Case Nos. 64702, 65007 and 65172

In the Supreme Court of Nevada

RAYMOND RIAD KHOURY,
Appellant,

vs.

MARGARET SEASTRAND,
Respondent.

SUPPLEMENTAL AUTHORITIES

Pursuant to NRAP 31(e), appellant provides the following supplemental authorities.

1. Nevada Federal Decisions Exclude Treating Physicians who are Not Properly Disclosed

On pages 4 and 22–26 of the opening brief and page 42 of the reply, appellant discusses the requirement that parties designate any non-retained experts and adequately disclose their opinions. On pages 10–12 of the answering brief, respondent cites to the analogous federal requirement, with a focus on the Ninth Circuit's decision in *Goodman v. Staples*, 644 F.3d 817 (9th Cir. 2011).

A popular blog on Nevada discovery describes how to disclose non-retained experts.[1] It concludes: "Disclosing non-retained expert witnesses is not hard. If done improperly, courts will exclude the experts." Lowry, *How to Disclose*. Nevada's federal courts have done just that.

In *Langermann v. Prop. & Cas. Ins. Co. of Hartford*, Magistrate Judge Leen held that it is insufficient to say that a treating physician "will testify to his/her knowledge regarding the medical treatment provided to [plaintiff] resulting from the subject accident":

> The disclosure contains no information about the facts and opinions on which each provider is expected to testify as required by Rule 26(a)(2)(C)(ii) [analogous to NRCP 16.1(a)(2)(B)]. The disclosure contains only the most **generic, unhelpful description of the subject matter** on which each provider is expected to present evidence under Rules 702, 703, or 705 Federal Rules of Evidence as required by Rule 26(a)(2)(C)(i) of the Federal Rules of Civil Procedure. Providing voluminous treating provider medical records is simply

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[1] Michael P. Lowry, *'Twas the Night Before Non-Retained Expert Disclosures*, COMPELLING DISCOVERY (Dec. 24, 2015), http://www.compellingdiscovery.com/?p=3727; Lowry, *Summary Judgment on Causation if Treaters are Excluded?*, COMPELLING DISCOVERY (Dec. 7, 2015), http://www.compellingdiscovery.com/?p=3482; Lowry, *How to Disclose Non-Retained Experts*, COMPELLING DISCOVERY (Oct. 1, 2015), http://www.compellingdiscovery.com/?p=3601; Lowry, *Disclosing Treating Physicians as Experts in Federal Courts*, COMPELLING DISCOVERY (June 30, 2014), http://www.compellingdiscovery.com/?p=2841, attached as Exhibit A.

> insufficient to enable [defendant] to determine what opinions the treating physicians will offer.

Langermann v. Prop. & Cas. Ins. Co. of Hartford, 2:14-CV-00982-RCJ, 2015 WL 4724512, at *3, *4 (D. Nev. Aug. 10, 2015) (emphasis added) (citing and applying *Goodman*, 644 F.3d at 825–26).

In a similar case, Judge Gordon held that the defendant's knowledge that plaintiff's experts would testify about particular topics did not excuse plaintiff's failure to designate them as experts and to disclose "a summary of the facts and opinions to which the witness is expected to testify" (quoting FRCP 26(a)(2)(C), identical to NRCP 16.1(a)(2)(B)):

> [Plaintiff] contends her noncompliance was harmless because (1) [defendant] knew that she intended to call her treating physicians to testify about causation, based on conversations between counsel . . . and (4) the Government never requested any additional information about these witnesses.
>
> [Plaintiff's] argument fails for several reasons. First, [defendant] does not have the burden to request supplemental Rule 26(f) disclosures [analogous to NRCP 26(e)]. The burden was on [plaintiff] to comply with Rule 26(a)(2)(A) and (C). Second, even if [plaintiff] had communicated her intent to call her treating physicians as experts, her affirmative designation of [another doctor] as an expert witness implied that she chose not to designate her treating physicians as experts. Her designation of [that doctor] also implies

> that she understood how to comply with Rule 26(a)(2)(A) and (C).

Nihart v. Nat'l Park Serv., 2:12-CV-00291-APG, 2014 WL 1415198, at *2 (D. Nev. Apr. 10, 2014).

2. Other Courts Recognize that Systematically Excluding Prospective Jurors Makes Juries Unrepresentative

On pages 49–52 of the opening brief and 13–23 of the reply, appellant discusses the harm of excluding jurors on a categorical basis. The Appellate Court of Connecticut recently addressed this issue in a case involving an English-proficiency requirement for jurors. *State v. Gould*, 109 A.3d 968 (Conn. App. Ct. 2015). The court did not find prejudice in the trial court's "isolated" error excusing one prospective juror (*id.* at 978), but it recognized the potential for significant harm in the "systematic exclusion of a particular class of juror":

> Had the court used the same approach to assess the English language proficiency of other prospective jurors for whom English was a second language, then **its cumulative rulings**, if they broadly excluded such persons from jury service, **could be evaluated for their resulting impact on the makeup and representative quality of the defendant's jury**. No claim to that effect has been made here, however, nor is any such claim supported by the record before us. Therefore, the court's isolated ruling as to [one prospective juror] has not been shown to have caused or risked causing the sort of systemic prejudice of

> which the defendant here complains, any more than it has been shown to have compromised the defendant's right to a fair trial before an impartial jury.

Id. (emphasis added).

The Connecticut court's decision cited to the U.S. Supreme Court's decision in *Thiel v. Southern Pacific Co.*, which reversed a civil judgment where the trial judge had systematically excluded daily wage earners from the jury. 328 U.S. 217, 224–25 (1946). Central to the trial judge's error was the inference of "undue financial hardship" (a legitimate statutory basis for exclusion) from the prospective jurors' disclosure of their occupation (not, in itself, a basis for exclusion):

> Jury service is a duty as well as a privilege of citizenship; it is a duly that cannot be shirked on a plea of inconvenience or decreased earning power. . . . **Thus a blanket exclusion** of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, **must be counted among those tendencies which undermine and weaken the institution of jury trial.** "That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one, lead to the irretrievable impairment of substantial liberties."

Id. at 224–225 (quoting *Glasser v. United States*, 315 U.S. 60, 86 (1942)). What's more, the error was structural, requiring automatic reversal:

> That conclusion requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. . . . On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class. . . . It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. **The evil lies in the admitted wholesale exclusion** of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen.

Id. (internal citations omitted).

3. Additional Authorities Support Applying the Cumulative-Error Doctrine

On pages 21, 25, and 51 of the opening brief, appellant discusses how reversible error arose from the cumulative effect of respondent's conduct and the district court's rulings.

While this Court has previously declined to address the issue directly, *see Nelson v. Heer*, 123 Nev. 217, 227 n.28, 163 P.3d 420, 427

n.28 (2007), authorities from this and other courts support the position that cumulative error is a proper basis for reversal.

This Court has long recognized that cumulative errors may require reversal in a criminal case. *See, e.g.*, *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). And it seems this Court has applied the cumulative-error doctrine in a civil case, too:

> Considered in isolation, the district court judge's comments may not have risen to the level of reversible error; however, reversal of this case is required when these errors are coupled with the other errors noted in this opinion.

Holderer v. Aetna Cas. & Sur. Co., 114 Nev. 845, 851, 963 P.2d 459, 463 (1998).

In federal court, applying that doctrine in civil suits has been described as the majority position because of strong policy concerns:

> We agree with the majority of courts that the cumulative-error doctrine should extend to civil cases. . . . Since a jury reaches its verdict in light of the evidence as a whole, it makes no sense to try to analyze errors in artificial isolation, when deciding whether they were harmless.

Beck v. Haik, 377 F.3d 624, 644–45 (6th Cir. 2004) (internal citations omitted) (citing cases from the Second, Seventh, Ninth, Tenth, and Federal Circuits), *overruled on other grounds by Adkins v. Wolever*, 554

F.3d 650 (6th Cir. 2009). *See also Kozlowski v. Hampton Sch. Bd.*, 77 Fed. Appx. 133, 154 (4th Cir. 2003) (analyzing a civil case for cumulative error); *Lenz v. S. Pac. Co.*, 493 F.2d 471, 472 (5th Cir. 1974) (same).

Many state courts also apply the cumulative-error doctrine to civil cases. *See, e.g.*, *Vargas v. Gutierrez*, 176 So. 3d 315, 327 (Fla. Dist. Ct. App. 2015); *Pellicer ex rel. Pellicer v. St. Barnabas Hosp.*, 974 A.2d 1070, 1088 (N.J. 2009); *Estate of Hunter v. Gen. Motors Corp.*, 729 So. 2d 1264, 1279 (Miss. 1999); *Tennant v. Marion Health Care Found., Inc.*, 459 S.E.2d 374, 395 (W. Va. 1995); *Katz v. Enzer*, 504 N.E.2d 427, 434 (Ohio Ct. App. 1985); *Estis Trucking Co., Inc. v. Hammond*, 387 So. 2d 768, 773 (Ala. 1980).

Dated this 21st day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2016, I submitted the foregoing "Supplemental Authorities" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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EXHIBIT A

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Civil discovery from beginning to end

Michael P. Lowry

'Twas the Night Before Non-Retained Expert Disclosures

Posted on **December 24, 2015**

This year's last post before the Christmas holiday is somewhat aspirational. Regular readers may have noticed that more than a few posts have discussed how not do disclose non-retained experts. Personally, I do not believe it is particularly difficult to disclose the information required. Yet receiving a proper disclosure is still the rare exception, three years after Nevada's state rules concerning disclosure of non-retained experts were modified to closely mirror the federal rules. For the most part, my clients have benefited from this because I and others have then gutted the opposing party's case by excluding all improperly disclosed experts from trial. It is hard to prove damages without experts.

I have two reactions when that happens. As an advocate hired to represent my client, I have served those interests well and am happy. As a lawyer who defends others against malpractice claims, I cringe and shake my head. Oh well. If you are reading this blog, I hope you can reach the aspirational goal of disclosing non-retained experts correctly.

This entry was posted in **Expert Witnesses** by **Michael Lowry**. Bookmark the **permalink [http://www.compellingdiscovery.com/?p=3727]** .

Compelling Discovery
Civil discovery from beginning to end

Michael P. Lowry

Summary Judgment on Causation if Treaters are Excluded?

Posted on **December 7, 2015**

Personal injury cases often rise and fall based upon the testimony of non-retained experts, usually treating physicians. When treating physicians are not properly disclosed, I usually move in limine to preclude them from offering causation opinions at trial and, if the plaintiff relied only upon the treating physicians to meet her burden of proof, to them exclude *all* treating physicians from trial. Those asserting this argument have enjoyed some success with it.

My thinking behind the motion in limine was that even if the motion was granted, trial would still occur because a plaintiff can always get on the stand and say "that did not make me happy, give me money." Apparently I need to broaden my thinking. *Blackmon v. New Albertson's, Inc.*[1] granted summary judgment on damages because the plaintiff had no treating physicians to testify on causation. Plaintiff had her own assertions but that was apparently not enough.

> *"When . . . the cause of injuries is not immediately apparent, the opinion as to the cause should be given by one qualified as a medical expert." Lord v. State, 107 Nev. 28, 33, 806 P.2d 548 (Nev. 1991); Grover C. Dils Med. Ctr. v. Menditto, 121 Nev. 278, 112 P.3d 1093, 1100 (Nev. 2005)("generally, because an injury is a subjective condition, an expert opinion is required to establish a causal connection between the incident and the injury"). "It is well-settled law that in a personal injury action causation must be proven within a reasonable medical probability based upon competent*

> *medical testimony. Mere possibility alone is insufficient." Layton v. Yankee Caithness Joint Venture, 774 F. Supp. 576, 579-80 (D. Nev. 1991) (citing Jones v. Ortho Pharm. Corp., 163 Cal. App. 3d 396, 209 Cal. Rptr. 456 (Cal. Ct. App. 1985)). Here, Plaintiff has failed in her to duty to produce specific, concrete facts that are more than speculation or conjecture. Therefore, since Plaintiff has failed to raise questions of fact on the issues of causation and damages that require resolution by a finder of fact, the Court grants Defendant's motion for summary judgment.*

This ruling only once more underscores the importance of properly disclosing non-retained experts.

[1] 2011 U.S. Dist. LEXIS 120682, 2011 WL 4958631 (D. Nev. Oct. 17, 2011).

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Michael P. Lowry

How to Disclose Non-Retained Experts

Posted on **October 1, 2015**

Welcome to October. As in 2014, I have decided once again to dedicate this month's posts to expert witnesses, again making this blog the second coolest thing after Shark Week.

I have repeatedly posted about non-retained experts.[1] The rule for disclosure in federal courts has been in effect since 2010 and Nevada followed in 2012. Yet I continue to see horribly non-compliant disclosures. I suspect this is primarily because attorneys are not paying attention and that is dangerous. Here are three cases that discuss why.

A-12-672128-C: All but $2,563 in medical damages barred from trial.

I was involved in this case. Plaintiff's only disclosure in the entire case listed every treating physician she had ever seen and said:

> *This treating physician, PMK and/or COR may offer an expert opinion regarding issues of causation and the injuries Plaintiff sustained in the subject incident and, particularly, his evaluation and the medical treatment provided as a result thereof. They may also testify as to the necessity and costs for future care, if any. They may also offer testimony as to the reasonableness and necessity of Plaintiff's treatment for the injuries sustained as a result of the subject incident, and that the medical expenses incurred were reasonable and customary in the community.*

I requested an order in limine 1) preventing any treater from offering an opinion on causation for failure to disclosure; 2) to prevent any treater from testifying because the jury would never hear anyone say the magic words relating their treatment to the case. The motion was largely a repeat of everything this blog offers on the topic. I got 95% of my request. Judge Hardy's 11 page order (available online) barred all treaters but one from offering causation testimony. That one treater could only testify about his treatment and its relationship, meaning the grand total of medical damages at trial would be $2,563. The case ended a week later.

A-14-694732-C: Plaintiff's treaters banned from discussing causation.

I did not handle this case, but my firm did. Plaintiff's disclosure of her treating physicians was one sentence. "It is anticipated that [treating physician's name] will testify regarding the injuries sustained by Plaintiff as a result of the subject incidents that occurred on February 21 and 23, 2012." My firm moved to exclude. Judge Villani ruled, in relevant part:

> *Plaintiff's treating physician disclosures merely state that the treating physician will testify "regarding the facts and circumstances of the subject incident that occurred on February 21, 2012, and the injuries sustained therein." The purpose behind timely Rule 16.1 disclosures is to prevent surprises at trial, requiring all relevant facts and information be provided to the opposing party prior to trial. FCH1, LLC v. Rodriguez, 130 Nev. Adv. Op. 46, 335 P.3d 183, 190 (2014). Therefore, Plaintiff's disclosed physicians' testimony shall be limited to Plaintiff's condition and their treatment of her.*

The question about how the treaters could even offer relevant testimony at trial if no one would ever testify about causation was not discussed.

Federal courts exclude treaters too.

MJ Leen addressed the same issue in *Langermann v. Prop. & Cas. Ins. Co.*[2] Plaintiff disclosed the name, "the contact information for the treating provider and all corresponding medical records from each provider." The disclosure also stated for each "a 'person most knowledgeable' would testify and provided the same description of the subject matter of their anticipated testimony: '[s]aid witness will testify to his/her knowledge regarding the medical treatment provided to Marike Greyson resulting from the subject accident.'"

"Defendant did not seek clarification of these disclosures during discovery, indicate that the disclosures were deficient, or conduct any discovery from these providers by

subpoena or deposition." The defendant argued without proper disclosure, it had "no way to determine what opinions the treating physicians will offer. Additionally, without the proper disclosure of the information required [defendant] could not make an informed decision about which, if any, of the witnesses to depose."

The treaters were barred from offering causation opinion testimony.

> *These disclosures are insufficient to comply with Plaintiff's obligations under Rule 26(a)(2)(C). The disclosure contains no information about the facts and opinions on which each provider is expected to testify as required by Rule 26(a)(2)(C)(ii). The disclosure contains only the most generic, unhelpful description of the subject matter on which each provider is expected to present evidence under Rules 702, 703, or 705 Federal Rules of Evidence as required by Rule 26(a)(2)(C)(i) of the Federal Rules of Civil Procedure. Providing voluminous treating provider medical records is simply insufficient to enable Hartford to determine what opinions the treating physicians will offer.*
>
> *Additionally, Plaintiff has not even attempted to show that the failure to comply with the Rule 26(a)(2)(C) disclosure requirements is substantially justified or harmless. The purpose of the expert witness disclosures is to prevent unfair surprise. The Plaintiff did not disclose a summary of the facts and opinions on which the providers will testify. Plaintiff's boilerplate conclusory description of their anticipated testimony is woefully inadequate. Identifying the treating physicians and providing Hartford with voluminous medical records does not meet Plaintiff's disclosure obligations under Rule 26(a)(2)(C), or provide sufficient information to prevent unfair surprise at trial.*
>
> *Discovery closed March 23, 2015. Hartford filed a motion for summary judgment on April 22, 2015, based in part on arguments Plaintiff failed to disclose any expert who could testify that Ms. Greyson was in an accident and suffered any injury as a result of that accident. Allowing these witnesses to provide medical opinion testimony, even limited to those formed during the course of treatment, would require reopening discovery to prevent unfair surprise, cause Hartford to incur additional costs, delay this case and result in future motion practice.*

What does it all mean?

Disclosing non-retained expert witnesses is not hard. If done improperly, courts will exclude the experts. Then all you have is a malpractice claim.

[1] Here, here, here, here and probably more.

[2] 2:14-cv-00982, 2015 U.S. Dist. LEXIS 105378 (D. Nev. Aug. 10, 2015).

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Compelling Discovery
Civil discovery from beginning to end

Michael P. Lowry

Disclosing Treating Physicians as Experts in Federal Courts

Posted on **June 30, 2014**

Given the uproar *FCH1 v. Rodriguez* recently caused in Nevada state courts, now seems like a good time to also consider the disclosure requirements in federal courts.

Nihart v. Nat'l Park Serv., 2014 U.S. Dist. LEXIS 51438, 2014 WL 1415198 (D. Nev. Apr. 10, 2014) addressed this topic. The plaintiff did not disclose her treating physicians as experts and defendant moved to "limit the treating physicians' testimony to their observations as percipient witnesses...." The court noted "[a] treating physician may not testify about injury causation unless she is properly designated an expert witness."

The plaintiff first argued her failure was substantially justified. That argument went over like a fart in church.

> *Nihart attempts to justify her noncompliance by arguing that to determine the exact opinions of her treating physicians would have required substantial costs—at least $3,500 per physician. Rule 26(a)(2)(C), however, does not require "exact" opinions. The rule requires disclosure of only "the subject matter" of the expected testimony and "a summary of the facts and opinions to which the witness is expected to testify." Moreover, it is difficult to understand how Nihart intends for her treating physicians to testify as to causation if she has not yet prepared the information required by Rule 26(a)(2)(C). And if she has that information in hand, there is no apparent reason why she could not have provided it to the Government, even if that effort was untimely as an*

> *attempt to cure her prior noncompliance. In short, Nihart's cost concerns do not amount to substantial justification.*

Plaintiff then argued her error was harmless, to no avail.

> *Nihart contends her noncompliance was harmless because (1) the Government knew that she intended to call her treating physicians to testify about causation, based on conversations between counsel and on the content of her previous administrative claim; (2) armed with this knowledge, the Government failed to request a supplemental Rule 26(f) disclosure; (3) the Government had "limitless time" to prepare for trial with the knowledge of Nihart's intent to use these witnesses to establish causation; and (4) the Government never requested any additional information about these witnesses.*
>
> *Nihart's argument fails for several reasons. First, the Government does not have the burden to request supplemental Rule 26(f) disclosures. The burden was on Nihart to comply with Rule 26(a)(2)(A) and (C). Second, even if Nihart had communicated her intent to call her treating physicians as experts, her affirmative designation of Dr. Gary J. La Tourette as an expert witness implied that she chose not to designate her treating physicians as experts. Her designation of Dr. La Tourette also implies that she understood how to comply with Rule 26(a)(2)(A) and (C).*
>
> *Third, allowing these witnesses would delay the litigation and negatively impact the Court's docket. Discovery closed long ago, and the case is ready for trial.*
>
> *Fourth, the Government certainly would be prejudiced by allowing these witnesses to testify as experts. The Government would have to determine whether to depose the newly-designated experts, and whether to find, prepare and designate rebuttal experts. If the Government's experts prepared full reports under Rule 26(a)(2)(B), Nihart would then need the opportunity to examine those reports and determine how to respond and whether to conduct additional discovery.*
>
> *Fifth, disallowing the treating physicians as experts would not foreclose the disposition of the case on the merits. Dr. La Tourette is designated to testify on Nihart's behalf as to causation. Thus, the treating physicians are not Nihart's only evidence as to causation, so granting the Government's motion does not amount to dismissing Nihart's claim.*

Lesson? Appropriately disclose treating physicians as expert witnesses or risk having them excluded.

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