of a written report to avoid exclusion of certain or all of his or her testimony at trial. If preparation of a report is not practical in a given case, a party may petition the court or discovery commissioner to relieve the expert from having to do so.

Rebuttal evidence and experts
ADKT 472 also amended NRCP 16.1(a)(2)(C) to codify the scope of rebuttal evidence as embodied in the pertinent federal cases. Although the federal rules do not specifically set forth the parameters of rebuttal expert testimony, federal case law provides guidance. Rebuttal evidence is "that which explains, repels, contradicts, or disproves evidence introduced by [an adverse party] during his case in chief." Levenson v. Lake-To Lake Dairy Co-op, 76 Ill. App. 3rd 526, 394 N.E. 2d 1359 (1979). Section (C)(ii) now requires that evidence intended solely to contradict or rebut evidence on the same subject matter identified by another party in its initial disclosure be made within thirty days after the other party's initial disclosures.

An expert is not a "rebuttal" expert if his or her testimony is required or anticipated in connection with a party's case-in-chief. Nor is an expert's testimony considered to be rebuttal if it introduces "new" or "novel" opinions outside the scope of the other party's initial disclosure. See, e.g., Morgan v. Commercial Union Assur. Companies, 606 F.2d 554, 556 (5th Cir. 1979); Amos v. Makita U.S.A., Inc., 2011 WL 43092 (D. Nev. Jan 6, 2011)(unpublished); LaFlamme v. Safeway, Inc., 2010 WL 3522378 (D. Nev. Sept. 2, 2010)(unpublished).

These rationales are also codified in NRCP 16.1(a)(2)(C)(ii): the rebuttal expert disclosure deadline ". . . does not apply to any party's witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party or to present any opinions outside of the scope of another party's disclosure."

As an illustration of the foregoing, liability, causation, and damages are commonly parts of a plaintiff's case in chief that a defendant should expect to defend against in its case in chief. As a general rule, if a party cannot prove or defend its case without an expert, then the expert should be designated as an initial expert, rather than as a rebuttal expert. See In Re Apex Oil Co., 958 F. 2d 243, 245 (8th Cir. 1992).

Rebuttal disclosure is also not to be used by a party to identify the "lion's share" of its expert information. See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc., 73. F. 3d 546, 571 (5th Cir. 1996). Before the current amendments to NRCP 16.1(a)(2)(C), defendants commonly only disclosed their rebuttal experts under the guise of disproving the plaintiff's initial expert's testimony. However, these rebuttal experts were often the only experts the defendants offered. In many cases, their testimony exceeded the scope of what the plaintiff's experts' had testified to previously.

The amendments to the rebuttal disclosure requirements have hopefully ended this practice. Now, the rules mandate simultaneous disclosure of the bulk of expert testimony by both sides. This is particularly applicable where the testimony encompasses evidence relevant to the elements of a plaintiff's case in chief. When in doubt, parties should disclose their experts as initial experts. This way all parties are assured of being able to call their experts in their case in chief, and not risk exclusion of any part of their experts' opinions as improper rebuttal evidence.

Bonnie Bulla is the Discovery Commissioner for the Eighth Judicial District Court. She received her law degree from Arizona State University and has been a licensed Nevada lawyer since 1987. Before being selected as Discovery Commissioner in 2007, she primarily defended healthcare professionals.

Chris Beecroft received his undergraduate degree from UNLV and his JD from McGeorge School of Law. Chris was in private practice for 26 years, specializing in personal injury (plaintiff and defense), civil and business litigation, bankruptcy and real estate, and all forms of ADR (arbitration, mediation, early and late neutral evaluations). In 2007, Chris was appointed Family Court Discovery Commissioner and in August 2012 was appointed Civil Discovery Commissioner for certain departments within the Eighth Judicial District Court.

The Unanswered Question: What is the Standard of Review When Objecting to a Discovery Commissioner's Report and Recommendations?

By Michael P. Lowry

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Discovery disputes are a fact of modern practice. After a discovery commissioner rules upon a dispute, one or more of the litigants might be dissatisfied with the ruling and could elect to object to it. As attorneys, we must evaluate the probability of a successful objection, which requires knowing the standard against which the objection will be evaluated. This leads to an unanswered question in state court: what is the standard of review a district court will apply to an objection to a discovery commissioner's report and recommendations? This article explores potential answers.

Walk before you run: Will the court even need to consider the standard of review?
A variety of procedural problems often seem to determine the fate of the objection before the standard of review question is even addressed. First, was the order compelling the objectionable discovery stayed pursuant to EDCR 2.34(e)? "The commissioner may stay any disputed discovery proceeding pending resolution by the judge."

> A ruling by the discovery commissioner is effective and must be complied with for discovery purposes once it is made, orally or written, unless the party seeks a stay of the ruling pending review by the district court. Goodyear failed to seek a stay of the ruling or an expedited review by the district court prior to the time to comply with the ruling, and was therefore required to comply with the discovery commissioner's directive. The failure to do so was tantamount to a violation of a discovery order as it relates to NRCP 37(b)(2).

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. Adv. Op. 26, 235 P.3d 592, 597 (2010).

JA0815

EXHIBIT "D"

DOEW
RICHARD A. HARRIS, ESQ.
Nevada Bar No. 505
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND, Plaintiff, vs. RAYMOND RIAD KHOURY; DOES I-X, and ROE CORPORATIONS I-X, inclusive, Defendants.	CASE NO.: A-11-636515-C DEPT. NO.: XXX

PLAINTIFF'S DESIGNATION OF EXPERT WITNESSES

COMES NOW, Plaintiff MARGARET G. SEASTRAND, by and through her counsel of record, Joshua R. Harris and Alison M. Brasier, of the RICHARD HARRIS LAW FIRM, and hereby submits the following Designation of Expert Witnesses:

///

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RICHARD HARRIS LAW FIRM

EXPERT WITNESSES

1. **JEFFREY GROSS, M.D.**
27882 Forbes Road, Suite 100
Laguna Niguel, California 92677
Tel: 949-364-6888

Dr. Gross is a board certified neurosurgeon and is expected to provide expert testimony relating to his review of Plaintiff's medical records, opinions regarding his past medical care and/or treatment, and his opinions regarding her potential need for future care and/or treatment, including the treatment and medical reasonableness of other medical providers. He will also provide opinions regarding the causation of Plaintiff's injuries and the necessity and reasonableness of Plaintiff's past and future medical expenses.

2. **TERRENCE B. DINNEEN, M.S., C.R.C., C.R.E.**
DeVINNEY & DINNEEN CAREER and VOCATIONAL ECONOMICS SERVICES, LTD.
445 Apple Street, Suite 205
Reno, Nevada 89502
Tel: 775-825-5558

Mr. Dinneen is a qualified economist and is expected to provide expert testimony relating to Plaintiff's present day value of Dr. Gross' life care plan and vocational loss report. Mr. Dinneen will also provide testimony as to any other economic issues raised by Defendant's or other experts in this action and will opine regarding the present value of Plaintiff's future medical expenses and vocational loss.

3. Arthur C. Croft, Ph.D.(c), D.C., M.Sc., M.P.H., F.A.C.O.
826 Orange Avenue, #633
Coronado, California 92118
Tel: (619) 423-9867

Dr. Croft is expect to testify with respect to accident reconstruction and injury biomechanics, including but not limited to, testimony with respect to vehicle components,

RICHARD HARRIS LAW FIRM

vehicle handling characteristics, the performance of the subject vehicle and its components at the time of the accident, vehicles speeds, impacts, motion, orientation, kinematics, and the reconstruction of the subject accident. Dr. Croft will testify in the areas of mechanical engineering, vehicle dynamics, and vehicle design in relation to accident reconstruction. Dr. Croft will also testify as to the injuries allegedly sustained by plaintiff, including an analysis of the mechanism of injury and injury causation, seating position of the plaintiff, and related issues.

EXHIBITS

1. Expert Neurosurgical Case Review and Medical Life Care Plan of Jeffrey D. Gross, M.D. dated June 4, 2012 (39 pages);

2. Curriculum Vitae, Fee Schedule, and Testimony and Depositions of Jeffrey D. Gross, M.D. (22 pages);

3. Present Value of Life Care Plan of Terrence B. Dinneen, M.S., C.R.C., C.R.E. dated August 24, 2011 (10 pages);

4. Vocational Loss Report by Terrence B. Dinneen, M.S., C.R.C., C.R.E. dated August 27, 2011 (13 pages);

5. Curriculum Vitae, Fee Schedule, Testimony and Depositions of Terrence B. Dinneen, M.S., C.R.C., C.R.E. (27 pages);

3. Expert Report of Arthur C. Croft, Ph.D.(c), D.C., M.Sc., M.P.H., F.A.C.O. dated August 28, 2012 (28 pages);

4. Curriculum Vitae, Fee Schedule, and Testimony Report of Arthur C. Croft, Ph.D.(c), D.C., M.Sc., M.P.H., F.A.C.O. (25 pages);

///

///

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RICHARD HARRIS LAW FIRM

Plaintiff reserves the right to supplement and/or amend any and all Expert Witness Disclosures and supplements thereto, as discovery is continuing.

DATED this 29th day of August, 2012.

RICHARD HARRIS LAW FIRM

By: _____
RICHARD A. HARRIS, ESQ.
Nevada Bar No. 505
JOSHUA R. HARRIS, ESQ.
Nevada Bar No. 9580
ALISON M. BRASIER, ESQ.
Nevada Bar No. 10522
801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

RICHARD HARRIS LAW FIRM

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of RICHARD HARRIS LAW FIRM and that on the 29 day of August, 2012, I caused the foregoing **PLAINTIFF'S DESIGNATION OF EXPERT WITNESSES** to be served as follows:

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

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

[ ] by hand delivery

to the attorneys listed below:

Steven T. Jaffe, Esq.
Jacob S. Smith, Esq.
HALL JAFFE & CLAYTON, LLP.
7455 West Washington Avenue, Suite 460
Las Vegas, Nevada 89128
Attorneys for Defendants

An employee of the RICHARD HARRIS LAW FIRM

RICHARD HARRIS LAW FIRM

EXHIBIT "E"

☐ Nursing Assessment Reviewed ☐ BP, HR, RR, Temp reviewed

PHYSICAL EXAM

GENERAL APPEARANCE
_ alert — _ anxious / lethargic
_ no acute distress — _ mild / moderate / severe

EENT
_ nml ENT inspection — _ purulent nasal discharge
_ pharynx nml — _ tender temporal artery
_ PERRL — _ pharyngeal erythema
_ tonsillar exudate
_ pain on percussion over sinuses
_ abnormal TM
_ pale conjunctivae
_ narrow angle (ant. chambers)

NECK
_ nml inspection — _ thyromegaly
_ supple — _ lymphadenopathy (R / L)*
_ stiff neck / meningismus

RESPIRATORY
_ no resp. distress — _ wheezing
_ breath sounds nml — _ rales

CVS
_ reg rate & rhythm — _ heart murmur
_ heart sounds nml — _ tachycardia / bradycardia
_ decreased pulse(s)

GI (ABDOMEN)
_ non-tender — _ tenderness
_ no organomegaly — _ hepatomegaly / splenomegaly / mass
_ nml bowel sounds*

SKIN
_ color nml, no rash — _ cyanosis / diaphoresis / pallor
_ warm, dry, nml palp. — _ skin rash

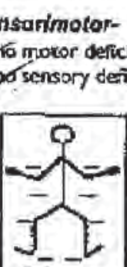
EXTREMITIES
_ non-tender — _ pedal edema
_ normal ROM * — _ calf tenderness
_ no pedal edema

NEURO / PSYCH
higher functions
_ alert — _ slow / confused / no response to commands
_ oriented x3 — _ disoriented
_ mood / affect nml — to: time / place / person

cranial nerves-
_ normal as tested — _ EOM palsy
_ pupils equal, round, and reactive — _ unequal pupils
R pupil ___ mm L pupil ___ mm
_ facial palsy
_ tongue deviation (to R / L)
_ facial numbness
_ abnormal fundi / papilledema / wide cups

cerebellar-
_ normal as tested — _ abnormal Romberg test
_ abnormal finger-nose-finger
_ abnormal gait

sensorimotor-
_ no motor deficit — _ weakness
_ no sensory deficit


Reflexes

_ pronator drift (RUE / LUE)
_ sensory loss
_ abnormal reflexes

Underline indicates organ system
* equivalent or minimum required for organ system exam

LABS, XRAYS, and PROGRESS

CBC		Chemistries	UA
normal except		normal except	normal except
WBC	segs	Na	WBC
Hgb	bands	K	RBC's
Hct	lymphs	Cl	bacteria
Platelets	monos	CO2	dip
	eos	Gluc	
		BUN	
		Creat	

LP _ discussed risks, benefits, alternatives: patient consents.
_ (R / L) siting — open press.=
_ betadine prep — fluid color ___ RBC ___ WBC ___
_ sterile technique — glucose ___ polys ___ lymph ___
_ L3-4 — protein ___ monos ___ gm stn ___
_ L4-5

Head CT nml

CXR ☐ Interp. by me ☐ Reviewed by me ☐ Discsd w/radiologist
_ nml/NAD _ no infiltrates _ nml heart size _ nml mediastinum

not / changed from:

EKG MONITOR STRIP _ NSR _ Rate

EKG _ NML ☐ Interp. by me ☐ Reviewed by me Rate ___
_ NSR _ nml intervals _ nml axis _ nml QRS _ nml ST/T

not / changed from:

Time ___ _ unchanged _ improved _ re-examined
_ pain relieved _ pain almost fully relieved

C [illegible]

1130 [illegible].
[illegible]
[illegible] morphine 5mg
[illegible] 98% [illegible].

Discussed with Dr. ___ Time ___
will see patient in: office / ED / hospital

☐ Counseled patient / family regarding: _ CRIT CARE- 30-74 min
lab results diagnosis need for follow-up — 75-104 min ___ min
_ Rx given _ Admit orders written — _ Additional history from:
_ Prior records ordered / reviewed — family caretaker paramedics

CLINICAL IMPRESSION:

Headache — Intracranial Hemorrhage
acute severe hemiplegic — Subarachnoid Hemorrhage
vascular migraine cluster — Sinusitis
Vomiting / Dehydration — Viral Cephalgia
Meningitis

Post-Concussion Syndrome

DISPOSITION- ☒ home ☐ admitted ☐ transferred ☐ expired ☐ AMA
Time ___ ☐ eloped ☐ Obs ☐ LWBS ☐ Other ___
CONDITION- ☐ good ☒ fair ☐ poor ☐ critical ☐ improved
☒ stable ☐ unchanged

___ PA

RUIZ [illegible] MD / DO

☐ Template Completed ☐ Dictated Addendum ☐ See Additional Template

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15

SUMMERLIN HOSPITAL MEDICAL CENTER

EMERGENCY NURSING RECORD
Headache

TRIAGE DATE 9/12/04 TIME 0752

emergent (urgent) non-urgent

NAME: Seastrand, Margaret

D.O.B. 12/27/61 AGE 42 M (F)

HISTORIAN: ✓patient ✓paramedics _family

ARRIVAL MODE: _car _police ✓EMS

(PCP) _none Brad Walker

TREATMENT PTA _meds _BS _IV _O2

Accu ✓ = 90

VITALS time: 0759

BP 142/106 P 61 RR 22 temp 98.3 (O) R Ax

O2 Sat% 95 (RA) O2 _____ GCS _____

Height 5' 6.5" Weight 72 lb (kg)

CHIEF COMPLAINT c/o H/A x 3 days, Numbness/tingling Both arm/finger

(fever) (nausea)

(visual disturbance) vomiting x

(blurred) double vision (neck discomfort)

photophobia mental status change

dizziness / syncope chemical exposure

quality:

similar to previous headaches

("pain")

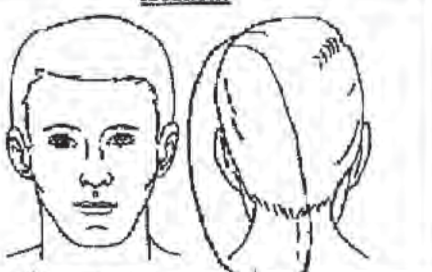
tightness

throbbing

sharp

"worst ever"

location:



PAIN LEVEL current 10 /10 maximum 10 /10

PAST HX _negative

(migraine hx / HTN / diabetes) hit head 1 day ago

_past surgeries none hysterectomy

_smoker / drugs / alcohol

_TB exposure / symptoms (chronic neck and back)

_has been physically hurt or threatened by someone close

MEDS _none Estradiol, Lortab, Percocet

ALLERGIES (NKDA) / PCN / ASA / sulfa / latex

LNMP N/A F ___ Ab ___ pregnant / post menopausal

(Circle) positive ✓Check-normal Backslash-negative

BARRIERS

_cultural _language

_cognitive _hearing impaired

_vision impaired _other

RN Signature [signature]

TIME TO ROOM: 0803 RACK TIME 0803

INITIAL ASSESSMENT TIME: 0815 ROOM: 8B

GENERAL APPEARANCE

_no acute distress _mild / (moderate) / severe distress

(alert) _anxious / decreased LOC

_tearful / crying

FUNCTIONAL / NUTRITIONAL ASSESSMENT

(appears well nourished) _obese / malnourished

(independent ADL) _assisted / total care

SKIN ASSESSMENT

_see documentation

NEURO

(oriented x 3) _disoriented to person / place / time

(moves all extremities) _unequal pupils

(PERRL) _confused

_weakness / sensory loss c/o bilateral arm numbness on (L)

PSYCH

(cooperative) _uncooperative / combative

(nml speech) _inappropriate speech / behavior

(responds appropriately) _speech slurred

_delusional

_hallucinating visual / auditory

SKIN

(warm, dry) _cyanosis / pallor

(intact) _cool / diaphoresis

_skin rash

ADDITIONAL FINDINGS

* c/o hit head on car hatch 1 day ago - NO LOC

RN Signature

3158318

SEASTRAND , MARGARET
DOB: 12/27/1961 42 SX: F SMR
MRN: 4100565 ADM/REG DT: 09/12/04

EXHIBIT "F"

OFFICE VISIT (PASEO MEDICAL CENTER):

PATIENT: Margaret Scastrand
DATE OF VISIT: 10/27/08

SUBJECTIVE: Chest pains over the last a few days. The patient states that she has been having left chest wall pain associated with numbness and tingling bilaterally in both arms. The pain shoots down her left arm; however, she has **00:24** no numbness bilaterally. She denies any shortness of breath. She recently had bilateral foot surgery and just recently exercising again. Interestingly, she states that the exercise actually takes the chest pain away thus her pain is not exertional.

She adds that she has been having quite a bit of stress from her job. They recently had a business venture, which has been doing well but nevertheless has been quite stressful on her.

OBJECTIVE: VITAL SIGNS: Stable. HEART: Regular rate and rhythm. I hear no murmurs, gallops, or rubs. LUNGS: Clear to auscultation bilaterally. NEURO: Non-lateralizing. GU: Deferred. SKIN: Negative for any rashes or lesions.

ASSESSMENT/PLANS/DISCUSSION:

1. Atypical chest pain – noninvasive workup.
2. Numbness. We will obtain C-spine x-rays.
3. I placed the patient on NSAIDs. Obtain chest x-ray, EKG, and refer to cardiology for echocardiogram and stress test.
4. Anxiety. The patient would benefit from a small dose of anxiolytics (Ativan or Xanax).
5. GYN update.
6. Her records indicate that she has had history of possible thyroid nodule and this should be further evaluated as well in an update.

Behzad Kermani, M.D.
BK/aks

D: 10/27/08
T: 10/27/08
C: N 1027-426

Left message 9/17/11 ga

EXHIBIT "G"

3560 EAST FLAMINGO RD.
SUITE 100
LAS VEGAS, NV 89121

MICHAEL A. BARON, M.D., LTD.

BOARD CERTIFIED IN
DIAGNOSTIC RADIOLOGY
AND NUCLEAR MEDICINE

Office (702) 433-6100
Fax (702) 433-9489

Patient Name: SEASTRAND, MARGARET **X-RAY #: 08-001-321** **D.O.B.: 12/27/61** **Date of Exam: 10/27/08**

Referring Physician: BEHZAD KERMANI, M.D.

Examination(s) Requested: CHEST X-RAY, CERVICAL SPINE

History: PHYSICAL EVALUATION.

Radiology Report

CHEST:

PA and lateral views of the chest were obtained from Paseo Medical Center in Las Vegas, Nevada.

The osseous structures are unremarkable. The heart is normal in size. No hilar or mediastinal adenopathy is seen.

The lungs are clear, without infiltrate, mass or volume loss.

IMPRESSION: Normal examination.

CERVICAL SPINE:

Four views of the cervical spine were obtained from Paseo Medical Center in Las Vegas, Nevada.

The spine is mildly flexed to the right suggesting muscle spasm. Vertebral bodies are well maintained without fracture. Mild disc space narrowing is seen at C5-C6 with early interbody osteophytic spurring. Early spondylitic c encroachment by uncinate process spurring is present at C5-C6.

IMPRESSION:
1. Mild rightward flexion of spine compatible with muscle spasm.
2. Spondylolytic changes of mild degree at C5-C6.

S. Robert Hurwitz, M.D. S. R. Hurwitz M.D.
RH:dk
Transcribed: 11/04/08
If unsigned, dictated but not edited.

FAXED
NOV 05 2008
By_____

EXHIBIT "H"

DR. BENJAMIN S. LURIE
CHIROPRACTIC PHYSICIAN

INITIAL CONSULTATION AND EXAMINATION

Patient's Name:	SEASTRAND, Margaret
Date of Birth:	12/27/61
Social Security No.:	530-80-5229
Date of Injury:	3/13/09
Treating Doctor:	Benjamin S. Lurie, D.C., CCST
Date of this Report:	3/20/09

To Whom It May Concern:

The following is a report respectfully submitted with the permission of the above-named patient with regard to a motor vehicle collision sustained on 3/13/09. Due to the symptomatology, Ms. Seastrand sought care at this office on 3/20/09. The following is the information I have on file relative to her care.

This objective functional evaluation follows the S.O.A.P. note format. It is based upon scientific peer-reviewed literature and recognized functional/structural outcome assessments. The examination procedures and report are in compliance with *The Guidelines for Evaluation and Management Services* published by the Health Care Financing Administration (HCFA) of the United States Federal Government (May 1997).

Medical History:
Ms. Seastrand stated she is currently receiving treatment for syncope, heart condition, and hormones therapy. She stated she had a hysterectomy approximately in 2003, bilateral foot surgery approximately in 2008, 2 DNC's in 1990 and 1991, and ovarian cyst surgery in the past with no evidence of residual difficulties. She stated that she has been seen in a hospital for 2 concussions in approximately 2004. She stated that she couldn't recall the name of the treating physician at this time. She also stated that she has been seen in a hospital for syncope episodes in approximately 2005 and 2006. She stated that she couldn't recall the name of the treating physician at this time. She stated that she had a positive stress test in approximately 2008 by her cardiologist. Ms. Seastrand denied any other surgeries, fractures, or serious illness in the past year that she can recall. She stated she was in a motor vehicle collision (rollover) approximately in 1981, and was treated and released with no evidence of residual difficulties. She recalls injuries to her neck, mid back and lower back. She also stated that was involved in a motor vehicle collision in approximately 1985 which she described as a head on collision. She stated that recall injuring her neck, mid back and lower back as well. She stated that she was treated by a physical therapist, however does not recall the name at this time. Ms. Seastrand denied any other workers' comp injuries or personal injuries in the past year that she can recall. Ms. Seastrand denied any sports injuries to the head, neck, or back in the past year that she can recall. She stated in the past year she has been treated by a medical doctor. She stated in the past five years she has been treated by a medical doctor. She stated in the past five years she has not been

treated by a chiropractor, physical therapist, neurologist, or orthopedic specialist that she can recall.

Social History:
Ms. Seastrand stated she does not smoke. Ms. Seastrand stated she does not drink alcoholic beverages. Ms. Seastrand stated she is married and living with her husband. Ms. Seastrand stated that she is not currently pregnant. Ms. Seastrand stated that she has 4 children.

Medications:
Ms. Seastrand stated she is currently not taking any medications at the present time. Ms. Seastrand stated she is currently taking Valdot from her primary care physician, Diflucan from her ob/gyn, and pain medication from Mountain View Hospital at the present time.

Mechanism of Injury:
Ms. Seastrand stated she was involved in a motor vehicle collision on 3/13/09. Ms. Seastrand stated she was the driver of a mid-sized vehicle and stated she was wearing both her shoulder harness and her lap belt at the time of the motor vehicle collision. Ms. Seastrand stated before the motor vehicle collision occurred she was traveling on Craig and Rancho. Ms. Seastrand stated that she stopped at a red light and was suddenly rear-ended pushed forward more than a little. Ms. Seastrand stated she was unaware she was about to be impacted by the other vehicle and therefore did not try to brace herself. Ms. Seastrand stated she was moderately jolted and dazed by the impact. Ms. Seastrand stated her head struck the headrest. Ms. Seastrand stated the Police, Fire Department, and Paramedics were on the scene of the motor vehicle collision and a police report was issued. Ms. Seastrand stated she did not lose consciousness during or after the crash occurred. Ms. Seastrand stated after the motor vehicle collision she was taken to Mountain View Hospital via ambulance on a PCS board with a cervical collar.

Present Symptomatology:

Original Complaints:

1. Ms. Seastrand stated immediately after the motor vehicle collision she complained of headaches, neck pain, mid back pain, low back pain, and right shoulder pain.

Present Complaints In Our Office:

1. She stated she has headache pain. She stated the headache pain began immediately after the motor vehicle collision and has remained frequent. She described the pain as throbbing and dull in nature. She stated there is no radiation of the pain at this time. She stated nothing has made the pain improve to date and all cervical ranges of motion increase the pain as well as coughing, sneezing, or laughing. She rated the pain today in the office as approximately 7 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). Ms. Seastrand stated with her normal activities of daily living, she rates her headache pain as approximately 8 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). At the time of the motor vehicle collision Ms. Seastrand rated her headache pain as approximately 4 out of 10 on a Borg Scale (0 = No

Pain, 10 = Worse Pain). Ms. Seastrand stated prior to the motor vehicle collision she was experiencing headache pain. She rated the previous intermittent headache pain as approximately 2 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). She described having intermittent headaches prior to the motor vehicle collision which she described as 1-2 x per month when present.

2. She stated she has neck pain. She stated the neck pain began immediately after the motor vehicle collision and has remained frequent. She described the pain as achy, sharp, burning, stiff, and sore in nature. She stated there is radiation of the pain at this time in the bilateral shoulders and upper extremities. She stated there is numbness or tingling at this time in the bilateral hands. She stated nothing has made the pain improve to date and all cervical ranges of motion increase the pain as well as prolonged sitting, prolonged standing, or walking, coughing, sneezing, or laughing. She rated the pain today in the office as 8 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). Ms. Seastrand stated with her normal activities of daily living, she rates her neck pain as approximately 9 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). At the time of the motor vehicle collision Ms. Seastrand rated her neck pain as approximately 5 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). Ms. Seastrand stated prior to the motor vehicle collision she was not experiencing intermittent neck pain. She rated the previous intermittent neck pain as approximately 3 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). She described having intermittent neck pain which she described as 2-3 x per month when present.
3. She stated she has mid back pain. She stated the mid back pain began immediately after the motor vehicle collision and has remained frequent. She described the pain as achy, burning, stiff, and sore in nature. She stated there is no radiation of the pain at this time. She stated nothing has made the pain improve to date and all cervical and thoracic ranges of motion increase the pain as well as prolonged sitting, prolonged standing, or walking, coughing, sneezing, or laughing. She rated the pain today in the office as 8 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). Ms. Seastrand stated with her normal activities of daily living, she rates her mid back pain as approximately 9 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). At the time of the motor vehicle collision Ms. Seastrand rated her mid back pain as approximately 5 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). Ms. Seastrand stated prior to the motor vehicle collision she was experiencing no mid back pain.
4. She stated she has lower back pain. She stated the lower back pain began immediately after the motor vehicle collision and has remained frequent. She described the pain as achy, burning, stiff, and sore in nature. She stated there is radiation of the pain at this time in the buttock region to the bilateral legs and knees. She stated there is numbness or tingling at this time in the leg. She stated nothing has made the pain improve to date and all lumbar ranges of motion increase the pain as well as prolonged sitting, prolonged standing, or walking, coughing, sneezing, or laughing. She rated the pain today in the office as 8 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). Ms. Seastrand stated with her normal activities of daily living, she rates her lower back pain as approximately 9 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). At the time of the motor vehicle collision Ms. Seastrand

rated her lower back pain as 4 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). Ms. Seastrand stated prior to the motor vehicle collision she was not experiencing any lower back pain. She rated the previous intermittent lower back pain as approximately 4 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). She described having intermittent lower back pain which she described as approximately 1-2 x per month when present.

5. She stated she has bilateral shoulder pain. She stated the bilateral shoulder pain began immediately after the motor vehicle collision and has remained frequent. She described the pain as achy, stiff, and sore in nature. She stated there is no radiation of the pain at this time. She stated there is no numbness or tingling at this time. She stated nothing has made the pain improve to date and all cervical and shoulder ranges of motion increase the pain. She rated the pain today in the office as 7 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). Ms. Seastrand stated with her normal activities of daily living, she rates her bilateral shoulder pain as approximately 7 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). At the time of the motor vehicle collision Ms. Seastrand rated her bilateral shoulder pain as approximately 7 out of 10 on a Borg Scale (0 = No Pain, 10 = Worse Pain). Ms. Seastrand stated prior to the motor vehicle collision she was experiencing no bilateral shoulder pain.

ACTIVITIES OF DAILY LIVING:

Ms. Seastrand stated since the motor vehicle collision on 3/13/09, she has been unable to perform her normal activities of daily living without experiencing a moderate amount of pain.

Rear-end motor vehicle collisions resulting in reported whiplash injuries have a substantial impact on health complaints, even a long time after the collision. The pain and discomfort Ms. Seastrand experiences makes it difficult for her to sleep soundly most nights. There are no comfortable positions that she has discovered which seem to ameliorate her symptoms.

PHYSICAL EXAMINATION:

Height: 5'6 ½"

HEENT clear of any recent trauma. Normocephalic, atraumatic. No mucosal lesions present. Chest is clear to percussion and auscultation. Abdomen is soft and non-tender to light and deep palpation. Normal bowel sounds are present. No organomegaly mass or tenderness noted. Extremities are without clubbing, cyanosis, or edema. Tenderness was noted over the right shoulder on palpation, no crepitus was noted. Distal pulses are full and equal bilaterally. Capillary refills within normal limits for upper and lower extremities.

NEUROLOGICAL EXAMINATION:

Cranial Nerves II-XII are intact.

Deep Tendon Reflexes: (0 to 4, 0 is no reflexive response and 4 is hyper-reflexive)

Bicep (C5)	Right	+2	Left	+2
Brachioradialis (C6)	Right	+2	Left	+2
Tricep (C7)	Right	+2	Left	+2
Patellar (L4)	Right	+2	Left	+2
Achilles (S1)	Right	+2	Left	+2

Sharp/Dull & Light Touch Sensation: P=Pinprick, C=Cotton swab, WNL=Within normal limits.

C5 Dermatome:	Right	WNL	Left	WNL
C6 Dermatome:	Right	WNL	Left	WNL
C7 Dermatome:	Right	WNL	Left	WNL
C8 Dermatome:	Right	WNL	Left	WNL
T1 Dermatome:	Right	WNL	Left	WNL
L4 Dermatome	Right	WNL	Left	WNL
L5 Dermatome	Right	WNL	Left	WNL
S1 Dermatome	Right	WNL	Left	WNL

Pathological Reflexes are negative.
There is no significant muscle-wasting present.

ORTHOPEDIC EVALUATION:
Active and passive ranges of motion were performed. (Evans, Ronald C. 1994. *Illustrated Essentials in Orthopedic Physical Assessment*. St. Louis: Mosby.) See below.

O'Donoghue Maneuver: While the patient is sitting, the cervical spine is actively moved through resisted range of motion then through passive range of motion. Pain during resisted range of motion, or isometric contraction, signifies muscle strain. Pain during passive range of motion signifies ligamentous strain.
O'Donoghue Maneuver was positive for sprain/strain of the cervical spine.

Jackson Compression Test: Cervical compression is commonly performed by having the patient sit up and bend the head obliquely backward while the examiner applies downward pressure on the vertex. However, with the Jackson cervical compression test, the head is only slightly rotated to the involved side. In either case, the sign is positive if localized pain radiates down the arm. A positive sign indicates nerve involvement from a space-occupying lesion, subluxation, inflammatory swelling, exostosis of degenerative joint disease, tumor, or disc herniation.
Jackson Compression Test was negative on the right and the left, however, pain was elicited upon cervical compression.

Maximum Cervical Compression Test: While in the seated position, the patient is instructed to approximate the chin to the shoulder and extend the neck. The test is performed bilaterally. Pain on the concave side indicates nerve root or facet involvement. Pain on the convex side indicates muscle strain.
Maximum Cervical Compression on the right was positive on the left. This result is consistent with muscular strain of the cervical paraspinals.
Maximum Cervical Compression on the left was positive on the right. This result is consistent with muscular strain of the cervical paraspinals.

Spurling's Test: The test is performed with the patient seated. The examiner placed one hand on top of the patient's head and gradually increases downward pressure. The patient notes any pain and the distribution thereof. Pressure may also be applied while the head is laterally flexed to either side and extended. Pressure should be maintained for 30 to 60 seconds. This maneuver closes the intervertebral foramina on the side of the flexion and reproduces the familiar pain or paresthesia.

EXHIBIT "I"

PATIENT NAME: SEASTRAND, MARGARET G

DATE OF CONSULTATION:

CONSULTATION REQUESTED BY:

REASON FOR CONSULTATION:
Evaluation of syncope.

HISTORY OF PRESENT ILLNESS:
The patient is a 43-year-old white female who is actually a patient of my associate, Dr. Luis Diaz. The patient was seen in our office on 03/15/2005 for evaluation of possible post-concussive headaches. At that time, there were no medical records from a previous hospitalization at Sunrise Hospital in December of 2004. But Dr. Diaz had placed the patient on a slowly increasing dose of Topamax for chronic daily headache. The Topamax was not for seizures.

The patient reports that in September of 2004, she did have a minor head trauma which gave her a headache, but did not produce any loss of consciousness. In December of 2004, she did have another head impact. This produced a loss of consciousness. This was then followed by approximately 30 minutes of a decreased level of arousability/contact. The patient was told that during this interval she had an MRI of her brain, had a 2-D echocardiogram performed. She evidently was conversing with the technologists, but she has no recollection of that time interval.

The patient did not have headaches prior September of 2004. She indicates that she, in the past, had 2 episodes of significant cervical spine injury.

The patient is being followed by Dr. Thomas Lambert of cardiology for hypotension. They evidently have been attempting sodium chloride supplements.

CURRENT NEUROLOGICAL EXAM:
The patient is awake and alert, oriented times 3. Language, speech, and memory are intact.
Cranial nerve II: Fundoscopic exam, disk margins are clear.
Cranial nerves III, IV, and VI: Extraocular movements full. Pupils are equal, round, and reactive to light.
Cranial nerve V: Facial sensation is intact and symmetric.
Cranial nerves VII: Facial musculature is intact and symmetric.
Cranial nerves VIII-XII: Tested sequentially and are within

normal limits.

MOTOR EXAM:
Strength is 5/5 in all groups tested and normal bulk and tone. No tremors were noted.

SENSORY EXAM:
Intact pin-prick and light touch throughout.

COORDINATION:
Finger-to-nose, finger-nose-finger, rapid alternating movements are intact.

GAIT:
Not tested.

REFLEXES:
Biceps are 2 and symmetric. Triceps are 1 to 2 and symmetric. Patellas are 2 and symmetric. Achilles are trace and symmetric. Toes are brisk in withdrawal bilaterally.

IMPRESSION:
Based on the fact that the patient has only had her syncopal and, especially, the near-syncopal episodes in the context of pain, I believe that this is most likely a vasovagal event.

There is, however, the episode of the prolonged decrease in responsiveness. Clinically, that has many of the hallmarks of transient global amnesia. In general, this is a fairly rare condition. If there is a physiological basis, it will be either in the realm of atypical seizures or cerebrovascular disease. The patient had a MRI of the brain with MR angiogram performed at Sunrise Hospital in December of 2004 which, by report, both were within normal limits. Unfortunately, the EEG performed at Sunrise, as interpreted by Dr. Simon Farrow, was almost un-interpretable because of movement artifact. Therefore, at this time, we will request EEG.

As the patient believes that 1 of her near-syncopal episodes, if not more than 1, are related to the fact that she discontinued her Topamax over 2 weeks ago secondary to nausea. We will return her to 25 mg Topamax at bedtime. She believes that at 50 mg per day, she was beginning to achieve improvement in her headache control. It was, however, when she increased the dose to Topamax 75 mg or even 100 mg per day, that nausea forced her to discontinue the medication.

PLAN:
1. EEG.
2. Laboratories that will include a.m. cortisol.
3. Topamax 25 mg p.o. at bedtime.
4. Ambien 5 mg p.o. at bedtime p.r.n.
5. Dr. Diaz will follow.

MICHAEL P HORAN, MD

CC: LUIS L DIAZ, MD
VIREN B PATEL, DO

MPH:Spheris20530
D: 05/17/05 09:21 T: 05/17/05 15:38 DOCUMENT: 200505172269197700

EXHIBIT "J"

DISTRICT COURT
CLARK COUNTY, NEVADA

MARGARET G. SEASTRAND,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	A-11-636515-C
RAYMOND RIAD KHOURY; DOES 1 through 10; and ROE ENTITIES 11 through 20, inclusive,	)	
	)	
	)	
Defendants.	)	
	)	

VIDEOTAPED DEPOSITION OF OFFICER TODD CONN
Taken on Monday, July 30, 2012
At 9:10 o'clock a.m.
At 7455 West Washington Avenue, Suite 460
Las Vegas, Nevada 89128

Reported by: Ann Salisbury, RPR, CCR 185

Q. Fair enough.

Now, I want to take a look at the last two sentences -- or maybe it's just the last sentence of the Narrative/Description. Starting with "Seastrand", would you read that?

A. "Seastrand told officers that she had prior neck and back injuries caused by a previous vehicle accident years before," period. And then it goes on with, "The injuries claimed by Seastrand are not consistent with being caused during this collision."

Q. Looking at that last sentence there, "The injuries claimed by Seastrand are not consistent with being caused during this collision," is that -- what was the basis that you used for including that in the Narrative?

A. She was complaining of severe neck and back injury when she got into the -- into the ambulance, so much so that -- by the minimal amounts of damage caused to both vehicles and no roadway markings whatsoever, I know that Mr. Khoury didn't come in at a high rate of speed, slam on his brakes, and smash into the back of Mrs. Seastrand. That was impossible. Didn't happen. I know that this is a low-speed-impact collision because I don't have bits of vehicles left in my roadway, I don't have any tire marks, I don't show her vehicle being

supervisors that were like that. I had some that were very specific in, Okay, remember to write down the color of the vehicle, the type of the vehicle, who was driving that vehicle, their directions of travel, the roadways that they were on. Those are all important factors. Whether or not they had their seatbelts on, air bags, injuries, those are all relatively important factors to have in -- in recalling it. Because 95 percent of all accidents we're not going to take photographs of, we're not going to diagram the scene because they're minor in nature. So we just want basic information to be able to recall at a later date.

Q. But primarily for the officer -- purposes of the officer being able to recollect the accident?

A. Correct.

Q. Okay. Is your intent in including information in that section also to be objective in -- in the information, observations that you make on scene?

MR. SMITH: Object as to form.

THE WITNESS: The information that I include in the scene is what I believe to be -- be important, okay? So anything that I put in there is what I thought was going to be important to be able to be recalled at a later date. In my opinion it is objectible (sic). It's -- it's, you know, my perception of the events that

took place. And so I'm trying to be as fair as I can, but I want to make sure that I have the facts and circumstances that I've heard.

Q. (BY MS. BRASIER) All right. You also told us that you took an advanced accident investigation course; is that correct?

A. Correct.

Q. How long is that course?

A. I can't recall the exact amount of time. I believe it was two weeks, but I'm not a hundred percent certain on that.

Q. When did you take that course?

A. Approximately a year and a half ago.

Q. Do you remember if that was before or after this accident which was in March?

A. It was after this accident.

Q. And then you indicate that there's an additional course called Vehicle Dynamics that you didn't take; is that right?

A. Correct.

Q. Okay. Is there a reason why you didn't take that course?

A. It's -- you only take that if you want to become a fatal detective. It is a very, very complicated course, and I had no intention of becoming a

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. 65907 Supreme Court Case No. 65172

Electronically Filed
Nov 13 2014 08:11 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

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'S APPENDIX

VOLUME V

STEVEN T. JAFFE, ESQ.
Nevada Bar No. 007035
JACOB S. SMITH, ESQ.
Nevada Bar No. 010231
HALL JAFFE & CLAYTON, LLP
7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Appellant Raymond Riad Khoury

VOLUME INDEX
VOLUME V

Exhibit 21	May 30, 2013, Defendant's Reply In Support Of Motion In Limine No. 4: To Limit Plaintiff's Presentation Of Past Medical Special Damages At Trial To Amounts Actually Paid By Or On Behalf Of Plaintiff	JA 0908-0914
Exhibit 22	May 31, 2013, Defendant's Reply In Support Of Motion In Limine No. 7: To Admit All Evidence Of Purchase Of Liens And Evidence Of The Amounts For Which Liens Were Purchased	JA 0915-0918