

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

EVANGELINA ORTEGA, AN INDIVIDUAL;
AND MIRIAM PIZARRO-ORTEGA, AN
INDIVIDUAL,
Appellants,
vs.
CHRISTIAN CERVANTES-LOPEZ, AN
INDIVIDUAL; AND MARIA AVARCA, AN
INDIVIDUAL,
Respondents.

No. 68471

DOCKETING STATEMENT
CIVIL APPEALS

Electronically Filed
Aug 12 2015 09:55 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department XXIII
County Clark Judge Stephany Miley
District Ct. Case No. A667141

2. Attorney filing this docketing statement:

Attorney Charles A. Michalek Telephone 702-383-3400
Firm Rogers Mastrangelo Carvalho & Mitchell
Address 300 South Fourth Street #710
Las Vegas, NV 89101

Client(s) Miriam Pizarro-Ortega, Evangelina Ortega

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Daniel S. Simon Telephone 702-364-1650
Firm Simon Law
Address 810 S. Casino Center Blvd.
Las Vegas, NV 89101

Client(s) Christian Cervantes-Lopez and Maria Avarca

Attorney _____ Telephone _____
Firm _____
Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input checked="" type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below:

Personal injury action for injuries resulting from an auto accident. Judgment for Plaintiffs following a jury trial.

9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

Admissibility of future damages not disclosed during a computation of damages under NRCP 16.1.

Exclusion of expert witness Tammy Rockholt.

Improper Voir Dire and Arguments in violation of Lioce v. Cohen

Exclusion of surveillance video of Plaintiffs.

Improper testimony by Plaintiffs' doctors allowed regarding costs of medical care.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Trial. If this action proceeded to trial, how many days did the trial last? 7

Was it a bench or jury trial? jury

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
N/A

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from Mar 12, 2015

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. Date written notice of entry of judgment or order was served March 13, 2015

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☒ NRCP 59 Date of filing Mar 27, 2015

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion Jul 7, 2015

(c) Date written notice of entry of order resolving tolling motion was served Jul 8, 2015

Was service by:

☐ Delivery

☒ Mail

18. Date notice of appeal filed Jul 21, 2015

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☒ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or order:
Appeal from an adverse judgment in a civil action and the denial of Defendant's motion for a new trial and/or remitur.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Christian Cervantes-Lopez

Maria Avarca

Miriam Pizarro-Ortega

Evangelina Ortega

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

No judgment was rendered against Evangelina Ortega. The case against Evangelina Ortega was not formally prosecuted at trial.

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Negligence - resolved by jury trial March 4, 2015

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

24. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Miriam Pizarro - Ortega


Name of appellant

Charles A. Michalek

Name of counsel of record

Aug 12, 2015

Date


Signature of counsel of record

Clark County, Nevada

State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 12 day of August, 2015, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Daniel S. Simon, Esq.
Nevada Bar No: 4750
SIMON LAW
810 South Casino Center Blvd.,
Las Vegas, NV 89101
P: (702) 364-1650
F: (702) 364-1655
Attorney for Respondents

Dated this 12th day of August, 2015

/s/ Camie DeVoge

Signature

1 COMP
2 KRISTIAN LAVIGNE, ESQ.
3 Nevada Bar No.11629
4 THE LAW OFFICE OF KRISTIAN LAVIGNE AND ASSOCIATES, P.C.
5 5265 S. Durango Dr. Suite 1
6 Las Vegas, NV 89113
7 Attorneys for Plaintiff

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8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 *Alfonso L. Lujan*
11 CLERK OF THE COURT

12 CHRISTIAN CERVANTES-LOPEZ,
13 an individual,
14 MARIA AVARCA, an individual,
15
16 Plaintiffs,

CASE NO.:
DEPT. NO.:

A-12-667141-C
XXIII

vs.

12 EVANGELINA ORTEGA, an individual;
13 MIRIAM PIZARRO-ORTEGA, an individual;
14 DOES I through V, inclusive;
15 and ROE CORPORATIONS I
16 through V, inclusive
17 Defendant.

18 COMPLAINT

19 Plaintiffs, CHRISTIAN CERVANTES-LOPEZ and MARIA AVARCA, by and through
20 their attorney, KRISTIAN LAVIGNE, ESQ., of THE LAW OFFICE OF KRISTIAN LAVIGNE
21 AND ASSOCIATES and for their causes of action against Defendants, and each of them, alleges
22 as follows:

23 GENERAL ALLEGATIONS

- 24 1. That Plaintiff, CHRISTIAN CERVANTES-LOPEZ, is and was at all times
25 mentioned herein a resident of Clark County, Nevada.
26 2. That Plaintiff, MARIA AVARCA, is and was at all times mentioned herein a
27 resident of Clark County, Nevada.
28 3. That Defendant, EVANGELINA ORTEGA upon information and belief, is and
was at all times mentioned herein, a resident of Clark County, Nevada.

2 4. That Defendant, MIRIAM PIZARRO-ORTEGA, upon information and belief, is
3 and was at all times mentioned herein, a resident of Clark County, Nevada.

4 5. That the incidents, transactions and occurrences that comprise the basis of this
5 lawsuit took place in Clark County, Nevada.

6 6. That venue is proper in the Eighth Judicial District Court, Clark County, Nevada.

7 7. That at all times relevant herein, Defendants designated as DOES I through V and
8 ROE CORPORATIONS I through V, in their true capacities, whether individual, corporate,
9 associate or otherwise of the Defendants named herein are unknown to Plaintiff who, therefore,
10 sues said Defendants by said fictitious names; Plaintiff is informed and believes and thereon
11 alleges that each of the Defendants designated a DOES I through V and ROE CORPORATIONS
12 I through V are responsible in some manner for the events and happenings referred to herein, and
13 caused damages proximately to Plaintiff as herein alleges, and Plaintiff will ask leave of this
14 court to amend this Complaint to insert the true names and capacities of DOES I through V and
15 ROE CORPORATIONS I through V, when the same have been ascertained and to join such
16 Defendants in this action.

17 FIRST CAUSE OF ACTION

18 (Negligence)

19 8. On or about November 12, 2011, Plaintiffs CHRISTIAN CERVANTES-LOPEZ
20 and MARIA AVARCA were traveling in a 2001 Chevrolet Impala and were heading Westbound
21 on Lake Mead Blvd near Statz. Then suddenly and without warning a vehicle driven by MIRIAM
22 PIZARRO-ORTEGA and owned by EVANGELINA ORTEGA, made an improper left turn
23 causing a violent collision with the Plaintiff's vehicle. As a result of Defendants, and each of
24 them, negligent and wanton acts, the Plaintiffs and each of them, suffered severe injuries
25 including but not limited to their necks, backs, heads and shoulders.

26 9. Defendant MIRIAM PIZARRO-ORTEGA was operating the vehicle in a
27 negligent, careless, reckless and wanton manner causing a collision between his vehicle and the
28 Plaintiffs' vehicle. Defendant EVANGELINA ORTEGA was the registered owner of the

1 negligent vehicle and is therefore responsible for the Plaintiff's injuries. That by reason of the
2 Defendants, and each of them, negligent acts and as a direct and proximate result thereof,
3 Plaintiffs sustained great pain of body and mind, and mental stress and anxiety, all or some of
4 which conditions may be permanent and disabling in nature, all to Plaintiffs' damage in an
5 amount in excess of \$10,000.00.

6 10. That by reason of the Defendants' negligent acts and as a direct and proximate
7 result thereof, Plaintiffs have incurred expenses for medical care and treatment and expenses
8 incidental thereto, all to Plaintiffs' damage, the present amount of which is unknown; such
9 expenses will continue in the future, all to Plaintiffs' damage in a presently unascertainable
10 amount. In this regard, Plaintiffs pray for leave of Court to insert all said damages hearing when
11 the same have been fully ascertained.

12 11. That by reason of Defendants' negligent acts and as a direct and proximate result
13 thereof, Plaintiffs, who were well and able-bodied individuals; as a direct and proximate result of
14 the negligence, carelessness, recklessness and wantonness of said Defendants, and each of them,
15 has been absent from employment which has resulted in a loss of earning capacity, all to
16 Plaintiffs' damage in an amount unknown at the present time. When the amount of said damages
17 is ascertained, Plaintiffs will make known said damages to this Court and to all Defendants.

18 12. That as a rather direct and proximate result of the negligence and carelessness of
19 Defendant, Plaintiffs have been caused to retain KRISTIAN LAVIGNE, ESQ. of THE LAW
20 OFFICE OF KRISTIAN LAVIGNE AND ASSOCIATES, in order to prosecute this matter and is
21 entitled to reasonable attorney's fees and costs of suit herein.
22

23 //

24 //

25 //

26 //

27


28

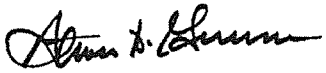
1 WHEREFORE, Plaintiffs reserve the right to amend this Complaint at the time of trial to
2 include all items of damages not yet ascertained, prays for judgment against the Defendants, and
3 each of the, as follows:

- 4 1. For general damages in excess of \$10,000.00;
- 5 2. For special damages in excess of \$10,000.00;
- 6 3. For punitive damages in excess of \$10,000.00;
- 7 4. For reasonable attorney's fees and costs of suit herein; and
- 8 5. For such other and further relief as the Court deems proper.

9 DATED this 20 day of August, 2012.

10 LAW OFFICE OF KRISTIAN LAVIGNE, P.C.

11 
12 KRISTIAN LAVIGNE, ESQ.
13 Nevada Bar No.11629
14 5265 S. Durango Dr. Suite 1
15 Las Vegas, NV 89113
16 Attorneys for Plaintiff
17 702-379-4413
18
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27
28



CLERK OF THE COURT

CHARLES A. MICHALEK, ESQ.
Nevada Bar No. 5721
R. KADE BAIRD, ESQ.
Nevada Bar No. 8362
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Phone (702) 383-3400
Fax (702) 384-1460
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTIAN CERVANTES-LOPEZ,
an individual; MARIA AVARCA, an individual,
Plaintiffs,

vs.

EVANGELINA ORTEGA, an individual;
MIRIAM PIZARRO-ORTEGA, an individual;
DOES I through V, inclusive; and
ROE CORPORATIONS I through V, inclusive,
Defendants.

CASE NO.: A-12-667141-C

DEPT. NO.: XXIII

DEFENDANT'S MOTION FOR REMITTUR AND/OR NEW TRIAL

COMES NOW Defendant EVANGELINA ORTEGA, by and through her attorneys, Rogers, Mastrangelo, Carvalho & Mitchell, and hereby submits this Motion for Remittur and/or a New Trial.

This Motion is based upon the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument the Court is willing to entertain at the time of the hearing.

DATED this 27th day of March, 2015.

ROGERS, MASTRANGELO, CARVALHO &
MITCHELL

R. KADE BAIRD, ESQ.
Nevada Bar No. 8362
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendant

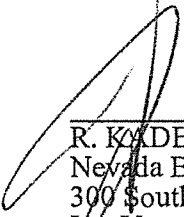
1 **NOTICE OF MOTION**

2 TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that the foregoing **DEFENDANT'S MOTION FOR**
4 **REMITTUR AND/OR A NEW TRIAL** will come on for hearing before the above-entitled court
5 on the 30 day of April, 2015, at 9:30a a.m. in Department XXIII.

6 DATED this 27th day of March, 2015.

7 ROGERS, MASTRANGELO, CARVALHO &
8 MITCHELL

9
10 
11 R. KOIDE BAIRD, ESQ.
12 Nevada Bar No. 8362
13 300 South Fourth Street, Suite 710
14 Las Vegas, Nevada 89101
15 *Attorneys for Defendant*

16 **I.**

17 **BRIEF STATEMENT OF FACTS**

18 This case arises out of a 11/12/11 three-car MVA at the intersection of Lake Mead Blvd. and
19 Statz Rd. Plaintiffs' vehicle (driven by Plaintiff Christian Cervantes-Lopez; front seat passenger:
20 Plaintiff Maria Avarca) was traveling in the #2 lane on westbound Lake Mead, approaching the Statz
21 intersection. The Defendant's vehicle (driven by Defendant Miriam Pizarro-Ortega; owner:
22 Defendant Evangelina Ortega) was stopped in the center turn lane on eastbound Lake Mead, to make
23 a left turn onto Statz.

24 The impact occurred as the Defendant's vehicle was making the left turn, crossing the
25 Plaintiffs' lane of travel. The front of Plaintiffs' vehicle collided with the right side of the Defendants
26 vehicle. Post impact, the Defendant's vehicle rotated clockwise and struck the front of a third vehicle
27 Plaintiff Cervantes-Lopez estimated he was going 35 mph at the time of impact.

28 Trial in this matter occurred between February 23, 2015 and March 4, 2015. Prior to trial,
Plaintiffs Christian Cervantes-Lopez and Maria Avarca alleged medical expenses of \$55,364.45 and
\$42,496.47 respectively. However, Plaintiffs then presented claims for future medical expenses that
were not disclosed during discovery.

1 In not one of the four supplements produced for each Plaintiff during the discovery did either
2 Plaintiff produce any calculation of their future damages claims. Further, Defendants explicitly
3 requested that Plaintiffs produce a description of any future medical care. (See, Plaintiff Cervantes-
4 Lopez' Responses to Interrogatories 27-28 and Plaintiff Avarca's Responses to Interrogatories 27-
5 28.) In each case, Plaintiffs failed to give any worthwhile description of their supposed future
6 damages. Defendants had no idea on the actual amount of the future care and medical specials
7 Plaintiffs may incur in the future that they would like to relate to the subject accident until that
8 information was disclosed at trial. Therefore, Defendant files this motion for a new trial.

9 II.

10 STANDARD FOR A NEW TRIAL

11 A new trial may be granted to all or any of the parties and on all or part of the issues for any
12 of the following causes or grounds materially affecting the substantial rights of an aggrieved party.
13 See Nev. R. Civ. P. 59:

- 14 (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order
15 of the court, or master, or abuse of discretion by which either party was prevented
from having a fair trial;
- 16 (2) Misconduct of the jury or prevailing party;
- 17 (3) Accident or surprise which ordinary prudence could not have guarded against;
- 18 (4) Newly discovered evidence material for the party making the motion which the party
could not, with reasonable diligence, have discovered and produced at the trial;
- 19 (5) Manifest disregard by the jury of the instructions of the court;
- 20 (6) Excessive damages appearing to have been given under the influence of passion or
prejudice; or,
- 21 (7) Error in law occurring at the trial and objected to by the party making the motion.

22 On a motion for a new trial in an action tried without a jury, the court may open the judgment
23 if one has been entered, take additional testimony, amend findings of fact and conclusions of law or
24 make new findings and conclusions, and direct the entry of a new judgment.

23 III.

24 ARGUMENT

25 **A. Defendant was unfairly prejudiced by Plaintiff's failure to provide timely computation 26 of damages as required by NRCP 16 (A)(1)C).**

27 NRCP 16.1(a)(1)(c) required Plaintiff to provide a computation of damages:

28 A computation of any category of damages claimed by the disclosing party, making
available for inspection and copying as under Rule 34 the documents or other

1 evidentiary matter, not privileged or protected from disclosure, on which such
2 computation is based, including materials bearing on the nature and extent of
injuries suffered.

3 NRCP 26(e) further requires a party to supplement the disclosures made under NRCP 16.1(a):

4 (e) Supplementation of Disclosures and Responses. A party who has made a disclosure under
5 Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty
6 to supplement or correct the disclosure or response to include information thereafter acquired, if
7 ordered by the court or in the following circumstances:

8 (1) A party is under a duty to supplement at appropriate intervals its disclosures under
9 Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information
10 disclosed is incomplete or incorrect and if the additional or corrective information has
11 not otherwise been made known to the other parties during the discovery process or
12 in writing. With respect to testimony of an expert from whom a report is required
under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report
and to information provided through a deposition of the expert, and any additions or
other changes to this information shall be disclosed by the time the party's disclosures
under Rule 16.1(a)(3) are due.

13 (2) A party is under a duty seasonably to amend a prior response to an interrogatory,
14 request for production or request for admission, if the party learns that the response
15 is in some material respect incomplete or incorrect and if the additional or corrective
information has not otherwise been made known to the other parties during the
discovery process or in writing.

16 Plaintiff failed to provide a computation of the requested future damages prior to trial. See
17 *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 593 94 (D. Nev. 2011):

18 The plaintiff cannot shift to the defendant the burden of attempting to determine the amount
19 of the plaintiff's alleged damages. See *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 294-95
20 (2nd Cir.2006). In *Francois v. Colonial Freight Systems, Inc.*, 2007 WL 4564866, at *3
21 (S.D.Miss.2007), the court rejected the plaintiffs' argument that sanctions *594 under Rule
22 37(c) were not warranted because defendant was provided a "medical waiver" and, therefore,
23 could have obtained plaintiff's medical records and bills. The court found that this argument
lacked merit because Rule 26(a)(1)(A)(iii) specifically requires the plaintiff to provide a
computation of each category of damages and make the documents on which each
computation is based available for inspection and copying. Rule 26(a)(1)(A)(iii) would be
rendered meaningless if a party could avoid its requirements by not obtaining the documents
or information needed to prepare the damages computation.

24 The sanction for failing to disclose evidence according to the rules is exclusion at trial. Rule
25 37 makes clear that if a party fails to disclose information required under Rule 16.1 or 26(e), the party
26 "is not permitted to use the evidence at trial," unless the failure is justified or harmless. See *Jackson*
27 *v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 594 (D. Nev. 2011):

28 Rule 37(c)(1) states that if a party fails to provide information or identify a witness as required

1 by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply
2 evidence at trial unless the failure was substantially justified or is harmless. The rule also
3 states that "in addition to or instead of this sanction," the court may order payment of
4 reasonable expenses, including attorney's fees caused by the failure, and may impose other
5 appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(v). The
6 burden is upon the disclosing party to show that the failure to disclose information or
7 witnesses was justified or harmless. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d
8 1101, 1107 (9th Cir.2001).

9 Courts are more likely to exclude damages evidence when a party first discloses its
10 computation of damages shortly before trial or substantially after discovery has closed. *CQ Inc. v.*
11 *TXU Mining Company*, 565 F.3d 268 (5th Cir.2009); *24/7 Records v. Sony Music Entertainment*, 566
12 F.Supp.2d 305, 318 (S.D.N.Y.2008); and *Green Edge Enterprises, LLC v. Rubber Mulch Etc. LLC*,
13 2009 WL 1383275 (E.D.Mo.2009). In *Hoffman v. Construction Protective Services*, 541 F.3d 1175
14 (9th Cir.2008), the Ninth Circuit affirmed the district court's order excluding plaintiffs' damages
15 evidence because they failed to provide any computation of damages prior to the pretrial conference.
16 The court stated that the late disclosure was not harmless because it would have most likely required
17 the trial court to create a new briefing schedule and perhaps re-open discovery, rather than simply set
18 a trial date.

19 Several Nevada District Court cases have likewise excluded claims for future medical
20 expenses when the required computation of damages was not disclosed during trial. See *Calvert v.*
21 *Ellis*, 2015 WL 631284, at *2 (D. Nev. Feb. 12, 2015); *Baltodano v. Wal Mart Stores, Inc.*, 2011
22 WL 3859724, at *6 (D. Nev. Aug. 31, 2011); *Olaya v. Wal Mart Stores, Inc.*, 2012 WL 3262875,
23 at *5 (D. Nev. Aug. 7, 2012); *Patton v. Wal Mart Stores, Inc.*, 2013 WL 6158461, at *5 (D. Nev.
24 Nov. 20, 2013); *Smith v. Wal Mart Stores, Inc.*, 2014 WL 3548206, at *5 (D. Nev. July 16, 2014).

25 1. Plaintiff did not provide any computation of future damages prior to trial.

26 Although Plaintiffs continued to update their past medical bills throughout discovery,
27 Plaintiffs never provided a computation of the damages they would be seeking for such future medical
28 care. Attached as Exhibit "A" is the last computation of medical bills for each Plaintiff provided,
which did not include any costs for future care. In addition to the computation being required under
NRCp 16.1, Plaintiffs were required to provide this information in response to Defendant's
interrogatories (Exhibits "B" and "C"). The first time that Plaintiff presented any actual computation

1 of future damages was during the middle of trial, when the Court finally compelled the Plaintiff's to
2 disclose the computation of damages just hours before Plaintiff's physicians testified as to the costs
3 of future medical care.¹ This notice is insufficient as a matter of law. See *Calvert v. Ellis*, 2015 WL
4 631284, at *4 (D. Nev. Feb. 12, 2015):

5 "[m]ere notice of an upcoming surgery ... cannot substitute for the disclosure that is required
6 by Rule 26(a)." *Patton v. Wal-Mart Stores, Inc.*, 2013 WL 6158461, at *4 (D.Nev. Nov. 20,
7 2013).

8
9 2. Justice required that Defendants be provided all medical opinions and documentary
10 evidence, along with computation of damages, prior to trial.

11 Our system of civil justice is founded on the premise that a party be given sufficient notice
12 of evidence to be presented at trial. The discovery rules are designed "to take the surprise out of trials
13 of cases so that all relevant facts and information pertaining to the action may be ascertained in
14 advance of trial." *Washoe County Bd. of Sch. Trustees v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758
15 (1968).

16 "Gamesmanship' and actions designed to minimize adequate notice to one's adversary have
17 no place within the principles of professionalism governing the conduct of participants in litigation."
18 *Collins v. CSX Transp., Inc.*, 441 S.E.2d 150, 153-54 (N.C. Ct. App. 1994). The discovery rules are
19 designed to make trials "fair contest[s] with the basic issues and facts disclosed to the fullest
20 practicable extent." *U.S. v. Proctor & Gamble*, 356 U.S. 677, 682 (1958) (internal quotation marks
21 omitted).

22 3. Plaintiff's Failure To Disclose Was Neither "Substantially Justified" or "Harmless"

23 NRCP 37(c)(1) states:

24 A party that without **substantial justification** fails to disclose
25 **information required by Rule 16.1** is **not**, unless such failure is
26 **harmless**, permitted to use as evidence at a trial, at a hearing, or on a
27 motion any witness or information not so disclosed.

28 (Emphasis added.) "The party facing sanctions bears the burden of proving that its failure to disclose
the required information was substantially justified or is harmless." *R & R Sails, Inc. v. Ins. Co. Of*

¹ The amount disclosed by Plaintiff's per the Court's Order was not the same amount that
was testified to by Plaintiff's doctors.

1 *Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012). Magistrate Johnston, in *Baltodano v. Wal-Mart*
2 *Stores, Inc.*, 2011 WL 3859724 (August 31, 2011), found that, “among the factors” that could be
3 considered by a Court when making the determination as to whether a failure to disclose was
4 substantially justified or harmless are: (1) Prejudice to the party to whom the disclosure should have
5 been made; (2) the ability of the prejudiced party to cure the prejudice; (3) the likelihood of the
6 disruption of the trial; and (4) bad faith or willfulness in not disclosing the evidence. These factors
7 weigh in favor of a finding that Plaintiff’s failure to comply with NRCP 16.1(a)(1)(C) was neither
8 substantially justified or harmless.

9 *I. Prejudice to Non-Offending Party*

10 Defendants have suffered prejudice as a result of Plaintiff’s failure to comply with NRCP
11 16.1(a)(1)(C) because they were not afforded the benefits that timely disclosures of computations of
12 damages are designed to provide.

13 *ii. Ability of Non-Offending Party to Cure Prejudice*

14 Defendant could not cure the prejudice they suffered as a result of Plaintiff’s failure to comply
15 with the discovery rules.

16 *iii. Likelihood of Disruption of Trial*

17 Trial was not disrupted.

18 *iv. Bad Faith or Willfulness of Offending Party*

19 Bad faith or willfulness is not required. However, Oversight is not a substantial justification.
20 *R & R Sails*, at 526 (S.D.Cal.2008). Plaintiff never actually complied with the rule, instead arguing
21 that no computation was required. Plaintiff’s attempt to place the burden on Defendant to calculate
22 the damages, even if not in bad faith or willful, is sanctionable.

23 In the instant case, however, a real argument can be made that Plaintiffs acted willfully.
24 Plaintiff’s ignored not only written requests (interrogatories) and well-established Rules governing
25 the disclosure (NRCP 16.1), but testimony by their own doctors that no computation had been
26 requested as well as a Motion in Limine indicating that no computation had been produced and that
27 such damages should be excluded. Simply put, Plaintiffs were on notice at least four times that they
28 had not disclosed a computation of future damages and each time, they could have disclosed their

1 damages months prior to trial but elected to do so in the middle of trial. Their repeated failure to do
2 so implies at least extreme negligence and at most, a calculated plan to ambush the Defendants at
3 trial.

4 Under the several Nevada District Court cases cited above, Defendant was unfairly prejudiced
5 with the late disclosure of the future medical care. As these damages were not timely and properly
6 disclosed under the rules, Defendant request that this court grant Remittur of these amounts (future
7 medical care, future pain and suffering) or simply grant a new trial outright. In addition, upon re-trial,
8 other errors occurring at the trial are set forth to prevent their recurrence.

9 **B. Plaintiff Should Not be Allowed to Present Inflated and Unreasonable Billed Amounts**
10 **as a Recoverable Medical Special Damages.**

11 Traditionally, any request by a party to present the amounts paid (whether it be by an insurer
12 or private party after a negotiation), is met with a claim that this is a violation of the "collateral
13 source" Rule that prohibits the introduction of evidence regarding insurance or "collateral sources"
14 of payment. Proctor v. Castalletti, 112 Nev. 88, 911 P.2d 853 (1996). Recent cases from nearby
15 jurisdictions show that the cry of "collateral source" does not necessarily mean that the just result is
16 to allow Plaintiff to reap the benefit of the reduction of medical bills by an insurer or other payor.
17 See, e.g., Hanif v. Housing Authority (1988) 200 Cal. App.3d 635, 246 Cal.Rptr. 192, Olszewski v.
18 Scripps Health, supra, 30 Cal.4th 798, 135 Cal.Rptr.2d 1, 69 P.3d 927 Nishihama v. City and County
19 of San Francisco (2001) 93 Cal.App.4th 298, 112 Cal. Rptr.2d 861, Parnell v. Adventist Health
20 System/West (2005) 35 Cal.4th 595, 598, 26 Cal.Rptr.3d 569, 109 P.3d 69 .

21 Thus, even the collateral source rule is being interpreted in such a way as would limit a
22 Plaintiff's recovery to a reduced, negotiated amount instead of the "extremely high" amount charged
23 by doctors.

24 More importantly, however, is the actual holding of the Howell Court with respect to whether
25 a Plaintiff can claim as damages an amount higher than the amount paid:

26 We conclude the negotiated rate differential is not a collateral
27 payment or benefit subject to the collateral source rule. We
28 emphasize, however, that the rule applies with full force here and in
similar cases. Plaintiff here recovers the amounts paid on her behalf
by her health insurer as well as her own out-of-pocket expenses. No
"credit[] against the tortfeasor's liability" (Rest.2d Torts, § 920A,

1 subd. (2)) and no deduction from the "damages which the plaintiff
2 would otherwise collect from the tortfeasor" (Helfend, supra, 2 Cal.3d
3 at p. 6, 84 Cal.Rptr. 173, 465 P.2d 61) is allowed for the amount paid
4 through insurance. Plaintiff thus receives the benefits of the health
insurance for which she paid premiums; her medical expenses have
been paid per the policy, and those payments are not deducted from
her tort recovery.

5 Plaintiff's insurance premiums contractually guaranteed
6 payment of her medical expenses at rates negotiated by the insurer
7 with the providers; they did not guarantee payment of much higher
8 rates the insurer never agreed to pay. Indeed, had her insurer not
9 negotiated discounts from medical providers, Plaintiff's premiums
10 presumably would have been higher, not lower. In that sense, Plaintiff
11 clearly did not pay premiums for the negotiated rate differential.
Recovery of the amount the medical provider agreed to accept from
the insurer in full payment of her care, but no more, thus ensures
Plaintiff "receive[s] the benefits of [her] thrift" and the tortfeasor
does not "garner the benefits of his victim's providence." (Helfend,
supra, 2 Cal.3d at p. 10, 84 Cal.

12 Rptr. 173, 465 P.2d 61.)

13 Howell v. Hamilton Meats and Provisions, Inc., 257 P.3d 1130, 1144 (2011). The remarkable holding
14 by the Howell Court is that reducing Plaintiff's medical specials to the amount paid, whether by
15 insurance or not, is acceptable and does not implicate the collateral source rule.

16 1. Tami Rockholt was qualified to testify as an expert witness.

17 Defendant was prevented from challenging Plaintiffs paid medical bills through the expected
18 expert testimony of Tammi Rockholt. Ms. Rockholt's testimony would have been helpful to the jury,
19 and Ms. Rockholt had the same (or at least functionally similar) database foundation as Dr. Koka,
20 who was allowed to testify as to reasonableness and necessity of medical bills that were not his own.
21 See NRS 50.275 "If scientific, technical or other specialized knowledge will assist the trier of fact to
22 understand the evidence or to determine a fact in issue, a witness qualified as an expert by special
23 knowledge, skill, experience, training or education may testify to matters within the scope of such
24 knowledge."

25 2. Defendant was entitled to present evidence of liens.

26 Defendant was also precluded from introducing evidence that the medical treatment was on
27 a lien basis. Health and auto insurance are collateral sources, and are inadmissible under *Proctor v.*
28 *Castelletti*, 112 Nev 88 (1996). A lien is not a collateral source, and is admissible evidence of bias,

1 prejudice, and interest in the outcome of the trial, which are never collateral. See *Amlotte v. United*
2 *States*, 292 F. Supp 2d 922) (Collateral sources do not include entities entitled to a lien against
3 recovery of the Plaintiff in an action for damages.) See also *Sears v. Rutishauser*, 466 N.E. 2d 210,
4 213 (Ill. 1984) (“A medical expert can be questioned about fee arrangements, prior testimony for the
5 same party, and financial interests in the outcome of the case.”).

6 If a physician has an interest in the outcome of the litigation, evidence of a lien is relevant to
7 bias. See *Lobato v. State*, 120 Nev. 512 (2004):

8
9 Extrinsic evidence relevant to prove a witness’ motive to testify in a
10 certain way, i.e. bias, interest, corruption or prejudice, is never
collateral to the controversy and not subject to the limitations
contained in NRS 50.085(3).

11 In conclusion, collateral source evidence should be excluded, but there was no justification
12 for exclusion of evidence of medical liens. The financial interests of Plaintiff’s treating physicians
13 are relevant for trial. Further, the exclusion of Tami Rockholt while allowing Dr. Koka to testify
14 was not only highly prejudicial, but unfair.

15 **C. Defendant should be allowed to introduce the surveillance video.**

16 The parties agreed to a stipulation which extended discovery until January 9, 2015. Ex. “D”.
17 This stipulation was approved and signed by the court. Defendant timely produced a copy of the
18 video surveillance pursuant to this discovery extension. Defendant should be allowed to present
19 such evidence for impeachment or rebuttal purposes.

20 **D. Dr. Duke Should be allowed to Testify Regarding Secondary Gain**

21 As noted in arguments during trial, All of Plaintiffs’ doctors acknowledged the possibility
22 of secondary gain motivating a patient’s care. Many of Plaintiffs’ doctors acknowledged the
23 possibility that patients involved in litigation could also exaggerate their symptoms due to
24 secondary gain motivations. Dr. Duke’s opinions were based on evidence, which was described
25 in his report, that showed there were discrepancies in the record keeping and methods of Plaintiffs’
26 doctors that indicated that secondary gain was likely a factor in Plaintiffs’ treatment. It was
27 prejudicial to preclude those opinions at trial.

28 ...

1 **E. Plaintiffs arguments should be properly limited.**

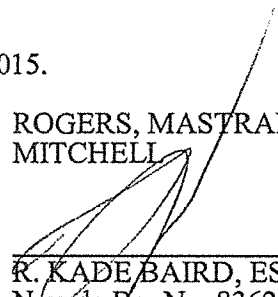
2 Plaintiffs counsel referenced insurance several times, as well as requested that the jury "send
3 a message" with their verdict. In addition to other arguments objected to at trial, Plaintiffs counsels
4 opening and closing arguments violated *Lioce v. Cohen*, 124 Nev. 1, 23, 174 P.3d 970, 984 (2008).
5 Such arguments should be precluded upon re-trial.

6 **CONCLUSION**

7 Defendants motion should be granted and Plaintiff's improper future damages should be
8 remitted and/or a new trial granted.

9 DATED this 27th day of March, 2015.

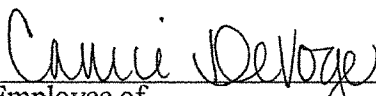
10 ROGERS, MASTRANGELO, CARVALHO &
11 MITCHELL

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13 R. KADE BAIRD, ESQ.
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17 Attorney for Defendants
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28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of
3 Rogers, Mastrangelo, Carvalho & Mitchell, and on the 27th day of March, 2015, a true and correct
4 copy of the foregoing **DEFENDANT'S MOTION FOR REMITTUR AND/OR NEW TRIAL**
5 was served via Wiznet Electronic Service, upon the following counsel of record:

6
7 Daniel S. Simon, Esq.
8 Nevada Bar No: 4750
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11 Las Vegas, NV 89101
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14 *Attorneys for Plaintiffs*

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28

An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

M:\Kade\Ortega adv. Cervantes-Lopez\Pleadings\Motion for New Trial2.wpd


CLERK OF THE COURT

1 **ORDR**
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13
14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 CHRISTIAN CERVANTES-LOPEZ,
17 an individual,
18 MARIA AVARCA, an individual

19 Plaintiffs,

20 vs.

21 EVANGELINA ORTEGA, an individual;
22 MIRIAM PIZARRO-ORTEGA, an individual
23 DOES I through V; inclusive
24 and ROE CORPORATIONS I through V,
25 inclusive

26 Defendants.

Case No.: A667141
Dept. No.: XXIII

27 **ORDER DENYING DEFENDANT'S MOTION FOR REMITTUR AND/OR NEW TRIAL**

28 THIS MATTER having come on for hearing pursuant to Defendant's Motion for Remittur and/or New Trial, on the 30th day of April and the 23rd day of June, with Plaintiffs represented by Daniel S. Simon, Esq., and Ashley M. Ferrel, Esq., of the law firm SIMON LAW, and Defendant represented by Kade Baird, Esq. and Charles Michaleck, Esq., of Rogers, Masterangelo, Carvalho & Mitchell.

Defendant asserts that she was denied a fair trial and deprived of a meaningful opportunity to present a defense during trial because the Court: (1) improperly permitted Plaintiffs to present future damages, because Plaintiffs failed to comply with NRCP 16.1(a)(1)(c); (2) excluded Defendant's expert on medical billing, Tami Rockholt, R.N.; (3) excluded evidence of liens; (4) excluded the surveillance video; (5) precluded Dr. Duke from testifying about secondary gain

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1 motives; and (6) Plaintiffs' counsel made improper arguments to the jury in violation of *Lioce v.*
2 *Cohen*. Alternatively, Defendant requests remittitur of the future damages award.

3 The Court having reviewed the pleadings and papers on file herein and heard arguments of
4 counsel made at the hearing, and other good cause appearing,

5 THE COURT HEREBY FINDS:

6 I.

7 FINDINGS OF FACT AND CONCLUSIONS OF LAW

8 1. Defendant's argument regarding Plaintiffs' failure to provide computation of future
9 damages prior to trial, was overruled at the time of trial and the Court finds that Defendant's
10 arguments do not warrant granting a new a new trial. Defendant was aware of Plaintiffs' claim of
11 future damages prior to trial during the discovery phase and Plaintiffs' made their doctor's available
12 for depositions. Defendant exercised her opportunity to depose Plaintiffs' doctor, but for strategic
13 purposes chose not to question the doctor's regarding the cost of future damages at that time. Since
14 the treatment, including, the future lumbar surgery for Christian Cervantes was contained in the
15 medical records produced in discovery and was discussed at Dr. Kaplan's deposition, Defendant's
16 were well aware of the future treatment. That further, the Court finds no prejudice as this information
17 was provided to Dr. Duke, who practices in the same specialty as Dr. Kaplan, rendered opinions about
18 the future treatment and surgery, as well as the cost of same.

19 2. Defendant's argument regarding the exclusion of Defendant's expert Tami Rockholt, R.N.,
20 was discussed at length at the time of trial and the Court finds that Defendant's arguments do not
21 provide a basis for a new trial. Ms. Rockholt's exclusion did not prevent Defendant from challenging
22 the charges of Plaintiffs' medical bills, as Dr. Duke was given all of the findings of Ms. Rockholt and
23 her conclusions. Dr. Duke then provided testimony regarding the reasonableness of the charges for
24 all the medical providers, including the charges of Dr. Kaplan and the future cost of surgery.

25 3. Defendant's argument regarding the exclusion of evidence of liens was addressed at the
26 time of trial and the court affirms its ruling and finds that evidence of liens its prejudicial effect
27 outweighed any probative value, and is not a basis for a new trial. Plaintiff also argued it is a payment
28 source that also invites questioning about insurance or the lack thereof.

1 4. Defendant's argument regarding the exclusion of the surveillance video is not a basis for
2 a new trial because the Court finds that video was in the possession of the Defendant for
3 approximately one year prior to its disclosure and long before the close of discovery and could have
4 been disclosed, but Defendant chose not to do so for nearly one year and only produced it shortly
5 before trial. The Court recognized that discovery was extended for new information to be produced
6 for a short time, but Defendant could not provide a satisfactory explanation why the video
7 surveillance was not produced prior to the close of discovery when it was in its possession for a year.
8 Since the video surveillance is evidence created by the Defendant and could not have been obtained
9 independently by Plaintiff, the prejudicial effect outweighs any probative value. The police report and
10 pictures taken by the police department is substantially different as both parties had equal access to
11 this information and the police report was disclosed in discovery. The pictures were a part of the
12 police investigation at the scene of the accident. The Court finds there is no prejudice to either party
13 to allow the pictures of the accident taken by the police at the scene of the accident.

14 5. Defendant's argument that Dr. Duke should have been permitted to testify regarding
15 secondary gain was properly excluded and does not warrant granting a new trial. Dr. Duke had no
16 basis for any testimony regarding secondary gain specific to these plaintiffs', because there was no
17 evidence of secondary gain motives in this case. Further, Dr. Duke is not qualified as a neurosurgeon
18 to testify to psychological issues regarding why people do or do not do certain things. Dr. Duke
19 opined that both Plaintiffs' were truthful. His testimony about secondary gain would have been mere
20 conjecture as to the Plaintiffs' in this case.

21 6. Defendant's argument that Plaintiffs' counsel made improper arguments during Opening
22 and Closing Statements was properly addressed during each instance at the time of trial and the Court
23 finds that Plaintiffs' Counsel's arguments do not rise to the level to warrant the granting of a new
24 trial. The Court fully examined each improper argument pursuant to the seminal case in Nevada
25 regarding attorney misconduct, *Lioce v. Cohen*, 124 Nev. 1, 23, 174 P.3d 970, 984 (2008) and also
26 evaluated its possible cumulative effect on the outcome of the trial and finds as follows:

27 (i) The Duke "for sale" comment was sustained during Opening, because it was argument for
28 closing, and not a violation of *Lioce*;

1 (ii) Dollar signs during Plaintiffs' opening PowerPoint were taken off the screen fairly quickly,
2 and was not a violation of *Lioce*;

3 (iii) Statements regarding Duke's services for sale in Closing was not a violation of *Lioce*,
4 because the Court permitted both parties to discuss the charges of the witnesses and Duke specifically
5 testified during trial that his services were for sale in this case;

6 (iv) Statement during Opening that the verdict would affect the community were improper,
7 but the statement was objected to, objection was sustained and the jury was admonished;

8 (v) Statement during Opening regarding Defendant avoiding responsibility was not made by
9 Plaintiffs' counsel and the reading of the pleadings to the jury was not a violation of *Lioce*;

10 (vi) Statement in Closing about awarding damages on a per diem basis was not a violation of
11 *Lioce* because the Court routinely permits it because it assists the jury; and

12 (vii) Statement in Closing that jury's verdict will send a message, did not violate *Lioce*
13 because the Court asked Plaintiffs' counsel to re-direct the line of closing and Plaintiffs' counsel did.

14 7. The Court finds that the single improper argument made by Plaintiffs' counsel, taken in
15 isolation, does not rise to the level to award Defendant a new trial, because Defendant has failed to
16 demonstrate that the misconduct's harmful effect was not removed through the Court sustaining the
17 objection and subsequent admonishment to the jury. The Court further finds that any possible
18 cumulative effect from the above arguments would not have changed the outcome of the case.

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1 8. The Court also finds that there is insufficient evidence in the record to support the assertion
2 by Defendant that the future damages award was excessive or improperly influenced by passion or
3 prejudice. The jury did not disregard the evidence or the jury instructions, which is confirmed by the
4 jury's award of zero for loss of enjoyment of life for both Plaintiffs. The jury also awarded much less
5 than what the Plaintiffs' asked for in closing arguments. The record supports the jury's award, which
6 was based on substantial evidence.

7 II.

8 ORDER

9 ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that
10 Defendant's Motion for Remittur and/or New Trial is DENIED.

11 IT IS SO ORDERED.

12 DATED this 7 day of July, 2015.

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DISTRICT JUDGE

JUDGE STEFANY A. MILEY

Submitted by:
SIMON LAW

DANIEL S. SIMON, ESQ.
ASHLEY M. FERREL, ESQ.
810 South Casino Center Boulevard
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

Approved as to Form and Content:
ROGERS, MANTERANGELO, CARVALHO & MITCHELL

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Attorneys for Defendant


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9 Telephone (702) 364-1650
10 Attorney for Plaintiffs

6 **DISTRICT COURT**
7
8 **CLARK COUNTY, NEVADA**

8 CHRISTIAN CERVANTES-LOPEZ and
9 MARIA AVARCA,

10 Plaintiffs,

11 vs.

12 MIRIAM PIZARRO-ORTEGA,


13 Defendant.

Case No.: A667141
Dept. No.: XXIII

14 **NOTICE OF ENTRY OF ORDER DENYING DEFENDANT'S MOTION FOR**
15 **REMITTUR AND/OR NEW TRIAL**

16 **PLEASE TAKE NOTICE** that an Order Denying Defendant's Motion for Remittur and/or
17 New Trial was duly entered in the above-entitled matter on the 8th day of July, 2015, a copy of which
18 order is attached hereto.

19 Dated this 8th day of July, 2015.

20
21 
22 **DANIEL S. SIMON, ESQ.**
23 Nevada Bar #004750
24 **ASHLEY M. FERREL, ESQ.**
25 Nevada Bar #012207
26 **SIMON LAW**
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Attorney for Plaintiff

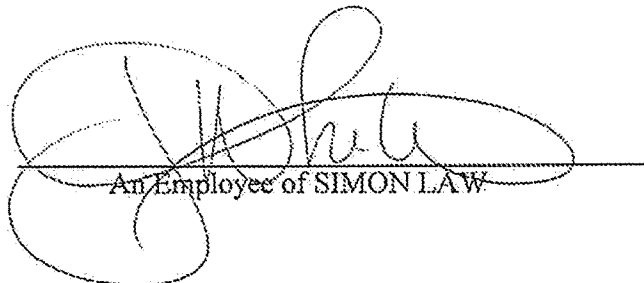
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CERTIFICATE OF E-SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 8th day of July, 2015, I served the foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANT'S MOTION FOR REMITTUR AND/OR NEW TRIAL** on the following parties by electronic transmission through the Wiznet system:

Stephen Rogers, Esq.
Kade Baird, Esq.
Rogers, Masterangelo, Carvalho & Mitchell
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Las Vegas, NV 89101
(702) 383-3400
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Attorneys for Defendants



An Employee of SIMON LAW


CLERK OF THE COURT

1 **ORDER**
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11 dan@simonlawlv.com
12 Attorneys for Plaintiffs

13
14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**
16

17 CHRISTIAN CERVANTES-LOPEZ,
18 an individual,
19 MARIA AVARCA, an individual

20 Plaintiffs,

21 vs.

22 EVANGELINA ORTEGA, an individual;
23 MIRIAM PIZARRO-ORTEGA, an individual
24 DOES I through V; inclusive
25 and ROE CORPORATIONS I through V,
26 inclusive

27 Defendants.

Case No.: A667141
Dept. No.: XXIII

28 **ORDER DENYING DEFENDANT'S MOTION FOR REMITTUR AND/OR NEW TRIAL**

29 THIS MATTER having come on for hearing pursuant to Defendant's Motion for Remittur
30 and/or New Trial, on the 30th day of April and the 23rd day of June, with Plaintiffs represented by
31 Daniel S. Simon, Esq., and Ashley M. Ferrel, Esq., of the law firm SIMON LAW, and Defendant
32 represented by Kade Baird, Esq. and Charles Michaleck, Esq., of Rogers, Masterangelo, Carvalho &
33 Mitchell.

34 Defendant asserts that she was denied a fair trial and deprived of a meaningful opportunity
35 to present a defense during trial because the Court: (1) improperly permitted Plaintiffs to present
36 future damages, because Plaintiffs failed to comply with NRCP 16.1(a)(1)(c); (2) excluded
37 Defendant's expert on medical billing, Tami Rockholt, R.N.; (3) excluded evidence of liens; (4)
38 excluded the surveillance video; (5) precluded Dr. Duke from testifying about secondary gain

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1 motives; and (6) Plaintiffs' counsel made improper arguments to the jury in violation of *Lioce v.*
2 *Cohen*. Alternatively, Defendant requests remittitur of the future damages award.

3 The Court having reviewed the pleadings and papers on file herein and heard arguments of
4 counsel made at the hearing, and other good cause appearing,

5 THE COURT HEREBY FINDS:

6 I.

7 FINDINGS OF FACT AND CONCLUSIONS OF LAW

8 1. Defendant's argument regarding Plaintiffs' failure to provide computation of future
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19 2. Defendant's argument regarding the exclusion of Defendant's expert Tami Rockholt, R.N.,
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23 her conclusions. Dr. Duke then provided testimony regarding the reasonableness of the charges for
24 all the medical providers, including the charges of Dr. Kaplan and the future cost of surgery.

25 3. Defendant's argument regarding the exclusion of evidence of liens was addressed at the
26 time of trial and the court affirms its ruling and finds that evidence of liens its prejudicial effect
27 outweighed any probative value, and is not a basis for a new trial. Plaintiff also argued it is a payment
28 source that also invites questioning about insurance or the lack thereof.

1 4. Defendant's argument regarding the exclusion of the surveillance video is not a basis for
2 a new trial because the Court finds that video was in the possession of the Defendant for
3 approximately one year prior to its disclosure and long before the close of discovery and could have
4 been disclosed, but Defendant chose not to do so for nearly one year and only produced it shortly
5 before trial. The Court recognized that discovery was extended for new information to be produced
6 for a short time, but Defendant could not provide a satisfactory explanation why the video
7 surveillance was not produced prior to the close of discovery when it was in its possession for a year.
8 Since the video surveillance is evidence created by the Defendant and could not have been obtained
9 independently by Plaintiff, the prejudicial effect outweighs any probative value. The police report and
10 pictures taken by the police department is substantially different as both parties had equal access to
11 this information and the police report was disclosed in discovery. The pictures were a part of the
12 police investigation at the scene of the accident. The Court finds there is no prejudice to either party
13 to allow the pictures of the accident taken by the police at the scene of the accident.

14 5. Defendant's argument that Dr. Duke should have been permitted to testify regarding
15 secondary gain was properly excluded and does not warrant granting a new trial. Dr. Duke had no
16 basis for any testimony regarding secondary gain specific to these plaintiffs', because there was no
17 evidence of secondary gain motives in this case. Further, Dr. Duke is not qualified as a neurosurgeon
18 to testify to psychological issues regarding why people do or do not do certain things. Dr. Duke
19 opined that both Plaintiffs' were truthful. His testimony about secondary gain would have been mere
20 conjecture as to the Plaintiffs' in this case.

21 6. Defendant's argument that Plaintiffs' counsel made improper arguments during Opening
22 and Closing Statements was properly addressed during each instance at the time of trial and the Court
23 finds that Plaintiffs' Counsel's arguments do not rise to the level to warrant the granting of a new
24 trial. The Court fully examined each improper argument pursuant to the seminal case in Nevada
25 regarding attorney misconduct, *Lioce v. Cohen*, 124 Nev. 1, 23, 174 P.3d 970, 984 (2008) and also
26 evaluated it possible cumulative effect on the outcome of the trial and finds as follows:

27 (i) The Duke "for sale" comment was sustained during Opening, because it was argument for
28 closing, and not a violation of *Lioce*;

1 (ii) Dollar signs during Plaintiffs' opening PowerPoint were taken off the screen fairly quickly,
2 and was not a violation of *Lioce*;

3 (iii) Statements regarding Duke's services for sale in Closing was not a violation of *Lioce*,
4 because the Court permitted both parties to discuss the charges of the witnesses and Duke specifically
5 testified during trial that his services were for sale in this case;

6 (iv) Statement during Opening that the verdict would affect the community were improper,
7 but the statement was objected to, objection was sustained and the jury was admonished;

8 (v) Statement during Opening regarding Defendant avoiding responsibility was not made by
9 Plaintiffs' counsel and the reading of the pleadings to the jury was not a violation of *Lioce*;

10 (vi) Statement in Closing about awarding damages on a per diem basis was not a violation of
11 *Lioce* because the Court routinely permits it because it assists the jury; and

12 (vii) Statement in Closing that jury's verdict will send a message, did not violate *Lioce*
13 because the Court asked Plaintiffs' counsel to re-direct the line of closing and Plaintiffs' counsel did.

14 7. The Court finds that the single improper argument made by Plaintiffs' counsel, taken in
15 isolation, does not rise to the level to award Defendant a new trial, because Defendant has failed to
16 demonstrate that the misconduct's harmful effect was not removed through the Court sustaining the
17 objection and subsequent admonishment to the jury. The Court further finds that any possible
18 cumulative effect from the above arguments would not have changed the outcome of the case.

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1 8. The Court also finds that there is insufficient evidence in the record to support the assertion
2 by Defendant that the future damages award was excessive or improperly influenced by passion or
3 prejudice. The jury did not disregard the evidence or the jury instructions, which is confirmed by the
4 jury's award of zero for loss of enjoyment of life for both Plaintiffs. The jury also awarded much less
5 than what the Plaintiffs' asked for in closing arguments. The record supports the jury's award, which
6 was based on substantial evidence.

7 II.

8 ORDER

9 ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that
10 Defendant's Motion for Remittur and/or New Trial is DENIED.

11 IT IS SO ORDERED.

12 DATED this 2 day of July, 2015.

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DISTRICT JUDGE

JUDGE STEFANY A. MILEY

Submitted by:
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