Supreme Court Case No. 66473
District Court Case No. A-13-680935

IN THE SUPREME COURT OF THE STATE OF NEVADA

JA CYNTA McCLENDON,

Appellant,

v.

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

Respondent.

ANSWERING BRIEF

District Court, Clark County
The Honorable Jerry A. Wiese
Civil Case No. A-13-680935

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Nevada Rule of Appellate Procedure 26.1(a) Disclosure Statement

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent Diane Collins is an individual, and thus there is no corporation or parent corporation involved in ownership of the party.

The following law firms appeared for Respondent Diane Collins in the proceedings in the district court:

Barski Drake Browne PLC
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The following law firm is appearing for Respondent Diane Collins in the current appeal:

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No other law firms are expected to appear in this court on behalf of Respondent.

Dated this 20th day of July, 2015

By: /s/ Wade M. Hansard

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I.
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW[1]

Respondent Diane Collins[2] notes that the Issues Presented for Review in Appellant Ja Cynta McClendon's[3] Opening Brief, although generally similar to those referred to in McClendon's Docketing Statement and Case Appeal Statement, differ slightly. McClendon's "Statement of the Issues" is, instead, an argument. The issues it does list are a claimed order allowing Defendant to de-designate her expert[4] and an Order denying Plaintiff's request to take Dr. Appel's deposition and use his testimony and written report at trial. (*See Appellant's Brief at p. 2*). McClendon's docketing statement indicated that she was appealing "this order and all subsequent judgments." As Appellant's Brief does not address any further issues than the District Court's above-referenced order, any further issues are deemed waived.

Pursuant to NRAP 28(b)(2), Collins submits that the following issue is before this Court:

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[1] Respondent Collins does not object to Appellant's Jurisdictional Statement, and thus omits this section in the current brief pursuant to NRAP 28(b).

[2] Respondent Diane Collins is hereinafter referred to in this Brief as "Defendant Collins" or "Collins", pursuant to NRAP 28(d).

[3] Hereinafter, "Plaintiff McClendon" or "McClendon".

[4] Collins submits that the District Court had no involvement in Defendant's de-designation of its expert - - its involvement was regarding Plaintiff's attempt to use him as a witness.

1. Was it an abuse of discretion for the District Court to preclude Plaintiff McClendon from deposing Defendant's de-designated expert and using that expert's reports and opinions at trial?

2. If it was error, has Plaintiff McClendon shown that it was not harmless error?

II.
STATEMENT OF THE CASE

Defendant Collins generally concurs with the statements made in Appellant's Brief regarding the general nature of the case, the order and course of proceedings (including the dates of filings and relevant deadlines), and the disposition of the trial proceeding that are supported by citation to the record.[5] However, to the extent that Appellant inserts unsupported argument or "facts" without citation to the record, the Court must disregard those claims. This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993).

[5] Defendant Collins notes that Appellant's Brief does not contain appropriate separate headings for a statement of the case and a statement of the facts as required by NRAP 28(a)(6)-(7). As Collins' duty to submit these statements in this Answering Brief depends on the content of Appellant's Brief, Collins submits her separate Statement of the Case and Statement of Facts sections based on the portion of Appellant's Brief entitled "Statement of the Case and Relevant Facts."

III.
STATEMENT OF FACTS

Plaintiff McClendon's recitation of the facts as it relates to the accident – that it was a rear-end accident – is accurate. Unfortunately, Appellant choses to digress into an *ad hominem* attacks on trial counsel's character and ethics on what was a tactical trial decision and engages in puffery instead of providing this Court with, and citing to, a proper record. Hence, Collins submits the following facts that dispute or otherwise supplement McClendon's facts.

As was accepted by the jury, Collins disputed the extent of impact, the existence of injuries, as well as the causation of any injuries.

With respect to the subject matter of Dr. Eugene Appel, Defendant Collins disclosed this expert to opine regarding issues of Plaintiff's alleged injuries and the necessity of treatment. (*Appellant's App., Exhibit 4 at p. 12*). While Appellant's Brief characterizes Dr. Appel's disclosed opinion as "favorable", Collins notes that Dr. Appel's opinion was that Plaintiff's chiropractic treatment totaling over 30 visits was certainly excessive. (*Appellant's App., Exhibit 5 at p. 31, 33; Exhibit 6 at p. 38-39*). Dr. Appel did, however, indicate that Plaintiff's emergency room visit and one or two physical therapy sessions **might** have been within reason. (*Id.*). (Emphasis

added.) To the extent that McClendon asserts a desire to have Dr. Appel opine on causation, such testimony was unlikely to be admissible[6].

Furthermore, Plaintiff McClendon's facts do not mention the opinions of Plaintiff's own medical expert Dr. Oliveri. Dr. Oliveri's disclosure indicated that he would be opining on a variety of topics, including Plaintiff's alleged injuries and the necessity of treatment, which are the very same issues that Defendant's expert Dr. Appel was disclosed to opine on. (*Appellant's App., Exhibit 8 at p. 43-44*).

With respect to the Order that is the subject of this appeal, Collins notes that the District Court was fully briefed by the parties on the relevant law, and that the District Court "reviewed, in detail" the parties' arguments and case law. (*Appellant's App., Exhibit 12-14 at p. 54-71*). Based on this, the District Court, in its discretion, ruled that Plaintiff was barred from belatedly designating Dr. Appel as an expert witness, taking his deposition, or using his opinions at trial. (*Appellant's App., Exhibit 14 at p. 69-70*). The District Court's Order specifically stated that its decision was based, in

[6] In *Higgs v. Nevada*, 222 P.3d 648 (Nev. 2010), this Court made clear the District Court is the gatekeeper for which experts should be permitted and to what they should be permitted to testify. The *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008) case made the standards for admissibility of biomechanical expert testimony more stringent. The expert must actually inspect the vehicles involved; the biomechanical engineer must be sufficiently qualified; his or her opinions must be of assistance to the trier of fact; and the testimony must be limited to matters within the scope of the expert's specialized knowledge.

part, on the fact that, in accordance with the relevant case law, no Rule 35 examination of Plaintiff had been performed by the expert. (*Id.*).

Finally, while Appellant's Brief correctly indicates that the underlying action proceeded to a Short Trial, it does not provide any details for this Court to consider regarding the events of the Short Trial itself. Indeed, Plaintiff McClendon elected not to provide any transcript of the proceedings or statement of the short trial proceedings pursuant NRAP 9(c) upon which this Court could evaluate the effect of the District Court's alleged error on the outcome of the trial. This is fatal. Even assuming error, a verdict will not be set aside unless it affects the substantial rights of the parties. NRCP 61. *City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984).

Defendant Collins notes that Appellant's Brief does not allege that Plaintiff's own expert Dr. David Oliveri was unable to testify at trial. However, the Joint Pre-Trial Memorandum clearly shows that the testimony of both Dr. Oliveri and Plaintiff's chiropractor Laura Jagget, D.C. was admitted at trial, along with Dr. Oliveri's expert report. (*Resp. App. at 5, 7*). More importantly, Appellant's Brief does not allege that Dr. Oliveri was unable to offer the opinions on Plaintiff's injuries, causation, and the necessity of treatment, which are the exact topics that Appellant alleges she sought to elicit from Dr. Appel.[7]

[7] Causation and damages were the sole issues to be decided at trial, as duty and breach had been stipulated to prior to trial. (*Resp. App. at 9*)

With respect to Dr. Appel, his expert report states:

> For a minor accident such as this, only the neck is at risk as the thoracic spine and lumbar spine are supported by the seat back. Minor whiplash injuries are self-limited and heal in one or two weeks.
>
> Therefore, I feel that this patient's care was excessive. I would allow the emergency room visit and one or two physical therapy sessions as mentioned above.
>
> (*Appellant's App., Exhibit 5 at p. 33*).

Since Dr. Appel's report states that the vast majority of Plaintiff's alleged care was unnecessary, it is not immediately clear why Plaintiff would seek to use Dr. Appel's opinion. Indeed, if Dr. Appel's report was favorable to Plaintiff, why would she have Dr. Oliveri prepare a rebuttal to it?

Nonetheless, the report of Plaintiff's own expert[8] Dr. Oliveri makes abundantly clear that he expressed a causation opinion as well, which was much stronger than those of Dr. Appel.[9] (*Resp. App.* at 18-27). Dr. Oliveri's report contains a two-page section entitled "Medical Causation", which culminates with his "conclusion to a reasonable degree of medical probability that Ms. McClendon sustained the following

[8] Plaintiff falsely characterizes Dr. Oliveri as a "rebuttal expert". (*Appellant's Brief, p. 4.*) Dr. Oliveri was disclosed as a medical expert to perform a records review, as is evident from his expert report.

[9] While Plaintiff's Appendix omits Dr. Oliveri's expert report, this report was filed in the District Court as a Trial Exhibit and is thus part of the trial court record. (*NRAP 10(a)*).

injuries resulting from the 05/15/12 subject accident", after which he describes Plaintiff's alleged back and knee injuries. (*Id.* at 24-25). Dr. Oliveri's report also opines that **all** treatment the Plaintiff received was necessary. (*Id.* at 26).

Put simply, while Plaintiff claims she was deprived of Dr. Appel's expert testimony at trial, her own expert Dr. Oliveri (which her Brief omits) was more than sufficient to present these issues to the jury. Even with Dr. Oliveri's extensive opinions on this point, the jury found in favor of Defendant. (*Resp. App. at 13.*) Further, Plaintiff's treating physician was permitted to offer testimony as it relates to the causation of Plaintiff's injuries. (*Resp. App. at 5*) Thus, notwithstanding the District Court's proper ruling excluding Dr. Appel's deposition and its subsequent use at trial, Plaintiff McClendon fails to establish what the testimony would have been or that it would have resulted in a different verdict.

IV.
SUMMARY OF THE ARGUMENT

McClendon's appeal should be dismissed for multiple violations of the Nevada Rules of Appellate Procedure including the form of her brief, lack of citation to the record, and failure to provide a complete record. Appellant's Opening Brief and Appendix is so inadequate that this Court cannot perform its review without providing advocacy on McClendon's behalf. Since McClendon did not provide a sufficient record, Collins is entitled to a presumption that the District Court's decision was correct.

Wholly separate from McClendon's procedural failures, McClendon's appeal must be denied because the District Court did not commit reversible error. The District Court correctly assessed Dr. Appel as a retained expert witness that was not expected to testify at trial (given his de-designation) and, pursuant to NRCP 26 (b)(4)(B), precluded McClendon from deposing Dr. Appel. NRCP 26 (b)(4)(B) provides that such a deposition could only be taken if "exceptional circumstances" existed by which Plaintiff could not obtain opinions on the same subject elsewhere, which was not the case given that Plaintiff's own expert Dr. Oliveri opined on the same subject.

While the language of NRCP 26(b)(4)(B) is clearly applicable, Plaintiff cites case law from other jurisdictions analyzing the rule's federal counterpart, FRCP 26(b)(4). Plaintiff notes that certain federal courts that have suggested that, where a testifying expert is de-designated, the "exceptional circumstances" ordinarily required by the rule to obtain discovery of that expert's opinions need not be shown. Rather, a discretionary balancing of probative versus prejudicial value is required in those jurisdictions. Notably, Appellant's Brief does not actually perform an analysis to apply the alternative standard she argues should be used. Furthermore, even if the approach outlined by these other cases were adopted by this Court, Plaintiff still has not shown reversible error, as Plaintiff still would be precluded from taking Dr. Appel's deposition under that standard.

Finally, even if the District Court's ruling constituted an abuse of discretion, it resulted in harmless error that does not warrant reversal. As Plaintiff's own experts presented testimony[10] regarding her alleged injuries, causation, and necessity of treatment, the addition of Dr. Appel's testimony would have made no difference to the jury's ultimate decision. Therefore, the Jury's Verdict must be affirmed.

V.
ARGUMENT

A. McClendon's Brief Fails To Comply With The Nevada Rules Of Appellate Procedure

Appellant's Opening Brief fails to comply with numerous requirements of the Nevada Rules of Appellate procedure ("NRAP"). Contravening NRAP 28(a)(7), it omits a summary of her argument. Nor is there any mention of the applicable standard of review for any of McClendon's arguments, in violation of NRAP 28(a)(9)(B). While it is understandable that McClendon would avoid this issue given that the relevant standard of review is abuse of discretion, this omission is nonetheless a violation of NRAP 28(a)(9)(B).[11]

[10] Again, Appellant's Brief does not include any records or statement of the proceedings, however, no court order or allegation in Appellant's Brief suggests she was unable to present such evidence. In fact, the record shows she was able to do so.

[11] As outlined below, omission of the standard of review is particularly fatal to McClendon's arguments because the cases which purportedly support her position actually reflect that a trial court's exercise of its discretion on this issue does not warrant reversal.

Most importantly, McClendon fails to provide citation to the record in support of any of her factual contentions. NRAP 28(e)(1) requires that every assertion in a brief regarding matters in the record to be supported by a reference to the page and volume number of the appendix where the matter relied upon can be found.

Further, although asserting that the lack of medical testimony of Dr. Appel caused a wrong decision by the jury, McClendon does not support the factual contention with reference to the record. NRAP 9(c) provides that even where the proceedings were not recorded or when a transcript is unavailable, an appellant is required to "prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." This statement "shall be served on the respondent", and must be "submitted to the district court for settlement and approval" in order to be "included by the district court clerk in the trial court record". (*Id.*) Put simply, the law provided for an explicit manner by which McClendon could have presented a proper record on appeal. However, no settled statement was ever prepared or submitted, and this Court thus has no way to determine whether the District Court's disputed ruling actually had any effect on the jury's verdict. This failure is fatal to the appeal.

Where no official transcript of trial was prepared, NRAP 9(a)(6) provides that a party's failure to comply with the provisions of NRAP relating to obtaining such a transcript "may result in the imposition of sanctions, including dismissal of the

appeal." Here, McClendon has failed to provide a transcript or a settled statement of facts in lieu of an official transcript. Collins accordingly requests that this Appeal be dismissed for this failure.

NRAP 30(b)(2)-(3) imposes a duty on the appellant to provide all portions of the record essential to the determination of the issues raised by the appeal. The Nevada Supreme Court held in *Cuzze v. University and Community College System of Nevada*, 172 P.3d 131, 135 (Nev. 2007) that the Court does not consider matters not contained in the record on appeal. *Id.* Appellants have the responsibility of making an adequate appellate record and respondents have no obligation to supplement the record. *Id.* Under such circumstances, the Nevada Supreme Court will affirm the district court's order. *Id.* Accord *Stover v. Las Vegas Int'l Country Club Estates Home Owners Ass'n*, 589 P.2d 671, 672 (Nev. 1979). Consequently, and separately from the correctness of the Jury's Verdict, because Appellant does not provide the record to show prejudice, the Jury's Verdict and Judgment in this matter must be affirmed. Those deficiencies alone authorize the Court to affirm the Judgment.

B. The District Court Did Not Abuse Its Discretion When It Denied Plaintiff's Attempt To Elicit Dr. Appel's Testimony

1. Standard of Review

A district court's decision to admit expert testimony is reviewed for an abuse of discretion and the decision will not be overturned absent "a clear abuse of discretion." *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115

(2005). (citing *Krause Inc. v. Little*, 117 Nev. 929, 933-34, 34 P.3d 566, 569 (2001)). *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

2. The District Court Correctly Found That McClendon Was Precluded From Deposing Dr. Appel Pursuant to NRCP 26 (b)(4)(B)

NRCP 26 (b)(4)(B) provides:

> 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**. (emphasis added).

Dr. Appel was retained by Defendant but de-designated as a trial expert witness, rendering him a retained expert that was "not expected to be called as a witness at trial". Accordingly, NRCP 26 (b)(4)(B) was the controlling statute regarding Plaintiff's ability to depose Dr. Appel.

NRCP 26 (b)(4)(B) provides only two avenues by which a party may depose such an expert: (1) "as provided in Rule 35(b)", or (2) "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". The District Court correctly found that neither of these avenues existed.

The first avenue to such discovery, provided for in NRCP 35(b), was not present here because no Rule 35 physical examination of Plaintiff was performed by

Dr. Appel. Indeed, the District Court explicitly took this into account, as the Court stated its ruling was "based significantly on the fact that Dr. Appel, prior to Defendant de-designating him as an expert witness, had not performed a Rule 35 examination on the Plaintiff." (*Appellant's App., Exhibit 14 at p. 69-70*) (emphasis in original).

The second avenue was similarly not present because Plaintiff could not make a showing, as required by NRCP 26 (b)(4)(B), "of exceptional circumstances under which it was impracticable for her to obtain facts or opinions on the **same subject** by other means." This is abundantly clear because Plaintiff had her own expert, Dr. Oliveri, who opined on Plaintiff's alleged injuries and the necessity of treatment, the same subject to which Appellant wanted Dr. Appel to testify. (*Appellant's App., Exhibit 8 at p. 43-44*). As Plaintiff had practicable means by which to obtain opinions on this same subject, and she in fact did so, NRCP 26 (b)(4)(B)'s second avenue for deposing a non-testifying expert witness does not assist her here.

As outlined above, NRCP 26(b)(4)(B) is applicable and bars Plaintiff's attempt to depose Dr. Appel. In considering and applying this rule, not only did the District Court act within its discretion, it performed the analysis above in the only rational manner possible given the circumstances, finding that the rule clearly precluded Plaintiff from taking Dr. Appel's deposition. Accordingly, the District Court's rational exercise of its discretion must be upheld.

3. Even if The Legal Standard Argued For in Plaintiff's Brief Had Been Adopted in Nevada, Plaintiff Still Would Have Been Precluded From Taking Dr. Appel's Deposition

Notably, Plaintiff does not attempt to argue that NRCP 26 (b)(4)(B) did not bar her from taking Dr. Appel's deposition. Rather, Plaintiff cites various published and unpublished decisions from other jurisdictions, and argues that these decisions should render NRCP 26(b)(4)(B)'s "exceptional circumstances" standard inapplicable. While Defendant Collins submits that such other decisions do not impact the explicit application of NRCP 26 (b)(4)(B), it should be noted that even Plaintiff's argued standard would not change the District Court's ultimate decision.

Plaintiff's principal argument regarding the inapplicability of NRCP 26 (b)(4)(B) and its "exceptional circumstances" standard is that other courts have held this standard does not apply where a non-testifying expert was previously designated as a testifying expert. (*Appellant's Brief, p. 12*). Plaintiff cites the unpublished decision *Meharg v. I-Flow Corp.* 2009 WL 1867696 (S.D. Ind. June 26, 2009) for the proposition that such de-designation of a testifying expert takes the situation "out of purview" of NRCP 26 (b)(4)(B)'s federal counterpart and its "exceptional circumstances" standard. Plaintiff also cites *United States v. Cinergy Corp.*, 2009 WL 1124969 (S.D. Ind. Apr. 24, 2009) for this same proposition.

However, as Plaintiff's own Brief admits, even under this inapplicable and unpublished case law, the court is then permitted to "use discretion to decide whether

the expert should be deposed, weighing the probative value against the prejudice". (*Id.*; *Appellant's Brief, p. 12*). Put simply, even if Plaintiff's cited case law were applicable, it would not mandate that Plaintiff be allowed to depose Dr. Appel, but simply require the District Court to use its discretion in weighing probative and prejudicial value. **Plaintiff then offers no argument that she should have been allowed to depose Dr. Appel under that standard, failing to carry her burden of showing reversible error.**

Under a probative versus prejudicial weighing analysis, it is clear that Plaintiff would have been precluded from deposing Dr. Appel. Indeed, Plaintiff's own cited case *Cinergy* reflects this. In *Cinergy*, the Court performed this analysis and found that the plaintiff could not admit the opinion of the defendant's de-designated expert. With respect to the probative value of this testimony, *Cinergy* found that the plaintiff did "not need [the expert's] testimony to present their case in chief because other of its witnesses have testified" as to the same subject matter." (*Id.* at 3). The testimony was thus "cumulative and its probative value on the issue is very slight." (*Id.*). In the current case, Plaintiff McClendon's expert Dr. Oliveri was able to testify to the exact same issues regarding her alleged injuries and treatment, so Dr. Appel's testimony would have been cumulative, with essentially no probative value.

With respect to prejudice, *Cinergy* further noted "the undue prejudice to Cinergy if Plaintiffs are allowed to use this portion of [the expert's] testimony and

also allowed to elicit information that identifies the fact that Cinergy hired [him] as its expert." (*Id*.). This is the exact same prejudice that would have resulted in the underlying case here. Given that Plaintiff already had experts to testify on the relevant topics, Plaintiff's only purpose for calling Dr. Appel would have been to point out that Dr. Appel was Defendant's previously-retained expert. This is the very definition of undue prejudice. *Cinergy* accordingly held that the plaintiff could not depose the opposition's de-designated expert. (*Id*.). The exact same circumstances were present in the underlying matter here, and Plaintiff was properly precluded from deposing Dr. Appel under a weighing analysis as well.

Indeed, all of Plaintiff's remaining cited cases are simply fact-specific applications of the discretionary weighing standard, wherein wholly different circumstances existed than those currently before this Court. The brief analysis of Plaintiff's cited cases below clearly shows they are inapplicable and unpersuasive here.

In *Hartford Fire Ins. Co. v. Transgroup Exp., Inc.*, 264 F.R.D. 382 (N.D. Ill. 2009) (cited in Appellant's Brief at p. 6-8), the court's decision to allow the deposition of the de-designated expert was based entirely on the fact that the trial judge had previously issued an order allowing the deposition of that expert, and the deposition was thus "within the scope of the judge's [previous] Order." (*Id*. at 385). No such

order exists in the facts before this Court, and thus the basis of *Hartford*'s holding is inapplicable and unpersuasive here.

In *Peterson v. Willie*, 81 F.3d 1033, 1036-37 (11th Cir. 1996) (cited in Appellant's Brief at p. 8-9), the court considered a situation where a plaintiff's expert had actually examined the plaintiff, reexamined the plaintiff without counsel's instruction or knowledge, then testified at his deposition that, as a result of his second examination, his opinion concerning the plaintiff had changed. The expert in *Peterson* thus had extremely pertinent knowledge that the other party could not obtain elsewhere. Even so, *Peterson* held that it was error for the trial court to have admitted the fact that the expert was "previously retained by the opposing party", and that "the unfair prejudice resulting from disclosing this fact usually outweighs any probative value". (*Id*. at 1038.). In the case currently before this Court, Dr. Appel never examined the Plaintiff, and never was deposed. Unlike the party in *Peterson*, there is no information that Plaintiff could obtain from Dr. Appel to which her own experts could not testify. The only additional fact that Plaintiff could have elicited from Dr. Appel is that he was previously retained by Defendant, which even Plaintiff's own cited cases state is improper. Thus, the basis of *Peterson*'s holding is inapplicable and does not support McClendon's claim.

Cogdell v. Brown, 220 N.J. Super. 330, 333 (Ch. Div. 1987) (cited to in passing in Appellant's Brief at p. 9) was a New Jersey trial court ruling that did not consider

whether a party's previous expert could be deposed, but whether the fact of this previous retention was admissible. *Cogdell* allowed the admission of this fact without considering any of the legal doctrines outlined above, and issued its ruling based on the a general proposition that a "jury should have the opportunity to consider the fact that this expert witness was initially consulted by one of the defendants in judging his credibility." (*Id*. at 337). Notably, the New Jersey Supreme Court rejected *Cogdell*'s approach. *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 305-06, 895 A.2d 405, 416 (2006). ("we adopt the approach of those courts that generally restrict inquiry regarding the circumstances of the [expert witness'] initial retention".) Accordingly, not only is *Cogdell* inapplicable to the question of whether Plaintiff McClendon should have been able to depose Dr. Appel, but its own jurisdiction's subsequent overruling unambiguously shows that Plaintiff would not have been able to refer to Dr. Appel's previous retention by Defendant Collins.

Finally, Plaintiff relies on *S.E.C. v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009). However, Plaintiff's citation to this case paraphrases and omits an extremely relevant portion. Plaintiff's citation to this states:

> 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.
>
> (*Appellant's Brief, p. 12*) (emphasis added).

The ellipsis emphasized above is notable because it omits the following brief and very pertinent phrase from the opinion: "**and a deposition conducted**". *S.E.C. v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009). Put simply, the Court in *Koenig* placed importance on the fact that the expert's deposition had occurred, which did not occur in the facts before this Court. Plaintiff's omission of this exact portion of the sentence is also strange given that, earlier in her Brief, she included this full quote when cited by *Hartford, supra*. (*Appellant's Brief, p. 7.*) This earlier portion of Plaintiff's Brief also noted the fact that *Koenig*'s statement on this point was merely dicta. (*Id.*).

Put simply, Plaintiff's cited cases are either inapplicable, or show that Plaintiff would have been precluded from deposing Dr. Appel even under her proposed alternate standard. Rather, none of the circumstances from the cases above that weighed in favor of allowing the deposition of those experts are present here. Dr. Appel never examined Plaintiff and never had his deposition taken. The only information Plaintiff could have elicited from Dr. Appel that her own experts were not able to fully testify to was the fact that Dr. Appel was previously retained by Defendant, which even Plaintiff's own cited cases show is clearly improper.[12]

[12] Several other courts and authorities have noted the prejudice that results from informing a jury that an expert had been originally consulted by the opposing party. (See, e.g., *Healy v. Counts*, 100 F.R.D. 493 (D.Colo.1984); *Granger v. Wisner*, 134 Ariz. 377, 656 P.2d 1238, 1242 (1982) ("Jurors unfamiliar with the role of counsel in adversary proceedings might well assume that plaintiff's counsel had suppressed evidence which he had an obligation to offer. Such a reaction could destroy counsel's credibility in the eyes of the jury."); *Rubel v. Eli Lilly and Company*, 160 F.R.D. 458,

Accordingly, Plaintiff has not demonstrated that the District Court committed reversible error.

4. This Court Has Previously Held that a District Court's Proper Exercise of Discretion Will Not be Overturned

Finally, while NRCP 26 (b)(4)(B) is controlling here based on its plain language, Plaintiff's Brief has, at most, pointed to an ambiguity and split of authority that exists on the application of analogous rules in other jurisdictions. To the extent that the District Court's decision was a reasoned decision on an open question of Nevada law, it should not be disturbed.

A trial court is vested with discretion to simplify the issues and limit the number of expert witnesses allowed to testify. *Jeep Corp. v. Murray*, 101 Nev. 640, 646, 708 P.2d 297, 301 (1985), superseded by statute on other grounds as stated in *Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 192 P.3d 243, 253–54 & n. 39 (2008). For such evidentiary issues, both admission and exclusion of the evidence may be within the District Court's discretion, and the trial court's decision will not be disturbed absent an abuse of discretion. *Hansen v. Universal Health Servs. of Nevada, Inc.*, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999) ("This exclusion was not an abuse of discretion. Even though a contrary finding would also have been within the court's discretion with regard to the standard of care upon which the jury was instructed, this

460 (S.D.N.Y.1995) (describing this prejudicial fact as "explosive.") (quoting 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure: Civil § 2032, at 447 (1994)).).

court will not overturn the district court's exclusion of relevant evidence absent an abuse of discretion."). *See also, Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978). (The court is likewise authorized to exclude even relevant evidence if its probative value is substantially outweighed by the danger that it will confuse the issues, mislead the jury, or result in undue delay.")

Plaintiff's Brief does not identify any specific abuse of discretion. At most, Plaintiff argues that a legal standard never adopted in Nevada should have applied, but even under that standard fails to address how exactly the District Court's decision strayed from its wide latitude of discretion into reversible error. Based on the applicable Nevada legal authority outlined above, the District Court should not be disturbed because the District Court did not abuse its discretion.

C. The Court's Order Properly Excluded Dr. Appel's Written Opinions At Trial.

1. Standard of Review

A district court's evidentiary rulings are ordinarily reviewed for an abuse of discretion. *Hansen, supra*, 115 Nev. 24. See also *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1186, 866 P.2d 274, 278 (1993) (Court will not overturn trial court's determination absent manifest error or abuse of discretion); and *Jacobson v. Manfredi*, 100 Nev. 226, 679 P.2d 251 (1984) (held that allowing the subsequent drug product container and label as evidence of feasibility of precautionary measures was within the district court's discretion). "We review a district court's decision to admit or exclude

evidence for abuse of discretion, and we will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse." *M.C. Multi–Family Dev., L.L.C. v. Crestdale Assocs.*, Ltd., 124 Nev. 901, 913, 193 P.3d 536, 544 (2008); *Fulbrook v. Allstate Ins. Co.*, No. 61567, 2015 WL 439598, at *2 (Nev. Jan. 30, 2015). Indeed, NRS §48.035 provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

2. The District Court Correctly Excluded Dr. Appel's Expert Report and Opinions at Trial

Contrary to Plaintiff's assertions, the District Court did not disregard any legal standards. Instead, the Court correctly exercised its discretion by recognizing Defendant's right to de-designated its expert and to then preclude his opinions on medical issues from being presented at trial. Plaintiff has not indicated or alleged that her own treating physicians were unable to testify regarding medical causation.

The case of *Staccato v. Valley Hosp.*, 170 P.3d 503, 123 Nev. Adv. Rep. 49 (2007) clearly articulates that the district courts have discretion regarding the allowance of expert witness testimony. (See also, *Hansen, supra*.) The District Court exercised this discretion in allowing Defendant to withdraw its expert witness and by not allowing him to testify at deposition or trial.

3. The District Court's Precluding Of Dr. Appel's Testimony Was Harmless

Even assuming error, a verdict will not be set aside unless it affects the substantial rights of the parties. NRCP 61. *City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984).

It is curious as to why Plaintiff did not alert this Court to the fact that the District Court allowed Plaintiff to offer expert witness causation testimony. She attempts to have this Court address her argument about Dr. Appel's "missing" testimony in a void without providing this crucial factor that was appropriately weighed by the trial court in exercising his discretion, and in balancing the equities, in order to achieve an even playing field and overall fairness.

Plaintiff's claim that she was deprived of Dr. Appel's "favorable" causation testimony is simply false. First it was likely inadmissible under *Hallmark*. As outlined earlier in Defendant's Statement of Facts, Dr. Oliveri's report contains two entire pages outlining his medical causation opinion, ultimately concluding that the subject accident caused all of Plaintiff's alleged injuries, and that all of Plaintiff's treatment was necessary. (*Resp. App.* at 24-25). This expert report was admitted at trial. (*Resp. App.* at 14-27). Thus, Plaintiff was able to present expert testimony regarding her alleged injuries, the causation of these injuries, and the necessity of medical treatment via her own experts at trial.

Given the extensive medical expert opinions on causation that Plaintiff was able to present at trial, Dr. Appel's opinion that the emergency room visit and 1 or 2 physical therapy sessions might have been necessary was duplicative. Any content of Dr. Appel's expert report that Plaintiff claims she was deprived of would already have been before the jury by her expert.

Plaintiff offers only unsupported statements that she should have been able to depose Dr. Appel and use him at trial, however, her Brief never takes the necessary analytical step of showing how exactly the result of trial would have differed—this is fatal given that the addition of Dr. Appel's opinions by Plaintiff would not have served any additional purpose at trial or affected the trier of fact's decision. Thus, the exclusion of these opinions was, if in error, harmless error.

The Nevada Supreme Court clearly articulated its position in *Fox v. Cusick*, 91 Nev. 218 (1975). The Court held:

> It was for the jury to weigh the evidence and assess the credibility to be accorded the several witnesses. It is impossible for us to know whether the jury found for the defendant … because of a belief that he did not proximately cause the [accident], or because of a belief that the [Plaintiffs] did not truly sustain personal injuries as a result of the [accident]. With regard to the matter of injury and damage, it was within the province of the jury to decide that an accident occurred without compensable injury.

Fox, 91 Nev. at 221.

The Court affirmed this position in *Nev. Contract Servs. Inc. v. Squirrel Cos. Inc.*, 119 Nev. 157 (2003), when it held that:

> It is within the province of the jury, not the court, to weigh the credibility of the plaintiff's evidence in order to determine whether the defendant caused the plaintiff's damages.

Nev. Contract Servs. Inc., 119 Nev. at 162 citing *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 452 (1984).

The Supreme Court of Nevada has held that a jury, just as they did here, can find liability, but no damages. See *Quintero v. McDonald*, 116 Nev. 1181, 14 P.3d 522 (2000) (held that jury was within its proper discretion in finding that the defendants were entirely at fault for the accident but refusing to award any damages to plaintiff, where plaintiff had presented evidence of $1,885 in medical expenses, but inconclusive evidence of the reasonableness of her expenses or of the necessity of her treatment). The *Quintero* court stated that the credibility of witnesses and the weight of their testimony is within the jury's sole province and that "[…] the jury was not bound to assign any particular probative value to any evidence presented" 116 Nev. at 1184, 14 P.3d at 524.

Although Plaintiff's Brief does not directly challenge the jury's decision, it implicitly does so, as Plaintiff claims that the jury reached a wrong result. In *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1506, 970 P.2d 98, 123 (1998), the court held that a jury's findings will be affirmed on appeal if they are based upon substantial

evidence in the record. *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). "Substantial evidence has been defined as that which 'a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)). In *Dow Chemical* the court said that although there were disputes regarding the conclusions of the Mahlums' experts, the jury was entitled to rely on their testimony, stating: "This court has long adhered to the rule that when there is a conflict in the evidence, the verdict or decision will not be disturbed on appeal." [citing, *Frances v. Plaza Pacific Equities*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993)]. Stated differently, a jury's verdict will not be overturned if it is supported by substantial evidence unless the verdict was clearly erroneous when viewed in light of all the evidence presented. *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 779 P.2d 956 (1989).

Again, it is extremely important that Plaintiff has wholly failed to provide any record from the trial on this matter. Quite simply, this omission renders Plaintiff unable to carry her burden of showing what the jury's verdict was based on, let alone how the District Court's alleged error influenced the result.

In *Cardinal v. Zonneveld*, 89 Nev. 403, 407-08, 514 P.2d 204, 206-07 (1973), the trial court would not allow an expert to give his opinion as to the speed of the vehicle at the time of collision. This Court had a record that had he been permitted to do so, he would have fixed the speed at about 10 m.p.h. The judge believed that the

witness did not possess sufficient factual data upon which to base an opinion, and for that reason precluded the same based on *Levine v. Remolif*, 80 Nev. 168, 390 P.2d 718 (1964). Importantly, the *Cardinal* Court stated:

> We need not decide whether the judge properly construed the *Levine* decision since we are wholly unable to perceive how the proffered opinion was critical to the jury's decision. Mr. Blewett was permitted to testify that since the cars came to rest almost at impact, neither could have been proceeding at a high speed. His testimony corroborated that given by Mrs. Cardinal that she was proceeding slowly. Neither was there a conflict in the evidence as to the speed at which the Zonneveld car was traveling. All who testified on that point surmised his speed to be about 25 m.p.h. The crucial issue was not speed, but rather which driver ran the red light. The jury evidently decided that issue against Mrs. Cardinal. In these circumstances we cannot find that the substantial rights of the plaintiff-appellant were prejudiced by the exclusionary ruling. NRCP 61.

Id. at page 407-08.

The decision to admit or exclude relevant evidence, after balancing the prejudicial effect against the probative value, is within the sound discretion of the trial judge, and the trial court's determination will not be overturned absent manifest error or abuse of discretion. *Id*. *See also*, NRS 48.035; *K–Mart*, *supra*, 109 Nev. 1180 at 1186). However, Appellant, in failing to provide a record of the evidence at trial has precluded any meaningful review of the issue.

VI.
CONCLUSION

Procedurally, Appellant's Brief should be dismissed for failure to comply with the relevant provisions of the Nevada Rules of Appellate Procedure, and failing to provide this Court any record of the Short Trial itself.

Even if the merits of Appellant's Brief are considered, the District Court applied the controlling statute NRCP 26 (b)(4)(B), finding that a Rule 35 examination had not been performed and that no "exceptional circumstances" existed, proceeding to correctly preclude Plaintiff from deposing Defendant's previous expert Dr. Appel.

Furthermore, even if Plaintiff's non-controlling case law were applicable and a weighing of probative versus prejudicial value had been performed, Plaintiff similarly would have been barred from taking Dr. Appel's deposition—the only portion of his testimony that would not have been cumulative of Plaintiff's experts is his prior retention by Defendant, which is unquestionably improper. This further illustrates that any error Plaintiff could point to was harmless error, as Plaintiff's own experts would have testified to her alleged injuries and medical treatment.

Based on the foregoing, Respondent Collins respectfully requests that this Court affirm the judgement.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2010, Times New Roman, 14 points;

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:

Proportionately spaced, has a typeface of 14 points or more and contains 30 pages and 7281 words.

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

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

Dated this 20th day of July, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2015, a true and correct copy of this completed **ANSWERING BRIEF** upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By /s/ Cheryl A. Schneider
Cheryl A. Schneider, an Employee of
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WAYTE & CARRUTH LLP