IN THE SUPREME COURT OF THE STATE OF NEVADA

EVANGELINA ORTEGA, AN INDIVIDUAL; AND MIRIAM PIZARRO-ORTEGA, AN INDIVIDUAL, Appellants, vs. CHRISTIAN CERVANTES-LOPEZ, AN INDIVIDUAL; AND MARIA AVARCA, AN INDIVIDUAL, Respondents.	CASE NO.: 68471

APPELLANT'S OPENING BRIEF

Submitted by:

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
Telephone: (702) 383-3400
Facsimile: (702) 384-1460

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Nevada Cases

Federal and Other Jurisdictions

Other Authorities

NRAP 26.1 DISCLOSURE

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

No such corporations involved

No other attorneys have appeared for the Appellants except current counsel, Rogers Mastrangelo, Carvalho & Mitchell.

Charles A. Michalek
R. Kade Baird
Attorneys of Record for Appellants

I.

STATEMENT OF JURISDICTION

This appeal is from the decision by the jury, and the denial of Appellant's motion for a new trial, from the courtroom of DISTRICT COURT JUDGE MICHELLE LEAVITT, Department 12. Notice of Entry of the Judgment was entered on March 13, 2015. (8 A.A. 01551-01554) Defendant's motion for new trial, filed March 27, 2015 (8 A.A. 01555-01605), was denied on July 8, 2015. (9 A.A. 01809-01815). Defendants Notice of Appeal was filed July 24, 2015. (9 A.A. 01816-01844). Jurisdiction is therefore proper under NRAP 3(b)(1) and (2). No presumption of placement to the Supreme Court or the Court of Appeals applies under NRAP 17.

II.

ISSUES ON APPEAL

1. Did the trial court improperly allow evidence of future damages when Plaintiff failed to comply with pre-trial discovery obligations and disclosure requirements under the Nevada Rules of Civil Procedure.
2. Did the trial court improperly exclude Defense Expert Tami Rockholt as unqualified to serve in an expert capacity.
3. Were the repeated improper arguments of counsel during opening and closing statements grounds for a new trial.
4. Did the trial court improperly exclude surveillance video which was timely produced by Defendants.

III.

STATEMENT OF THE CASE

A. Statement of Facts

1. Background facts

This case arises out of a November 12, 2011 three-car MVA at the intersection of Lake Mead Blvd. and Statz Rd. Plaintiffs' vehicle, driven by Plaintiff Christian Cervantes-Lopez and containing front seat passenger Plaintiff Maria Avarca, was traveling in the #2 lane on westbound Lake Mead, approaching the Statz intersection. (1 A.A. 00001-00004). The Defendant's vehicle, driven by Defendant Miriam

Pizarro-Ortega and owned by Defendant Evangelina Ortega, was stopped in the center turn lane on eastbound Lake Mead, to make a left turn onto Statz.[1]

The impact occurred as the Defendant's vehicle was making the left turn, crossing the Plaintiffs' lane of travel. The front of Plaintiffs' vehicle collided with the right side of the Defendants vehicle. (1 A.A. 00001-00004).

Trial in this matter occurred between February 23, 2015 and March 4, 2015. The jury rendered a verdict for Plaintiffs. (8 A.A. 01549-01550).

2. Facts Pertinent to Plaintiffs' claim of future damages.

During the discovery period, Plaintiffs Christian Cervantes-Lopez and Maria Avarca alleged medical expenses of $55,364.45 and $42,496.47 respectively. (8 A.A. 01570-01574). At no time prior to trial did either Plaintiff produce any calculation of their future damages claim as required by NRCP 16.1 (5 A.A. 00748-00749).

In addition to the required production under NRCP 16.1, Defendants explicitly requested that Plaintiffs produce a description of any future medical care by way of Interrogatories and Requests for Production of Documents. (8 A.A. 01578-01602). In each case, Plaintiffs failed to give any calculation or description of their supposed future damages. (8 A.A. 01587, 01600).

Defendant further deposed Plaintiffs treating physicians, including Dr. Stuart Kaplan, on June 6, 2014. (9 A.A. 01719-01721). Dr. Kaplan stated that Plaintiff was a **potential candidate** for future surgery if his pain complains increased, but no surgery was actually scheduled.

> Q. So while you've identified Mr. Cervantes-Lopez as a candidate for a lumbar fusion, you don't have, like, a plan laid out for this to actually occur yet?
>
> A. No. The way in which -- we're surgeons. I'm not here to follow him if he doesn't want surgery. The way in which I leave all of these patients, I say, "Listen, based on your information I have, you are a surgical candidate. Oh, but you're -- but you're telling me your pain is a three out

---

[1] Judgment was not entered against Evangelina Ortega. (8 A.A. 01549-01550).

> of ten and you want to live with it. Then live with it. Come back and see me if it worsens or you have a problem." I leave it open-ended.

(9 A.A. 01720-01721). Furthermore, there was no written record of any projected costs for any future surgery (a costs letter) found in Dr. Kaplan's medical file:

> Q. You haven't projected the cost for any of these treatments either; correct?
>
> A. I don't know if I was asked to do a cost letter. I might have.
>
> Q. Okay.
>
> A. You would know. You would know. You would know.
>
> Q. It wouldn't be in your file here?
>
> A. No.

(9 A.A. 01719-01721). Dr. Kaplan did not provide an actual cost estimate for surgery until the middle of trial. (5 A.A. 00748-00749; 00936-00938).

Defendant moved to exclude any evidence of, or request for, future damages by Plaintiffs, based upon the failure to provide the required computation of damages and to comply with the discovery rules. The trial court denied the motion, instead placing the burden on Defense counsel to "ask the right question":

> However, the Court's opinion is that the doctor was made available for deposition and the choice of what to ask or not to ask was within the attorney's discretion.

(9 A.A. 01854). As shown by the Order denying the Motion for New Trial, The trial court improperly placed the burden **upon Defendants** to obtain the cost for the future surgery instead of placing the burden on Plaintiffs to produce this information:

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

surgery, as well as the costs of same.

(9 A.A. 01812).

3. Facts Pertinent to Trial Judge's evidentiary rulings.

Defendant also objected to several of counsel's improper arguments which violated Nevada law. The trial court found that most of Plaintiffs arguments were not improper, and no new trial was warranted. (9 A.A. 01812-01814).

The trial court also excluded Tami Rockholt. (9 A.A. 01812-01814). The trial court found that Defendant was not prejudiced because Dr. Duke was able to testify as to Plaintiff's future damages. (9 A.A. 01812). The trial court's determination was error, because Dr. Duke was unable to rebut Plaintiff's charges for future surgery and medical care. (6 A.A.01079-01082).[2]

Finally, Defendant was precluded by the trial court from utilizing surveillance video that was timely produced by after a stipulation to continue discovery. (9 A.A. 01813).

IV.

SUMMARY OF ARGUMENT

The trial court improperly admitted evidence of Plaintiffs' future medical expenses and allowed them to request future damages in violation of the Nevada Rules of Civil Procedure. The trial court's decision was in error because Plaintiffs had the burden to produce evidence of any future medical care, including providing a estimate of its costs. NRCP 16.1 Merely providing medical records, or identifying Plaintiff as a " candidate" for surgery does not comply with NRCP 16.1 Defendant was unfairly prejudiced by allowing this evidence, as Defense experts could not contradict the claim for future damages at trial. This error was compounded because the trial court erred in excluding Defendant expert, Tami Rockholt from testifying.

---

[2] Plaintiff counsel's own closing argument admitted that Dr. Duke could not dispute the future surgery costs. (8 A.A. 01398).

She was qualified to discuss Plaintiffs' inflated medical charges as unreasonable.

Other errors should be addressed upon re-trial. These include Plaintiff making multiple and repeated improper arguments in violation of *Lioce v. Cohen*, 124 Nev. 1, 23, 174 P.3d 970, 984 (2008). Plaintiff repeatedly slandered Dr. Duke, a defense expert, referenced insurance, and told the jury to "send a message". The trial court further erred in precluding the use of the timely disclosed surveillance video.

V.

STANDARD OF REVIEW

A. Interpretation of NRCP 16.1

Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes. *Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009). Statutory interpretation is a question of law that is reviewed de novo. *Consipio Holding, BV v. Carlberg*, 128 Nev. Adv. Op. 43, 282 P.3d 751, 756 (2012). If a statute is clear and unambiguous, the Court gives effect to the plain meaning of the words, without resort to the rules of construction. *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 63, 309 P.3d 1017, 1020 (2013).

B. Admission or Exclusion of Evidence

A decision to admit or exclude evidence is within the discretion of the trial court and is reviewed for abuse of discretion. *FGA, Inc. v. Giglio*, 128 Nev. Adv. Op. 26, 278 P.3d 490, 499 (2012). This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 611 (2014).

C. Improper arguments at trial during opening or closing.

"Whether an attorney's comments are misconduct is a question of law, which we review de novo; however, we will give deference to the district court's factual findings and application of the standards to the facts." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 611 (2014).

"Finally, if misconduct is persistent or repeated, the district court must take into

account 'that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct.'" *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 612 (2014), reh'g denied (Apr. 23, 2014). "As a result, the district court must acknowledge that although specific instances of misconduct alone might have been curable by objection and admonishment, the effect of persistent or repeated misconduct might be incurable. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 612 (2014), reh'g denied (Apr. 23, 2014).

VI.

ARGUMENT

A. A NEW TRIAL WAS WARRANTED AS DEFENDANT WAS UNFAIRLY PREJUDICED BY PLAINTIFF'S FAILURE TO PROVIDE A TIMELY COMPUTATION OF FUTURE DAMAGES AS REQUIRED BY NRCP 16 (A)(1)(C).

A new trial is clearly warranted in this case because Plaintiffs failed to comply with the Nevada Rules of Civil Procedure in disclosing the necessity for, and cost of, future medical treatment for each Plaintiff. Admission of this evidence at trial unfairly prejudiced Defendants, and a new trial is warranted.

NRCP 16.1(a)(1)(c) clearly requires a Plaintiff to provide an actual computation of future damages. That section requires Plaintiffs to produce:

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

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

> (e) Supplementation of Disclosures and Responses. A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:
>
> (1) A party is under a duty to supplement at appropriate intervals its

disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is 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. 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.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response 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.

Plaintiffs did not prove a computation of damages for Plaintiffs alleged future medical treatment until the middle of trial, and only when ordered by the Court to do so (4 A.A. 00643-00646); (5 A.A. 00936-00938).

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

Although Plaintiffs continued to update their **past** medical bills throughout discovery, Plaintiffs never provided a computation of the damages they would be seeking for future medical care. The last NRCP 16.1 supplement provided by Plaintiffs during discovery did not include any costs for future care. (8 A.A. 01570-01574).

In addition to the computation being required under NRCP 16.1, Plaintiffs were required to provide this information in response to Defendant's interrogatories (9 A.A. 01578-01602). The first time that Plaintiff presented any actual computation of future damages was during the middle of trial, when the Court finally compelled the Plaintiffs to disclose the computation of damages just hours before Plaintiff's physicians testified as to the costs of future medical care.[3]

Plaintiffs argue that a "candidate" for future surgery constitutes "actual notice" of the future damages. It should be noted that Dr. Kaplan did **not** testify that Plaintiff

[3] The single "total" charge which was disclosed (5 A.A. 00748-00752) was not the same amount that was testified to by Plaintiff's doctors.

Christian Cervantes would be having surgery to a reasonable degree of medical probability. Christian was merely a potential candidate for surgery if his symptoms worsened. (9 A.A. 01720-01721). Also, Defendants asked if Plaintiff's physician wrote a cost letter, which was not found in the Dr.'s file. (9 A.A. 01720-01721). Likewise, no documentation of Plaintiff Avarca's future care was ever disclosed.

In any event, any such "notice" was insufficient as a matter of law. See *Calvert v. Ellis*, 2015 WL 631284, at *4 (D. Nev. Feb. 12, 2015)[4]:

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

The trial court did not require Plaintiffs to comply with the rule. Instead, the trial court held that the burden to discover such information **fell upon Defendants**:

> Defendant was aware of Plaintiffs' claim of future damages prior to trial during the discovery phase and Plaintiffs' made their doctor available for depositions. Defendant exercised her opportunity to depose Plaintiffs' doctor but for strategic purposes chose not to question the doctor's regarding the cost of future damages at that time. Since the treatment, including, the future lumbar surgery for Christian Cervantes was contained in the medical records produced in discovery and was discussed at Dr. Kaplan's deposition, Defendant's were well aware of the future treatment.

(9 A.A. 01812). The trial court mis-interpreted NRS 16.1 and NRCP 26. These rules explicitly state that the burden to produce a computation **falls on the Plaintiffs**.

a. Plaintiffs were under an affirmative burden to produce the costs of future medical care they would seek to recover at trial.

Case law interpreting the Federal Rules of Civil Procedure, upon which Nevada's rules are based, have already determined that a Plaintiff **must** provide an actual computation of the future damages the Plaintiff will seek to recover at trial. See *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 593 94 (D. Nev

---

[4] SCR 123 prohibits citation to unpublished orders and opinions issued by the Nevada Supreme Court. This ban does not extend to federal district court dispositions. *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 441, 245 P.3d 542, 547 (2010).

2011):

> Plaintiffs, however, ignored their obligation under Rule 26(a)(1)(A)(iii). This rule requires a party to provide "a computation of each category of damages claimed by the disclosing party." It also requires the disclosing party to "make available for inspection and copying as under Rule 34 the documents or other evidentiary material ... on which each computation is based, including materials bearing on the nature and extent of injuries suffered." While a party may not have all of the information necessary to provide a computation of damages early in the case, it has a duty to diligently obtain the necessary information and prepare and provide its damages computation within the discovery period.

Federal cases interpreting the analogous federal rules are strong persuasive authority as to the meaning of Nevada's Rules of Civil Procedure. *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002):

> Federal cases interpreting the Federal Rules of Civil Procedure "are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.

See also *Sanders v. Sears-Page*, 131 Nev. Adv. Op. 50, 354 P.3d 201, 213 (Nev. App 2015):

> We further note that NRCP 16.1 parallels Federal Rule of Civil Procedure 26, which was enacted to prevent ambush at trial.

NRCP 16.1 says that a party **must** provide such information without a discovery request. Thus, compliance with the rule is mandatory. See *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 63, 309 P.3d 1017, 1020 (2013):

> The use of the word "must" means that the rule's requirements are mandatory. See *Washoe Cnty. v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 725 (2012).

The rule requires more than merely identifying to Defendants that the Plaintiffs will seek future medical expenses. The rule requires that an actual computation be provided. See *Clasberry v. Albertson's LLC* 2015 WL 9093692, at *2 (D. Nev. Dec 16, 2015):

> The computation of each category of damages requires more than the listing of the broad types of damages so as to enable the defendants to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery.

The record is clear that Plaintiffs never provided any calculation of surgical costs or for any future medical expenses for either Plaintiff until after trial began. (5 A.A.

00748-00752). Thus, Plaintiffs did not comply with the disclosure requirements of NRCP 16.1.

b. Plaintiffs cannot shift to Defendant the burden of attempting to determine the amount of Plaintiffs future damages.

The trial court reversed the burden of discovery and production. The trial court mis-read the rule, and held that it was the Defendant's burden to discover Plaintiffs computation of future damages. (9 A.A. 01812). If the Defendants failed to ask the "right" question, such alleged failure fell upon them. The trial court held it was sufficient for Plaintiffs to have simply disclosed their documents, witnesses, and potential of surgery for trial. (9 A.A. 01812).This ruling was in clear error.

A Plaintiff cannot shift to Defendant the burden of discovering Plaintiffs future damages. See *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 593-94 (D. Nev. 2011):

> The plaintiff cannot shift to the defendant the burden of attempting to determine the amount of the plaintiff's alleged damages. See *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 294–95 (2nd Cir.2006). In *Francois v. Colonial Freight Systems, Inc.*, 2007 WL 4564866, at *3 (S.D.Miss.2007), the court rejected the plaintiffs' argument that sanctions under Rule 37(c) were not warranted because defendant was provided a "medical waiver" and, therefore, 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.

The Federal case of *Calvert v. Ellis*, 2015 WL 631284, at *4 (D. Nev. Feb. 12, 2015) is also instructive on this issue. As in the present case, Plaintiffs failed to present a computation of future damages. When Defendant moved to exclude these damages prior to trial, Plaintiff argued that the failure fell upon Defendant:

> Plaintiff argues that any failure is substantially justified or harmless because: (1) "Defendants already knew that Plaintiff was seeking damages for future surgeries because her treating physicians gave these opinions during her treatment and her experts gave these opinions during at the time of the initial expert deadline"; (2) Defendants have an expert, Dr. Duke, who is in "in the field of expertise appropriate to rebut Plaintiff's experts' opinions regarding costs

of future surgeries"; (3) Defendants chose to not take any depositions of Plaintiff's experts after the disclosure of future medical expenses; and (4) "the certainty that [Plaintiff] would require future surgeries was not entirely known at the time of expert disclosures."

The *Calvert* court denied all of Plaintiff's arguments, and excluded the future damages from trial, holding the burden fell upon Plaintiffs to comply with the rule:

> The Court does not find any of Plaintiff's proffered reasons why her discovery shortcomings were substantially justified or harmless compelling. First, other courts in this District have noted that "[m]ere notice of an upcoming surgery .. cannot substitute for the disclosure that is required by Rule 26(a)."*Patton v. Wal–Mart Stores, Inc.*, 2013 WL 6158461, at *4 (D.Nev. Nov. 20, 2013). In personal injury cases, the amount, nature, and extent of damages is a central issue in litigation. Additionally, since Defendants have admitted liability in this case, this Court has already determined that "the issue of whether Plaintiff's medical bills are reasonable is one of the central features of this entire litigation."Docket No. 87, at 5 (emphasis added). Second, Defendants do not have an expert in life-care planning that can properly rebut Plaintiff's expert Mr. Sidlow. Hearing Tr. 10:20 a.m. Third, Plaintiff cannot shift her Rule 26(a) responsibilities upon Defendants. *Baltodano v. Wal–Mart Stores, Inc.*, 2011 WL 3859724, at *4 (D.Nev. Aug. 31, 2011) (holding that defendant did not have to acquire a computation of damages with its own expert because it was plaintiff's affirmative duty to provide it). Finally, Plaintiff knew since litigation began in this case that Plaintiff was treating and had been recommended for future surgery, so her argument as to the "certainty" of her need for future surgeries is not persuasive. Consequently, Plaintiff has not met her burden of proving that her disclosure was substantially justified or harmless.

Calvert v. Ellis, 2015 WL 631284, at *4 (D. Nev. Feb. 12, 2015). See also *Olaya v. Wal-Mart Stores, Inc.*, 2012 WL 3262875, at *4 (D. Nev. Aug. 7, 2012):

> The Court does not find any of Plaintiffs' proffered reasons for its discovery shortcomings compelling. The amount and nature of damages claimed is a significant part of a personal injury case and one that Wal–Mart was not required to acquire on its own. Plaintiff's attempt to shift its affirmative duty onto Wal–Mart cannot be allowed.

Allowing the future damages to be recovered at trial resulted in a trial by ambush. See *Silver State Broad., LLC v. Beasley FM Acquisition*, 2016 WL 320110, at *4 (D. Nev. Jan. 25, 2016):

> Requiring the defendants to proceed to trial without an understanding of what damages the plaintiffs are seeking, what evidence supports those damages, or how those damages were calculated is trial by ambush.

c. <u>Defendants asked for a computation of damages during discovery.</u>

Defendants asked Plaintiffs whether they would be seeking future medical

care in Defendants interrogatories. (8 A.A. 01578-01602). Plaintiffs did not specify any future medical care, but referred to documents produced in discovery. (8 A.A. 01587, 01600).

Defendants also deposed Dr. Kaplan. (9 A.A. 01720-01721). Defendants asked Dr. Kaplan whether any future surgery had been scheduled, and whether Dr. Kaplan had provided Plaintiffs with a written estimate of the cost for such treatment. (9 A.A. 01720-01721). Dr. Kaplan responded that no surgery was ever scheduled. (9 A.A. 01720-01721). Furthermore, there was **no record** of any projected costs for any future surgery found in Dr. Kaplan's medical file (9 A.A.01720-01721; 5 A.A. 00936-00937).

While a treating physician is exempt from the report requirement, this exemption only extends to opinions that were formed during the course of treatment. Where a treating physician's testimony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements. *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46, 335 P.3d 183, 189 (2014).[5]

No surgery was ever scheduled and no "costs letter" was found in his file. Thus, Dr. Kaplan could not have formed an opinion as to any future costs during the course of his treatment. Therefore, Dr. Kaplan (and Plaintiffs other treating providers)[6] were subject to the expert witness reporting requirements, and Plaintiff was required to disclose an expert report detailing their opinions. No cost estimate was ever provided to Defendants until after the trial began. (5 A.A. 00936-00937).

The Plaintiffs failed to comply with the burden of producing the costs for Plaintiffs expected future medical care and surgeries. It was patently unfair for the

---

[5] Additionally, over objection, the trial court allowed Plaintiff's chiropractor to testify as to the reasonableness and necessity of MRI's. (4 A.A. 00636-00641).

[6] Over objection, **Dr. Koka** was similarly allowed to testify as to the reasonableness and necessity of **Dr. Coppel's** treatment. (4 A.A. 00709-00713).

trial court to place the burden upon Defendant to obtain such information, when the Nevada Rules of Civil Procedure explicitly require Plaintiffs to timely disclose such information. NRCP 16.1

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

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

The trial court clearly erred in finding that Defendants had the burden to obtain Plaintiff's future damages computation. This error resulted in unfair prejudice to Defendants and a new trial is warranted.

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

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

> Rule 37(c)(1) states that if a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence at trial unless the failure was

> substantially justified or is harmless. The rule also states that "in addition to or instead of this sanction," the court may order payment of reasonable expenses, including attorney's fees caused by the failure, and may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(v). The burden is upon the disclosing party to show that the failure to disclose information or witnesses was justified or harmless. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir.2001).

Courts are more likely to exclude damages evidence when a party first discloses its computation of damages **shortly before trial or substantially after discovery has closed**. *CQ Inc. v. TXU Mining Company*, 565 F.3d 268 (5th Cir.2009); *24/7 Records v. Sony Music Entertainment*, 566 F.Supp.2d 305, 318 (S.D.N.Y.2008); and *Green Edge Enterprises, LLC v. Rubber Mulch Etc. LLC*, 2009 WL 1383275 (E.D.Mo.2009).

In *Hoffman v. Construction Protective Services*, 541 F.3d 1175 (9th Cir.2008), the Ninth Circuit affirmed the district court's order excluding plaintiffs' damages evidence because they failed to provide any computation of damages prior to the pretrial conference. The court stated that the late disclosure was not harmless because it would have most likely required the trial court to create a new briefing schedule and perhaps re-open discovery, rather than simply set a trial date.

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

NRCP 37(c)(1) states:

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

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

I. Prejudice to Non-Offending Party

Defendants have suffered prejudice as a result of Plaintiff's failure to comply with NRCP 16.1(a)(1)(C) because they were not afforded the benefits that timely disclosures of computations of damages are designed to provide. Dr. Duke was unable to rebut Plaintiffs projected costs for trial. (6 A.A.01079-01082). Dr. Duke did not have an opportunity to review and evaluate the costs as they were provided only the night before his testimony at trial.

ii. Ability of Non-Offending Party to Cure Prejudice

Defendant could not cure the prejudice they suffered as a result of Plaintiff's failure to comply with the discovery rules. Dr Duke was unable to rebut such costs, and Tami Rockholt was precluded from testifying at trial.

iii. Likelihood of Disruption of Trial

As the trial had already begun, the trial was not disrupted.

iv. Bad Faith or Willfulness of Offending Party

Bad faith or willfullness is not required. However, oversight is not a substantial justification. *R & R Sails*. at 526 (S.D.Cal.2008). Moreover, Plaintiffs

never actually complied with the rule until after trial began.

Instead, Plaintiffs argued that no computation was required, and **Defendant** was under the burden to discover the information for themselves. Plaintiff's attempt to place the burden on Defendant to calculate the damages was improper.

However, the actions (or inactions) of the Plaintiffs can be readily interpreted as willful. Plaintiff's ignored not only written requests (the interrogatories) and well-established Rules governing the disclosure (NRCP 16.1), but also Plaintiffs knew, through testimony by Dr. Kaplan, that no computation had been provided.

Simply put, Plaintiffs were on notice several times that they had not disclosed a computation of future damages, but Plaintiffs chose not to do so. Their repeated failure to do so implies at least extreme negligence and at most, a calculated plan to ambush the Defendants at trial.

Under the several Nevada District Court cases cited above, Defendant was unfairly prejudiced with the late disclosure of the future medical care. As these damages were not timely and properly disclosed under the rules, Defendant request that this court grant a New trial.[7] In the alternative, the Defendant requests remittur of these excessive amounts (for future medical care, future pain and suffering, as well as the past medical bills testified to without proper foundation.)[8]

e. Defendants could not rely on Duke and Rockholt to dispute the future charges.

The trial court also stated that there was no prejudice to the admission of

---

[7] In addition, upon re-trial, other errors occurring at the trial are set forth below to prevent their recurrence.

[8] When the court determines that the damages award is excessive, it has two alternatives. It may grant defendant's motion for a new trial or deny the motion conditional upon the prevailing party accepting a remittitur. *Fenner v. Dependable Trucking Co., Inc.*, 716 F.2d 598, 603 (9th Cir. 1983).

future medical expenses because Defendant was able to elicit opposing cost of future care opinions from Dr. Duke. (9 A.A. 01082). The trial court's order is incorrect, as Dr. Duke was actually unable to provide any substantive opinion as to many of the future costs requested. (6 A.A. 01079-01082).

Plaintiff's costs for future medical expenses were finally provided to the Defense on February 25, 2014 from 9pm to 10pm. (6 A.A. 00936-00937). Due to the late disclosure, Dr. Duke was unable to fully evaluate any of Plaintiff's requested future medical specials. For example, Dr. Duke could not dispute the total charge for an L5-S1 fusion:

> Q. Okay. What's the most amount of money that you charge for your surgeon fee when you do an L5-S1 fusion?
>
> A. That -- that depends upon the exact codes that are used and what surgery it is. So I honestly can't say that number.

(6 A.A. 01079). Dr. Duke also could not dispute Plaintiffs alleged charges for the assistant surgeon fee:

> A. I honestly can't say. It depends upon the surgery.
>
> Q Okay. Because you don't know, right?
>
> A. Correct.

(6 A.A. 01081). Dr. Duke could only testify that the hospital charges "seemed high", but admitted that the hospital fees varied:

> Q. All right. Thank you. Hospital fees can vary depending on the hospital, fair?
>
> A It is. It seems like it's on the high end. 120,000 is what I've seen in the past for the L5-S1 fusion.
>
> Q Okay. But it certainly-- and when you say in the past, how long ago?
>
> A In the past six months.

(6 A.A. 01081-01082). Nor could Dr. Duke comment on post operative physical therapy costs:

> Q And then there's post-op physical therapy? That's pretty reasonable, right?

A. 7,000? That-- I can't comment on what the charge is for that.

(6 A.A. 01082). Defendant's other expert, Tami Rockholt, a cost expert, had been precluded from testifying at trial. Thus, Defendant was unable to provide any evidence to dispute Plaintiff's future medical care costs, except to generally allege that the costs of the hospital were "high". Plaintiff's closing argument even admitted this fact:

> Remember, Mr. Baird asked him and he looked over at this board, and he looked at it and he goes, well, it seems high. That's all he could tell you.
>
> And then when I questioned him, I went down the line item, he couldn't tell me anything. So I erased it all. He doesn't know, that's not evidence that any of the bills are excessive.

(8 A.A. 01398). Defendant was clearly unfairly prejudiced by the admission of the future damages testimony. This testimony inflated the award for Plaintiffs both as to the proposed future medical charges, as well as the awards for future pain and suffering. Therefore, Defendants request a new trial be granted.

B. DEFENDANT SHOULD BE ALLOWED TO CONTEST PLAINTIFFS' MEDICAL BILLS THROUGH THE TESTIMONY OF TAMMI ROCKHOLT.

Traditionally, any request by a party to present the actual amounts paid (whether it be by an insurer or private party after a negotiation), is met with a claim that such is a violation of the "collateral source" Rule of *Proctor v. Castalletti*, 112 Nev. 88, 911 P.2d 853 (1996). However, even the collateral source rule is being interpreted in such a way as would limit a Plaintiff's recovery to a reduced, negotiated amount instead of the "extremely high" amount charged by doctors. See *Howell v. Hamilton Meats and Provisions, Inc.* 257 P.3d 1130, 1144 (Cal 2011):

> We conclude the negotiated rate differential is not a collateral payment or benefit subject to the collateral source rule. We 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.
> ...
>
> 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."

However, the above not yet being Nevada law, Defendant offered Tami Rockholt as an expert witness. The trial court excluded Tami Rockhot from testifying at trial. (9 A.A. 01812). As shown below, Ms. Rockholt was competent to testify in an expert capacity and her exclusion was an abuse of discretion. (5 A.A. 00863-00884).

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

Ms. Rockholt's testimony would have been helpful to the jury[9], and Ms. Rockholt had the same (or at least functionally similar) database foundation as Dr. Koka, who, as a treating physician, was allowed to testify as to reasonableness and necessity of medical bills that were not his own, simply because he had "prior experience" with pain management doctors. (4 A.A. 00709-00713).

> THE COURT: I'm not sure how he would be qualified to testify to Dr. Coppel's billing.
>
> MR. SIMON: Because he's very familiar with the billing, including pain management, and he's already laid the foundation that he actually had a pain management doctor in his office and has worked with them.

(4 A.A. 00710). Additionally, over objection, the trial court allowed Plaintiff's chiropractor to testify as to the reasonableness and necessity of MRI's. (4 A.A. 00636-00641), despite her not knowing how her billing actually works (4 A.A. 00648-00652) . Ms Rockholt certainly had the necessary foundation and qualification to discuss medical bills.

/ / /

/ / /

---

[9]See NRS 50.275 "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."

2. Tami Rockholt is qualified to offer an expert opinion in the field of medical costs and billing and has a proper foundation for the same.

Nevada Law does not support Plaintiff's contention that a nurse may not testify against a doctor's opinions. See *Williams v. Eighth Judicial Dist. Court*, 262 P.3d 360, 127 Nev. Adv. Op. 45 (2011). This Court held:

> . . . [W]e have consistently rejected the notion that any rigid guidelines can govern this analysis, and district courts have "wide discretion, within the parameters of NRS 50.275, to fulfill their gatekeeping duties' to evaluate the admissibility of expert testimony."

This rejection of "rigid guidelines" means that any claim by Plaintiff that a nurse, by definition, may not serve as an expert is simply inappropriate and conflicts with current binding precedent. This Court should recall that in "some circumstances, a nurse may obtain the requisite skill, knowledge, or experience to testify as to cause." *Id.* Nevada law has not mandated that a nurse, per se may not offer expert testimony that is contrary to that of a doctor, even with respect to causation. *Id.*

In this case, Defendants did not present Tami Rockholt, RN as an expert on causation. She was proffered as an expert regarding the reasonable cost of the medical care of the Plaintiff. The reasonableness of the medical expenses is an explicit aspect of the Nevada Jury Instruction 5PID.1 cited by Plaintiff ("[t]he reasonable medical expenses plaintiff has necessarily incurred as a result of the accident").

3. Tami Rockholt utilized the same information as Dr. Koka to determine the reasonable charges for the provided medical care.

Tami Rockholt utilized one of two popular medical databases as foundation for her opinion on the reasonableness of Plaintiffs medical care. Dr. Koka, one of Plaintiffs treating physicians, utilized one of those **same databases**, in book form, to form his own opinions as to the reasonable charges for medical care:

> There's different benchmarks out there and there are two major I call it gorillas that kind of, for lack of a better word, own the market for not only payors but also physicians for setting their own fee schedules. And those two

payors -- or those two databases that are -- that are out there are Context For Healthcare as well as Fair Health. And I think Dr. Koka uses Fair Health.

(5 A.A. 00872). These entities review over a billion medical charges per year, and provide statistical analysis to determine the reasonable charge:

> COURT: Okay. Well, those two entities that you've named, that are the entities that come up with the reimbursement amounts for the CPT codes, do you know what methodology those two entities utilize in coming up with how much reimbursement should be associated with any one CPT code?
>
> WITNESS: They utilize --they review-- it's pretty much just numbers and statistics. But they look at over -- both of them are claiming over one billion line-charged items per year, and so they average those out into different percentiles. And when I was reviewing the one deposition, I -- interested in what percentile the physician utilizes, because it sounds like he buys the book, the Physicians Fee Analyzer, which has I think 25th, 50th, and 75th percentile. I actually buy the database so you can get it down to the 5th percentile. So it can be the 5th, the 9th, 10th, the 15th, the 20th.

(5 A.A. 00872-00873). Thus, Tami Rockholt and Dr. Koka had the same information and foundation necessary to determine the reasonable charges for medical care:

> Q Okay. I guess if you could briefly comment on whether there's any difference between your qualifications versus those of the foundation that you have for your opinions versus that of Dr. Koka, whose deposition you referred to earlier.
>
> A From what I've seen, no. You know, and what -- it sounds like he buys -- he buys the book, which is much less expensive than what, you know, buying the whole database is. You know, it's $150 -- $150,000 -- $150 versus 15,000. However, what I do a lot and the reason I need, like, the 5th, the 10th, the 15th percentile by the 5th percentiles is because a lot of my consulting is with physician groups. So I will work with them to set their own fee schedules. So I need more specificity than what the doctor might.

(5 A.A. 00875-00876). While allowing Dr. Koka to testify as to other physicians medical charges without being designated an expert, the trial court excluded Ms. Rockholt, holding that her testimony did not assist the jury:

> And I'll tell you why. It allowed you guys to make the record, because it should be in the record. And frankly, I wasn't sure as to Dr. -- I mean Nurse Rockholt's qualifications from her testimony. But quite frankly, I don't think that the testimony is assistive to the Jury. Quite simply, as Ms. Rockholt already stated, the doctors are not mandated by any federal law. They can

charge whatever they want. And I think there's a clear distinction as to reimbursement[10] rates versus what's reasonable and customary in the community.

(5 A.A. 00877). Her proposed testimony became a court exhibit. (5 A.A. 00878).

a. Rockholt's database (Context4Healthcare) is Recognized in the Field

For 25 years, Context4Healthcare has provided fee schedules for physicians that allow them to see what fees are charged from the 50th to the 95th percentile, based on a provider's ZIP code. **This same information**, in book form, was used by Dr. Koka to determine the reasonable amounts he and Dr. Coppell charged for medical care. (5 A.A. 00875).

b. Context4Healthcare is a tested database.

Context4Healthcare's database has also been tested. Their medical billing products have been "developed by a team of fee experts and mathematicians over a period of several years. Ms. Rockholt testified that these products have been reviewed and are regularly relied upon in her industry and throughout the medical field. (5 A.A. 00864-00869) Ms. Rockholt has been admitted as an expert in several sister states on these same issues in the past. (5 A.A. 00865).

c. Context4Healthcare's Database Is Reliable and Accepted

The database Ms. Rockholt uses has been thoroughly tested, reviewed, and found reliable by Plaintiff's own physicians. It was the same class of database relied upon by Dr. Koka to testify as to reasonable charges, except that Dr. Koka uses the book form of a competitor rather than the online database. The weight to give Ms. Rockholt's opinions should have been up to the jury. However, Ms. Rockholt is certainly qualified to present her opinions at trial.

///

///

---

[10]Ms. Rockolt's opinions did not refer, in any way, to reimbursement rates.

C. PLAINTIFFS' COUNSEL MADE SEVERAL IMPROPER OPENING AND CLOSING ARGUMENTS IN VIOLATION OF LIOCE.

Plaintiffs counsels opening and closing arguments violated *Lioce v. Cohen*, 124 Nev. 1, 23, 174 P.3d 970, 984 (2008), by telling the jury to send a message, by referencing insurance, and attacking the credibility of witnesses.

1. Improper Disparagement of Dr. Duke.

Although "a single improper remark or argument might not be so prejudicial as to require reversal," cumulative improper arguments operate to deprive a litigant of a fair trial. See *Muhammad v. Toys "R" Us, Inc.*, 668 So.2d 254, 259 (Fla. 1st DCA 1996); *Fasani v. Kowalski*, 43 So. 3d 805, 811-12 (Fla. Dist. Ct. App. 2010).

Disparagment of a witnesses is improper. See *Regan v. Vizza*, 65 Ill.App.3d 50, 22 Ill.Dec. 89, 382 N.E.2d 409 (1978) (likening expert medical witness to "hired gun" was improper); *Cecil v. Gibson*, 37 Ill.App.3d 710, 346 N.E.2d 448 (1976) (reference to plaintiff's expert as a "sidekick" and "right hand man" was improper); *O'Donnell v. Holy Family Hosp.*, 682 N.E.2d 386, 397 (1997); *People v. McBride*, 228 P.3d 216, 223 (Colo. App. 2009):

> The prosecution's repeated personal attacks on the defense expert went so far beyond accepted limits as to constitute obvious error. Those attacks denigrated the expert as a "hired gun" who was "full of it" and who in return for $275 an hour fees (which overstated the actual $175–225 per hour fees) "made up" testimony that was "garbage."

During both opening and closing arguments, Plaintiffs counsel disparaged Dr. Duke as an expert "for sale" who will say anything once paid. (3 A.A. 00465-00467).[11] In closing, the trial court allowed the Plaintiffs line of attack, ruling that it was "argument". (8 A.A. 01391-01392).

2. Improperly Attempting to Influence the Jury.

An attorney may not make a golden rule argument, which is an argument

---

[11] Plaintiff used a line of dollar signs ($) to emphasize the above point. (3 A.A. 00467). A motion for mistrial was denied (3 A.A. 00478-00481).

asking jurors to place themselves in the position of one of the parties. Golden rule arguments are improper because they infect the jury's objectivity. *Lioce v. Cohen*, 124 Nev. 1, 22, 174 P.3d 970, 984 (2008).

A "golden rule" argument is one in which a litigant asks the jury to place themselves in the shoes of the victim, or in which an attorney appeals to the jury's own interests. See *Lee v. State*, 405 Md. 148, 171 (2008). Reference to the effects this case would have on the "community" encourage the jury to consider their own interests in protecting themselves as members of the community over applying the law.

Plaintiff repeatedly asked the jury to make a statement and to possibly put itself in the news by it's verdict. "It is improper for the [state] to make statements urging the jury to protect society or to send a message with its verdict." *State v. Duncan*, 608 N.W.2d 551, 556 (Minn.App.2000); *State v. Cauthern*,, 1998 WL 133757 (Tenn. 1998):

> Third, the statements that the jury should "do its duty" and that its verdict should send a message to the community constituted a plea for general deterrence, which we have held has no application to either aggravating or mitigating factors. Keen, 926 S.W.2d at 737; *State v. Irick*, 762 S.W.2d 121, 131 (Tenn.1988), cert. denied, 489 U.S. 1072, 109 S.Ct. 1357, 103 L.Ed.2d 825 (1989).

See also *State v. Goltz,* 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003):

> The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

See also *Lioce v. Cohen*, 124 Nev. 1, 18 19, 174 P.3d 970, 981 (2008):

> We therefore conclude that when the district court decides a motion for a new trial based on repeated or persistent objected-to misconduct, the district court shall factor into its analysis the notion that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct. Therefore, the district court shall give great weight to the fact that single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent.

Plaintiff began trial by telling the jury that their verdict will affect the community:

> Your verdict, which we'll be asking you for, will ultimately affect the community. And the reason it will affect the community because –

(3 A.A. 00470). Defendant objected and the court sustained the objection. (3 A.A. 00471). During closing, after attacking Dr, Duke as "for sale", Plaintiffs counsel requested the jury to "send a message" with their verdict:

> You have important power and important duty and a service that you provided here for us today. And you have two options. If your verdict is too low, then that tells people they can get away with breaking the rules.

(8 A.A. 01426). Defendant objected, and the trial court told Plaintiff to modify the argument. However, Plaintiff quickly returned to the argument:

> Just so we're clear, when you go into that jury room and reach this verdict, your verdicts are read. Plaintiff reads it, the defense reads it. Other people here in the courtroom read it. Your verdict might even hit the papers. Verdicts hit the papers. And the reason they do that is because people read verdicts. And verdicts shape how people follow the rules. I submit to you the evidence in this case. If you return a verdict that is too low people don't follow the rules.

(8 A.A. 01426). Plaintiff asserted that the argument was allowed under *Gunderson*:

> Just that I disagree with all of his arguments. And I didn't ask the jury to send the message beyond the evidence in this case. Under the Gunderson case you're allowed to even tell the jury to send a message to this Defendant, and that's ultimately what I was doing.

(8 A.A. 01430). Plaintiff's counsel then again attacked Dr. Duke (and Defense counsel) and asked the jury to "send a message" with their verdict:

> When you go back into the jury room, ask yourself, is it okay to change the truth? Is it okay? Because Ms. Ortega has selected her lawyers, fine lawyers. Ms. Ortega retained Dr. Duke, a fine expert witness that he is retained specifically to undermine this case. And when people spend money to protect paying people who are injured and victims, those are dangerous people.[12] And when there's dangerous people, only juries like you can change this. Your verdict will be read, your verdict will keep her driving safe next time and others like her, because if your verdict is too –

(8 A.A. 01494-01495). Defendants objection was sustained and Plaintiff's counsel told to modify the argument. But Plaintiff's counsel still returned to the argument:

> What'll happen is after you deliberate and you return your verdict, you have two options. If the verdict's too low, they're going to get up and shake each

---

[12] This argument also implies that Defendant and her counsel are "dangerous people."

other's hand and go, good job, good job, we did our job. And your verdict will be forgotten before the lights go down in this courtroom. However, if –

(8 A.A. 01495-01496). Defendant's objection was denied (8 A.A. 01496). So Plaintiff's counsel continued:

> Okay. Thank you, Your honor. Like I said, not too many jurors get to make a difference in people's lives, get to make decisions that make a difference in the – in the community in which we live. If your verdict is too low, again, it'll be forgotten before the lights go down. But if your verdict is right and just and fair, it may be put in the paper. People may ask you about it later —

(8 A.A. 01496-01497). After another objection and bench conference, Plaintiff's counsel finished his argument:

> What your verdict will do is if you give a fair and just verdict, it will make people like her do it right next time.

(8 A.A. 01497). Plaintiffs counsel's closing arguments clearly violated *Lioce v. Cohen*, 124 Nev. 1, 23, 174 P.3d 970, 984 (2008). Despite objection, counsel kept returning to the argument, and thus accepted the risk of his misconduct.

3. Improper References to insurance

The specter of insurance coverage came up multiple times during voir dire and witness testimony. (5 A.A. 00758); (5 A.A. 00788-00793) (5 A.A. 0001004-01005). Two curative instructions were given by the court. (6 A.A. 01105). Despite this, Plaintiffs counsel again injected the idea that Defendant had insurance coverage by directing questions to Dr. Duke, to reference which party had "paid" him for his testimony:

> Q All right. And you're a little bit different than a treating physician in your role here today?
>
> A Correct.
>
> Q Right? You are an IME physician, right, hired by the defense, fair?
>
> A I'm-- I'm technically hired I think by who -- whoever the other party is being sued in the accident. They -- they're the ones who who I -- who has representation who's hired me on their behalf.
>
> Q Okay. So this firm, Rogers Mastrangelo, did not hire you; it was Ms. Ortega back in the court?
>
> A. I think it was via this firm, correct.

Q Okay. Has she paid you any money?

A Well, it -- I think she's paid her insurance and to the extent that that is what she used to --

(6 A.A. 01098). Plaintiffs counsel knew how expert witnesses are hired and paid, and that Defendants themselves do not pay for expert witnesses out of their own pocket. There was only one reason to direct such a line of questioning - to get the witness to remind the jury that Defendant had insurance coverage:

> MR. MICHALEK: Well, no, there was a -- there was a mention again, a question by Mr. Simon, did the defendant pay you. Mr. Simon has been in this community for 20 years practicing law. He well knows that defendants don't pay, it's law firms that pay the doctor. That question was only designed to attempt to get the doctor to say the reference to insurance. There has not been a day that has gone by at this trial that the word insurance has not been raised either by the plaintiffs themselves or other expert witnesses. It has pervaded this trial. We have asked for two instructions, which have been given. And yet it keeps -- the questions keep happening.
>
> There is no other remedy at this point except to declare a mistrial, because the references to insurance have been so pervasive. And at this point I think the conduct has been if not intentional, then clearly negligent and designed to get witnesses to reference insurance. It's not proper and I just don't know what to say, except a mistrial's appropriate.

(6 A.A. 01105-01106). Plaintiffs counsel stated, in open court, that the purpose of the questioning was to prevent a "fraud upon the court", in that Defendant does not pay for the expert but Defendants "act" as if she does:

> But then when they try to play the sympathy card that she hired them, that she retained Dr. Duke, I mean, that's just a fraud upon the Court. And that's what invited my question, is when he tried to suggest that she actually retained him, which we know is all not true, including counsel to my right.

(6 A.A. 01107). This excuse is nonsensical. The questioning was designed to inject insurance further into the minds of the jury:

> MR. BAIRD: Your Honor, there is no -- the only evidence that is admissible in a trial are facts that are reasonably expected to -- they have to relate to a material fact. It is well known to the Jury Mr. Simon had to prove absolutely nothing before he stood up to ask Dr. Duke questions for the jury to know that Dr. Duke was being paid to offer his opinions. He had to offer zero evidence.
>
> And when he got up there and said, So she had paid you? What other purpose could there have been to ask that question other than to try and get him to mess up and try and say, Okay, it was insurance. He's he's already --

> and went through his bills for 15 minutes. It was very obvious to the jury he was being paid. The purpose of that was to hopefully elicit insurance.

(6 A.A. 01107-01108). The misconduct in totality warrants a new trial.

4. Disparagement of Defense Case.

The law is clear that it is improper for an attorney to disparage an opposing party's defense of a case or to suggest that a party should be punished for contesting a claim. *Carnival Corp. v. Pajares*, 972 So.2d 973 (Fla. 3d DCA 2007); *Fasani v. Kowalski*, 43 So. 3d 805, 809,10 (Fla. Dist. Ct. App. 2010):

> In order to rectify the appellants' "corporate greed and corporate arrogance" and refusal to "do the right thing," Kowalski's counsel argued to the jury that it would have to "make them do the right thing because they haven't done it on their own and they have no intentions on doing it on their own. You're going to have to make them do the right thing." In essence, counsel was arguing that the jury had to punish the appellants. Kowalski's counsel's comments denigrated the appellants' defense, suggested that they needed to be punished, and served no purpose other than to inflame and prejudice the jury. Such arguments are improper.

Fasani v. Kowalski, 43 So. 3d 805, 810 (Fla. Dist. Ct. App. 2010)

Plaintiff argued Defendants were "avoiding responsibility". (3 A.A. 00442-00447). Plaintiff made a theme of arguing that Defendant failed to take responsibility at trial. These arguments were made in direct violation of well settled case law.

As the Defendants have a fundamental right to defend themselves, and to confront the witnesses against them, no attorney may make a disparaging remark intimating that the Defendants are "avoiding responsibility" by exercising these fundamental rights. *United States v. Derosa*, 548 F.2d. 464 (3rd Cir. 1977); *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed. 2d 717 (1978).

The Plaintiffs did not plead, and should not be heard to complain, that Defendants were somehow additionally responsible to the Plaintiff for "avoiding responsibility," to appear at trial, or exercise their right to put the Plaintiff to his burden of proof. Such arguments at the trial were improper.

///

///

D. DEFENDANT WAS ENTITLED TO PRESENT EVIDENCE OF LIENS.

Defendant was also precluded from introducing evidence that the medical treatment was on a lien basis. Health and auto insurance are collateral sources, and are inadmissible under *Proctor v. Castelletti*, 112 Nev 88 (1996). A lien is not a collateral source, and is admissible evidence of bias, prejudice, and interest in the outcome of the trial, which are never collateral. See *Amlotte v. United States*, 292 F. Supp 2d 922) (Collateral sources do not include entities entitled to a lien against recovery of the Plaintiff in an action for damages.) See also *Sears v. Rutishauser*, 466 N.E. 2d 210, 213 (Ill. 1984) ("A medical expert can be questioned about fee arrangements, prior testimony for the same party, and financial interests in the outcome of the case.").

If a physician has an interest in the outcome of the litigation, evidence of a lien is relevant to bias. See *Lobato v. State*, 120 Nev. 512 (2004) (holding that a witness' bias, interest, corruption or prejudice, is never collateral). These liens should have been allowed into evidence at trial.

E. DEFENDANT SHOULD BE ALLOWED TO INTRODUCE THE SURVEILLANCE VIDEO.

The parties agreed to a stipulation which extended the time to supplement documents and witnesses until January 9, 2015. (8 A.A. 01603-01605). This stipulation was approved and signed by the court. Defendant timely produced a copy of the video surveillance pursuant to this discovery extension. Thus, exclusion of the video was error. Defendant should have been allowed to present such evidence for impeachment or rebuttal purposes.

F. DR. DUKE SHOULD BE ALLOWED TO TESTIFY REGARDING SECONDARY GAIN

All of Plaintiffs' doctors acknowledged the possibility of secondary gain motivating a patient's care and that patients involved in litigation could also exaggerate their symptoms due to secondary gain motivations. Dr. Duke's opinions were based on evidence, which was described in his report, that showed

there were discrepancies in the record keeping and methods of Plaintiffs' doctors that indicated that secondary gain was likely a factor in Plaintiffs' treatment. It was prejudicial to preclude those opinions at trial.

VI.

CONCLUSION

Appellants request reversal of the jury verdict and request a new trial.

DATED this 17th day of February, 2016.

ROGERS, MASTRANGELO,
CARVALHO & MITCHELL

CHARLES A. MICHALEK, ESQ.
Nevada Bar No. 5721
R. KADE BAIRD, ESQ.
Nevada Bar No. 8362
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a) (6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 11 Times New Roman 14 pt font. 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 does not exceed 30 pages.

I hereby certify that I have read this Petition, 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, N.R.A.P. 28(e), 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.

DATED this 17th day of February, 2016.

ROGERS, MASTRANGELO,
CARVALHO & MITCHELL

CHARLES A. MICHALEK, ESQ.
Nevada Bar No. 5721
R. KADE BAIRD, ESQ.
Nevada Bar No. 8362
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Appellants

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 17th day of February, 2016, a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** was served via Electronic Service and Hand Delivery, upon the following counsel of record:

VIA ELECTRONIC SERVICE
Daniel S. Simon, Esq.
Nevada Bar No: 4750
Simon & Associates
810 South Casino Center Blvd.,
Las Vegas, Nevada 89101
P: (702) 364-1650
F: (702) 364-1655
Attorneys for Respondents

VIA HAND DELIVERY
Judge Stefany Miley
Dept. 23
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Carrie DeVoge
An Employee Of
Rogers, Mastrangelo, Carvalho & Mitchell

M:\Kade\Ortega adv. Cervantes-Lopez\Appeal\opening brief 15.wpd