Case Nos. 64702, 65007 and 65172

In the Supreme Court of Nevada



RAYMOND RIAD KHOURY,

Appellant,

*vs.*

MARGARET SEASTRAND,

Respondent,

**APPEAL**

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

# APPELLANT'S REPLY BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

**OTHER AUTHORITIES**

**RULES**

## ARGUMENT

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# PART ONE:

# JURY SELECTION ISSUES

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Plaintiff's brief shows how affirmance would endorse the tactics used in this case. If this Court were to affirm, it would encourage even more lawyers to purge juries of differing points of view, signaling that even systematic error in challenges for cause will entirely escape appellate review. Instead, this Court should declare the practices here improper and reverse the judgment, ordering a new trial with a properly selected jury.

## I.

## THE DISTRICT COURT ERRED IN SUSTAINING PLAINTIFF'S CHALLENGES FOR CAUSE

During jury selection, the district court excused ***for cause*** all five potential jurors who did not initially embrace the idea of a $2 million verdict, even though they were given no facts to support such an award. This was error, because this is not one of the NRS 16.050 categories calling for a challenge for cause and the court expressly found that the

potential jurors did not otherwise demonstrate bias.

### A. STANDARD OF REVIEW: Because the District Court Misinterpreted NRS 16.050 and Controlling law, its Error is Reviewed *De Novo*

Contrary to plaintiff's assertion, this Court's review of the district court's ruling is plenary in this situation. A decision that would ordinarily be considered discretionary is nonetheless reviewed *de novo* if it rests on the interpretation of a relevant statute. *Davis v. Beling*, 128 Nev. ___, ___, 278 P.3d 501, 508 (2012); c*f.* Rex A. Jemison, *A Practical Guide to Judicial Discretion*, *in* 2 NEVADA CIVIL PRACTICE MANUAL § 29.05 (5th ed. 2011).[1]

Where the district court's determination was not based on an individualized assessment of the juror's "state of mind," it is not entitled to deference. *Cf. Leonard v. State*, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001) (trial court determination evaluated under the abuse of discretion standard where it relied on individualized assessments of potential jurors). Instead, the district court legally erred in removing jurors

[1] That is because "deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (giving no deference to an ordinarily discretionary post-trial ruling where based on an error of statutory interpretation).

based on a *per se* rule, not codified in NRS 16.050, that a juror's hesitancy to award $2 million implies bias as a matter of law. Because the district court based its for-cause rulings on a misinterpretation of NRS 16.050, that interpretation is reviewed *de novo* and that decision is not entitled to deference.

### B. A Party Must Prove Actual or Implied Bias to Sustain a Challenge for Cause

The use of challenges for cause is governed by NRS 16.050. To sustain a challenge for cause, a party must prove either:

- actual bias under NRS 16.050(1)(f)–(g); *Hall v. State*, 89 Nev. 366, 371, 513 P.2d 1244, 1247 (1973) (explaining "actual bias" under NRS 16.050(1)(g)); or
- a circumstance or type of conduct that has been legislatively defined as implied bias under NRS 16.050(1)(b)–(e); *Otis Elevator Co. v. Reid*, 101 Nev. 515, 524 n.5, 706 P.2d 1378, 1383 n.5 (1985) (explaining the statutory limits of "implied bias").

In this case, plaintiff did not establish either to justify the disqualification of the five prospective jurors.

### C. The Excluded Jurors Did Not Exhibit Actual Bias by Hesitating to Commit to a $2 Million Verdict

#### *1. A Juror's Opinions or Views, Alone, Do Not Establish Bias*

"A juror's opinions or views for or against a party do not, without more, establish bias." *Sanders v. Sears-Page*, 131 Nev. Adv. Op. 50, at 9, ___ P.3d ___, ___ (Ct. App. July 16, 2015). Instead, bias exists only "when the juror's views either prevent or substantially impair the juror's ability to apply the law and the instructions of the court in deciding the verdict." *Id.*; *accord State v. Brown*, 902 S.W.2d 278, 285 (Mo. 1995) ("The question is not whether a prospective juror holds opinions . . . but whether these opinions will yield and the juror will determine the issues under the law." (quoting *State v. Feltrop*, 803 S.W. 2d 1, 8 (Mo. 1991))). As such, even *after* a juror recounts a viewpoint that "suggest[s] actual bias, the trial court must properly question the juror to determine if the juror will be impartial despite the bias." *Sanders*, 131 Nev. Adv. Op. at 8, ___ P.3d at ___.

#### *2. Responses to a Proposed Verdict Do Not Demonstrate Bias*

A potential juror's response to a proposed verdict, especially without any factual context, is also not an expression of bias. *See Haydel v.*

*Hercules Transp., Inc.*, 654 So. 2d 418, 426 (La. Ct. App. 1995) (eliciting responses to specific figures is "not critical to a determination of prejudice"). Even where a juror has "tremendous" difficulty with multimillion-dollar verdicts, that is simply not sufficient to sustain a challenge for cause. *Gragg v. Neurological Assocs.*, 336 S.E.2d 608, 609–10 (Ga. Ct. App. 1985). A venire member's response to a proposed monetary amount says so little about her that several jurisdictions do not even permit *voir dire* on specific verdict amounts. *See, e.g.*, *Paradossi v. Reinauer Bros. Oil Co.*, 146 A.2d 515, 519 (N.J. Super. Ct. App. Div. 1958); *Trautman v. New Rockford-Fessenden Co-op Transp. Ass'n*, 181 N.W.2d 754, 759 (N.D. 1970); *Henthorn v. Long*, 122 S.E.2d 186, 196 (W. Va. 1961); *Goldstein v. Fendelman*, 336 S.W.2d 661, 665 (Mo. 1960).

### *3. To Sustain a Challenge for Cause, the Juror's Opinion about a Proposed Verdict would have to be Fixed and Unyielding*

To sustain a challenge for cause based on an expression of opinion about a proposed verdict, the trial court would also have to expressly find that the juror's "opinions [are] so fixed as not to yield to the evidence and the instructions of court." *Gragg v. Neurological Assocs.*, 336 S.E.2d 608, 609–10 (Ga. Ct. App. 1985); *accord Sanders*, 131 Nev. Adv.

Op. at 9, ___ P.3d at ___ ("a prior belief becomes 'bias only if it were irrational or unshakable'" (quoting *Thompson v. Altheimer & Gray*, 248 F.3d 621, 625 (7th Cir. 2001))). This kind of assessment must be done on a juror-by-juror basis, not a *per se* rule. The prospective jurors here certainly did not make any such professions to justify a challenge for cause.

The district court removed jurors based on its own notion that a juror's hesitancy to award a $2 million verdict implies bias as a matter of law without determining, through an individual assessment, that each could not be fair.[2] This, alone, was error. And the error was especially acute here, as the district court actually found that the excluded jurors could treat the parties fairly. (7 App. 1361–64.)

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[2] The district court acknowledged that it may have overlooked that one excluded juror had even "made it very clear she has no artificial limits." (8 App. 1426.) Indeed, the trial court clarified that it simply excluded "all" jurors who expressed hesitation toward the proposed verdict amount:

> Some of [the prospective jurors] you couldn't even tell who it was that was saying things but some of them you could. I looked at that as well, but the unequivocal language is the language that I keep coming back to and in order to avoid the potential of bias or prejudice, **I'm going to exclude them all**.

(8 App. 1426 (emphasis added).)

### *4. The District Court Actually found the Individual Jurors Could be Fair*

Far from making an individualized assessment that the excluded jurors could not be fair, the district court rejected these arguments. Although plaintiff spends several pages on appeal pages attacking the prospective jurors on individualized grounds (RAB 49–52), The trial court actually made assessments that the individually challenged jurors could be fair:

- Prospective Juror 1, Mr. Frazier, "was going to be fair and impartial and listen to the facts before he made a decision." (7 App. 1362.)
- Prospective Juror 4, Mr. Runz, "would be willing to award pain and suffering if the . . . situation justified it." (7 App. 1363.)
- Prospective Juror 5, Ms. Vera, "could award pain and suffering consistent with the law" and "any award she made would depend on the circumstances." (7 App. 1363.)
- Prospective Juror 6, Ms. Ong, "would listen to the facts, and if she believed that a 2 million-dollar award was justified, she would consider that." (7 App. 1363.)
- Prospective Juror 9, Ms. Agnor, "was willing to follow the law

> and give a fair award for pain and suffering if the evidence justified it"; "the parties were starting at equal places and she would be able to be fair to both sides." (7 App. 1364.)

In other words, the district court found these potential jurors to be unbiased, except that they hesitated to agree to a $2 million verdict before hearing the evidence. As noted above, disqualifying them for cause for that circumstance created another category of implied bias, and that violates NRS 16.050.

### *5. A Juror's Expression of Feelings is Not Contrary to Unequivocal Impartiality*

Plaintiff also argues that her challenges for cause were valid because the prospective jurors' "declarations of impartiality [were] less than unequivocal." (RAB 42, 49 (citing *Preciado v. State*, 130 Nev. ___, ___, 318 P.3d 176, 177 (2014).) That is incorrect.

Skepticism toward large verdicts is not an equivocation on whether the juror can be impartial. The Missouri Supreme Court, applying a standard requiring an "unequivocal indication" of impartiality similar to that in *Preciado*, explained that a "general feeling" did not necessarily create a bias against this plaintiff. *Joy v. Morrison*, 254 S.W.3d 885, 890-91 (Mo. 2008). In that case, the appellate court ruled that the trial

judge had properly seated a juror who was uncomfortable with million-dollar verdicts. *Id.*

The standard of unequivocal "impartiality" to serve on a Nevada jury does not require jurors have no opinions or viewpoints. Such a requisite would undermine the intent of the jury including all points of view and being a cross section of the community. (This concept is discussed in more detail below in section "II" as the basis for error being reversible.) The district court simply erred in interpreting what constitutes bias.

### D. The District Court Improperly Applied its Own Categorical Rule of Thumb that Skepticism toward Large Verdicts Implies Bias as a Matter of Law

There is another type of bias, implied bias, from which the grounds for disqualifying a jury are inferred from circumstances. The circumstances that create such "implied bias" are defined by statute, however, and a district judge erred in creating a new category for wholesale exclusion of otherwise qualified jurors.

### *1. The Legislature has Already Defined the Only Circumstances that Justify Challenges for Cause on Implied Bias*

The circumstances that justify a challenge for cause are set out in NRS 16.050(1)(b) through (e), which is attached in the Rule 28(f) addendum . Those circumstances are:

> (b) Consanguinity or affinity within the third degree to either party.
>
> (c) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, being a member of the family of either party or a partner, or united in business with either party, or being security on any bond or obligation for either party.
>
> (d) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action or being then a witness therein.
>
> (e) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member or citizen of a municipal corporation.

After the Jury Improvement Commission recommended abolishing occupational exemptions from jury service,[3] the Legislature in 2003 eliminated all but a few such exemptions. *See* 2003 Stat. Nev. 1347 (enacting SB 73), *as amended* NRS 6.020, also attached in in the Rule 28(f) addendum.

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[3] REPORT OF THE JURY IMPROVEMENT COMMISSION 30 (2002).

These are the only proper circumstances to justify a challenge for cause for implied bias. Skepticism regarding a large proposed verdict is not among them.

### *2. Only the Legislature Can Define the Circumstances that Constitute Implied Bias*

"[T]he Legislature, in specifying the several grounds of challenge for implied bias, intended the statute to be exclusive of all others." *State v. Lewis*, 50 Nev. 212, 255 P. 1002, 1006 (1927)). "[I]t is the Legislature's prerogative to decide questions of *per se* exclusion for implied bias." *Otis Elevator*, 101 Nev. at 524 n.5, 706 P.2d at 1383 n.5 (rejecting the *per se* exclusion of judges).

### *3. The District Court Improperly Created a new Category that Hesitation to Agree to a Proposed Verdict Requires Exclusion*

In this case, the district court erred in creating its own *per se* rule of disqualification that is not contained in the statute governing challenges for cause, NRS 16.050. Such blanket rules of thumb, based on circumstances rather than proof of actual bias in the individual juror, are left to the Legislature. Any time a district court creates a *per se* category for excluding jurors, this is the judicially-created equivalent of

a statutory ground for implied bias, which is improper. *See State v. Lewis*, 50 Nev. 212, 255 P. 1002, 1006 (1927) (court refused to create a new category of implied bias).

It was just as improper for the district court to apply a blanket rule excluding all jurors who expressed hesitation at awarding a specific verdict as it would be to eliminate other groups the Legislature has not excluded, such as judges,[4] lawyers,[5] or members of a political party.[6] Some individuals in these groups, of course, may demonstrate actual bias against a party, but to exclude the groups altogether would prevent the jury from representing a "fair cross section of the community." *See Powers v. Ohio*, 499 U.S. 400, 422 (1991). So without an individualized showing of actual bias, the parties can remove these jurors only by using their peremptory challenges under NRS 16.040. The district court's attempt to circumvent that process with a categorical ruling was error.

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[4] *Otis Elevator*, 101 Nev. at 524 n.5, 706 P.2d at 1383 n.5.

[5] *Faucett v. Hamill*, 815 P.2d 989, 990 (Colo. Ct. App. 1991).

[6] *See, e.g.*, *Connors*, 158 U.S. at 414 (HARLAN, J.); *State v. McGee*, 83 S.W.2d at 106; *Gray v. State*, 49 S.W. 699, 702 (Tex. Civ. App. 1898).

## II.

## EXCLUDING THESE JURORS FOR CAUSE WAS REVERSIBLE ERROR

Plaintiff seems to realize the impropriety of her jury selection practice, and she concentrates her argument on the suggestion that this Court cannot reverse errors in jury selection where a jury was ultimately seated comprised of "acceptable" jurors. Taken at face value, plaintiff's argument means that a party in each trial in Nevada can skew the jury system and exclude jurors of a particular viewpoint or social philosophy, so long as the ultimate jury does not have any jurors who are, by definition, biased. This Court should reject that contention.

Admittedly, reversal is unusual on jury selection issues. *See Jitnan v. Oliver*, 127 Nev. ___, ___, 254 P.3d 623, 630 (2011). Unfortunately, plaintiff takes full advantage of that situation in devising an improper methodology for challenges for cause that she believes would be unreviewable. She argues that this Court should never reverse a case where the district court sustains, rather than overrules, a challenge for cause[7] on the *assumption* that any error in sustaining the challenge will

[7] Some ancient Nevada cases suggest this absurd result. *See, e.g.*, *Sherman v. S. Pac. Co.*, 33 Nev. 385, 111 P. 416, 418–19 (1910); *State v.*

be harmless because the jury can still be composed of qualified jurors. (RAB 41.)

But on this unusual issue, where challenges for cause are being used in such an improper and systematic manner, the harm is that entire legitimate points of view are purposefully eliminated from the venire. Under these circumstances, this Court should intervene and reverse. Where a district court adopts a category for challenges for cause not found in NRS 16.050, the judgment must be reversed regardless whether each seated juror is individually unbiased.

### A. The Importance and Depth of the Harm: Plaintiff's Improper Challenges for Cause Prevented the Jury from Being a Fair Cross Section of Society

#### *1. Exclusion of Certain Groups Undermines the Jury's Representation of the Community*

The harm from plaintiff's irregular practice was unusually extensive here. Her improper challenges for cause excluded five jurors based

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*Buralli*, 27 Nev. 41, 71 P. 532, 534 (1903). These cases appear to rely on a since-repealed section of Nevada's criminal practice act, which permitted objections to a court ruling "*disallowing* a challenge to the panel of the jury, or to an individual juror, for implied bias," but not a ruling *allowing* such a challenge. *State v. Larkin*, 11 Nev. 314, 325 (1876) (quoting 1 Comp. L. 2046) (emphasis added). If those cases are not wholly superseded by NRS 16.050 (enacted in 1911), they should be overruled.

on their legitimate beliefs, rather than unacceptable biases. This practice excludes from the jury pool whole factions of our society, undermining the intent that the jury represent a "fair cross section of the community." *Powers*, 499 U.S. at 422.

> [A]n impartial jury as a whole means more than a collection of impartial jurors: The exclusion of certain groups from among those who qualify as impartial could produce disproportional representation at one end of the impartiality spectrum even if all who serve qualify individually as impartial.

Scott W. Howe, *Juror Neutrality or an Impartiality Array: A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1243 (1995)).

If plaintiff can eliminate jurors because they have a certain philosophy, such as those who think that $2 million dollars is a lot of money, she is excluding these citizens only because they are conservative in their views. As plaintiff accomplished this with five venire members, she eliminated a legitimate point of view—whether we label it political, philosophical or socio-economic—from this trial. If others repeat this practice, they will eliminate that viewpoint from representation in our jury system as a whole. In the next case, a defendant might be permitted to exclude all those potential jurors who think that $2 million is not

very much money or who otherwise have liberal beliefs.[8]

Clearly, all of this is improper. Courts have long held that political affiliation, for example, is not grounds for disqualification. *Connors v. United States*, 158 U.S. 408, 414 (1895) (HARLAN, J.); *State v. McGee*, 83 S.W.2d 98, 106 (Mo. 1935); *Gray v. State*, 49 S.W. 699, 702 (Tex. Civ. App. 1898). *See* Scott W. Howe, *Juror Neutrality or an Impartiality Array: A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1210–11 & n.33 (1995) (explaining why party membership should not affect jury service). But once individual district judges start venturing out beyond the statutory bases for challenges for cause, there are no clear and easy boundaries in the heat of trial.

### *2. This Court Cannot Allow this Important Issue and Great Harm to Escape Reversal*

Worse yet, plaintiff argues that appellate courts are prevented from reversing where trial judges exclude potential jurors whose abstract views might tend to favor one side. The purpose of challenges for cause is not to exclude from the venire any citizen who has legitimate

[8] Once points of view become the bases for challenges for cause, plaintiffs may seek to exclude jurors who own their own businesses, are Republican or think there is too much litigation. Defendants may then challenge venire members who are on welfare, are Democrats or believe there should be a redistribution of wealth or power in our society.

viewpoints or backgrounds that differ from those of a party. Nonetheless, that is what plaintiff's challenges accomplish. And without reversal, that purposeful perversion of the system bears fruit. This is improper.

This practice cannot be tolerated. If individual district judges in each department are allowed, *ad hoc*, to create their own private additional categories beyond NRS 16.050 upon which to dismiss jurors, this practice will skew the jury pool and harm the institution of civil jury service. This kind of error merits reversal.

The only way to stop the practice—and to correct the harm in this case—is for this Court to declare it improper. This Court should do just that in this case.

### *3. Systematically Excluding Jurors with a Particular Viewpoint Raises an Issue of Constitutional Dimension that Requires more than a Harmless Error Analysis*

Keeping qualified jurors from serving raises issues of a Constitutional dimension, and the exclusion, itself, is unconstitutional. *Cf. Frame v. Grisewood*, 81 Nev. 114, 122, 399 P.2d 450, 454 (1965) (noting that the legislature cannot abrogate the right to challenge jurors for bias), *disapproved of on other grounds by Whitlock v. Salmon*, 104 Nev.

24, 752 P.2d 210 (1988). Excluding jurors on prohibited grounds offends both equal protection and also the right to an impartial jury. Tania Tetlow, *Solving* Batson, 56 WM. & MARY L. REV. 1859, 1869 (2015); Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 152 (1996); *see also Gray v. Mississippi*, 481 U.S. 648, 668 (1987).

This harm to Constitutional rights requires more than a mere harmless error analysis that would overlook the violation so long as some other qualified juror, albeit with a different political view, is seated in place of the excluded juror. *See Barral v. State*, 131 Nev. Adv. Op. 52, at 8, ___ P.3d ___, ___ (July 23, 2015) (treating "any deviation from constitutionally or statutorily prescribed procedures for jury selection" as reversible error).

### B. Creating New Categories beyond NRS 16.050 was also Reversible as Structural Error

Excusing a prospective juror on a misinterpretation of the bases for challenges for cause is *per se* reversible error. *Faucett v. Hamill*, 815 P.2d 989, 990 (Colo. Ct. App. 1991). In *Faucett*, the trial court had misinterpreted a court rule nearly identical to NRS 16.050(1) when it excluded a prospective juror merely because he was an attorney. *Id.* Re-

versing, the court of appeals held that this kind of error effectively gives the requesting party undeserved peremptory challenges and that "[s]uch a manipulation of the scales of justice is sufficient to warrant a finding of prejudice as a matter of law." *Id.* (quoting *Fieger v. E. Nat'l Bank*, 710 P.2d 1134 (Colo. App. 1985)).

For the same reasons, the district court here committed structural error by excluding qualified jurors. NRS 16.050 left the district court no discretion to create new criteria for excluding citizens from jury service. *See State v. Lewis*, 50 Nev. 212, 255 P. 1002, 1006 (1927). Recently, this Court explained that a deviation from the statutorily mandated jury-selection procedures constitutes a structural error and warrants reversal. *Barral*, 131 Nev. Adv. Op. at 4, 7, ___ P.3d at ___ (ignoring NRS 16.030's instruction to swear in the jury before *voir dire* necessarily infected the "integrity of the judicial process.")

In the face of such an error, it is not enough that the seated jurors appear impartial. An infirm selection process makes it impossible to say what verdict a properly-selected jury, one who was truly a cross section of the community, would have rendered. *Id.* Thus, the law presumes harm to the parties, the excluded jurors, and the community.

*Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986).

### C. The Systematic Improper Exclusions of Jurors Creates an Intentional Disruption of the System that Must be Reversed

The district court's error in this case systematically cultivated a jury predisposed to higher verdicts. The systematic error here is even worse than the isolated strike that called for reversal in *Faucett*. In the present case, the district court excluded five qualified jurors for cause, not just one. Under NRS 16.040, each party had just four peremptory strikes, but the improper ruling effectively gave plaintiff five more. This undermined the fairness of the entire process and warrants reversal.

A systematic error differs categorically from an isolated abuse of discretion. In *Gray v. Mississippi*, the U.S. Supreme Court held that the systematic removal of "all venire members who expressed any degree of hesitation against the death penalty" tainted the seated jury as a matter of law. 481 U.S. 648, 667–68 (1987). Unlike an "isolated incident," the legal error in the blanket exclusion ensured a "tribunal 'organized to convict.'" *Id.* (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968)).

Here, too, the district court handpicked the jury through a structurally infirm process. The trial judge sustained plaintiff's challenges to anyone who demonstrated hesitation toward plaintiff's proposed verdict amount. Like *Gray v. Mississippi*, this ensured a tribunal organized to return a high verdict. (That plaintiff still could not recover this verdict even from her curated jury says little about what a fairly-selected jury would have awarded.)

Although plaintiff cites some cases to argue that an improper challenge for cause is not reversible error, those authorities are distinguishable because they involved individualized, discretionary excusals, not systematic errors. For example, *Basham v. Commonwealth* involved a single juror excused for her unique circumstances. 455 S.W.3d 415, 420–21 (Ky. 2014). Just the previous week, she had sat on a jury that convicted the defendant, and she exhibited "confusion and frustration with the process." *Id.* at 420. Assuming the excusal was improper, it was not a "systematic exclusion" that undermines "the fairness of the entire jury process." *Id.* at 421.

Similarly, *Jones v. State* did not involve systematic error. 982 S.W.2d 386, 389 (Tex. Crim. App. 1998). There, the trial court improp-

erly excluded a single juror for viewing accomplice testimony skeptically. *Id.* It did not test the entire panel against the faux criterion to view accomplice testimony as favorably as other witness testimony. If *Jones* would shield from review even systematic errors in excluding jurors, this Court should not follow it.

This case was a systematic elimination of all jurors with a conservative or skeptical view. That was improper, and this Court should reverse.[9]

### D. The Wrongful Exclusion Deprived Qualified Citizens of the Civil Right to Jury Service and Harmed the Perception of the Judicial System

Plaintiff also overlooks the harm to the excluded jurors and the Public. This Court has the obligation to protect the civil right of citizens under NRS 6.010 to perform jury service. Jury service is "[t]he opportunity for ordinary citizens to participate in the administration of

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[9] Even if there had been only one such juror eliminated in this case, this Court should not condone that situation. The removal of one juror via an improper challenge for cause could be the elimination of an entire point of view from a jury. If that situation is repeated over hundreds of trials, it is not a *de minimis* situation, and the practice still results in a systematic exclusion of a legitimate point of view from the justice system. *Batson*, 476 U.S. at 87–88. This Court should make clear that, in the absence of actual bias, any creation of grounds for challenges for cause beyond NRS 16.050 is reversible error.

justice." *Powers*, 499 U.S. at 406; *see generally* Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825 (2015). In fact, as noted above, keeping qualified jurors from serving may be unconstitutional. *Frame*, 81 Nev. at 122, 399 P.2d at 454 (noting that the legislature cannot abrogate the right to challenge jurors for bias), *disapproved of on other grounds by Whitlock*, 104 Nev. 24, 752 P.2d 210.

Leaving these errors unchecked would also "undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 79.

> The purpose of the jury system is to impress upon . . . the community as a whole that a verdict . . . is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset.

*Powers*, 499 U.S. at 413. Plaintiff's contention that this Court should not reverse wholesale irregularities in challenges for cause, if adopted, would breathe new cynicism into public attitudes about Nevada's judicial system.

## III.

## IT WAS INAPPROPRIATE TO LET PLAINTIFF ANCHOR THE VENIRE TO A $2 MILLION BASELINE

The three days of *voir dire* focused on an improper question, the juror's willingness to award $2 million.

### A. Litigants Cannot Use *Voir Dire* for Improper Purposes

It is error for a district court to allow *voir dire* to go beyond identifying impartial jurors. Plaintiff relies heavily on *Whitlock v. Salmon* but omits an important point: "The trial judge has a duty to restrict attorney-conducted *voir dire* to its permissible scope: obtaining an impartial jury." *Whitlock*, 104 Nev. at 28, 752 P.2d at 213.

### B. Testing Jurors' Enthusiasm Toward a Specific Verdict is Inappropriate

Qualifying jurors to a specific dollar amount is not a permissible goal of *voir dire*. Anchoring questions create a "dangerous field" of jurors because they are more likely to orient their verdict in terms of the amount requested in *voir dire*. *Henthorn v. Long*, 122 S.E.2d 186, 196 (W. Va. 1961). Plaintiff ignores the substantial scientific literature describing jurors' susceptibility to anchoring. (AOB 46–48.)

This Court should rule that such questions are *per se* improper. Some courts explicitly say so. *E.g.*, *Paradossi*, 146 A.2d at 519 ("It is a pointless question."); *Trautman*, 181 N.W.2d at 759; *Henthorn*, 122 S.E.2d at 196; *Goldstein*, 336 S.W.2d at 665.[10] Since these questions affect all juries in the same way—reinforce a baseline verdict—it makes more sense for this Court to decide this issue as a matter of law.

Plaintiff's citation to *City of Cleveland v. Cleveland Electric Illuminating Co.* is dubious. There, the court permitted a general question about verdicts in the "millions of dollars" precisely because it did not suggest the jury should award "a specific verdict amount." 538 F. Supp. 1240, 1250 (N.D. Ohio 1980); *see also Dehn v. Otter Tail Power Co.*, 251 N.W.2d 404, 415 (N.D. 1977) (no abuse of discretion in allowing a question that "did not refer to a specific dollar amount"). The problem here is that plaintiff did anchor the jury to a specific amount. This inevitably skewed the jury's verdict.

[10] Others hold that the trial court has discretion to disallow such questions. *E.g.*, *Haydel*, 654 So. 2d at 426; *Farrow v. Cundiff*, 383 S.W.2d 119, 119 (Ky. 1964); *Chambers v. Bradley Cnty.*, 384 S.W.2d 43, 44–45 (Tenn. Ct. App. 1960).

## PART TWO:

## THE MEDICAL BILLS ISSUES: COLLATERAL SOURCE AND DISCOUNTS

Some of plaintiff's doctors accepted, in lieu of immediate payment, a lien against the judgment in this case. Of those, some continue to hold the lien and thus a have financial interest in the outcome. Others sold their liens for amounts substantially less than the face-value of their bills. The district court, excluded both facts as collateral-source evidence. (24 App. 4735, 4737.) Because neither fact implicates the collateral-source rule, however, excluding them was error.[11]

### I.

### A FINANCIAL STAKE IN THE JUDGMENT THAT DEFENDANT WILL PAY IS A NOT COLLATERAL SOURCE

The jury should have learned that plaintiff's treating physicians

[11] **Standard of Review:** This Court reviews interpretation of the collateral-source rule *de novo*. *See Proctor v. Castelletti*, 112 Nev. 88, 91, 911 P.2d 853, 854 (1996) (holding that the application of the collateral-source rule is not discretionary); *Tri-County Equip. & Leasing v. Klinke*, 128 Nev. ___, ___, 286 P.3d 593, 595 (2012) (reviewing *de novo* district court's application of collateral-source rule to worker's compensation payments).

have a financial stake in the outcome. Such evidence is admissible to show that a doctor's "excessive involvement in the issue" may influence his or her medical opinion. Jay M. Zitter, Annotation, *Excessiveness of Adequacy of Damages Awarded for Injuries to Nerves or Nervous System*, 51 A.L.R. 5TH 467, at § 2[f] (1997).

Plaintiff's collateral-source argument misfires because a lien against the judgment represents payment by defendant, not a third party. *See Smith v. Geico Cas. Co.*, 127 So. 3d 808, 813 (Fla. Dist. Ct. App. 2013). The Florida District Court of Appeal recently explained this point:

> The reduction-of-fee agreements . . . do not involve a payment by a third party. The doctors' fees will only be established after the jury determines the damages. The collateral source rule specifically relates to the offsetting of damages, but there is no offset to be paid here. Accordingly, the instant agreements do not meet the definition of a collateral source.

*Id.* A rule of *per se* exclusion is thus inapplicable. *Cf. Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996) (excluding evidence of *third-party* payments). The district court erred in excluding the liens.

## II.

## THIS COURT SHOULD CLARIFY THAT THE COLLATERAL-SOURCE RULE DOES NOT APPLY TO MEDICAL DISCOUNTS

The jury should also have seen not just the face value of plaintiff's medical bills, but the much lower amount her doctors actually accepted as full payment.

### A. The Sale of Medical Liens at a Discount is Considered a Write-Down of Medical Expenses

Those who sold their liens against the judgment created the same effect as an ordinary "write-off" or "write-down." Plaintiff says that (in the absence of a damage award for the full value of the lien), she may still be liable to the third parties for the excess. (RAB 24, 26.) But this does not change the fact that what her doctors billed as *medical expenses* is more than what they actually accepted as payment for those expenses.

### B. Amounts Billed but Not Paid are Not "Incurred" Medical Expenses

Despite plaintiff's protests, it makes sense to let the jury see what the doctor accepts as full payment. *See, e.g.*, *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 791 (Pa. 2001), *abrogated on other grounds*

*by Northbrook Life Ins. Co. v. Commonwealth*, 949 A.2d 333 (Pa. 2008); *see also McAmis v. Wallace*, 980 F. Supp. 181 (W.D. Va. 1997). This is because a plaintiff can recover only reasonable expenses, but expenses are not reasonable if the plaintiff never incurs them as a liability to the doctor. *See Hanif v. Hous. Auth.*, 200 Cal. App. 3d 635, 640 (1988).

### C. To Evaluate whether Amounts Billed are Reasonable, the Jury Must See what was Accepted as Full Payment

Accordingly, a possibly-inflated bill should not be the jury's only data point. *See* Todd R. Lyle, *Phantom Damages and the Collateral Source Rule: How Recent Hyperinflation in Medical Costs Disturbs South Carolina's Application of the Collateral Source Rule*, 65 S.C. L. REV. 853, 865–76 (2014) (arguing that the jury should see both the bill and the amount accepted as payment). A better indication of the *reasonable* price of medical services is the price doctors are willing to accept in the market. *See Robinson v. Bates*, 857 N.E.2d 1195, 1200 (Ohio 2006); *Stanley v. Walker*, 906 N.E.2d 852, 857 (Ind. 2009); *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 229 (Kan. 2010); *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1141 (Cal. 2011).

### D. There is No Policy Justification to Preclude Evidence of what was Actually Paid as Plaintiff's Medical Expenses

The collateral-source rule's policy justifications do not support blinding the jury to the amounts plaintiff's doctors accepted as full payment. *See Martinez*, 233 P.3d at 225–229 (rejecting other court's policy arguments in favor of exclusion).

#### *1. Plaintiff Does Not Lose the Value of Any Investment in Insurance Premiums*

One popular argument holds that plaintiffs should not be discouraged from purchasing health insurance; they earned the reward of the write-off by paying their insurance premiums. 2 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 8.6(3), at 495 (2d ed. 1993). This carries no weight here, because plaintiff did not purchase insurance to merit a lower bill. Indeed, the fact that the doctors sold their liens for so much less without such negotiations suggests the face-value of the bills was inaccurate from the start.

#### *2. Defendant Does Not Receive a Windfall*

The other primary justification for the collateral-source rule, avoiding windfalls to wrongdoers, has actually been criticized as the

"weakest argument" (*id.*):

> This argument seems to assume what it sets out to prove. The credit to the defendant is a windfall only if he is not entitled to it. Whether the defendant is entitled to the credit is the very issue under consideration. In addition, it is hard to say the defendant gets a windfall if the plaintiff is fully compensated . . . .

1 DOBBS § 3.8, at 375; *see also* 2 DOBBS § 8.6(3), at 495.

In any case, letting the jury see only unadjusted medical bills—not what was actually paid—does not advance that policy. An award based on the bills' face-value actually overcompensates *plaintiff* compared to her doctors' actual price for services. It serves as a back door for punitive damages against a merely negligent defendant. *See* NRS 42.005 (restricting punitive damages to acts of "oppression, fraud or malice").

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## PART THREE:

## THE EXPERT ISSUES

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### I.

### THE DISTRICT COURT ERRED IN ALLOWING UNDISCLOSED EXPERT TESTIMONY

The district court erred in letting the jury hear expert testimony that had not been properly disclosed before trial.

### A. Dr. Gross Concealed his Opinion about what Caused Plaintiff's Pre-Accident Symptoms

Plaintiff's neurological expert, Dr. Gross, did not disclose before trial his affirmative opinion that heart problems or anxiety caused plaintiff's pre-accident symptoms. True, his rebuttal report discussed the tingling symptoms, but it did not say what caused them. It only relayed that the "records" related the tingling "to chest pain and stress." (20 App. 3686.) Dr. Gross did not adopt that opinion or explain why it was reasonable. And even that contrasted with his affirmative opinion at trial that the tingling was "more likely related to the *heart* or anxiety or both." (11 App. 2149 (emphasis added).)

This distinction is crucial because it thwarted the preparation of defendant's experts. When a plaintiff's medical expert moves from simply noting a subissue to offering a firm opinion to "a reasonable degree of medical probability," it fundamentally changes the burden for the defendant's experts. *See FGA, Inc. v. Giglio*, 128 Nev. ___, ___, 278 P.3d 490, 498 (2012); *Williams v. Eighth Judicial Dist. Court*, 127 Nev. ___, ___, 262 P.3d 360, 368 (2011). Here, Dr. Gross did not adopt an affirmative causation opinion until trial, leaving defendant's experts unprepared to rebut it.

The Court of Appeals recently held that even an *enhanced* version of an existing opinion constitutes an undisclosed opinion. *Sanders*, 131 Nev. Adv. Op. at 24, 26–27, ___ P.3d at ___ (Ct. App. July 16, 2015). In *Sanders*, the defense expert disclosed an opinion that the plaintiff "had a chronic condition causing her neck pain." *Id.* at 24. Later in trial, the expert "support[ed] his previous opinion" with new evidence of "an ongoing recorded history of chronic neck pain." *Id.* at 24, 27. Just that additional support was enough to cause unfair surprise and prejudice. *Id.* at 27.

Here, the nondisclosure is even more egregious because Dr. Gross did not merely bolster an existing opinion; he actually posited a new and more specific mechanism of injury. Before trial, Dr. Gross at most signaled that he agreed with records correlating plaintiff's tingling to chest pain. (20 App. 3686.) That vague term has myriad sources, including the lungs, esophagus, gallbladder, stomach, pancreas, and ribs, along with various muscles and nerves. *See What's Causing My Chest Pain?*, WEBMD, http://www.webmd.com/pain-management/guide/whats-causing-my-chest-pain (last accessed July 16, 2015). Dr. Gross did not disclose the specific cardiologic opinion that heart problems caused the

tingling. (11 App. 2149.) Not only was Dr. Gross, a neurologist, unqualified to offer such an opinion, but he also deprived defendant of the chance to retain a cardiologic expert to rebut it.

Similar problems plague Dr. Gross's evolution from "stress" to "anxiety." Stress is the body's simple reaction to an external demand, while anxiety disorders may be a secondary reaction to stress or may not have a clear cause. *See Adult Stress—Frequently Asked Questions*, NAT'L INST. OF MENTAL HEALTH, http://www.nimh.nih.gov/health/publications/stress/Stress_Factsheet_LN_142898.pdf (last accessed July 16, 2015); Lindsay Holmes, *The Difference Between Stress and Anxiety*, HUFFINGTON POST, Feb. 25, 2014, http://www.huffingtonpost.com/2014/02/25/stress-anxiety-difference_n_4833172.html. Because Dr. Gross did not disclose his anxiety opinion before trial, defendant could not obtain a mental-health expert to rebut it.

Plaintiff blames defendant for not including Dr. Gross's deposition in the record. (RAB 20–21.) If it supported plaintiff's argument, however, she would have cited it in the district court. Instead, she relied solely on Dr. Gross's note in his rebuttal report. (22 App. 4255.) De-

fendant agreed that this comment was Dr. Gross's only pre-trial hint, but it was not an adequate disclosure. (24 App. 4681–82.) It was not defendant's burden to find other statements to prop up plaintiff's argument.

### B. Dr. Muir was Not Exempt from Producing an Expert Report

Plaintiff's treating physician, Dr. Muir, gave improper opinion testimony on what caused plaintiff's accident and whether prior treatment was necessary. Defendant acknowledges an error in his opening brief: Dr. Muir did testify in deposition that Dr. Belsky's injections were reasonable and that the accident caused plaintiff's injuries. (23 App. 4445.) These statements do not undermine defendant's argument, however, because they did not discharge Dr. Muir's disclosure obligation.

#### *1. The Limited Expert-Report Exemption for Treating Physicians*

Ordinarily, a treating physician must submit an expert report unless he or she fulfills two requirements: (1) prove that he or she formed all opinions during treatment, based on records actually reviewed during treatment; and (2) timely disclose these records to the other side. *FCH1, LLC v. Rodriguez*, 130 Nev. ___, ___, 335 P.3d 183, 189 (2014)

(citing NRCP 16.1 drafter's note (2012 amendment)).[12] This Court will not assume that a treating physician qualifies for the exemption. *Id.* So in *FCH1*, for example, this Court refused to infer from the statement that a physician "reviewed all the medical records in this case" that he reviewed those records during treatment. *Id.*

### *2. Dr. Muir Did Not Prove that He Formed his Opinions while Treating Plaintiff*

Here, Dr. Muir was not exempt from producing an expert report. Plaintiff concedes that the exemption applies only to opinions adopted during treatment. (RAB 12.) Her view of what qualifies, however, is so lenient that it effectively lets a physician transform mere assumptions for treatment into firm conclusions for litigation. For many ailments, a doctor can simply accept the patient's story of what caused it for pur-

[12] In a petty skirmish, plaintiff spends four pages berating defendant for citing the superseded version of *FCH1*. (RAB 9–12.) When the revised opinion came down, defendant accurately amended the quote in his brief (AOB 23) but defendant did not notice that the "citing" reference had also been changed. This Court's revised opinion omits the "citing" reference to *Brooks v. Union Pac. R. Co.*, 620 F.3d 896 (8th Cir. 2010), probably because the preceding sentence of this Court's revised opinion now refers to "NRCP 16.1(a)(2)(B) disclosure," rather than "expert reports," and the Eighth Circuit in *Brooks* did not cite Nevada's Rule 16.1. It is doubtful that the editing in the revised opinion proclaims a wholesale rejection of *Brooks*. Nonetheless, nothing in our argument on appeal, either in the opening brief or this brief, turns on the deleted "citing" reference.

poses of diagnosis and treatment. To diagnose a broken bone and set it, for example, a doctor need not conclude to a reasonable degree of medical probability that the patient's account is the correct one.

While a doctor may need to pinpoint a cause with confidence for some diagnoses or treatments, courts should not *presume* that a doctor has done so. Yet plaintiff effectively urges this Court to adopt such a presumption, by simply letting Dr. Muir opine to anything that is supportable in hindsight by his medical records, without ever proving why that opinion was a necessary part of diagnosis and treatment. That presumption would force defendants to assume that a treating physician may invoke any statement in the medical records to support an opinion to a reasonable degree of medical probability, all without the benefit of an expert report.

#### a. DR. MUIR DID NOT SHOW THAT HE FORMED HIS MEDICAL-CAUSATION OPINION DURING TREATMENT

Nowhere in deposition or at trial does Dr. Muir state that he formed his opinion regarding medical causation during treatment. Plaintiff asserts otherwise, pointing to Dr. Muir's report from plaintiff's surgery:

> Q. . . . Do you have an opinion as to whether

> this accident produced the bulge?
>
> A. Yes, the accident did cause protrusion, actually a herniated portion. And that was confirmed at the time of surgery by direct observation.

(23 App. 4433.) But Dr. Muir was not saying that surgery confirmed the accident's role; he was saying that surgery confirmed that plaintiff had a herniated disc. In fact, he clarifies this immediately after:

> Q. Okay. There's nothing in there that indicates anything suggestive that the herniation in and of itself must have come about as a result of the accident; would that be true? And I'm referring to your Operative Report.
>
> A. The Operative Report does not alone indicate that it was from the accident.
>
> Q. There's no way you can tell simply from looking at the disc itself while you're doing the surgery to indicate that it is a product of a traumatic episode as opposed to some sort of ongoing degenerative condition; would that be fair to say?
>
> A. Correct.

(23 App. 4433.) At trial, similarly, Dr. Muir says only that this is his current causation opinion, not that he formed it during treatment. (10 App. 1962–63, 2009.)

Because Dr. Muir did not have to identify the cause of injury to a reasonable degree of medical probability just to treat plaintiff's injuries, it is unlikely that he did. His description of how to arrive at a medical-causation opinion sounds like a post-treatment process to meet the

standards of proof at trial, not like a real-time decision for treatment:

> But ideally for causation, the more information that you have . . . potentially the more accurate you can be on your causation. You don't want to omit important factors that may change your opinion on whether something caused it 100 percent or a portion of it or none at all.

(10 App. 2001.) Unsurprisingly, Dr. Muir's final statement on the subject is an admission that he reviewed "additional records" after stopping treatment. (10 App. 2012–13.) No doubt these additional records could improve the accuracy Dr. Muir's causation opinion, but it is not one he could share without producing an expert report.

#### b. DR. MUIR DID NOT SHOW THAT HE FORMED HIS OPINION ABOUT DR. BELSKY'S PRIOR TREATMENT WHILE TREATING PLAINTIFF

Dr. Muir likewise never states that, while treating plaintiff, he concluded that Dr. Belsky's prior treatment was appropriate. He consistently describes his opinion with reference to the present litigation, not his past treatment:

> Q. *Do* [not *did*] you have an opinion whether the treatment that she received before coming to you was reasonable, customary, and related to the accident at issue within a reasonable degree of medical probability?
>
> * * *
>
> THE WITNESS: Regarding the notes that I *have re-*

> *viewed* [not *reviewed then*], they were reasonable and customary. . . . So the treatment that *I'm aware of* [not *I was aware of*], but I have not reviewed the specific notes from the chiropractor.

(23 App. 4445 (emphasis added).)

> Q. Dr. Muir, No. 1, *do* [not *did*] you feel that there was an adequate workup of the patient prior to getting to you?
> A. Yes.

(10 App. 1938 (emphasis added).)

Here, too, nothing about his treatment of plaintiff required Dr. Muir to opine whether her prior doctors acted appropriately. Plaintiff again protests that Dr. Muir *must* have formed this opinion during treatment (even though he doesn't say so), because "[h]e would not have recommended and performed a cervical fusion if the necessity of it had not been adequately demonstrated by the treatment accorded by Dr. Belsky." (RAB 13 (supplying no citation to the record).) This mixes together two meanings of "adequate": because Dr. Belsky's treatment *adequately* demonstrated the need for surgery, Dr. Muir can testify that Dr. Belsky's treatment was *adequate*. (*Compare* RAB 13 *with* 10 App. 1938.) Yet Dr. Muir himself confirms that merely relying on the results of prior treatment does not make that treatment appropriate:

> Q. Did you rely . . . on the course of treatment of other providers in making your diagnosis and treatment plan?
>
> A. I took that into consideration, though I did not see the actual chiropractic notes.
>
> * * *
>
> A. . . . She had chiropractic treatment which, my understanding, **it tended to aggravate the condition more than it helped**.

(10 App. 1938–40 (emphasis added).) Thus, the timing of Dr. Muir's reliance on Dr. Belsky's treatment says nothing about when Dr. Muir decided to endorse it.

#### c. DR. MUIR COULD NOT OFFER OPINIONS FORMED DURING LITIGATION TO DEFEND DR. BELSKY

Alternatively, plaintiff argues that the timing of Dr. Muir's opinion is irrelevant because he was entitled to defend against attacks on Dr. Belsky. (RAB 13 (citing NRCP 16.1 drafter's note (2012 amendment).) This is wrong for two reasons: First, plaintiff again conflates reliance with endorsement. At the time of treatment, Dr. Muir could have believed plaintiff's prior treatment made surgery necessary without yet deciding whether the prior treatment was reasonable. Second, the drafter's note does not suggest that a treating physician may adopt new opinions for litigation to defend prior treatment. It says only that a treating physician may review external records to defend treatment.

NRCP 16.1 drafter's note (2012 amendment). This Court could not have been clearer: "the exemption only extends to opinions that were formed during the course of treatment." *FCH1*, 130 Nev. at ___, 335 P.3d at 189 (citing *Goodman v. Staples the Office Superstore, L.L.C.*, 644 F.3d 817, 826 (9th Cir. 2011)) (internal quotation marks and brackets omitted). The more detailed comment to the federal counterpart[13] confirms that this rule was not intended to let doctors avoid submitting a report on "opinions formed outside the course of treatment and diagnosis." Comment to Fed. R. Civ. P. 26.

### *3. Dr. Muir Did Not Prove that he Adequately Disclosed the Factual Support for his Opinions*

Even if Dr. Muir had formed his opinions during treatment, he did not show that he disclosed *all* of the foundational facts and documents supporting his opinions. *See* NRCP 16.1 drafter's note (2012 amendment). Federal courts have held that it is not enough to disclose that treaters "will present factual and opinion testimony on causation" and "will discuss the reasonableness of healthcare costs generated for

[13] NRCP 16.1(a)(2)(B) tracks Federal Rule of Procedure 26(a)(2)(C) nearly verbatim, except that Nevada additionally requires disclosure of a witness's qualifications and compensation.

medical treatment and medical testing rendered to Plaintiff." *Pineda v. City & Cnty. of San Francisco*, 280 F.R.D. 517, 523 (N.D. Cal. 2012). Without a specific outline of the facts to support those opinions, the disclosure was inadequate. *Id.* In her answering brief, plaintiff does not even try to argue that her disclosures included sufficient factual detail.

Because Dr. Muir was not exempt from producing an expert report, his failure to do so rendered his testimony inadmissible.

## II.

## THE DISTRICT COURT ERRED IN AWARDING ADDITIONAL EXPERT FEES

Although the district court has discretion to award additional expert fees "after determining that the circumstances . . . require[d] the larger fee" (NRS 18.005(5)), such an excess award "must be supported by an express, careful, and preferably written explanation" of the factors justifying it. *Frazier v. Drake*, 131 Nev. Adv. Op. 64, at 25–26, ___ P.3d ___, ___ (Ct. App. Sept. 3, 2015). The district court entered no such findings here. Plaintiff requested $92,132.40 in expert-witness fees. (19 App. 3430.) In its costs order, the district court awarded $42,750 without explanation. (24 App. 4676.) Because the written record does not explain its necessity, the award merits no deference. *See Frazier*,

131 Nev. Adv. Op. at 25–26, ___ P.3d at ___. It must be vacated.

## CONCLUSION

Defendant did not receive a fair trial. The district court imposed new criteria for jury service that ensured an inflated verdict, excluded admissible evidence, and admitted improper testimony. This Court should reverse the judgment.

DATED this 11th day of September, 2015.

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# RULE 28(f) ADDENDUM OF STATUTES

## Rule 28(f) Addendum

### NRS 16.050 Grounds for challenges for cause.

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

(a) A want of any of the qualifications prescribed by statute to render a person competent as a juror.

(b) Consanguinity or affinity within the third degree to either party.

(c) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, being a member of the family of either party or a partner, or united in business with either party, or being security on any bond or obligation for either party.

(d) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action or being then a witness therein.

(e) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member or citizen of a municipal corporation.

(f) Having formed or expressed an unqualified opinion or belief as to the merits of the action, or the main question involved therein, but the reading of newspaper accounts of the subject matter before the court shall not disqualify a juror either for bias or opinion.

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

2. A challenge for cause for standing in the relation of debtor and creditor when the party to an action is a public utility as defined in NRS 704.020 may be allowed only where the circumstances as determined by the court so warrant.

**NRS 6.020 Exemptions from service.**

1. Except as otherwise provided in subsections 2 and 3 and NRS 67.050, upon satisfactory proof, made by affidavit or otherwise, the following-named persons, and no others, are exempt from service as grand or trial jurors:

(a) While the Legislature is in session, any member of the Legislature or any employee of the Legislature or the Legislative Counsel Bureau;

(b) Any person who has a fictitious address pursuant to NRS 217.462 to 217.471, inclusive; and

(c) Any police officer as defined in NRS 617.135.

2. All persons of the age of 70 years or over are exempt from serving as grand or trial jurors. Whenever it appears to the satisfaction of the court, by affidavit or otherwise, that a juror is over the age of 70 years, the court shall order the juror excused from all service as a grand or trial juror, if the juror so desires.

3. A person who is the age of 65 years or over who lives 65 miles or more from the court is exempt from serving as a grand or trial juror. Whenever it appears to the satisfaction of the court, by affidavit or otherwise, that a juror is the age of 65 years or over and lives 65 miles or more from the court, the court shall order the juror excused from all service as a grand or trial juror, if the juror so desires.

## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook.

2. I certify that this brief exceeds the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 7,937 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 11th day of September, 2015.

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## CERTIFICATE OF SERVICE

I certify that on September 11, 2015, I submitted the foregoing APPELLANT'S REPLY BRIEF for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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