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IN THE SUPREME COURT OF THE STATE OF NEVADA

JA CYNTA McCLENDON,

Appellant,

vs.

DIANE COLLINS and; ROE CORPORATIONS I through X, inclusive; and DOES I through X, inclusive,

Respondent.

Supreme Court No. 66473

District Court Case No. A-13-680935
Dept. No. XXX

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This appeal arises from a negligence action for personal injuries related to a motor vehicle accident that occurred on May 15, 2012, in Las Vegas, Nevada. On April 30, 2013 Appellant filed a complaint against the Respondent. On or about August 14, 2014, certain pretrial issues were raised by motion and were ruled upon in the days prior to Short Trial, which directly impacted the outcome of subject underlying Short Trial. On August 22, 2014, this matter went to Short Trial before a jury and resulted in a jury verdict in favor of the Defendant (Respondent). On September 5, 2014 Plaintiff filed her Notice of Appeal and Case Appeal Statement with the Court.

NSTR 33 states, in relevant part that a party to a case within the short trial program shall have a right to file a direct appeal of the final judgment to the supreme court under the provisions of the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure.

NRAP 3A(b)(1) provides that an appeal may be taken from a final judgment entered in an action commenced in court in which a judgment has been rendered. This appeal is taken subsequent to the judgment and entry of judgment from the Court in which a judgment is rendered pursuant to this rule.

Therefore, Appellant filed her appeal timely, complied with the appropriate rules following final judgment in the underlying matter and jurisdiction is proper.

II. STATEMENT OF THE ISSUES

The Short Trial court improperly granted Defendant's Motion for Protective Order, which precluded Defendant's own designated medical expert and the expert opinion which was favorable to Plaintiff and unfavorable to Defendant, following Defendant's proper designation of that expert, including supplements thereto. The court also denied Plaintiff the right to designate that same expert. The Short Trial court's ruling permitted Defendant to:

- De-designate her testifying expert medical witness on the eve of trial, despite timely designation of that expert months earlier, and two disclosed supplemental reports from that expert;
- Deny the Plaintiff the right to depose that expert and use that expert's testimony and report at trial.

Defendant's actions, and the Short Trial court's ruling were inappropriate, do not comport with Nevada Rules of Civil Procedure, case law precedent, or the principles of justice and fairness, and precluded the jury from reviewing the whole truth, and key evidence and ultimately was fatal to Appellant's underlying claims.

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III. STATEMENT OF THE CASE AND RELEVANT FACTS

This matter originates from a motor vehicle accident that occurred May 15, 2012. Plaintiff Ja Cynta McClendon was exiting the I-95 Northbound off-ramp onto westbound Lake Mead Blvd., in Las Vegas, when Defendant Diane Collins failed to stop her vehicle behind Plaintiff, and crashed into the rear of Plaintiff's vehicle. As a result of the accident Ja Cynta McClendon sustained injuries, received medical treatment, and incurred significant medical expenses as a result of those injuries.

On April 30, 2013 Ja Cynta McClendon filed a complaint against Defendant Collins in District Court under a negligence theory. *See* **Exhibit 1**. This matter proceeded through the court mandated arbitration program. Plaintiff Ja Cynta McClendon prevailed at arbitration. *See* **Exhibit 2**.

Thereafter, Defendant filed a timely Request for Trial de Novo. Subsequently, short trial was set for August 22, 2014, with a discovery deadline of July 30, 2014. *See* **Exhibit 3**. On June 4, 2014, Defendant designated medical expert witness Dr. Eugene Appel. *See* **Exhibit 4**. On June 24, 2014 Defendant disclosed her first supplement to Dr. Appel's expert report. *See* **Exhibit 5**. On August 5, 2014, Defendant disclosed a second supplement to Dr. Appel's expert report. *See* **Exhibit 6**. Dr. Appel's report and supplemental reports contained opinions favorable to Plaintiff. *See* **Exhibit 7**. Prior to the close of discovery,

Plaintiff designated medical expert Dr. David Oliveri, as a rebuttal expert, to rebut various opinion's held by Dr. Appel. *See* **Exhibit 8**. Defendant disputed Plaintiff's designation and demanded additional time to depose Dr. Oliveri. As a matter of fairness and reciprocity, Plaintiff also requested leave to depose Dr. Appel. The court granted both parties requests for deposition of the opposing expert, then extended the discovery deadline from July 30, 2014 to August 18, 2014, (only three days prior to trial) for the sole purpose of deposing those expert witnesses: Dr. Appel, and Dr. Oliveri. *See* **Exhibit 9**.

On August 12, 2014, after properly noticing the depositions of the experts, and approximately three days prior to Plaintiff taking Dr. Appel's deposition, Defendant filed a de-designation of Dr. Appel. *See* **Exhibit 10**. On August 13, 2014, prior to the close of discovery, and as a result of Defendant's de-designation, Plaintiff designated Dr. Appel as her own expert. *See* **Exhibit 11**.

On August 14, 2014, Defendant filed a Motion for Protective Order, arguing that because Dr. Appel had been de-designated, he was no longer an expert, could not be deposed, and could not testify or render opinions to be used in trial. *See* **Exhibit 12**. On August 14, 2014, in opposition to Defendant's motion, Plaintiff filed a motion to designate Eugene L. Appel, M.D., as her own expert witness, take his deposition, and use his written opinions and deposition testimony at trial. *See* **Exhibit 13** The court issued an Order granting Defendant's Protective Order and

denying Plaintiff's Motion. *See* **Exhibit 14**. At Short Trial, the jury rendered a verdict in favor of Defendant. Without doubt, Defendant's deception in keeping Dr. Appel's opinions from the jury contributed heavily to such a verdict, and the Short Trial court erred in allowing Defendant to hide the truth.

IV. ARGUMENT

DISCOVERY IS A TRUTH SEEKING PROCESS

A. Defendant properly disclosed Dr. Appel as an expert medical witness, but on the eve of trial de-designated Dr. Appel to conceal the truth from the jury.

Defendant properly designated Dr. Appel on June 4, 2014, more than two months prior to trial. *See* **Exhibit 4**. On June 24, 2014, Defendant provided a supplemental expert report from Dr. Appel. *See* **Exhibit 5**. Then, on August 5, 2014, approximately two weeks prior to trial, Defendant disclosed a second supplement to Dr. Appel's expert medical report. *See* **Exhibit 6**. Dr. Appel's reports actually imply that the subject accident not only occurred but produced enough force to injure Plaintiff/Appellant and to justify her in seeking medical treatment. *See* **Exhibit 7**. However, on the eve of trial and Dr. Appel's properly noticed deposition, Defendant/Respondent de-designated Dr. Appel as her medical expert. *See* **Exhibit 10**. Defendant/Respondent knew the jury would see the truth and that it would benefit Plaintiff: that Plaintiff/Appellant was in fact injured as a

result of the underlying motor vehicle accident and was justified in seeking medical treatment.

This Court has not yet directly addressed the issue Appellant raises in this appeal: the impropriety of a party de-designating their own expert witness on the eve of trial following his timely disclosure, and production of his reports and supplemental reports, to precluded a properly noticed deposition, and to hide those opinions from the jury; and, the propriety of the opposing party's timely subsequent expert designation (of the de-designated expert); and, the opposing party's timely notice of deposition of that expert, to permit the jury to review all of the evidence and see the whole truth.

Fortunately, several other courts around the country have ruled on this issue. Courts from California to Florida have ruled in favor of denying a defendant's de-designation of a properly disclosed expert, (or, what amounts to, Defendant's' Motion to Strike her own expert), and in favor of allowing that expert's properly disclosed report to be used at trial.

District Court Judge George Marovich, in a memorandum opinion and order regarding The Hartford Fire Insurance Company, Inc., v. Transgroup Express, Inc., 264 F.R.D. 382 (N.D. Ill. 2009), discusses The Hartford Fire Insurance Company, Inc.'s petition to quash a subpoena issued by Transgroup Express, Inc., served on one of Hartford's disclosed testifying experts. In that case, Hartford's expert had

already produced *two* expert reports in the matter. Upon notice of that expert's deposition, Hartford withdrew the expert as a testifying expert and refused to produce him for deposition. Judge Marovich found that Transgroup was entitled to the expert's deposition, even though Transgroup had re-designated the expert as a non-testifying expert. Judge Marovich opined, in relevant part, as follows:

> **Discovery is a truth-seeking process, and it does not serve that process to allow a party to avoid the deposition of an expert whose report has been produced by changing that expert's designation to that of a trial-preparation expert. The Court anticipates that the Seventh Circuit would agree that parties cannot protect an expert from a deposition by changing an expert's designation from testifying expert to trial-preparation expert after that expert's report has been produced to the opposing party.** [Magistrate] Judge Denlow properly relied on SEC v. Koenig, 557 F.3d 736, 744 (7th Cir. 2009). In Koenig, the Seventh Circuit considered whether it was proper for the SEC to call Koenig's expert witness, Dunbar, at trial even though Koenig had decided not to call Dunbar. The Seventh Circuit concluded that the SEC was not required to list Dunbar as its own witness during discovery in order to call him at trial. The Seventh Circuit went on to say:
>
> > Suppose this is wrong, however, and that the SEC should have identified Dunbar during discovery as its own witness .... Delay in alerting Koenig that Dunbar might testify was as harmless as they come, given Dunbar's status as Koenig's expert .... Koenig maintains that with more advance notice from the SEC he would have withdrawn Dunbar as an expert. But how could that have helped? **A witness identified as a testimonial expert is available to either side**; such a person can't be transformed after the report has been disclosed, and a deposition conducted, to the status of trial-preparation expert whose identity and views may be concealed. See Fed. R.Civ.P. 26(b)(4)(B). **Disclosure of the report ends the opportunity to invoke**

confidentiality. SEC v. Koenig, 557 F.3d at 744 (emphasis added).

This Court is aware, as Hartford points out, that the quoted portion is dicta. Still, the Seventh Circuit considered (albeit quickly) whether a party could re-designate an expert as a trial-preparation expert after an expert report has been issued. **The Seventh Circuit concluded, albeit in dicta, that the "[d]isclosure of the report ends the opportunity to invoke confidentiality." This Court reads that to mean that a party cannot invoke the protections of Rule 26(b)(4)(B) after the party has issued an expert report with respect to a particular expert.**

Other courts mirror Judge Marovich's Order and the holding in SEC v. Koenig. In Peterson v. Willie, 81 F. 3d 1033 (1996), the United States Court of Appeals, Eleventh Circuit, dealt with a similar issue. In that case, a plaintiff appealed a judgment entered on a jury verdict, based in part on the district court's purported error in allowing the testimony of a doctor retained by the plaintiff- but later discharged- to testify on behalf of defendants. Id. at 1037. The doctor in Peterson was designated by the plaintiff as an expert witness expected to testify at trial pursuant to Federal Rule of Civil Procedure 26(b)(4)(A)(i), the analogue to Nevada Rule of Civil Procedure 26(b)(4)(A). Following that doctor's unfavorable deposition testimony, the plaintiff in Peterson withdrew the doctor's designation as a trial expert and filed a motion in limine seeking to preclude him from testifying in the trial. Id. The plaintiff argued, that the testimony from that doctor would be cumulative and duplicative of other experts. However, the district court permitted

the doctor to testify at trial on behalf of the defendants, and also allowed the doctor to testify that he was originally retained by plaintiff's counsel. Id. The Eleventh Circuit ruled that there was no error in allowing Defendants to call Plaintiff's expert at trial. Id.

The instant issue raised by Appellant mirrors the above-cited cases. In Peterson, an expert is retained and properly designated by a party. Then, that party, following disclosure of the expert as a trial witness, and written report, finds that the testimony no longer benefits their case. See Peterson at 1036-37. Following the de-designation by a party, the Eleventh Circuit found that the opposing party could then call that expert at trial. In Hartford, the Eleventh Circuit found that simply because a party's expert produces opinion unfavorable to their position does not preclude the other party from eliciting their testimony at trial.

Additionally, in Cogdell v. Brown, the New Jersey Superior Court of Law noted that **"a trial is essentially a search for the truth,"** and found that the plaintiff in that matter could call as their witness an examining doctor who was initially consulted by one of the defendants and who prepared a report on behalf of a defendant. Codgell v. Brown, 220 N.J. Super. 330, 531 A2d 1379 (1997).

Here, similar to Hartford, Respondent in this matter sought to preclude her own expert from testifying via his written and disclosed opinion, due to what she perceive as unfavorable testimony to her case, and also to preclude her expert's

deposition testimony for the same reason. And like Hartford, Respondent here was successful in excluding her expert's report and concealing truth from the jury. Respondent's actions here were questionable at every level, and contrary to the principle of justice, fairness, and propriety. The Short Trial court's opinion regarding Respondent's de-designation was contrary to the procedural rules, logic, and the well-reasoned opinions found in persuasive authority from other jurisdictions.

B. The protections of NRCP 26 (b)(4)(B) do not apply in this case because Respondent properly designated Dr. Appel as a testifying expert witness, supplemented his report twice, and originally agreed to the Doctor's deposition.

Nevada Rule of Civil Procedure 26(b)(4)(B) reads:

> A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and **who is not expected to be called as a witness at trial**, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

It is anticipated that Respondent may erroneously attempt to rely upon NRCP 26 (b)(4)(B) in her argument before this Court. However, reliance upon this rule by Respondent here, and the by underlying Short Trial court in making the subject underlying ruling, was/is wrong.

On June 4, 2014, Defendant/Respondent filed a Designation of Expert Witness, designating Dr. Appel as an expert witness, and stated, "Dr. Appel is expected to testify with respect to his evaluation of Plaintiff JaCynta McClendon's medical records and render opinions regarding Plaintiff's alleged injuries and the reasonable necessity of Plaintiff's medical treatment." *See* **Exhibit 4.**

On June 24, Defendant/Respondent filed a first Supplement to Designation of Expert Witness, again designating Dr. Appel, and stating that he "is expected to testify with respect to his evaluation of Plaintiff JaCynta McClendon's medical records..." *See* **Exhibit 5.**

Yet again, on August 5, 2014, Defendant/Respondent filed a second Supplement for Dr. Appel, stating the same designation. *See* **Exhibit 6.** Additionally, on August 1, 2014, and at the agreement of the parties, Plaintiff/Appellant properly noticed the deposition of Dr. Appel. *See* **Exhibit 15.**

Within days of trial, and acting well outside the scope of NRCP 26 (b)(4)(B), Respondent inappropriately de-designated Dr. Appel as an expert witness after having properly designated him, supplemented his expert report twice, and agreed to his deposition as an expert, with that deposition having been properly noticed. The Short Trial court wrongly upheld Respondent's deceptive action.

Regarding such behavior, the Seventh Circuit Court of Appeals flatly

rejected the idea that an expert who has been designated as a testifying expert witness and has produced an expert report can later be re-designated as a non-testifying expert (or, de-designated like the present matter) to avoid having the expert deposed.

In SEC v. Koenig, 557 F.3d 736, (7th Cir. 2009) (citing Fed.R.Civ.P. 26(b)(4)(B)), that court stated:

> A witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report has been disclosed . . . to the status of a trial-preparation expert whose identity and views may be concealed." **A party's "disclosure of the report ends the opportunity to invoke confidentiality**. Id. at 744.

Additionally, while NRCP 26(b)(4)(B) also makes reference to *exceptional circumstances*, courts have held that the "exceptional circumstances" exception does not apply where a non-testifying expert was previously designated as an expert testifying witness.

In Meharg v. I-Flow Corp., the U.S. District Court held that "an expert is taken out of purview of Rule 26(b)(4)(B) *once designated to testify at trial* and court should use discretion to decide whether expert should be deposed, weighing the probative value against the prejudice." Meharg v. I-Flow Corp., 2009 WL 1867696, (S.D. Ind. June 26, 2009)(Emphasis added). Likewise in United States v. Cinergy Corp., the U.S. District Court for the Southern District of Indiana held that a "designation of expert as one to testify at trial takes expert out of purview of

doctor's deposition. Yet, the Short Trial court failed to stand upon the rules, logic, and persuasive case law, in order to preclude a clear miscarriage of justice. Nothing in NRCP 26(b)(4)(B) prohibited Plaintiff from deposing Dr. Appel and using his report at trial. What Respondent did was wrong, as was the Short Trial court's ruling in Defendant/Respondent's favor.

V. CONCLUSION

Dr. Appel was properly designated and disclosed by Respondent as a testifying expert witness; his report was supplemented not once, but twice; and, Respondent agreed to the taking of Dr. Appel's deposition. Thus, Dr. Appel was a testifying medical expert. The Short Trial court was wrong in permitting Respondent to de-designate Dr. Appel as a testifying expert and consider him a trial consultant, simply because Respondent realized Dr. Appel's report was entirely favorable to the Defendant/Respondent's underlying case. Additionally, nothing in NRCP 26(b)(4)(B) exists to prohibit Plaintiff/Appellant from deposing Dr. Appel, and using his report at trial, and designating him as her own testifying expert.

Respondent in this matter sought to preclude her own expert from testifying in deposition, and at trial in person, or via his written and disclosed opinion, because she realized his report was unfavorable to her case. However, despite the

present facts being similar to the facts in above-cited cases, the Short Trial court ruled in Respondent's favor and in direct opposition to rulings in Hartford and Peterson. Consequently, Respondent here was successful hiding the whole truth from the jury, by excluding her expert's report and supplements, and in preventing his deposition. These actions ultimately proved to fatally harm Appellant's underlying case. This is the antithesis of justice. Discovery is a truth seeking process. Respondent hid the truth. The Short Trial court permitted the deception. And, ultimately Plaintiff/Appellant suffered. Appellant respectfully requests that this honorable Court reverse the Short Trial court's subject order granting Defendant/Respondent's de-designation of Dr. Appel as testifying expert and reverse the subject protective order, and reverse the denial of Plaintiff's motion to designate the good doctor and take his deposition. Appellant further respectfully requests that, as a result of the injustice described in this appeal, this Court vacate the Short Trial jury verdict and judgment, and remand this matter for retrial.

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VI. CERTIFICATE OF ATTORNEY

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14 point Times New Roman; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[X] Does not exceed 17 pages.

3. Finally, 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 and volume number, if any, 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.

Dated this 1st day of April, 2015

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