IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND RIAD KHOURY, APPELLANT, VS. MARGARET SEASTRAND, RESPONDENT.	Case Nos. 64702 65007 65172 (Consolidated)

Appeal from the Eighth Judicial District Court of the State of Nevada,
in and for the County of Clark,
The Honorable Jerry Wiese, District Court Judge,
District Court Case No. A-11-636515-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record for respondent, Margaret Seastrand, hereby certifies that she is an individual who has been represented both before and during the litigation in the matter solely by attorneys at the Richard Harris Law Firm. She will continue to be represented by these attorneys in this appeal.

DATED this 7th day of May, 2015.

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By _____

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court Abused its Discretion in Admitting the Opinion Testimony of Seastrand's Non-Retained Expert, Dr. William Muir, Given that Dr. Muir Was a Treating Physician Who Formed His Opinions During the Course of His Treatment of Seastrand and Whose Opinions Were Properly Disclosed Prior to Trial?

II. Whether the District Court Abused its Discretion in Permitting Seastrand's Retained Expert, Dr. Jeffrey Gross, to Rule Out in His Opinion Seastrand's Age-Related Changes in Her Cervical Spine as the Cause of Certain Preexisting Symptoms, Given that Dr. Gross Was Clearly Qualified to Form Such an Opinion and it Was Disclosed Prior to Trial?

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VI. Whether the District Court Abused its Discretion in Denying a Motion for a Mistrial on the Ground that it Erred in Permitting Seastrand's Counsel to "Indoctrinate" the Prospective Jurors During Voir Dire by Inquiring as to Their Fixed Beliefs Concerning Large Awards in Personal Injury Cases?

VII. Whether the District Court Abused its Discretion in Denying a Mistrial on

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the Ground that the "Indoctrination" of the Prospective Jurors Was Furthered by the Grant of Challenges for Cause as to Five Individuals?

VIII. Whether the District Court Abused its Discretion in Denying in Part Khoury's Motion to Re-Tax Costs?

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SUMMARY OF ARGUMENT

Khoury's contentions about Dr. Muir's expert opinion testimony are replete with factual and legal misrepresentations, in violation of NRAP 28(e) and his counsel's duty of candor to the court. Contrary to the egregious and undocumented misrepresentations made by Khoury's counsel, Dr. Muir's opinions were disclosed in discovery. Thus, the assertion that Khoury was "ambushed" by Dr. Muir's expert testimony at trial is entirely unfounded and warrants imposition of sanctions.

In ostensible support of his contention that Dr. Muir was required to produce an expert report, notwithstanding that he was one of Seastrand's treating physicians, Khoury's counsel purports to rely on this court's amended opinion in *FCH1, LLC v. Rodriguez*, 130 Nev. ___, 335 P.3d 183 (Adv.Op.No. 46; 10/02/14), then proceeds to quote from a portion of the original opinion that has been withdrawn. Because Dr. Muir formed his opinions as to causation in the course of his treatment of Seastrand, he was clearly entitled to attest to those opinions without producing a report as is required of retained experts. Khoury's citations in support of a different result are to federal cases that preceeded the amendment which adopted the distinction between retained and non-retained experts.

There was, likewise, no abuse of discretion in allowing Seastrand's retained expert, Dr. Gross, to attest to his opinion that certain symptoms she experienced before the accident were not caused by preexisting age-related changes in her cervical spine. Dr. Gross was fully qualified to form such an opinion. Again, contrary to the undocumented contentions of Khoury's counsel, Dr. Gross' opinion was disclosed long before trial. Whether viewed as a supplemental or a rebuttal disclosure, Dr. Gross' opinion was timely produced.

Equally unpersuasive is Khoury's contention that the district court abused its discretion in excluding evidence that Seastrand's medical providers treated

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her on a medical lien. To have admitted such evidence would have been a direct violation of the collateral source rule. Additionally, Khoury's stated justification for the admission of such evidence, *i.e.*, that these medical providers had become "contingent" witnesses, is refuted by the evidence itself, which expressly required payment of the medical bills irrespective of whether Seastrand prevailed on her personal injury claim.

Khoury's somewhat related assertion, that evidence of the medical providers' sale of their liens to third-parties should have been admitted, is illogical. By invoking the decisions involving medical "write-downs," most notably *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal. 2011), Khoury appears to contend that the sale of medical liens created the same kind of discount to the plaintiff as do "write-downs" in the context of insurance. But Khoury never pauses to explain how the sale of the liens would have reduced Seastrand's obligation. Moreover, *Howell* has been rightly criticized as "schizophrenic," "incoherent," and inconsistent with Nevada law.

The district court did not abuse its considerable discretion in denying Khoury's motion for mistrial, predicated on the flimsy assertion that Seastrand's counsel had informed the jury Khoury carried liability insurance merely because, in opening statement, he remarked that his client had made no "claim" in a prior accident in which she had been involved. This remark was made in a good-faith attempt to respond to Khoury's assertions that a) Seastrand's present suit was motivated by secondary gain and that b) she had sustained a preexisting and still symptomatic injury in a prior accident. Only by the most strained logic can one conclude that this remark somehow informed the jury that Khoury was insured. And even if one could bridge the logical gap, the jury was emphatically instructed to refrain from considering or discussing whether either party was insured.

Finally, the district court did not abuse its discretion in denying a motion

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for mistrial on the ground that it should not have permitted Seastrand's counsel to voir dire the prospective jurors on their beliefs concerning large verdicts, and more specifically Seastrand's claim in excess of $2 million. This did not "indoctrinate" the jury, as Khoury contends, which is established by the fact the jury awarded only marginally sufficient damages for past and future pain and suffering. Additionally, the majority of jurisdictions addressing the matter permit such inquiry on voir dire, recognizing that it is a proper means of identifying jurors who might have a bias or prejudice against large verdicts, which certainly proved to be true in this case. Nor did Seastrand's counsel violate EJDCR 7.70's prohibition on asking hypothetical questions. Rather, he made every effort to steer clear of what the evidence would show and sought to identify and exclude jurors prone to nullification; that is, jurors who would be reluctant to return a large verdict regardless of the evidence and the law.

The portion of Khoury's "indoctrination" argument, that addresses the dismissal of five jurors for cause, is also without merit. First, because Khoury does not contend that any unqualified jury was thrust upon him, there was no prejudice and, in fact, no error – even if one qualified juror was wrongly excused for cause. However, because each of the dismissed jurors agreed that he or she was possessed of bias, all were clearly "less than unequivocal" regarding their impartiality and were properly, indeed presciently, excused for cause in conformity with this court's most recent and subsequent pronouncement in *Preciado v. State*, *infra* ("We take this opportunity to stress . . . that a prospective juror who is anything less than unequivocal about his or her impartiality should be excused for cause.")

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ARGUMENT

I. THE DISTRICT COURT PROPERLY ADMITTED THE EXPERT OPINION TESTIMONY OF DR. WILLIAM MUIR, ONE OF SEASTRAND'S TREATING PHYSICIANS, AND KHOURY'S ARGUMENT TO THE CONTRARY VIOLATES NRAP 28(e) AND HIS COUNSEL'S DUTY OF CANDOR TOWARD THE COURT

Khoury makes two related arguments concerning the expert testimony of Dr. William Muir, who is one of Seastrand's treating physicians. He first contends that the district court impermissibly allowed the doctor to give expert opinions that allegedly went beyond those he formulated in the course of his treatment. Khoury contends that this was impermissible because Dr. Muir did not undertake to meet the disclosure requirements imposed on *retained* experts. Secondly, in an attempt to prop up this assertion, Khoury argues that Dr. Muir's opinions were not disclosed prior to trial.

Both of these arguments lack merit. However, the second rests upon blatant misrepresentations made in violation of NRAP 28(e) and Rule of Professional Conduct (RPC) 3.3(a)(1) (duty of candor toward the tribunal). After setting forth the applicable legal standards, we will first demonstrate the sanctionable misconduct on the part of Khoury's counsel. We will then show that the district court did not abuse its discretion in determining that Dr. Muir could testify, as a non-retained expert, to the opinions he formulated in the course of his treatment of Seastrand.

A. Applicable Standards

This court applies an abuse of discretion standard of review in deciding whether the trial court erred in admitting the expert opinion testimony of a treating physician without the report and other disclosure required of a *retained* expert, pursuant to NRCP 16.1(a)(2)(B). *See FCH1, LLC v. Rodriguez*, 130 Nev. ___, ___, 335 P.3d 183, 190 (Adv.Op.No. 46; 10/02/14) ("Allowing Dr. Schifini to testify as he did without an expert witness report and disclosure was an abuse of the district court's discretion.").

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The court has inherent, original jurisdiction to determine whether its rules have been violated and its processes have been abused by appellate counsel's lack of candor to this tribunal. *See, e.g., Thomas v. City of North Las Vegas*, 122 Nev. 82, 95, 127 P.3d 1057, 1066 (2006) (court imposed sanction in first instance upon its finding that appellant's counsel violated NRAP 28(e) requiring citations to the appendix in support of factual assertions in an appellate brief, and also violated SCR 172(1)(a) imposing on counsel a duty of candor toward the tribunal).[1]

B. Khoury's Counsel Makes Material Misrepresentations in His Brief to Convey the False Impression that Dr. Muir's Opinions Were Not Disclosed During Discovery

Khoury complains about the admission of two opinions expressed by Dr. Muir. One was his opinion as to the reasonableness of prior treatment rendered to Seastrand by her pain management specialist, Marjorie E. Belsky, M.D., who had referred the patient to him. JA, v. X, p. 1920. With respect to this testimony, Khoury argues as follows:

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

Appellant's Opening Brief (AOB), p. 24.

The second Muir opinion about which Khoury complains pertained to

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[1]SCR 172(1)(a) has since been repealed and the current version now appears as Rule of Professional Conduct (RPC) 3.3(a)(1) and provides:

> **Rule 3.3. Candor Toward the Tribunal.**
> (a) A lawyer shall not knowingly:
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . ..

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causation:

> Dr. Muir also improperly causally related his treatment, including neck and back surgeries and Seastrand's post-accident symptoms, to the subject accident.

AOB, p. 25.

After making a misleading legal argument concerning the effect of this court's recent opinion in *FCH1, LLC, supra* (which will be addressed below), Khoury egregiously misrepresents the events in the district court to convey the false impression that his counsel was the hapless victim of surprise because Dr. Muir's opinion as to causation had allegedly not been disclosed prior to trial:

> Dr. Muir's failure to comply with expert requirements, combined with the court's refusal to enforce this mandate, unduly prejudiced Khoury. Specifically, this error by the court allowed a completely unexpected witness to opine about a topic never previously anticipated or addressed. Khoury's counsel could not have known to prepare to address this point with Dr. Muir, and was left to "wing it," despite preparing as follows: a) obtaining all of Dr. Muir's records to learn his opinions in advance; b) depose Dr. Muir, to learn all of his opinions in advance; c) serve written discovery to obtain all expected expert witness testimony and opinion testimony of treating physicians; and d) move *in limine* to prevent this precise ambush at trial. During that *in limine* argument, Khoury's counsel asserted that everything possible was done to obtain all of the treating physicians' opinions in advance, and to allow those physicians to exceed their opinion [*sic*] stated in records, depositions, or discovery, violated Khoury's due process rights. (VI-JA-0959-61.)

AOB, pp. 25-26.

The court will note that there is only a single record reference in ostensible support of the many factual assertions contained in the foregoing paragraph. And this single record reference merely cites the ***argument*** of Khoury's counsel at the hearing on the motions in limine. Conspicuously absent are any record references in support of the factual assertion that Dr. Muir was "a completely unexpected witness [who] opine[d] about a topic never previously anticipated or addressed." Nor are there any record references in ostensible support of all the steps Khoury's counsel allegedly took (which he listed in the quoted passage, *supra*), or to show that such steps yielded no reason to expect

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Dr. Muir's testimony. These are not merely innocent omissions. In the circumstances, they amount to gross misrepresentations. They create the false impression that during the trial court argument on the motions in limine, Khoury's counsel made a record concerning having done "everything possible" (*id.*) to secure disclosure of Dr. Muir's opinion, but was thwarted at every turn.

However, review of the referenced pages reveals that Khoury's counsel did not even make the argument about his allegedly diligent but unsuccessful discovery attempts, much less establish any factual content in support of such a claim. It is the burden of an appellant to affirmatively demonstrate reversible error. *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994). Additionally, statements made by counsel portraying what purportedly occurred below will generally not be considered on appeal. *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). Thus, all of the representations by Khoury's counsel as to his discovery efforts, and the results thereof, should be disregarded. It would have been a simple matter for Khoury to have, for example, provided the written discovery to which he refers if he deemed it supportive of his contention that he thwarted from discovering Dr. Muir's opinions. Had he actually made the argument below, he could have annexed the written discovery as an exhibit to his new trial motion.

Meanwhile, the discovery material that ***is*** in the record flatly contradicts Khoury's contention that his counsel was surprised by Dr. Muir's opinions. Khoury's counsel took Dr. Muir's deposition on November 27, 2012, several months prior to trial. JA, v. VI, p. 1078. And the record reveals that his counsel questioned Dr. Muir extensively concerning his causation opinions. As to the injury to Seastrand's cervical spine, Khoury's counsel asked the following question which elicited the following response:

[BY MR. JAFFE]

Q. . . .

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> Do you have an opinion as to whether this accident produced the bulge?
>
> A. Yes, the accident did cause a protrusion, actually a herniated portion. And this was confirmed at the time of surgery by direct observation.

JA, v. XXIII, p. 4433 (deposition p. 27). Khoury's counsel then cross-examined Dr. Muir for approximately 20 pages concerning his opinion that the accident had caused the injury to Seastrand's cervical spine. *Id.* at 4433-38 (deposition pp, 27-49). In the midst of this extensive cross-examination, Dr. Muir reiterated his opinion. *See, e.g., id.* at 4437 (deposition p. 44) ("but my opinion is that, more likely than not, the disc herniation impinging on the spinal cord was due to the accident rather than a preexisting condition.").

While Khoury's counsel chose not to ask Dr. Muir about his causation opinion as to Seastrand's injury to her lumbar spine, Seastrand's counsel did so during the very same deposition:

> [BY MR. HARRIS]
> Q. And in rendering your opinions, which you've touched upon, but I want to just have you succinctly tell us, within a reasonable degree of medical probability, what was your diagnosis of Ms. Seastrand relative to the motor vehicle accident which is at issue?
>
> A. She sustained injury to her C5-C6 disc, including a small disc herniation, and the damages to the C5-C6 resulted in her symptomatology in the neck.
>
> Regarding the low back, she sustained damage to the L4-5 and L5-S1 discs which resulted in her symptomatology.

Id. at 4445 (deposition pp. 74-75).

Khoury's counsel touched upon the injections performed by Dr. Belsky (*id.* at 4436 (deposition p. 40)), but he did not ask for Dr. Muir's opinion as to their reasonableness. However, once again Seastrand's counsel asked Dr. Muir to state his opinion as to the reasonableness of Dr. Belsky's treatment of Seastrand prior to her referral of the patient to him. *Id.* at 4445 (deposition p. 75). Specifically mentioning the injections, Dr. Muir stated his opinion that Dr.

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Belsky's treatment was reasonable and customary. *Id.*

In summary, the notion that Khoury's counsel was "ambushed" at trial is entirely false and is made in complete disregard of the court's rules intended to prevent this illegitimate form of 'advocacy.' NRAP 28(e).

C. Because Dr. Muir's Opinions Were Formed During His Treatment of Seastrand, He Could Properly Attest to These Opinions at Trial Without Becoming a Retained Expert, Subject to NRCP 16.1(a)(2)(B)

The misrepresentations of Khoury's counsel, described above, are not limited to the misportrayal of, and failure to document, the facts. He also purports to cite this court's amended opinion in *FCH1, LLC v. Rodriguez*, 130 Nev. ___, 335 P.3d 183 (Adv.Op.No. 46; 10/02/14), but then misleadingly quotes from the superceded opinion.[2] Claiming to discuss the amended opinion in *FCH1, LLC*, Khoury argues as follows:

> The Court [in *FCH1, LLC*] held that the court abused its discretion by allowing Dr. Schifini to testify without an expert witness report, and that even if Dr. Schifini reviewed records from other providers in the course of treating the plaintiff, he could only address the opinions he formed from the documents he disclosed. *Id.* citing NRCP 16.1 drafter's note (2012 amendment); *also Washoe Cnty. Bd. of Sch. Trustees v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (discovery's purpose is to take the "surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial.")
>
> The Court further held that once Drs. Kidwell and Shannon offered opinions pertaining to causation of plaintiff's injuries and/or the causal relation of the plaintiff's treatment to the injuries, "they should have been subect to the [NRCP 16.1(a)(2)(B)]'s disclosure standards." *Id.* citing *Brooks v. Union Pac. R. Co.*, 620 F.3d 896, 900 (8th Cir. 2010); *also* NRCP 16.1(a)(2)(B).) Allowing them to offer these opinions without requiring them to disclose expert reports was an abuse of discretion. *Id.*

AOB, p. 23.

While the original opinion in *FCH1, LLC* cited *Brooks v. Union Pac. R.*

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[2]The superceded opinion bears the same Advance Opinion Number, but a different Pacific Reporter citation and was decided 4 months earlier. Its citation is 130 Nev. ___, 326 P.3d 440 (Adv.Op.No. 46; 06/05/14).

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Co., this authority was deliberately omitted in the amended opinion. 130 Nev. at ___, 335 P.3d at 190. This omission is highly significant, first, because it is the only discernable amendment to the opinion and, second, because *Brooks* represents the only federal circuit that takes an extremely narrow view of the testimony a treating physician may give without transmuting him- or herself into a retained expert. Indeed, in *Goodman v. Staples the Office Superstore, L.L.C.*, 644 F.3d 817 (9th Cir. 2011) – cited in both the original and amended opinions in *FHC1, LLC* – the Ninth Circuit declined to follow *Brooks*.

In *Goodman* the plaintiff tripped and fell on an "end cap" in a Staples office supply store. She was transported by ambulance to an Arizona ER, where she complained of head, neck, and foot pain. Ultimately, medical scans revealed that Goodman had sustained a fracture adjacent to a fusion plate that had been installed in a surgery performed prior to her fall. She then underwent fusion revision surgery in which the existence of the fracture was confirmed by observation. After additional treatment, including another surgery, Goodman filed suit against Staples.

Goodman identified her treating physicians as witnesses, but failed to comply with the additional disclosure requirements for retained experts. The district court ruled that these witness could not give opinions as to the cause of Goodman's injuries because allowing them to do so would transform them into retained experts. *Id.* at 821-22. Staples then filed a motion for summary judgment arguing, among other things, that Goodman could not prevail on her negligence claim, as a matter of law, because she could adduce no evidence of causation. The district court granted the motion and Goodman appealed.

The court in *Goodman* first noted that the issue before it was one of first impression in the Ninth Circuit:

> The issue of when, if ever, a treating physician is transformed into an expert offering testimony on matters beyond the treatment rendered, for purposes of Rule 26 disclosures, is an

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issue of first impression for us.

Id. at 824. The court then examined decisions from other circuits, beginning with the Sixth Circuit's opinion in *Fielden v. CSX Transportation, Inc.*, 482 F.3d 866 (6th Cir. 2007), describing it as a case in which "the Sixth Circuit held that '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.'" 644 F.3d at 825, quoting *Fielden*, 482 F.3d at 871.

Next, the court in *Goodman* examined the Seventh Circuit's decision in *Meyers v. Nat'l R.R. Passenger Corp.*, 619 F.3d 729 (7th Cir. 2010). It noted that in *Meyers*, like the Sixth Circuit in *Fielden*, the Seventh Circuit drew the line between a retained medical expert, who is required to produce a report, and a treating physician, who is exempt from doing so, by deciding whether the opinion of causation was formed during the treatment of the patient.

The Ninth Circuit then examined the Eighth Circuit's opinion in *Brooks*, *supra*, stating that it "goes further, requiring disclosure of a written report any time a party seeks to have a treating physician testify as to the *causation* of a medical condition, as opposed to merely the existence of the condition." 644 F.3d at 825; emphasis by the court. The court in *Goodman* then rejected the Eighth Circuit's narrow approach in *Brooks*, instead aligning itself with those circuits that permit a treating physician to attest, without a report, to causation opinions formed during his or her treatment of the patient:

> Today we join those circuits that have addressed the issue and hold that a treating physician is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment. Goodman specifically retained a number of her treating physicians to render expert testimony beyond the scope of the treatment rendered; indeed, to form their opinions, these doctors reviewed information provided by Goodman's attorney that they hadn't reviewed during the course of treatment.

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644 F.3d at 826.

This court's amendment of its opinion in *FCH1, LLC* to omit reliance on *Brooks* can only be interpreted as a desire not to engender the kind of confusion that Khoury attempts to create in his opening brief. By misleadingly quoting from the superceded opinion, Khoury creates the impression that this court intended to adopt *Brooks*' per se prohibition against allowing treating physicians to attest to causation opinions in the absence of a written report. However, the deletion of the citation to *Brooks* indicates that this court intends to take its guidance from *Goodman*, not *Brooks*. And, as explained, under *Goodman* treating physicians can give causation opinions so long as such opinions were formed during the course of treating the patient.

Seastrand's reading of *FCH1, LLC* is consistent with the Drafter's Note to the September 30, 2012 amendment to Rule 16.1(a)(2)(B). The drafters rejected the notion that there is a per se rule that treating physicians are transformed into retained experts if they attest to opinions as to causation:

> A treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or ***causation*** of the patient's injuries, or because the witness reviews documents outside of his or her medical chart in the course of providing treatment or defending that treatment.

Michie's Nevada Revised Statutes Annotated, Court Rules, v. 1, p. 570 (2015); emphasis added.[3]

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[3]Likewise, the facts of *FCH1, LLC* fully support Seastand's reading of that decision. It is evident that the causation opinions expressed by Rodriguez's "treating physicians" (specifically, Drs. Kidwell and Shannon) were not formed during the course of their treatment. Dr. Shannon's causation opinion related to the treatment rendered by a completely different doctor. 130 Nev. at ___, 335 P.3d at 190. And Dr. Kidwell attempted to attest to "the mechanism" of Rodriguez's injury. While this latter testimony is not set forth in the opinion, it seems clear that it transcended any opinion

(continued...)

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The deposition testimony of Dr. Muir, quoted above, establishes that his opinions as to causation were formed in diagnosing Seastrand's condition. As to the injury to her cervical spine, this diagnosis was confirmed by direct observation during surgery. There is no doubt, therefore, that Dr. Muir formed his causation opinions during the course of Seastrand's treatment.[4] It is equally clear that his opinion concerning the adequacy of Dr. Belsky's work-up was formed during his treatment of Seastrand. He would not have recommended and performed a cervical fusion if the necessity of it had not been adequately demonstrated by the treatment accorded Seastrand by Dr. Belsky.

Additionally, admission of Dr. Muir's opinion as to the reasonableness of Dr. Belsky's prior treatment was independently supported by the other part of the aforementioned Drafter's Note, which permits a treating physician to attest to opinions in "defending" his or her treatment. By challenging the adequacy of Dr. Belsky's work up of Seastrand, Khoury was suggesting that the cervical fusion that Dr. Muir performed on Seastrand was unnecessary. He was clearly entitled to respond as he did.

D. Khoury's Citation of Cases From Other Jurisdictions is Unavailing

As he did in the district court (JA, v. II, pp. 340-41; pp. 341-42), Khoury string cites the same hand-picked cases from other jurisdictions which he argues support his position. AOB, pp. 23-24. The most notable feature of all of these cases is that they were decided before the 2010 amendment to Fed.R.Civ.P. 26, which created the distinction between retained and non-retained experts, and

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[3](...continued)
that Dr. Kidwell would have formed during his treatment.

[4]This is not a case, like *FCH1, LLC* and *Goodman*, in which a treating physician was provided extensive medical records by the patient's attorney to aid him in formulating after-the-fact opinions about the causal connection between the patient's injury and some other physician's treatment.

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which this court adopted in 2012. Thus, to the extent any of these cases supports Khoury's position, it has been superceded by the amendments.

An instructive example is *Griffith v. Northwest Illinois Commuter Railroad Corp.*, 233 F.R.D. 513 (N.D.Ill. 2006), the second decision in Khoury's string citation. AOB, pp. 23-24. In *Griffith*, the magistrate adopted what amounted to a per se rule that physicians could not express opinions as to causation, prognosis, or future disability. *Id.* at 516-17. As noted in *Richard v. Hinshaw*, 2013 WL 6709674 (D.Kan. Dec. 18, 2013), however, it is recognized even in the Northern District of Illinois that *Griffith* has been superceded by the 2010 amendments to Fed.R.Civ.P. 26:

> The *Griffith* case cited by plaintiff, which seemingly takes a narrow view of the subjects that relate to the physician's treatment of a patient, does not represent the prevailing view in this district. In fact it may not even represent the prevailing view in Illinois. *See Norton v. Schmitz*, 2001 WL 4984488, *3 (N.D.Ill., May 27, 2011) (indicating *Griffith* was superceded by rule as indicated in *Crabbs v. Wal-Mart, infra*); *Crabbs v. Wal-Mart Stores, Inc.*, 2011 WL 499141, *3 (S.D. Iowa 2011) ("To the extent the approach taken by *Smith*, *Griffith* and like cases would require a report from a non-retained treating physician they appear to have been overtaken by the 2010 amendments to Rule 26); *McCloughan v. City of Springfield*, 208 F.R.D. 236, 242 (C.D.Ill. 2002) ("the Court will follow the majority rule and finds that [plaintiff's] treating physicians may offer opinion testimony on causation, diagnosis, and prognosis without the prerequisite of providing a Rule 26(a)(2)(B) report.").

Id. at *2.

And even though each of Khoury's cases predates the amendment to Fed.R.Civ.P. 26, some still do not lend support to Khoury's position. For example, the first on Khoury's list is *Albough v. United States*, 2008 WL 686701 (S.D.Fla. March 13, 2008). This was a Federal Tort Claims Action alleging medical malpractice. Discovery had closed and plaintiff had not designated any expert witness to testify in support of her claim. Accordingly, defendant moved for summary judgment.

Plaintiff filed a cursory opposition to the summary judgment motion,

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appending an affidavit from Dr. Timothy McFadden wherein he opined that plaintiff had been over-medicated by her psychiatrist, which resulted in injury to her. When the affidavit was challenged, plaintiff took the position that Dr. McFadden was a treating physician. However, plaintiff had offered no explanation of who Dr. McFadden was and gave no detail regarding the scope of his treatment. And his affidavit reflected that his opinion was based solely on his independent review of the patient's medical records, not upon his own treatment of her. On this basis, the court properly concluded that Dr. McFadden's affidavit was inadmissible because he had never been designated as an expert and had not complied with the other attendant disclosure requirements, including the production of a report. The facts in *Albough* bear no resemblance to those at bench and, therefore, the decision is unsupportive of Khoury's position and fully consistent with that of Seastrand.

II. THE DISTRICT COURT PROPERLY PERMITTED DR. GROSS TO RULE OUT, IN HIS OPINION, SEASTRAND'S CERVICAL SPINE AS A CAUSE OF HER PRE-ACCIDENT SYMPTOMS

In Argument § B of his opening brief, Khoury argues that Seastrand's retained expert, Jeffrey D. Gross, M.D., was impermissibly allowed to attest to his opinion that Seastrand's pre-accident symptoms, noted in her October 27, 2008 visit to Dr. Kermani, her primary care physician, were probably not the result of a pre-existing, age-related changes in her cervical spine. This assertion lacks merit.

A. Standard of Review

The trial court's decision to admit expert testimony is reviewed under an abuse of discretion standard. *Perez v. State*, 129 Nev. ___, ___, 313 P.3d 862, 866 (Adv.Op.No. 90; 11/27/13).

B. Khoury Misconceives the Nature of Dr. Gross' Opinion that Seastrand's Pre-Accident Symptoms Were Not Caused by the Condition of Her Cervical Spine

There are many insurmountable obstacles to Khoury's complaint about the

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admission of Dr. Gross' opinion. However, it must first be noted that his argument that Dr. Gross had to be a cardiologist to express his opinion rests upon a fundamental misconception as to the nature of Dr. Gross' opinion. Indeed, Khoury stands the doctor's opinion on its head.

The thrust of Dr. Gross' testimony was not necessarily to ***rule in*** a cardiological event and/or anxiety as the definitive cause or causes of Seastrand's prior symptoms, as Khoury seems to suggest. There was no need to do so, inasmuch as Seastrand was not seeking compensation for treatment for cardiological care or for anxiety. Rather, his thrust was to ***rule out*** the age-related changes in her cervical spine as the cause. The very purpose of the testimony was to show that Seastrand's cervical spine was asymptomatic prior to the accident. This was well within the scope of his expertise as a Board Certified Neurological Surgeon. JA, v. XI, p. 2114.

The true nature of Dr. Gross' opinion becomes apparent when one examines the context of his testimony. In examining Dr. Kermani's records, which were contained in Defendant's Exhibit J (*id.* at 2139, Dr. Gross pointed out that they contained no reference to any complaints of neck of back pain. (*Id.* at 2140) He explained that Dr. Kermani's order of a cervical spine X-ray meant that, following a differential diagnosis protocol, the doctor was merely ruling out cervical spine problems as a possible cause of Seastrand's chest pains and bilateral numbness and tingling in her arms. (*Id.* at 2147.) And Dr. Kermani placed a checkmark in the box labeled "normal" for the spine. (*Id.* at 2144-45). Dr. Gross also opined that the X-ray of Seastrand's cervical spine was normal for someone of Seastrand's age and gender. (*Id.* at 2148). Meanwhile, the other records in Khoury's own Exhibit J showed that Seastrand's follow-up stress test was positive for exercise induced myocardial ischemia, meaning that when she exercised her heart was not getting enough blood flow to the heart muscle. (*Id.* at 2145-46). Khoury's counsel did not object to the substance of any of this line

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of testimony.

It was at this point that Seastrand's counsel asked Dr. Gross to express his opinion ruling out the age-related changes in Seastrand's cervical spine as the probable cause of her symptoms in October, 2008. After the question was asked and the objection of Khoury's counsel was overruled, the court re-asked the question and elicited the following answer:

> THE COURT: All right. The objection's overruled. I'm going to reask the question. So it says: Let me ask a question: It is more probable those findings were – of the numbness and tingling were coming from the neck or more probable it was from the heart event for which she had a positive stress test?
>
> THE WITNESS: Thank you. It is more probable that the arm symptoms are unrelated to the neck and more likely related to the heart or anxiety or both.

Id. at 2148-49.

When the thrust of Dr. Gross' opinion is properly viewed as testimony ruling out Seastrand's cervical spine as the cause of the bilateral numbness and tingling in her arms, most of Khoury's assertions simply evaporate.[5]

C. A Second Fatal Flaw in Khoury's Complaint About Dr. Gross' Opinion Regarding Seastrand's Pre-Accident Symptoms is That Such Opinion Was Fully Disclosed Ten Months Prior to Trial

1. Dr. Gross Was Not Required to Address the October, 2008 Symptoms in His Initial Report Because it Was Khoury's Burden to Establish Causation as to Any Alleged Pre-Existing Condition

Both at trial and on appeal Khoury has attempted to make much out of the

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[5]It is also noteworthy that Khoury's expert, John B. Siegler, M.D., a physiatrist and ***not*** a cardiologist (JA, v. XVI, p. 2826), expressed his opinion that it was more likely than not that the pre-accident symptoms ***were not*** caused by a cardiac event. *Id.* at 2841. It is difficult to understand how Khoury can contend that his non-cardiology expert can be permitted to rule out a cardiac event, yet Seastrand's expert had to be a cardiologist in order to rule out a cervical spine problem as the source of Seastrand's pre-accident symptoms.

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fact that Dr. Gross did not specifically address Seastrand's October, 2008 medical records and symptoms in his initial report. At trial, his counsel asserted:

> So who knew about October 2008 and who didn't? . . . Dr. Gross did but Dr. Gross wrote three reports in this case. He didn't know about it when he wrote his first report. He didn't know about it when he wrote his second report, but his third report rebutting one of our experts or a couple of our experts, now he finally got it.

(JA, v. IX, p. 1795) Similarly, in his opening brief, Khoury notes that "Dr. Gross reached causation opinions in his initial report dated August 7, 2012, without ever reviewing the records from October 2008." AOB, p. 5.

This line of argument overlooks that fact that it was Khoury's burden to produce evidence that Seastrand's injuries were caused by a preexisting condition. *See FGA, Inc. v. Giglio*, 128 Nev. ___, ___, 278 P.3d 490, 498 (Adv.Op.No. 26; 06/14/12) ("In order for evidence of a prior injury or preexisting condition to be admissible, a defendant must present by competent evidence a causal connection between the prior injury and the injury at issue."). Obviously, a plaintiff's expert cannot always predict, in advance, what records a defendant's expert will cite in support of a theory that plaintiff's symptoms result from a preexisting condition. Once Khoury's experts seized upon a particular record and produced reports attempting to establish a causal link to the preexisting condition, Dr. Gross properly supplemented his opinions to rebut the opinions of Khoury's experts.[6]

When the district court later explained its ruling on Khoury's objection,

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[6]Dr. Gross's September 29, 2012 "Neurosurgical Supplemental Report" was timely, whether viewed as rebuttal or supplemental report. Under the Stipulation and Order to Extend Discovery Deadlines Pursuant to EJDCR 2.35, rebuttal reports were due by October 1, 2012. Respondent's Appendix, p. 3. If viewed as a supplemental report, it was amended at an "appropriate interval[]" (within 60 days after receiving the reports of Khoury's experts) pursuant to NRCP 26(e)(1).

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it recognized that Dr. Gross had not changed his opinion: "I think it's [*i.e.*, his opinion about the October 2008 symptoms] related to the original causation opinion that he authored, and that's why I overruled the objection." *Id.* at 2157. This is an implicit recognition that Dr. Gross' initial opinion did not need to, in advance, specify and rule out as evidence of a preexisting injury every single medical record in Seastrand's history.

2. Additionally, Khoury's Counsel Was Fully Aware of Dr. Gross' Opinion as to the October, 2008 Medical Records and Symptoms Long Before Trial

Khoury again takes unwarranted liberties with the record when he asserts that Dr. Gross' opinion regarding Seastrand's pre-accident symptoms was not disclosed prior to trial and his counsel was left "to rebut [Dr. Gross'] opinions without preparation, despite having deposed him during discovery." AOB, p. 30.

In fact, Dr. Gross was identified on August 29, 2012 as a retained expert who would, among other things, "provide opinions regarding the causation of Plaintiff's injuries and the necessity and reasonableness of Plaintiff's past and future medical expenses." JA, v. XXII, p. 4287.

On September 29, 2012 – nearly ten (10) months prior to trial – Dr. Gross prepared the supplemental report that was provided to Khoury. *Id.* at 4291, *et seq.* In this supplemental report, Dr. Gross noted that he had reviewed all of Seastrand's relevant medical records, including those related to the symptoms for which she was seen on October 27, 2008. *Id.* at 4299-300. He summarized the October, 2008, treatment records and the diagnosis listed: "atypical chest pain, numbness, and anxiety." *Id.* Dr. Gross then specifically addressed, and disagreed with, Dr. Siegler's opinion that Seastrand's 2008 symptoms were indicative of a cervical injury. In commenting on Dr. Siegler's opinion, Dr. Gross stated:

> Dr. Siegler . . . notes that the patient had a documented

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> history of cervical and lumbar pain. She had back pain with flare ups in 2007 and in 2008 was seen for numbness and tingling radiating to both arms and shooting pain into the left arm. *[Reviewer's note:* ***Dr. Siegler appears to completely misrepresent the [2008] medical records . . .. In addition, he conveniently omits the fact that the records noted that the episode of tingling to the upper extremities was related to chest pain and stress.]*** He stated that the imaging studies did not indicate any acute pathology and given her previous history, it was likely that the disc findings were preexisting. *[Reviewer's note: no films exist to confirm Dr. Siegler's speculation.* ***There is no basis to support a pre-injury discal abnormality or clinical ramifications thereof. Pre-existing spondylosis is expected.]***

Id. at 4302; italics in original; boldface supplied. In the same supplemental report, Dr. Gross stated that all of his opinions expressed therein were "given within a reasonable degree of medical probability." *Id.* at 4311. Accordingly, nearly ten (10) months prior to trial, Dr. Gross specifically discussed Seastrand's October 2008 treatment and stated that such treatment was attributed to "chest pain and stress" and was not the result of a preexisting cervical spine issue.

In short, Dr. Gross expressed his disagreement with Dr. Siegler long before trial and consistently expressed and adhered to his own opinion that the subject accident caused Seastrand's injuries and need for treatment.[7] Thus, there was no "surprise" in his trial testimony that it was more probable than not that Seastrand's arm symptoms were "unrelated to the neck" but rather "more likely related to the heart or anxiety or both." JA, v. XI, p. 2149.

As to Dr. Gross' deposition, Khoury asserts in his Statement of the Facts, as follows:

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

AOB, p. 5. Once again, Khoury has provided no reference to the appendix

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[7] *See, e.g., id.* at 4341-42 (August 7, 2012 report); *id.* at 4363 (August 28, 2012 supplement).

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which supports this assertion and has not included a transcript of Dr. Gross' deposition testimony in the record. For the reasons expressed above in regard to similar undocumented statements as to Dr. Muir, these assertions should be disregarded. *See*, again, *Schwartz*, 110 Nev. at 1051, 881 P.2d at 644 (it is the appellant's burden to affirmatively demonstrate reversible error); *Mack*, 125 Nev. at 91, 206 P.3d at 106 (statements of counsel as to event that purportedly occurred in the district court will generally be disregarded). It would have been easy for Khoury to include the transcript of Dr. Gross' deposition (as an exhibit to his new trial motion, for example) if it truly supported his assertion that the witness never provided his opinions during that examination. That he did not is more evidence that he did not even make this assertion below.

In light of the foregoing, Khoury's argument that his counsel had no opportunity to conduct discovery as to Dr. Gross's opinion is contradicted by the discovery documents his counsel has included in the record and the documents he has omitted must be presumed to support Seastrand's position.

III. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT SEASTRAND'S MEDICAL PROVIDERS EXTENDED HER CREDIT IN EXCHANGE FOR A MEDICAL LIEN

A. Standard of Review

Ordinarily, a district court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *FGA, Inc.*, at ___, 278 P.3d at 497-98. However, in *Proctor v. Castelletti*, 112 Nev. 88, 91, 911 P.2d 853, 854 (1996), this court expressly "eviscerate[d] the trial court's discretion" regarding collateral source evidence by adopting a per se rule against its admission for any purpose. Thus, the introduction of collateral source evidence would constitute legal error per se.

B. The Extension of Interest-Free Credit to Seastrand in Exchange for a Medical Lien is a Collateral Benefit and is, Therefore, Inadmissible for Any Purpose

"The [collateral source rule] does not differentiate between the nature of

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the benefits, so long as they did not come from the defendant or a person acting for him." Restatement (Second) of Torts § 920A, comment b (hereinafter "Restatement"). Given the time value of money, it is difficult to understand how the extension of interest-free credit would not be deemed a benefit that her medical providers extended to Seastrand. While Khoury's counsel made a conclusory statement that the lien arrangement was not subject to the collateral source rule (JA, v. VI, p. 1019), he never cogently explained his reasoning.

And the arguments Khoury made in support of his proffer of this evidence fully demonstrate that he intended to create the very types of unfair prejudice the collateral source rule is intended to prevent. He argued primarily that the existence of the liens effectively converted Seastrand's medical providers into "contingent" witnesses because, in the event she lost her case, the medical witnesses might receive no payment. JA, v. III, p. 0374; v. V, p. 788. But the situation in which an injured plaintiff pays nothing for his or her medical treatment is one of the archetypal applications of the collateral source rule. *See, e.g., Kenny v. Liston*, 760 S.E.2d 434, 442 (W.Va. 2014) (citing Restatement § 920A, comment c and explaining that the plaintiff's receipt of gratuitous medical care is an example of one of the four categories the Restatement drafters listed and stated that the collateral source rule should always apply). So, in advocating for the right to argue that the medical witnesses were biased, Khoury is automatically also advocating for the right to contend that, if Seastrand lost her case, she would not have to pay her medical bills anyway. The district court properly disallowed this contention.

This is not a matter of weighing the probative value of the evidence against the danger of unfair prejudice. In *Proctor* this court held that it adopted a per se rule that collateral source evidence is inadmissible for any purpose because it could envision no circumstance in which the prejudicial value of such evidence would outweigh its prejudicial effect. Thus, even if one accepts

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Khoury's argument that the evidence would otherwise be proper for purposes of exploring issues of the witness's bias, citing *Lobato v. State*, 120 Nev. 512, 96 P.3d 765 (2004), this would not overcome the per se prohibition of collateral source evidence adopted in *Proctor*.[8]

Seastrand pointed out also that evidence of the medical liens would improperly inform the jury that Seastrand did not have health insurance (JA, v. V, p. 0855), a matter which a jury may not consider. Whitehead and Thornley, Nevada Pattern Jury Instructions: Civil, Nev. J.I. 1.07 (Michie 1986) ("You are not to discuss or even consider whether or not the plaintiff was carrying insurance to cover her medical bills, loss of earnings, or any other damages she claims to have sustained.") Khoury's counsel responded with the following facile, and completely undocumented assertion:

> 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 necessarily 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.

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[8]In *Proctor*, the defendant sought to justify admission of the evidence on the ground that it was relevant to its contention that the plaintiff was a malingerer. Referring to this as a "flimsy purpose," this court held that it simply does not matter what the claimed relevance may be. "[N]o matter how probative the evidence of a collateral source may be, it will never overcome the substantially prejudicial danger of the evidence." 112 Nev. at 91, 911 P.2d at 854. Khoury's purpose is no less flimsy. Every single medical lien he tendered to the district court stated in these exact words or words of similar import: "I further understand that such payment is not contingent on any settlement, judgment or verdict by which I may eventually recover." JA, v. III, pp. 0444, 0445, 0446, 0447, 0449, 0450, 0451. Thus, the notion that the medical providers became "contingent" witnesses is nonsense.

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JA, v. III, p. 0373; v. V, p. 0788.

Apparently, Khoury's counsel has not examined the documents he sought to introduce into evidence. In one of the liens, Seastrand was required to initial the following statement: "Patient affirmatively represents to provider that no health insurance coverage exists for the treatment to be rendered to patient . . .." JA, v. III, p. 447. Thus, counsel's unsworn assertion that even insured patients often receive treatment under a lien, the evidence that he tendered in this case quite unequivocally would have suggested to the jury that Seastrand was not covered by medical insurance. Whether true or not, this could have engendered resentment toward Seastrand for failing to have the foresight to insure herself against this kind of loss.

IV. THE DISTRICT COURT PROPERLY EXCLUDED EVIDENCE OF THE AMOUNTS THAT SEASTRAND'S MEDICAL PROVIDERS RECEIVED FOR THE SALE OF THEIR LIENS

Before addressing Khoury's fourth argument (§ D, AOB, pp. 33-41), it is important to point out some threshold issues.

First, the argument heading is misleading. Omitting the bold, enlarged font and initial uppercase letters, Khoury's argument heading reads: "The district court abused its discretion by permitting Seastrand to claim the entire amount billed for her treatment instead of the amount paid." *Id.* at 33. The problem with this statement is that, while Khoury suggested (in unsworn argument only) that the ***medical providers*** "likely" accepted sale prices that were lower than the liens' face values (JA, v. V, p. 916), he never contended that the ***third-party lien purchasers*** would have accepted anything but the face value of their liens as payment from Seastrand. Therefore, the suggestion that the lien sales (if any) had any bearing whatsoever on what ***Seastrand*** actually paid is false and misleading.

Second, when one reads the four somewhat confusing sub-arguments, it is apparent that Khoury is merely attempting to use a different rationale for his

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contention that evidence of the medical liens were relevant. Here, Khoury apparently contends that evidence of what third-party buyers paid the medical providers for their liens is probative of the reasonable value of the services that the providers rendered. It has just been shown, however, that in *Proctor* this court enunciated a per se prohibition on the introduction of collateral source evidence "for any purpose." 112 Nev. at ___, 911 P.2d at 854. As noted, the court expressly explained that it simply does not matter how probative the evidence may be. It must be excluded because its probative value can never outweigh the danger of unfair prejudice. Thus, shifting the claimed relevance from an attempt to show a witness's bias to an attempt to prove the reasonable value of the medical services Seastrand received does not change the fact that the evidence is inadmissible per se.

Third, the purpose of a motion in limine is to procure an advance ruling on the admissibility of specific evidence. In his motion in limine no. 7, Khoury revealed that he had not done the discovery to determine whether the evidence he sought to admit even existed. He argued that Seastrand's medical providers "***may*** have received a reduced rate" when (and if) they had sold their medical liens. JA, v. IV, p. 596; emphasis added. A motion in limine may not be used to obtain a ruling on an abstract proposition of law and, by failing to point to specific evidence that he sought to admit, Khoury abused the procedure. *See, e.g., McCluskey v. Allstate Insurance Company*, 2006 WL 6853110, at *6 (D. Mont. 02/10/06) ("Defendant's motion is DENIED as it has failed to identify any specific testimony and it is seeking only to enforce an exclusionary rule in the abstract.").

A. Standard of Review

As noted under Argument § III(A), a district court's decision to admit or exclude evidence is ordinarily reviewed under an abuse of discretion standard. *FGA, Inc.*, at ___, 278 P.3d at 497-98. Khoury's argument to the contrary

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notwithstanding, evidence of the sales price that a medical provider received for his or her lien would implicate the collateral source rule. And, as also previously noted, in *Proctor v. Castelletti*, 112 Nev. 88, 91, 911 P.2d 853, 854 (1996), this court expressly "eviscerate[d] the trial court's discretion" regarding collateral source evidence by adopting a per se rule against its admission for any purpose. Thus, the introduction of collateral source evidence would constitute legal error per se.

B. Khoury's Reliance on *Howell v. Hamilton Meats and Provisions, Inc.* is Misplaced First Because There Was No Evidence of "Amounts Billed But Unpaid"

Khoury summarizes his fallacious reasoning in the opening lines of his argument as follows:

> Plaintiff treated with several providers on a lien, and some doctors holding liens sold them for less than the actual billed amount. (III-JA-0371; 0444-62.) Therefore, Seastrand incurred no obligation for the unpaid portion written down from the sale.

AOB, p. 34. This is a *non sequitur*. Assuming the truth of the first sentence, the second sentence does not logically follow, despite Khoury's insertion of the word "Therefore." As noted above, any sales of liens by providers had no demonstrated effect on the amount of Seastrand's obligation. Thus, even if one accepts the notion that this court would embrace *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal. 2011), the reasoning of that decision simply has no application.

In that case, Rebecca Howell was injured in an automobile collision caused by an employee of Hamilton Meats. Hamilton Meats admitted liability and the case went to trial on the issue of economic and noneconomic damages. Howell had health insurance through PacifiCare, which had negotiated "write-downs" with the hospital in which Howell was treated. The issue was whether Howell's economic damages consisted of the amounts orginally billed by the hospital or rather was limited to the lower amounts that PacifiCare actually paid.

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The California Supreme Court held that Howell could not recover the full amount of the hospital's original billings because her economic damages were limited to amounts actually paid on her behalf by PacifiCare. For reasons we will presently explain, *Howell* is contrary to Nevada law. The point here, however, is that it involved a differential between what Howell was originally charged for her health care and the amounts ultimately paid by her or on her behalf. There is simply no such evidence here and thus Khoury's argument is way wide of the mark.

C. Even if *Howell* Were Somehow Apposite (and it is Not), that Decision Would Have No Application Because it is Ill-Considered and is Inconsistent with *Proctor v. Castelletti* and its Progeny

In *McConnell v. Wal-Mart Stores, Inc.*, 995 F.Supp.2d 1164 (D.Nev. 2014), U.S. District Court Judge Robert C. Jones undertook a thoughtful analysis of *Howell* and made an *Erie*-educated determination as to whether this court would embrace its reasoning. Unlike the instant case, *McConnell* involved a situation in which there was evidence of "write-downs" which reduced the amount for which the injured plaintiff would ultimately be responsible to pay for her medical treatment. Wal-Mart filed a motion in limine, arguing the court should exclude evidence of the amounts originally billed by the plaintiff's medical providers.

The *McConnell* court began by summarizing this court's view of the collateral source rule, as enunciated in *Proctor, supra*, noting the decision's embrace of ""*per se* rule barring the admission of a collateral source of payment for an injury into evidence for *any* purpose."" *Id.* at 1169, quoting *Proctor*, 112 Nev. at 90, 911 P.2d at 854 (emphasis added in part). The court then dispatched Wal-Mart's contention that *Proctor* was no longer good law, in light of *Tri-County Equip. & Leasing, LLC v. Klinke*, 128 Nev. ___, 286 P.3d 593 (Adv.Op.No. 33; 06/28/12). The court in *McConnell* explained the *Klinke* was merely a statutory interpretation case and that "the language of *Proctor* remains

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in tact after *Klinke*: not admissible "for any purpose." *Id.* at 1170.

The court in *McConnell* then turned its attention to Wal-Mart's reliance on *Howell*. It expressly rejected "the *Howell* Court's rationale that a write-down is not equivalent to forgiveness of a debt because write-downs are prearranged between insurers and providers." *Id.*, flag-citing *Howell*, 257 P.3d at 1138-39. Judge Jones then painstakingly described the lack of logic in *Howell's* rationale, showing that the decision's reasoning was "schizophrenic" and the resulting rule "incoherent." *Id.* at 1170-71. In summary, even if by some feat of legerdemain *Howell* could possibly be deemed relevant, it is a poorly reasoned decision that is trumped by existing Nevada law.

V. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MISTRIAL BASED ON THE USE OF THE WORD "CLAIM" IN THE OPENING STATEMENT OF PLAINTIFF'S COUNSEL[9]

A. Standard of Review

Khoury accurately states that the applicable standard of review is abuse of discretion, citing *Owens v. State*, 96 Nev. 880, 620 P.2d 1236 (1980). However, it is worth noting that, in *Owens*, the court's actual language was that, "the [trial] court's determination will not be disturbed on appeal in the absence of a ***clear*** showing of abuse." *Id.* at 883, 620 P.2d at 1238; emphasis supplied. To illustrate the depth and breadth of the trial court's discretion, it can be noted that Seastrand's research reveals only two cases in this court's 150-year history in which it reversed judgments on the ground that a motion for mistrial was

[9]In his argument heading, Khoury argues it was error for the district court to refuse to grant a "new trial," but the body of his argument focuses on the alleged error in failing to grant a mistrial. Seastrand assumes that Khoury's argument heading is a mistake and that his intent is more accurately reflected in the argument itself.

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denied.[10] This is true, notwithstanding that a Westlaw search lists 155 Nevada Supreme Court decisions (dating back to 1870) in which the word "mistrial" appears in the headnotes. One can readily conclude that an abuse of discretion occurs in only the most egregious of circumstances.

B. Khoury Has Made No Clear Showing of Abuse of Discretion in the District Court's Denial of the Motion for Mistrial, Predicated Solely on a Single, Innocent Utterance of the Ambiguous Word "Claim"

Because Seastrand's trial counsel knew that two of Khoury's defenses were that 1) Seastrand was injured in a prior accident and that 2) the instant suit was motivated by "secondary gain," he noted in opening statement that Seastrand had, indeed, been involved in a prior automobile accident – a rollover in which she was a passenger – but she had not made any claim because her injuries were insignificant and had resolved quickly. In describing the testimony to be expected from his client, Seastrand's counsel stated:

> But you'll hear from Margie and she'll tell you, yeah, in that rollover I was the passenger and I wasn't hurt. I went to the ER and the ER physicians checked me out, and then I went to a holistic doctor one or two times and then I didn't have any

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[10]In both cases, the irregularity at trial was of constitutional proportions. One case, *Valdez v. State*, 124 Nev. 1172, 196 P.3d 465 (2008), involved the guilt phase of a first degree murder trial. This court held it was error to deny a motion for mistrial premised on intrinsic juror misconduct, where the jurors reached an improper compromise verdict of guilty by tacitly agreeing, before hearing the evidence in the penalty phase, on the punishment they would later impose. Obviously, this highly improper procedure warranted reversal, whether or not a motion for mistrial was made. The second case is *Harkness v. State*, 107 Nev. 800, 820 P.2d 759 (1991), also a first degree murder conviction. In argument, the prosecutor violated the defendant's Fifth Amendment right not to testify by rhetorically asking the jury whose fault it was "if we don't know the facts in this case." Again, this error was of constitutional magnitude and reversal would have been required in the absence of a motion for mistrial. At any rate, these two cases stand in sharp contrast to Khoury's anemic contention that the single use of the word "claim" required a mistrial as a matter of law.

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> problems. I didn't make a claim. I didn't do anything like that. I didn't have any issues with it.

JA, v. IX, p. 1752, ll. 9-15.

Khoury's counsel moved for a mistrial, arguing that the term "claim is uniquely an insurance term." *Id.* at 1760, ll. 7-8. He asserted further that, by telling the jury Seastrand had not filed an insurance claim against the prior driver, the jurors would infer that she had filed an insurance claim against Khoury.

The district court correctly rejected this assertion, reasoning that the single, isolated use of the word "claim" did not rise to the level of grounds for a mistrial:

> He did mention the word claim one time. I didn't want to emphasize that to the jury because I thought that would just draw additional attention to it. The fact that it was mentioned once in passing I don't think rises to the level of a mistrial that requires us to retry the case or pick a new jury. I don't know that they even appreciate the legal significance of the word claim but I understand your position.

Id. at p. 1761, ll. 4-12.

There are several difficulties with Khoury's contention. First, even if one accepts his dubious assumptions and strained logic, Khoury has still fallen far short of making a clear showing of abuse of discretion. *Henry v. Baber*, 75 Nev. 59, 334 P.2d 839 (1959), is instructive. There, Mr. and Mrs. Baber filed a personal injury action, after a four-car collision. During the direct examination of Mr. Baber, his counsel asked him if he had any conversations with one of the defendants. Mr. Baber responded by saying, "I went to get her name and her insurance information so I could fill in my report." *Id.* at 62, 334 P.2d at 840. Defendant's counsel moved for a mistrial on the ground that the issue of liability insurance had been improperly interjected into the case. The district court denied the motion and this court found no abuse of discretion in such ruling. The court in *Henry* relied, in part, upon the fact that the reference to insurance had

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not established the existence of coverage and that the question was not deliberately asked with the intent of bringing the issue of insurance coverage into the case. *See also, e.g., Diaz v. Legat Architects, Inc.*, 920 N.E.2d 582, 605 (Ill.App. 2009) (not every mention of insurance requires the court to declare a mistrial; it is prejudicial only if it directly indicates that defendant is insured or was the product of deliberate conduct intended to influence or prejudice the jury); *Genthon v. Kratville*, 701 N.W.2d 334, 347 (Neb. 2005) (it is not every casual or inadvertent reference to an insurance company in the course of a trial that will necessitate a mistrial; court must examine facts and circumstances peculiar to the case under consideration).

Both of these circumstances mentioned in *Henry* are present here. The highly speculative inferences that Khoury seeks to attribute to the jury clearly are a far cry from a direct statement that he carried liability insurance. And there is no showing that counsel's reference to a "claim" was anything more than an unfortunate choice of words, if that. Furthermore, the term "claim" is not "uniquely an insurance term," as Khoury erroneously contends.

Black's Law Dictionary contains 1½ pages defining the word "claim." Black's Law Dictionary, ("claim") (9th ed. 2009). The word "insurance" does not appear even once in these definitions. Rather, "claim" is defined in a manner that is nearly synonymous with lawsuit:

> **1.** The aggregate of operative facts giving rise to a right enforceable by a court <a plaintiff's short, plain statement about the crash established the **claim**>. Also termed ***claim for relief*** (1808). **2.** The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional <the spouse's **claim** to half of the lottery winnings>. **3.** A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for. [Cases: Federal Civil Procedure k680; Pleading 72.]

Even in more everyday parlance, the use of the word "claim" is not remotely synonymous with insurance. *See, e.g.*, Random House Webster's College

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Dictionary, p. 243 (1999), wherein the word insurance does not appear until last on the list of definitions. And even there, an "insurance claim" appears along with "workers' compensation claim" on a non-exclusive list of examples.[11] In short, it simply cannot be demonstrated that use of the word "claim" necessarily interjected the topic of insurance into the case.

Finally, it must be noted that the jurors were expressly instructed that they were "not to discuss or even consider whether or not [Khoury] was carrying insurance that would reimburse [him] for whatever sum of money [he] may be called upon to pay to [Seastrand]." JA, v. XVIII, p. 3221. They were further instructed that "[w]hether or not a party was insured is immaterial, and should make no difference in any verdict [they] may render in this case." *Id.* In the absence of any evidence to the contrary, it must be presumed that they followed these instructions. *Patton v. Henrikson*, 79 Nev. 197, 203, 380 P.2d 916, 918-19 (1963) (reviewing court could not presume that the jury ignored trial court's instruction to refrain from any inference, speculation or discussion about insurance).

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING COUNSEL TO VOIR DIRE THE JURY PANEL ON THEIR ATTITUDES REGARDING LARGE VERDICTS[12]

A. Standard of Review

As previously stated in Argument § V(A), above, this court reviews the denial of a motion for mistrial under an abuse of discretion standard. *Owens v.*

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[11] *See also*, http://dictionary.reference.com/browse/claim where insurance is mentioned only in the tenth (and final) definition of the word.

[12] Once again, there is a disconnect between Khoury's argument heading, which complains about the denial of a "new trial," and the body of his argument, which repeatedly refers to the denial of a motion for mistrial. And, once again, Seastrand assumes that Khoury's argument heading is a mistake and that his intent is more accurately reflected in the argument itself.

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State, 96 Nev. 880, 620 P.2d 1236 (1980). As also noted, however, the scope of the district court's discretion is particularly spacious. This is also true as to the district court's supervision of voir dire. "The scope of voir dire . . . 'rests within the sound discretion of the district court, whose decision will be given considerable deference by this court.'" *Thomas v. Hardwick*, 126 Nev. ___, ___, 231 P.3d 1111, 1115 (Adv.Op.No. 16; 05/27/10), quoting *Johnson v. State*, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006). Thus, the trial court's decision regarding the scope of voir dire is also reviewed under a very generous application of the abuse of discretion standard.

B. Seastrand's Counsel Did Not "Indoctrinate" the Jury, But Rather Asked Legitimate Questions Uncovering Information Critical to His Client's Challenges for Cause and Her Peremptory Challenges

1. General Principles Regarding Attorney-Conducted Voir Dire

The right to conduct voir dire free of unreasonable restrictions is secured by statute. NRS 16.030(6) provides that, "[t]he 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." The importance of participation by the parties or their attorneys was emphasized in *Whitlock v. Salmon*, 104 Nev 24, 752 P.2d 210 (1988). In *Whitlock*, the trial judge completely precluded either party's counsel from participating directly in voir dire. Instead, over objection, he required the attorneys to submit their questions to him and he, in turn, asked the questions of the prospective jurors. *Id.* at 25, 752 P.2d at 211. In reversing the ensuing defense verdict, this court reasoned as follows:

> The importance of a truly impartial jury, whether the action is criminal or civil, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country. *United States v. Bear Runner*, 502 F.2d 908, 911 (8th Cir.1974). The voir dire process is designed to ensure—to the fullest extent possible—that an intelligent, alert and impartial jury which will perform the important duty assigned to it by our judicial system is obtained. *De La Rosa v. State*, 414 S.W.2d 668, 671 (Tex.Crim.App.1967). The purpose of voir dire examination is to

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> determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she finds them, to the law given. *See Oliver v. State*, 85 Nev. 418, 422, 456 P.2d 431, 434 (1969). We are convinced that prohibiting attorney-conducted voir dire altogether may seriously impede that objective.
>
> Usually, trial counsel are more familiar with the facts and nuances of a case and the personalities involved than the trial judge. Therefore, they are often more able to probe delicate areas in which prejudice may exist or pursue answers that reveal a possibility of prejudice. Moreover, while we do not doubt the ability of trial judges to conduct voir dire, there is concern that on occasion jurors may be less candid when responding with personal disclosures to a presiding judicial officer. Finally, many trial attorneys develop a sense of discernment from participation in voir dire that often reveals favor or antagonism among prospective jurors. The likelihood of perceiving such attitudes is greatly attenuated by a lack of dialogue between counsel and the individuals who may ultimately judge the merits of the case. In that regard, we expressly disapprove of any language or inferences in *Frame* [*v. Grisewood*, 81 Nev. 114, 399 P.2d 450 (1965)] that tend to minify the importance of counsel's voir dire as a source of enlightenment in the intelligent exercise of peremptory challenges.

Id. at 27-28, 752 P.2d at 212-13; footnote omitted. In the omitted footnote, the court referenced a study which "suggests that the judge's presence evokes considerable pressure among jurors toward conforming to a set of perceived judicial standards and that this is minimized when an attorney conducts voir dire." *Id.* at 28 n. 6, 752 P.2d at 212 n. 6.

2. Because Plaintiff Was Seeking an Award of General Damages of $2 Million, Her Counsel Had a Right to Determine Whether Prospective Jurors' Preconceived Opinions Would Arouse Any Biases Against Plaintiff

As Khoury acknowledged at trial, Seastrand was seeking an award of "upwards of $2.9 million." JA, v. XVIII, p. 3371. Meanwhile, defense counsel contended for a "total verdict of $61,500." *Id.* at 3373. The only rationale for Khoury's voir dire objection as to the mention of $2 million was the contention that it was an attempt to "indoctrinate" the jury. There was no argument that the prospective jurors' preconceived notions regarding awards for pain and suffering were per se outside the realm of proper voir dire.

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In his opening brief, Khoury cites a decision from the Appellate Court of Illinois for the proposition that "[v]*oir dire* should not be used to indoctrinate a jury . . .." AOB, p. 45, citing *People v. Lanter*, 230 Ill.App.3d 72, 595 N.E.2d 210 (1992). That Khoury misreads *Lanter* becomes obvious when it is noted that Illinois is among the jurisdictions that have rejected the "indoctrination" rationale as a basis to thwart voir dire regarding the prospective jurors' fixed notions about large jury awards.

In *DeYoung v. Alpha Construction Co.*, 542 N.E.2d 859 (Ill.App. 1989), a woman who survived a gas explosion and the estate of her mother, who perished in it, brought suit and were awarded $4,224,694.89. On appeal, one of the defendant's contentions was that a *voir dire* question, asking whether prospective jurors would be willing to return a verdict "in the millions," was an ""improper attempt to indoctrinate the jury . . .."" *Id.* at 764, quoting defendant's argument. The appellate court flatly rejected this assertion, holding that it was entirely proper "to inquire whether potential jurors have fixed ideas about awards of specific sums of money." *Id.*

In support of its holding, the court in *DeYoung* cited *Kinsey v. Kolber*, 431 N.E.2d 1316 (Ill.App. 1982). In *Kinsey*, plaintiff's counsel, on four occasions, asked whether prospective jurors would have any trouble returning a verdict of over $2 million, if that amount was supported by the evidence and the law. In support of his contention that these questions constituted an improper attempt to indoctrinate the jurors and to elicit a pledge from them, the defendant also noted that plaintiff's counsel reminded the jurors of their answers during his closing argument. In rejecting the defendant's contention, the court in *Kinsey* noted that acceptance of his position would require the court to overrule long-standing Illinois law:

> Defendant urges that this remark [in closing argument] supports the indoctrination purpose of the questions asked during voir dire. In advancing this argument defendant is asking us to overrule *Scully*

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> *v. Otis Elevator Company* (1971), 2 Ill.App.3d 185, 275 N.E.2d 905, *Jines v. Greyhound Corporation* (1964), 46 Ill.App.2d 364, 197 N.E.2d 58, rev'd on other grounds (1965), 33 Ill.App.2d 83, 310 N.E.2d 562, and *Murphy v. Lindahl* (1960), 24 Ill.App.2d 461, 165 N.E.2d 340, all cases where the court has held that questions concerning a specific verdict amount tended to uncover jurors who might have a bias or prejudice against large verdicts.

Id. at 946-47. Accordingly, Khoury's attempt to contort the law of Illinois to support his "indoctrination" argument is ill-considered.

But the recognition that it is proper to ask prospective jurors on voir dire about any fixed beliefs they may have about large verdicts is not limited to Illinois. The parties' counsel submitted voir dire questions to the court in *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F.Supp. 1240 (N.D. Ohio 1980). The City of Cleveland submitted the following question:

> You are each to be aware of the fact that the City of Cleveland is seeking a judgment of millions of dollars from CEI. If the evidence supports the judgment sought by the City of Cleveland, would you have any hesitancy in awarding a judgment of millions of dollars for the City and against CEI?

Id. at 1249-50. In deciding the question was proper, the court cited cases from several jurisdictions and concluded that its propriety was supported by the "prevailing weight of authority." *Id.* at 1250.

Among the cases cited in *City of Cleveland* is the Seventh Circuit's opinion in *Geehan v. Monahan*, 382 F.2d 111 (7th Cir. 1967). There, plaintiff's counsel asked prospective jurors whether they would "have any hesitancy of returning a verdict commensurate with the injuries you find she has, even though it might run many thousands of dollars." *Id.* at 115. Defense counsel objected on the theory that his opponent was attempting to secure a pledge from the jury. The trial court overruled the objection and the Seventh Circuit sustained this ruling, noting that "[s]uch a question is generally in the discretion of the court." *Id. See also Bunda v. Hardwick*, 138 N.W.2d 305 (Mich. 1966).

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3. The Questions Seastrand's Counsel Asked on Voir Dire Were Not Improper Hypothetical Questions and, Thus, There Was No Violation of EJDCR 7.70

A hypothetical question is one in which the interrogated individual (usually an expert witness) is asked to assume the truth of one or more specific facts and, based on the hypothesis, answer the question. *See, e.g., Carruthers v. Phillips*, 131 P.2d 193, 196 (Or. 1942). In the context of voir dire, an excellent example of a prohibited hypothetical question appears in *Witter v. State*, 112 Nev. 908, 921 P.2d 886 (1996). The defendant was tried on charges of murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary. At the time, Nevada's criminal statutes provided that, if the defendant was convicted of first degree murder, the jury would reconvene for the penalty phase of trial and make a determination as to whether the defendant should be sentenced to death, life in prison without the possibility of parole, and life in prison with the possibility of parole. 1 Stats. of Nev. 323 (1993). The statutes set forth specific aggravating and mitigating factors to guide the jury during the penalty phase. One of the statutory aggravating factors was a prior felony conviction involving the use or threat of violence. 2 Stats. of Nev. 1452 (1989).

On voir dire, the defendant wanted to ask prospective jurors the following question: "If there was evidence that Defendant had a prior felony conviction involving the use or threat of violence, would you still consider all three sentencing alternatives?" 112 Nev. at 915, 921 P.2d at 891. This court held the district court properly ruled that this was an impermissible hypothetical question in violation of EJDCR 7.70. Because the juror was asked to assume the existence of specific evidence, the question was an improper attempt to "read how the potential juror would vote during the penalty phase of the trial." 112 Nev. at 915, 921 P.2d at 892.

The questions asked on voir dire by Seastrand's counsel took exactly the

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opposite approach. He scrupulously avoided presenting any specific evidence that would be presented. *See, e.g.*, JA, v. VII, p. 1338, ll. 10-13. ("It's hard to know, isn't it, until you hear the facts? That's one frustrating part about this is we can't tell you anything about the case."). In fact, the very point of his inquiry was to identify jurors who would automatically be reluctant to return a large verdict, ***irrespective*** of the evidence and the applicable law that may support such a verdict. This was an entirely proper attempt to ferret out individuals who may become advocates for the kind of jury nullification condemned by this court in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008). There, the court defined jury nullification as:

> [a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.

Id. at 20, 174 P.3d at 982-83, quoting Black's Law Dictionary 875 (8th ed. 2004).

In the context of criminal trials, the importance of voir dire in addressing the problem of jury nullification was eloquently discussed by the Second Circuit in *United States v. Thomas*, 116 F.3d 606, 616 (2nd Cir. 1997), explaining:

> [E]very day in courtrooms across the length and breadth of this country, jurors are dismissed from the venire "for cause" precisely because they are unwilling or unable to follow the applicable law. Indeed, one of the principal purposes of voir dire is to ensure that the jurors ultimately selected for service are unbiased and willing and able to apply the law as instructed by the court to the evidence presented by the parties. [Footnote omitted.]

It should not go unnoticed that Khoury's counsel spent a considerable amount of time ensuring that the prospective jurors agreed to return a verdict of only 4 or 5 figures, if that is the value the evidence revealed. *See, e.g.*, JA, v. VIII, pp. 1618-19.

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4. In Any Event, Khoury Can Demonstrate No Prejudice Resulting from the Alleged "Indoctrination," Given the Penurious Amounts the Jury Awarded for General Damages

The doctrine of harmless error is embodied in NRCP 61, which states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order of in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In keeping with this principle, the court has consistently held that it will not disturb a judgment on appeal if the claimed error was harmless. *See, e.g., Barrett v. State*, 105 Nev. 356, 361, 776 P.2d 538, 541 (1989) (since defendant failed to demonstrate prejudice resulting from statement made by court in presence of jury, any error in making comment was harmless); *Truckee-Carson Irr. Dist. v. Wyatt*, 84 Nev. 662, 666-67, 448 P.2d 46, 49-50 (1968) (judgment cannot be reversed by reason of erroneous instruction that violates Art. 6, § 12 and NRS 3.230 unless upon consideration of entire proceedings it shall appear that such error has resulting in miscarriage of justice because it is probable that a different result would ensue at a new trial; burden is upon appellant to show probability of different result).

In regard to general damages, the record reveals that Seatrand's counsel suggested a per diem of $1,000 for the four years of past damages (JA, v. XVIII, pp. 3300-01), which translates to a total of about $1.46 million. As for future damages, he suggested a per diem of $100 (*id.* at 3304), erroneously indicating Seastrand's remaining life expectancy was 31 years. *Id.* at 3268. (It was actually 32 years. *Id.* at 3233.) For future pain and suffering, this suggestion would yield an award of $1,131,500 for 31 years and $1,168,000 for 32 years. Either way, this works out to a total award of about $2.6 million in general damages.

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Yet the jury awarded only $85,013.00 for past general damages and only $68,010.00 for futures. JA, v. XVIII, p. 3420B. This is less than 6% of the requested past general damages and a hair over 6% of the requested future general damages. In fact, her past general damages equal about one-third of her past medical expenses. And her future generals equated to less than 60% of her future medical expenses. This is so, even though Khoury's counsel tacitly agreed in closing argument that doubling or tripling Seastrand's medical expenses would be a reasonable means of assessing her general damages.[13]

Where, as here, the amount of a jury's award clearly reveals that it was not "indoctrinated," any error in conducting voir dire on large verdicts is, at most, harmless. *Atlanta Joint Thrminals v. Knight*, 106 S.E.2d 417 (Ga.App. 1958), is instructive. There, the defendant argued on appeal that the trial court had erred in allowing plaintiff's counsel to ask prospective jurors whether they could return a verdict in the amount of $300,000 if that amount was supported by the evidence and the law. The court first noted that "prejudice as to the size of verdicts is as much comprehended under the subject matter of civil actions as the nature of the cause of action." *Id.* at 424. However, assuming any error occurred, it was harmless in light of the fact that the jury had returned a verdict of only about 13% of the requested amount:

> Accordingly, even if it could be said that the voir dire questions finally permitted were objectionable, and even if the instructions of the court were not sufficient as a matter of law to cure any irregularity therein, it is obvious from the small size of the verdict compared with the amount sued for that the questions were not, as a matter of fact, harmful to the complainant. This ground is without merit.

The same reasoning applies here.

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[13]After paring the related past medical costs to $30,750, Khoury's counsel argued: "The pain and suffering, well, you can do what you want. If he wants to — if counsel says doubling it or tripling it or whatever, fine." JA, v. XVIII, pp. 3372-73.

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Also helpful is the Seventh Circuit's opinion in *Geehan, supra*. As previously explained, the court there held that there was no abuse of discretion in allowing plaintiff's counsel to ask prospective jurors whether they would "have any hesitancy of returning a verdict commensurate with the injuries you find she has, even though it might run many thousands of dollars." 382 F.2d at 115. However, the court also noted that "defendant has not attempted to show any prejudice resulting from the asking of the foregoing question. Defendant makes no contention that the damages allowed by the jury are excessive." *Id.* The same is true here. Khoury has not contended, because he clearly cannot contend, that the general damages awarded by the jury are excessive. If anything, they are inadequate.

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE FIVE CHALLENGES FOR CAUSE ABOUT WHICH KHOURY COMPLAINS

A. Standards of Review

Notably, Khoury includes his contention about the dismissal of five jurors for cause within his larger argument that the district court erred in failing to grant a mistrial after Seastrand's counsel impermissibly "indoctrinated" the jury. AOB, p. 49. Thus, his contention regarding the district court's grant of Seastrand's challenges for cause is not presented as a separate independent point and, consequently, Khoury sets forth no separate standard of review.

The standard of review was touched upon in *Jitnan v. Oliver*, 127 Nev. ___, ___, 254 P.3d 623, 628 (Adv.Op.No. 35; 07/07/11), where this court observed:

> A district court's ruling on a challenge for cause involves factual determinations, and therefore, the district court enjoys "broad discretion," as it "is better able to view a prospective juror's demeanor than a subsequent reviewing court." *Leonard v. State*, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001).

While this language suggests a unitary abuse-of-discretion standard of review of the district's denial ***or*** grant of a challenge for cause, it has be persuasively noted

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that an appellant has a far greater burden in demonstrating error from the ***grant*** of a challenge for cause than from a ***denial*** of such a challenge.

This distinction stems from the simple fact that, while a litigant has a right to exclude a biased individual from the jury, he or she has no right to insist that any particular competent juror be selected over another competent venire member. *See, e.g., Tasby v. State*, 111 S.W.3d 178, 182 (Tex.App. 2003) ("There is no right to have a particular person on the jury; challenges for cause should be liberally granted."); *State v. Wilson*, 826 S.W.2d 79, 83 (Mo.App. 1992) ("When selecting jurors it is better to err on the side of caution."). This advice to err on the side of caution is consistent with this court's recent admonition "that a prospective juror who is anything less than unequivocal about his or her impartiality should be excused for cause." *Preciado v. State*, 130 Nev. ___, ___, 318 P.3d 176, 177 (Adv.Op.No. 6; Feb. 13, 2014).

Even many courts that apply an abuse of discretion standard to both the denial and grant of a challenge for cause, account for the obvious distinction between the two situations in their harmless error analyses. For example, also proceeding on the premise that a litigant has no right to insist on the selection of one qualified prospective juror over another, the Supreme Court of Kentucky has held that the erroneous grant of a challenge for cause is harmless unless it is "tantamount to some kind of systematic exclusion, such as race . . .." *Basham v. Commonwealth*, 455 S.W.3d 415, 421 (Ky. 2014).

The matter was examined in some depth in *Jones v. State*, 982 S.W.2d 386 (Tex.App. 1998) (en banc). *Jones* was a capital murder case in which the accused was convicted and sentenced to death. There, a challenge for cause to a prospective juror was granted on the ground that during voir dire she had stated she would view accomplice testimony implicating the accused with initial skepticism. After carefully determining that the grant of the challenge for cause was erroneous, the court turned its attention to the "next question," *i.e.*,

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"whether the judgment should be reversed because of the error." *Id.* at 390.

The court noted that Tex.R.App.Proc. 44.2(b), expressing the harmless error doctrine, was substantially identical to Fed.R.Crim.Proc. 52(a) and took guidance from the federal decisions applying the latter rule:

> It was established early in the federal courts that the incorrect exclusion of a juror did not require reversal of a judgment. Chief Justice Story, sitting as a circuit judge, denied a new trial to a defendant who claims that Quaker jurors had been excused in error. The Chief Justice reasoned, "Even if a juror had been set aside by the court, for an insufficient cause, I do not know that it is a matter of error, if the trial has been by a jury duly sworn and impaneled, and above all exceptions. Neither the prisoner nor the government in such a case have suffered an injury." *United States v. Cornell*, 25 F.Cas. 650, 656 (D.R.I.1820) (No. 14,868).
>
> The full Court adopted the same reasoning in *Northern Pacific R.R. Co. v. Herbert*, 116 U.S. 642, 6 S.Ct. 590, 29 L.Ed. 755 (1886), in which a juror had been challenged for cause by Plaintiff Herbert and excused by the trial court. The Supreme Court held that, even if there was no cause to excuse the juror, the ruling "did not prejudice the [defendant] company. A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand." 116 U.S. at 646, 6 S.Ct. 590.

982 S.W.2d at 392. The court in *Jones* then noted that its research revealed this rule to be universal among the states that had decided the issue. *Id.*

The court then overruled what it viewed as its anomalous and incorrect holding in *Payton v. State*, 572 S.W.2d 677 (Tex.App. 1978) (*i.e.*, that reversal on this ground is required if the prosecution exercised all of its peremptory challenges), summarizing later as follows:

> By the standards of *stare decisis*, analysis of precedent, and logic, the holding of *Payton* is unsupportable. It is also contrary to a policy which we think courts should follow: the liberal granting of challenges for cause. The venire comprises so many jurors who are clearly qualified that it is unnecessary to err by denying a challenge for cause on a close question.

Id. at 393. This reasoning applies here, as well, and is fully consistent with this court's holdings in *Preciado* and *Jitnan*.

Khoury does not claim that the jurors who replaced those excused for

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cause were somehow unqualified to serve. Indeed, he did not challenge the replacements. Rather, his only claim of prejudice is that, "every juror expressing even a whiff of skepticism in a vacuum about $2,000,000.00 was stricken, leaving behind only jurors already predisposed to believe that Seastrand's case warranted a verdict of a particular value, due to hours of indoctrination." AOB, p. 50. However, it does not follow that jurors who are open-minded about the possibility that a claim may be worth $2 million are necessarily close-minded about the possibility that it is worth less. In fact, Khoury's allegation of prejudice is a thinly veiled contention that he was entitled to jurors who were skeptical of Seastrand's damages claim.

One more point. Because Khoury has presented his claim of error regarding the grant of Seastrand's challenges for cause as a sub-part of his overall argument that the jury was indoctrinated, it must be reiterated that no such indoctrination occurred in this case. For this reason, as well, Khoury's argument about the challenges for cause amounts, at most, to harmless error.

B. The District Court Did Not Abuse its Discretion in Granting Seastrand's Challenges for Cause as to the Remaining Five of the Prospective Jurors

1. The Court Has Consistently Held that Prospective Jurors Who Equivocate as to Their Ability to Be Impartial Must Be Excused for Cause

In *Jitnan*, *supra*, this court summarized the applicable standards and principles that govern the determination of whether a juror should be excused for cause. While operating a cab, the plaintiff in *Jitnan* was struck from behind by defendant's vehicle. Jitnan and his wife brought a personal injury action against defendant. At the beginning of trial, the district court asked the panel of prospective jurors whether any of them had been a party to a lawsuit. Prospective juror no. 40 responded that he had been sued as a result of a car accident that he had caused. In response to further questioning, the prospective juror indicated a personal bias against plaintiffs in personal injury lawsuits.

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Plaintiffs' counsel asked that the prospective juror be excused for cause, but the court denied the challenge. After the jury returned a verdict in favor of plaintiffs in the amount of $47,472 in damages, plaintiffs appealed. They argued the district court abused its discretion in denying their challenge for cause.

In its opinion, this court in *Jitnan* began its legal analysis by reciting the following axioms:

> In determining if a prospective juror should have been removed for cause, the relevant inquiry focuses on whether the "'juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" *Weber v. State*, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (quoting *Leonard*, 117 Nev. at 65, 17 P.3d at 405 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985))). Broadly speaking, if a prospective juror expresses a preconceived opinion or bias about the case, that juror should not be removed for cause if the record as a whole demonstrates that the prospective juror could "'lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" *Blake v. State*, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)). ***But "[d]etached language considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state unequivocally that a preconception would not influence her verdict."*** *Weber*, 121 Nev. at 581, 119 P.3d at 125. [Emphasis supplied.]

127 Nev. at ___, 254 P.3d at 628-29.

The court in *Jitnan* then concluded that in light of the prospective juror's pre-existing bias and inconsistent responses to questions, the district court erred in denying the challenge for cause. 127 Nev. at ___, 254 P.3d at 629. If there is any doubt about this court's holding in *Jitnan*, it is removed by the later admonition in *Preciado, supra*, that a juror must be removed for cause if he or she is anything less than unequivocal about his or her ability to be impartial.[14]

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[14]The court in *Jitnan* went on to determine that the error was not prejudicial so as to require reversal. In so holding, the court rejected plaintiffs' argument that reversal was necessary because they were required

(continued...)

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Also instructive is *Bryant v. State*, 72 Nev. 330, 305 P.2d 360 (1956). There, the defendant was convicted of involuntary manslaughter. During voir dire, a juror stated that she had already formed an opinion as to the guilt or innocence of the accused, based on newspaper accounts she had read. When defense counsel asked her if she could "'impartially and fairly judge the case by reason of those opinions which you now have,'" the juror replied, "'I suppose yes. *I don't think I could, either, the way I feel like I do about it.*'" *Id.* at 332, 305 P.2d at 361 (italics by court). A challenge for bias was then interposed under NCL § 10946 (1929), which defined implied bias as "'having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged." *Id.* Then, the following occurred:

> This was followed by examination of the juror by the trial judge and district attorney from which examination it appeared that her opinion was based upon what she had read in the newspapers and assumed the truth of what she had read and would be set aside if the evidence justified; that if, upon conclusion of the trial, the court instructed her to determine guilt or innocence from the evidence presented, she would follow the court's instructions. In conclusion the district attorney asked, 'And if the facts are presented in this courtroom under oath by witness * * * [and are] different from what you read in the newspapers would you set aside your opinion based upon the newspaper and decide it fairly and impartially; that you will act fairly and impartially upon the matters submitted to you regardless of your opinion now?' Mrs. Walker answered, 'Yes.' Thus she ultimately did declare that she could act fairly and impartially notwithstanding her opinion.

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[14](...continued)
to use a curative peremptory challenge to remove the prospective juror, which prevented them from using a peremptory challenge on another juror. The court stated that "the curative use of a peremptory challenge does not violate a party's state constitutional rights unless he or she demonstrates actual prejudice," and no such prejudice occurred because plaintiffs failed to show that a member of the jury that was seated was unfair or partial. 127 Nev. at ___, 254 P.3d at 630. This aspect of *Jitnan* supports Seastrand's harmless error argument. *See* Argument § VII(A), *supra*. As there noted, Khoury cannot show that any unqualified juror was thrust upon him.

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Id. at 332-33, 305 P.2d at 361 (brackets and ellipsis by the court). The trial court denied the challenge.

On appeal, the issue presented was, whether the trial court could, under NCL § 10948 (1929),[15] "accept this final declaration as superseding and rendering of no significance the earlier, spontaneous and emphatic confession of bias?" 72 Nev. at 333, 305 P.2d at 361. This court held that it could not.

In explaining its conclusion, the court in *Bryant* began by noting:

> This court in many cases has dealt with the problem of a juror's qualification to act notwithstanding the existence of an opinion as to the defendant's guilt or innocence. In many cases it has upheld the trial court's determination that the juror could and would act impartially notwithstanding such opinion. [Citations omitted.] ***In none of these cases, however, did the juror express doubt as to his ability to act impartially. On the contrary, in each case he stated unequivocally and without self-contradiction that notwithstanding his opinion he could act impartially.*** [Emphasis supplied.]

72 Nev. at 333, 305 P.2d at 361.

Continuing its analysis, the court in *Bryant* emphasized that a juror's assertion that she could remain impartial despite an existing opinion must be firm and definite:

> With reference to the juror's declaration as contemplated by § 10948, we approve the statement of the New York Court of Appeals in People v. McQuade, 110 N.Y. 284, 18 N.E. 156, 162,

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[15] The court in *Bryant* quoted this statute:

> "[N]o person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon public rumor, statements in public press or common notoriety provided it appears to the court upon his declaration under oath, or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him."

72 Nev. at 332, 305 P.2d at 361.

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1 L.R.A. 273. "Now, as formerly, an existing opinion, by a person called as a juror, of the guilt or innocence of a defendant charged with crime, is prima facie a disqualification; but it is not now, as before, a conclusive objection, provided the juror makes the declaration specified, and the court, as judge of the fact, is satisfied that such opinion will not influence his action. ***But the declaration must be unequivocal. It does not satisfy the requirement of the statute if the declaration is qualified or conditional.*** It is not enough to be able to point to detached language which, alone considered, would seem to meet the statute requirement, if, on construing the whole declaration together, it is apparent that the juror is not able to express an absolute belief that his opinion will not influence his verdict. * * * Fairly construed, their declaration of their belief that they could render an impartial verdict was qualified by a doubt, and was not sure and absolute. The defendant was at least entitled to a certain and unequivocal declaration of their belief that they could decide the case uninfluenced by their previous opinions."

It is our view that in the case before us the declaration of the juror, Mrs. Walker, was at best qualified by doubt as to her ability to act fairly and impartially. We conclude that it was error to reject the challenge of that juror for cause. [Emphasis added.]

72 Nev. at 334-35, 305 P.2d at 362; ellipsis by court.

Bryant was followed in *Thompson v. State*, 111 Nev. 439, 894 P.2d 375 (1995). As in *Bryant*, the court in *Thompson* held that reversible error occurred when the district court denied a challenge for cause in a criminal action. The court determined that the juror in question should have been excused under NRS 16.050(1)(f) and (g)[16] where his responses to questions during voir dire demonstrated that he had formed or expressed an opinion as to the defendant's

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[16] These provisions state:

1. Challenges for cause may be taken on one or more of the following grounds:

. . ..

(f) Having formed or expressed an unqualified opinion or belief as to the merits of the action, or the main question involved therein . . ..

(g) The existence of a state of mind in the juror evincing enmity against or bias to either party.

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guilt and evinced enmity against the defendant. 111 Nev. at 441-42, 894 P.2d at 376-77. This court so held notwithstanding that the juror's contradictory answer to the final question was that he had not formed an opinion as to guilt or innocence. After quoting from *Bryant*, 72 Nev. at 334-35, 305 P.2d at 361-62, the court said:

> Therefore, simply because the district court was able to point to detached language that prospective juror eighty-nine could be impartial does not eradicate the fact that he previously demonstrated partial beliefs, capped by an unequivocal statement that Thompson was guilty.

111 Nev. at 442, 894 P.2d at 377.

2. Each of the Prospective Jurors Was Properly Excused for Cause Because None Could State Unequivocally and Without Self-Contradiction that He or She Could Act Impartially

When jury selection recommenced on the morning of July 16, 2013, Judge Wiese indicated that he had re-read *Jitnan* and had given further consideration to Seastrand's bench brief on jury selection. Notwithstanding that his consideration of these materials preceded the court's opinion in *Preciado* by some 7 months, Judge Wiese presciently focused his attention on the word "unequivocally" in the following sentence from *Jitnan*: "But detached language considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state unequivocally that a preconception would not influence her verdict." JA, v. VIII, p. 1411, ll. 7-12, quoting *Jitnan*, 127 Nev. at ___, 254 P.3d at 629 (internal quotation marks from, and citation to, *Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005), omitted in transcript. He concluded correctly than each of the challenged juror's declarations of impartiality had been less than unequivocal.

The five jurors in question were Mr. Frazier, Mr. Runz, Ms. Vera, Ms. Ong, and Ms. Agnor. JA, v. VIII, pp. 1424-25. These were prospective jurors 49, 1, 8, 28, and 33, respectively. *Id.* at v. VI, pp. 1126-30.

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a. Mr. Frazier: Mr. Frazier had served as an expert witness for the plaintiff in a suit for $20 million, which he felt was excessive, and he was left with the belief "that a lot of times . . . there's a significant amount of money that's being asked for that's over and above what the . . . plaintiff needs or deserves." *Id.* at v. VII, p. 1230. Mr. Frazier stated that, if he were a plaintiff who had sued for $2 million, he would be uncomfortable having a juror with a bias like his own deciding the issue of damages in his case. *Id.* at 1232. He acknowledged that, due to his bias, he would not be a good fit as a juror in this case. *Id.* He answered "Absolutely," when asked whether he would begin the case with a predisposition toward the defendant's view on damages. *Id.* He added that nothing either of the lawyers said would change his predisposition and that it was a core belief or value that he held. *Id.* at 1233.

Mr. Frazier also expressed his opinion that the majority of lawsuits are frivolous. *Id.* at 1252. This was his view of all lawsuits, whether they were big, small, or in between, "they're looking for a quick fix." *Id.* at 1253. Mr. Frazier had been rear-ended four time and had never brought suit. But the one time he rear-end another, the other driver "comes out holding her neck and all this other stuff . . .." *Id.* And Mr. Frazier ended up "going to court over it." *Id.*

b. Mr. Runz: Mr. Runz stated that he would be biased against awarding a verdict in excess of $2 million. *Id.* at 1223. He acknowledged that this bias as to Seastrand's damages might make him not a good fit as a juror in her case. *Id.* at 1224; 1264. His predisposition against Seastrand's damages claim would cause him to start the trial leaning in favor of Khoury. *Id.* He had held his view against large awards for pain and suffering for a long time; it was a core value that would not be changed by anything either counsel said. *Id.* at 1224-25. If he himself had brought a personal injury action, Mr. Runz would feel uncomfortable submitting his case to a jury comprised of people who held his view. *Id.* at 1264.

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c. Ms. Vera: Ms. Vera did not agree with the concept of awarding monetary damages for pain and suffering. *Id.* at 1198. She felt this was a way plaintiffs try to avoid working anymore; she spoke of her sister who was involved in an accident, received nothing for pain and suffering, and was "still out there working." *Id.* When questioned further, Ms. Vera indicated her view as to compensation for pain and suffering was a fundamental, core value and belief. *Id.* at 1208. She has held this belief for a long time and nothing either of the lawyers could say would change this value. *Id.* at 1209-10. If she were a plaintiff, she would not feel comfortable submitting her case to a juror with her mindset; accordingly, she acknowledged that she would not be a good fit for the Seastrand jury. *Id.* at 1210. In her mind, Khoury would start out with an advantage on the issue of damages if she were a juror in the case. *Id.*

d. Ms. Ong: Ms. Ong affirmed that a suit for over $2 million was outrageous because it was simply too much money. *Id.* at 1221. If she were a plaintiff, she would feel uncomfortable submitting her own case to a juror who shared her own core values and beliefs. *Id.* Because of her bias on the issue of damages, Ms. Ong acknowledged that she would not be a good fit for this particular jury. *Id.* She had held this belief for a long time and even mentioned it in her juror questionnaire she thinks that personal injury lawsuits are often "just for making money." *Id.* at 1221-22. Her predisposition against high awards for damages in personal injury action was long-standing and would not be changed by anything either of the lawyers or the judge might say to her. *Id.* at 1222.

e. Ms. Agnor: When informed that Seastrand's claim was in excess of $2 million, she expressed her immediate belief that it was "excessive," in light of her assumption that Khoury did not intend to harm Seastrand. *Id.* at 1191. She later referred to the claim as "astronomical," even if the plaintiff was disabled and could no longer work. *Id.* at 1199. On further questioning, Ms.

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Agnor attested that, even without knowing anything about the case, she would have a hard time with such a large claim due to her fundamental core beliefs. *Id.* at 1217. Ms. Agnor could only envision awarding such a large sum of money if Seastrand was physically disabled or had lost a limb. *Id.* at 1218. Referring to an award of $2 million as "kind of unfathomable," Ms. Agnor stated that, if she were a plaintiff, she would be uncomfortable having someone with her mindset serve as a juror on her case. *Id.* at 1219. She agreed that she would not be a good fit for this particular jury. *Id.* If on this jury, the playing field would not be level and nothing anyone else might say to her could change her long-held core values in this regard. *Id.* at 1220.

Given the foregoing facts, it is clear that these five prospective jurors were far less than unequivocal about their abilities to be impartial. Thus, there was no abuse of discretion in excusing them for cause, even if one assumes any prejudice could have arisen given the fact that the jury ultimately empaneled was impartial.

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING IN PART KHOURY'S MOTION TO RETAX COSTS

A. Standard of Review

This court generally reviews a trial court's award of costs for an abuse of discretion. *Copper Sands Homeowners v. Flamingo 94 Ltd.*, 130 Nev. ___, ___, 335 P.3d 203, 206 (Adv.Op.No. 81; 10/02/14).

B. There Was No Abuse of Discretion in Awarding Seastrand's Expert Witness Fees and the Costs of Trial Preparation

Seastrand submitted a memorandum of costs seeking an award of $125,238.01. JA, v. XIX, p. 3433. The district court awarded costs in the amount of $75,015.61 (JA, v. XXIV, p. 4676), disallowing $49,382.40 in expert witness fees and $840.00 in trial preparation expenses. In his opening brief, Khoury makes a conclusory assertion that the remainder of the expert witness

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costs should have been denied because they "far exceeded the per-expert amount permitted under NRS 18.005, as the court awarded more than $1,500 per witness, for more than five experts." AOB, p. 52. However, Khoury fails to mention that the statutory language permits the trial court to "allow[] a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." NRS 18.005(5). Khoury makes no assertion, and cites no relevant authority for the proposition, that this statutory provision was inapplicable or otherwise failed to justify the trial court's award of expert witness costs.

As to the costs incurred in trial preparation, they consist entirely of expenses incurred in the preparation of trial exhibits and a computer animation; the court denied the costs associated with the mock jury. JA, v. XIX, pp. 3431-32. The district court has broad discretion is awarding costs associated with preparation of exhibits and related expenses, such as computer animations. *Braunberger v. Interstate Engineering, Inc.*, 607 N.W.2d 904, 907, 910 (N.D. 2000). An abuse of such discretion is never presumed and the burden of demonstrating that the trial court acted arbitrarily, unreasonably, or in an unconscionable manner is upon the party seeking relief. *Id.* at 907. Khoury has made no such showing.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed in all respects.

DATED this 26th day of May, 2015.

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CERTIFICATION OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in proportionally spaced typeface using WordPerfect 12 in 14-point Times New Roman.

2. The brief exceeds the page limit and type-volume limitations in NRAP 28.1(e)(1) in that it consists of 53 pages and contains 18,293 words; however, contemporaneously with tendering the brief to the Clerk of the Court, respondent is filing a motion for leave to exceed such limitations pursuant to NRAP 32(a)(7)(D).

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that Respondent's Answering Brief and Respondent's Appendix were submitted for electronic filing with the Nevada Supreme Court on the 21th day of May, 2015. Electronic service of these documents will automatically be made in accordance with NEFCR 9(b) to:

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