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.	**SUPREME COURT NO. 68471**

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RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel certifies tha 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 Respondents except current counsel, Simon Law and co-counsel Kristian Lavigne, Esq.

Daniel S. Simon, Esq.
Attorney of Record for Respondents

I.

STATEMENT OF JURISDICTION

Plaintiffs do not contest jurisdiction, with the exception that the subject appeal is from the decision by the jury and the denial of Appeallant's Motion for a New Trial, from the courtroom of DISTRICT COURT JUDGE STEFANY MILEY, Department 23, *not* DISTRICT COURT JUDGE MICHELLE LEAVITT, Department 12. Also, Evangelina Ortega was dismissed as a Defendant prior to the trial and is not a named party in this case.

II.

STATEMENT OF THE CASE

A. Background Facts

This case arises from a motor vehicle accident on November 12, 2011, at the intersection of Lake Mead Blvd. and Statz Road. Plaintiff, Christian Cervantes, was traveling westbound on Lake Mead Blvd., and his wife, Plaintiff Maria Avarca, was a front seat passenger in the car. Defendant Miriam Pizarro-Ortega was driving a car owned by Defendant Evangelina Ortega, going eastbound on Lake Mead Blvd., and she attempted to make a left turn onto Statz Road. As Defendant Pizzaro-Ortega made the left turn, she slammed into the driver's side of Plaintiff's vehicle. (1 A.A. 0001-0004)

B. Procedural Facts

As a result of this motor vehicle accident, Plaintiffs filed a Complaint in this matter on August 20, 2012. (1 A.A.0001-0004) Defendants filed their initial Answer to Plaintiff's Complaint on December 31, 2012. (1A.A.0005-00010) Without leave of Court, Defendants filed an Amended Answer to Plaintiffs' Complaint on January 24, 2013. (1A.A.00011-00015) On October 8, 2013, the Court entered a Scheduling Order that expressly set forth the close of discovery in the matter as June 20, 2014. (1 A.A.00028) During the course of discovery the parties filed their initial NRCP 16.1 disclosures and timely supplemented same. On November 17, 2014, the Court entered an order to continue the trial date from November 12, 2014 to February 9, 2015. (1 A.A.00101-00102) The Order specifically stated "[t]he last day to supplement your documents and witness list, including expert and rebuttal witnesses, is January 9, 2015," 30 days before trial, as required by NRCP 16.1. (1 A.A.00102)

Trial in this matter began on February 23, 2015 and continued through jury verdict on March 4, 2015. The jury found for the Plaintiffs and awarded damages in the amount of $499,410.45 for Christian Cervantes-Lopez and $222,266.47 for Maria Avarca. (8A.A.01549-01550) Defendant filed a Motion for New Trial with the Trial Court on March 27, 2015 (9A.A.01555-01605), which was denied on July 8, 2015. (9A.A.01809-01815) This appeal followed. (9A.A.01816-01844)

III.

ARGUMENT

A. Defendants' Motion for New Trial Was Properly Denied Because Plaintiffs Properly Complied with NRCP 16.1 (a) and Defendant Did Not Suffer Any Prejudice

During the course of discovery, Plaintiffs timely disclosed each and every one of their treating physicians, all of their medical records, the necessity and cost of future medical treatment pursuant to NRCP 16.1(a).[1] Defendant was fully aware of Plaintiffs' need of future treatment during the course of discovery and had ample opportunity to contest the future damages sought by the Plaintiffs. In fact, Defendant did contest the future treatment through its retained expert, Dr. Duke, a neurosurgeon

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[1] The September 2012 Drafter's Note of NRCP 16.1 expressly states:

> Subdivision (a)(2)(B) specifies the information that must be included in a disclosure of expert witnesses who are not otherwise required to provide detailed written reports. A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment. These comments may be applied to other types of non-retained experts by analogy. ***In the context of a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider.*** A treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment. However, any opinions and any facts or documents supporting these opinions must be disclosed in accordance with subdivision (a)(2)(B). (emphasis added).

The Court further explained this Drafter's Note and the practical application of it in *FCH1, LLC., et al. v. Rodriguez,* 130 Nev.Ad.Op. 46 (No. 59630) (October 2, 2014), (herein after referenced as *"Palms"*).

as the Trial Court allowed Dr. Duke to given new opinions contesting all of the future damages, as well as past and future medical costs. As demonstrated below, even if Defendant's arguments had merit, which they do not, there is a complete lack of prejudice in this case.

During the course of this litigation, there was extensive argument on the necessity and admissability of Plaintiffs' future damages and each time the Trial Court properly ruled, which is squarely within its discretion, that Plaintiffs fully complied with NRCP 16.1(a) and Nevada law in disclosing their non-retained experts and their opinions regarding Plaintiffs' future treatment. In fact, Defendant had an opportunity to depose each one of Plaintiffs' disclosed experts and did, in fact, depose them. Defendant knew exactly what each of the treating physicians who testified were going to testify to at trial with regard to future damages prior to the start of trial. Simply, the Defendant had timely notice of the future care in this case and the Defendant suffered absolutely no prejudice related to this matter.

Defendant first made this *exact* argument in her Motion in Limine No. 2, wherein she asked the Trial Court to preclude Plaintiffs from introducing future damages at trial, which the Trial Court properly denied on October 14, 2014. (1 A.A. 00065) At this hearing, the Trial Court advised the Defendant that the Plaintiffs can have their treating physicians testify to the future surgery and costs that were

already recommended. (1 A.A. 00065) Defendant ignored this pre-trial ruling and objected to this permissible testimony during trial. (4 A.A. 00709) Once again, the Court found that Plaintiffs' treating physicians could testify regarding the Plaintiffs' future care and treatment and costs of same. (4 A.A. 00709)

In fact, Defendant fails to acknowledge in their Opening Brief, that when the Trial Court addressed their objection at trial, the Court in fact limited Plaintiffs' treating physicians testimony on future treatment and care to what was in the medical records and within their field of practice. Specifically, the Court precluded Dr. Adair from testifying about future chiropractic treatment that the Plaintiffs may need in the future because such future care was not indicated in her medial records. (4A.A.00605-00608) The Trial Court also limited Dr. Adair from testifying about the costs of the future pain management that Plaintiffs may require in the future as well. (4A.A.00605-00608) The Trial Court precluded Dr. Lanzkowsky from opining about any procedures other than Rhyzotomies as that was the only procedure discussed in the medical records. (5A.A.00806-00808) The Trial Court also precluded Dr. Kaplan from opining about adjacent segment breakdown and the need for a second fusion. The Trial Court properly addressed the Defendant's same argument at the time of trial and only allowed testimony concerning procedures that were contained in the medical records. (5A.A.00959-00972) Defendant has failed to

set forth any evidence showing that the Trial Court abused its discretion in permitting the limited evidence that was properly and timely produced pursuant to NRCP 16.1 regarding the necessity for future damages.

Further, Defendant's lack of prejudice precludes a new trial. Defendant was fully aware of the future treatments recommended in the medical records produced during discovery as well as the depositions of the treating physicians that Mr. Cervantes would require a future lumbar fusion. Dr. Kaplan opined in his medical records and his deposition about the need for this future procedure. (1R.A.00069) Dr. Duke was retained to rebut this proposition and did testify to this very issue at trial. In fact, Dr. Duke testified to what the reasonable cost is for this procedure when rebutting Dr. Kaplan's suggested amount. (6A.A.01070) Ultimately, it is the jury that decides the reasonable amount of the cost. The Trial Court advised the Defense on at least two separate occasions prior to trial that the cost of the surgery at present value would be testified to by the treating physicians. Dr. Duke was allowed to rebut these costs even though he specifically stated in his report and his deposition that he had no opinion about costs of any treatment, past or future. (1R.A.00112) (1R.A.00083-00104) Yet, Dr. Duke offered these new opinions about the past and future costs of the surgery and other treatment. (6A.A.01063-01070) Simply, there is absolutely no prejudice to Defendant as she was permitted to rebut each of the

concerns she now complains of with the competent expert medical testimony of Dr. Duke. Therefore, Defendant cannot demonstrate that the outcome would have been any different or that her rights were substantially affected.

1. The Trial Court Did Not Shift The Burden To Defendant

Defendant argues that the Trial Court "reversed the burden of discovery and production" to the Defendant regarding Plaintiffs' future damages. (Appeallant's Opening Brief 10:3-5; herein after cited as "O.B.") However, the Trial Court's ruling was proper, as Plaintiffs did meet their burden, pursuant to NRCP 16.1.

Defendant's reliance on *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 593 94 (D. Nev. 2011), is misplaced. First, the *Palms* case is controlling in this matter, yet Defendant has abandoned same, fully ignoring the *Palms* case entirely and now relying only on federal law and cases from other jurisdictions that have different standards than NRCP 16.1(a), which is further detailed by *Palms*. In *Jackson,* the federal district court found that evidence of the plaintiff's future damages should be excluded at trial because the plaintiff did not disclose *any* evidence and instead just provided a medical waiver to the defendants to go obtain the medical records and bills themselves. *See, Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 594 (D.Nev.2011). Unlike *Jackson*, Cervantes and Avarca not only provided a medical authorization for Defendant to get the medical

records and bills, Plaintiffs disclosed all of their medical records that clearly set forth their need for future treatment and care, and Defendant had the opportunity to depose Plaintiffs' treating physicians regarding their opinions on future treatment. Dr. Kaplan opined in his medical records and at his deposition before trial that a lumbar fusion was necessary and related to this case. (1R.A.00143-00188) Dr. Lanzkowsky performed a discogram and ordered MRIs further supporting the need for same. (1R.A.00189-00219) Defendant was clearly put on notice of Plaintiffs' future treatment and the Trial Court properly permitted this evidence at trial, as the admissibility of evidence is within the sound discretion of the trial court judge.

Thus, Defendant's argument that the presentation of Plaintiffs' future damages was a surprise is without merit, as the Trial Court had already ruled that Plaintiffs' expert, Dr. Kaplan, could testify regarding Christian Cervantes' future spinal fusion and the costs surrounding the procedure. (5A.A.00959-00972) It was at the request of Defendant's counsel that Plaintiffs' counsel agreed to provide an actual number and as a courtesy did provide a number. (5A.A.00748-00752) It was not in fact "compelled" by the Court as the Defendant suggests. (O.B. 7:20-23) Furthermore, Defendant argues in footnote one that "the amount disclosed by Plaintiffs per the Court's Order was not the same amount that was testified to by Plaintiffs' doctors." (O.B. 7:27-28). Although the number was not the same as the estimate given as a

courtesy to the Defendant, it is unknown why the Defendant would complain as the breakdown of the costs was actually *less* than the total cost previously provided to Defendant. So it is unclear how a procedure that Defendant was fully aware of that the costs were less than anticipated could prejudice the Defendant in any way. Prior to his testimony, Dr. Duke reviewed the cost of the procedures and testified to same during Defendant's case in chief. Defendant cannot complain that there was a surprise when her counsel intentionally refused to ask Dr. Kaplan for an amount of the cost of the surgery in his deposition when Dr. Kaplan clearly testified that the surgery was necessary and related to this case. The Trial Court reasoned that Defendant cannot cry ambush when it was free to ask these simple questions in the deposition, and all reasonable litigants understand and know the cost of the procedures at hand. Simply, there was no surprise about the need for the procedure and Defendant's strategy not to ask simple questions about cost will not create her own prejudice at a later time. As demonstrated, any alleged prejudice is disingenuous as the Trial Court allowed wide latitude to Dr. Duke to give his opinions regarding the cost and need for this future surgery and treatment.

Plaintiffs properly disclosed their need for future care and treatment pursuant to NRCP 16.1(a) and Nevada law. Simply because Defendant continues to ignore *Palms*, the controlling law in this jurisdiction, and instead try to force Plaintiffs to

comply with the federal standard of disclosure of future computation of damages, does not mean that Plaintiffs had some type of "calculated plan to ambush Defendant at trial." Defendant had an expert and was well aware of the future costs of this type of procedure. Defendant's case is managed by a sophisticated insurance company with seasoned attorneys, and they should not be able to play a disingenuous role of naivete to persuade this Court that the Trial Court abused its discretion in permitting these damages. Defendant's grievances regarding the Trial Court's rulings have no merit and certainly do not warrant a new trial.

B. <u>The Court Properly Excluded The Testimony Of Tammi Rockholt, RN</u>

The Trial Court's exclusion, after proper voir dire of Nurse Rockholt, was not an abuse of discretion. (O.B. 19:4-6) Defendant argues that the Trial Court abused its discretion for several unfounded reasons. First, the Trial Court properly excluded Nurse Rockholt, after voir dire, because she was unqualified and unable to provide the Court with any reliable methodology for how she calculated what she opined were reasonable and customary charges for medical treatment in Las Vegas. (5A.A 00864-00884) Second, at no time did the Trial Court base its ruling on the fact that a nurse may not testify against a doctor's opinions. (O.B. 20:3-4) The theme of the Defendant's briefing before the Trial Court and this Court is to represent the record in a false light as the assertions were never stated in the record. Third, the basis and

foundation for Plaintiffs' treating physicians' testimony on the customary and reasonableness of Plaintiffs' treatment and billing is that they practice in the medical community in Las Vegas and have done so for many years, not just some review of a national CPT database used for reimbursement of medicare or high volume insurance and/or managed care contracts. Fourth, Nevada law clearly precludes any reference to the collateral source of payment, as set forth in *Proctor v. Castalletti*, 112 Nev. 88, 911P.2d 853 (1996).

1. Nurse Rockholt is Not Qualified to Testify as an Expert in this Matter

Defendant's "expert" in this matter, Tami G. Rockholt, is a registered nurse, a nurse consultant, and a "medical bill review expert," based out of Oregon. However, Nurse Rockholt is not qualified as an expert in this field.[2] *See, Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). It is the most elementary of rules governing expert testimony that an expert must be qualified to testify to a partiular standard within the actual community in which the opinions are given. *Flamingo Realty v. Midwest Dev.*, 110 Nev. 984, 988 (Nev. 1994). In this case, the subject community is the billing standards of Las Vegas medical providers. Nurse Rockholt, however, has no experience or training as a practicing nurse in the State of Nevada

[2] Nurse Rockholt has previously been excluded from providing substantially similar opinions in the Eighth Judicial District Court. Specifically, Judge Barker excluded Nurse Rockholt from offering substantially similar opinons relating to the reasonableness and necessity of the medical procedures in Las Vegas. (1R.A.00220-00222)

or the Las Vegas community. (1R.A.00223-00227) Moreover, the usual and customary billing rates vary depending upon the community; therefore, it is essential that an expert who is intended to testify to the usual and customary billing rates of a particular community be knowledgable and familiar with those billing rates and procedures. Given Nurse Rockholt's lack of experience and training and her unfamiliarity with the billing standards in this community, she is not qualified to offer an opinion regarding such and was properly excluded from offering testimony at trial.

2. Nurse Rockholt's Opinions Would Not Assist the Trier of Fact.

Nurse Rockholt has failed to provide the proper foundation for her opinions in order to assist the trier of fact in determining whether the cost of Plaintiffs' medical treatment is customary and reasonable in the Las Vegas community. In her reports, Nurse Rockholt does not provide any basis for determining the reasonable and customary charges for medical care in the Las Vegas community, aside from the national CPT codes and her education and her experience (outside of Nevada). (1R.A.00228-00243) Nurse Rockholt has no personal knowledge of what the usual and customary billing standards are in the Las Vegas community.

Insurance industry billing codes cannot provide the proper foundation for Nurse Rockholt. The entirety of Nurse Rockholt's reports and opinions that she

intended to offer in this case consist of a history of the CPT code system in the United States and then nearly six pages of her review of "appropriate billing practices" pursuant to these CPT codes. (1R.A.00228-00243) Nowhere in her report does Nurse Rockholt even mention reviewing the rates with respect to the Las Vegas medical community. Instead, Nurse Rockholt relies on the national standard for health insurance companies' coding practices and completely ignores the usual and customary charges in the Las Vegas area. Specifically, Nurse Rockholt's opinion with regard to Mr. Cervantes-Lopez is based upon a selective and arbitrary review of the specific CPT codes from Plaintiff's medical records and a brief history of CPT codes, and therefore finds that only $13,005.48 of Christian's $55,784.45 incurred medical costs is related to the subject incident. (1R.A.00235) Similarly, Nurse Rockholt opines that only $10,018.38 of Maria's $41,596.47 incurred medical costs is related to the subject incident. (1R.A.00243)

Nurse Rockholt's analysis was unlike Dr. Koka's analysis, who based his testimony on his practice and experience in the Las Vegas community. Ms. Rockholt's proposed testimony was based solely on the reimbursement standard for insurance companies and ignores the proper analysis of the total charges incurred by the Plaintiffs for treatment in a personal injury case in Las Vegas. Thus, it is clear that Nurse Rockholt is not able to offer any opinions concerning what is reasonable

and customary in the Las Vegas community, where Plaintiffs' treatment was based. She did not possess the requisite foundation to offer any of her opinions. Pursuant to *Hallmark v. Eldridge*, there has not been any showing that Nurse Rockholt's testimony is based upon reliable methodology and this would not assist the jury. *Hallmark,* 189 P.3d at 651-2; *See also, Choat v. McDorman*, 86 Nev. 332, 335, 468 P.2d 354, 356 (1970) (concluding that an expert's testimony is inadmissible if it rests more on assumptions than facts); *Valentine v. Pioneer Chlor Alkali Co., Inc.*, 921 F.Supp. 666, 672 (D. Nev. 1996) (concluding that a physician's testimony was unduly speculative and did not reach the level of "scientific knowledge" because he opined that the plaintiff's abnormalities "could have occurred as a result of the toxic event" without knowing of any scientific research that would support his conclusion (quoting witness's testimony)).

3. Nurse Rockholt's Opinions are Precluded by Nevada's Collateral Source Rule.

Nurse Rockholt's reliance on CPT codes is misplaced given the fact that evidence of CPT codes is inadmissible pursuant to the well-established Collateral Source Rule, as the mention of CPT codes would inform the jury of a collateral source of payment and further confuse the jury. If her testimony was allowed, the focus of the trial would then be a debate why insurance payments, insurance contracts and insurance reimbursements have nothing to do with reasonable charges

in the community for this particular case. In *Proctor*, this Court held that the admission of a collateral source of payment for an injury into evidence for any purpose is improper. *Id.* at 90. This Court further held:

> We adopt a per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose. Collateral source evidence inevitably prejudices the jury because it greatly increases the likelihood that a jury will reduce a plaintiffs award of damages because it knows the plaintiff is already receiving compensation. *Id.*

It is clear that there are no circumstances under which a district court may properly exercise discretion to find that relevant collateral source evidence outweighs its prejudicial effect. Furthermore, the Trial Court properly excluded any reference to insurance precluded by the collateral source rule. (1A.A.00056-000057)

Moreover, Defendant fails to articulate how she suffered any prejudice by this Court's proper exclusion of Tami Rockholt. Defendant fails to acknowledge that her expert, Dr. Duke, was permitted to testify whether Plaintiffs' medical specials were reasonable and customary. In fact, the Defense spoon-fed the calculations and conclusions of Rockholt, which were on two charts prepared by Nurse Rockholt, to Dr. Duke on the stand whereby he adopted them as his own. Dr. Duke testified, as follows:

> Q. Okay. In these two documents, is the information that is contained on those information you have viewed and reviewed before?
> A. Yes.
> Q. Does that refresh your recollection as to what you believe the reasonable

medical bills for Maria Abarca are?

A. Yes.

Q. And what is that number?

A. And -- and again, just so you're clear, I'm not saying that -- that this amount is related to the accident. It's just if one were to bill properly the procedures that were performed, the amount would be 24,107. But I'm not relating that to the car accident.

Q. Very good. And same question with respect to Christian Cervantes?

A. And with the same, you know, caveat, it would be 36,214.

Q. What was the number again?

A. $36,214.38. And that was if one properly billed for all the services that were provided.

(6A.A.01068-01069)

Regardless of excluding Rockholt, Dr. Duke admitted her opinions and her version of the reasonableness of the medical bills, so there is no prejudice to the Defense as, Defendant was able to and in fact did contest the medical bills through the testimony of Dr. Duke, a neurosurgeon, who was much more qualifed to render such opinons. Thus, Defendant was able to present all of Rockholt's intended testimony and has suffered no prejudice.

C. Plaintiffs' Counsel's Arguments Were Proper And Do Not Violate *Lioce*

Defendant's arguments constitute her (i.e., the insurance company's and defense counsel's) own self-serving interpretation in a conclusory fashion when she summarily states that "Plaintiffs' counsel's opening and closing arguments violated *Lioce v. Cohen*, 124 Nev. 1, 23, 174 P.3d 970, 984 (2008)," and then cite to four

alleged violations, which are in fact not violations. (O.B. 23:2-5) The theme of the Defendant's post trial briefing is to cast aspersions against Plaintiffs' counsel and misrepresent the actual record when giving her self serving conclusions. Each and every one of the alleged *Lioce* violations that Defendant cites were proper arguments to present to the jury during opening and closing statements. The Trial Court properly addressed each instance at the time of the objection, ruled and, in an abundance of caution, ultimately admonished the jury if the objection was sustained. Nevada law provides that counsel is permitted to explain to the jury what the evidence in the case will show in their opening statement and counsel is given wide latitude during their closing argument to make reasonable inferences from the evidence, so long as the evidence was presented during the course of the trial.

1. <u>Disparagement of Duke</u>

Defendant claims that Plaintiffs' counsel made references to Dr. Duke being "for sale" and an "expert who will say anything once paid" in opening statements and that the court allowed "Plaintiffs' line of attack, ruling it was argument" in closing and, thus, somehow this is "Disparagement of Dr. Duke." (O.B. 23:5-22) Similar to their trial tactics and post trial briefing, the defense is putting their own words in place and stead of the actual transcript and what was actually said.

In Opening, Plaintiffs' counsel simply stated that the evidence would show that

Dr. Duke's services were "for sale." (4A.A. 00465-00466) However, the Court agreed that is what the evidence will likely show, but that it had an element of argument and not proper for opening. (4A.A. 00467-00468) Then on February 27, 2015, Dr. Duke testified that ***his services were for sale*** because he was hired by the defense and he is expected to perform a service in exchange for payment. (6A.A. 01112-01113) This is testimony in the record that was exactly what Dr. Duke stated at trial. Dr. Duke admitted on the stand that his services in this case were "for sale." However, Plaintiffs' counsel's reference to such in opening statement, which was sustained, was not a violation of *Lioce* because that is exactly what the evidence was going to show, and in fact, did show. Moreover, a very similar statement was made in closing argument and the Court overruled the objection because the evidence was presented during the trial; it was proper argument based on the evidence in the case and a not a violation of *Lioce*. (8A.A. 01392)

In footnote 11, Defendant attempts to argue that the line of dollar signs in Plaintiffs' Opening Statement was used to emphasize the point that Dr. Duke was "for sale." (O.B. 23:27-28) The dollar signs were not used for that purpose, but were instead used to explain that Dr. Duke charges a lot of money for his services. Although this is not improper of anything, the Court sustained Mr. Baird's objection and told Mr. Simon to move on, which Mr. Simon did. There is no evidence that the

dollar signs that were on the screen for less than three seconds would have changed the outcome of this case. During trial, the evidence did show that Dr. Duke charges a substantial amount for his services and using dollar signs in an opening is not a violation of anything. All parties are free to discuss that experts charge substantial sums to testify and perform work, which is proper impeachment testimony and argument as the jury instructions make clear that the jury is to evaluate the motives of any witness on the stand. This is why the Defense did the same thing during trial. In fact, the defense compared Dr. Duke's fees to Dr. Kaplan's fees and argued his motive for bias based on a $35,000 surgical fee plus his deposition fee of $1,500. (6A.A.01169-01174)

At no point in time during this trial, did Plaintiffs' counsel disparage any witness, including Dr. Duke. As such, Plaintiffs' counsel's remarks were not improper and clearly did not violate *Lioce*.

2. <u>Plaintiffs' Counsel Did Not Improperly Attempt to Influence the Jury</u>

It is elementary to any trial lawyer that you cannot ask the jury to put themselves in the position of one of the parties, and such arguments are improper pursuant to Nevada law. Defendant asserts that Plaintiffs' counsel violated the golden rule by asking the jury to make a statement and to possibly put itself in the

news by its verdict. (O.B. 10-11) This is not true and just another example of the Defendant asserting a proposition not supported by the record. The Plaintiffs did not ask the jury to place themselves in the position of the Plaintiffs as alleged.

Defendant cites Plaintiffs' counsel's statements to the jury during opening that their verdict will "affect the community,"and during closing Plaintiffs' counsel made arguments "requesting that the jury make a statement with their verdict" as violation of Nevada law. Defendant *incorrectly* claims that Plaintiffs' counsel's argument in closing was requesting the jury to make a statement with their verdict. However, a review of the pages of the transcript defense counsel cites does not ever state that the jury make a statement with their verdict to the community or that they should send a message to the community. In *Lioce*, the Supreme Court found that Mr. Emerson's statements were improper because he was suggesting to the jurors that ***regardless of the evidence***, if the jury found in favor of the defense, the jury could remedy the social ills of frivolous lawsuits. Here, Plaintiffs' counsel's arguments never once told the jury or even remotely suggested to the jury to ignore the evidence and send a message to the community with their verdict. (8A.A.001425-001427) Moreover, Defendant objected, the Trial Court sustained the objection and Plaintiffs' counsel concluded closing arguments. (8A.A.001425-001427) Notably, this Court has approved the send the message arguments *if it is based on the evidence in the very*

case to the very defendant, which is exactly what was done in this case. *Gunderson v. D.R. Horton, Inc.*, 319 P.3d 606, 613-614 (Nev. 2014). Plaintiffs tailored their arguments to this specific Defendant and never suggested to send a message to the community at large in closing arguments. Neverthless, Defendant continually misrepresents the record to make her arguments. Upon review of the transcripts, it is clear that the Defendant's self-serving interpretation is not what was said or what actually occurred and/or does not support her arguments.

Defendant's argument leaps to unfounded conclusions and are simply not violations. Defendant has failed to identify any facts, argument or analysis that would lead the Court to conclude the outcome would have been any different and does not warrant a new trial. In an abudance of caution, the Trial Court did sustain an objection and admonished the jury to disregard. Even though Plaintiffs assert that the objections should not have been sustained, the Trial Court admonished the jury to disregard the prior statement. (3A.A.00470-00471) The defense has failed to demonstrate that the alleged misconduct's harmful effect was not removed through the Trial Court's sustained objection and admonishment.

3. <u>Plaintiffs' Counsel Did Not Improperly Reference Insurance</u>

Defendant argues that Plaintiffs' counsel improperly referenced insurance several times during the course of the trial and also "injected the idea" of insurance

during the cross-examination of Dr. Duke. (O.B. 26:14-19) Interestingly, the only portion of the trial transcript that Defendant can point this Court to is during the cross-exmaination of Dr. Duke when Plaintiffs' counsel asked him who he was hired by to conduct the IME. Specifically, Dr. Duke testified:

> 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 physcian, 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 -- the're the ones who who I -- who has representation who's hired me on their behalf.
> Q. Okay. So the firm, Rogers Mastroangelo, did not hire you; it was Ms. Ortega back in the court?
> A. I think it was via the 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)

The testimony is clear. Plaintiffs' counsel did not elicit Dr. Duke's reference to insurance during his testimony. Plaintiffs' counsel simply asked Dr. Duke if he was different than a treating physician in this case. Dr. Duke has testfied in thousands of cases over the last decade and knows that he is not permitted to comment on insurance. Dr. Duke knows that he was hired by the Defendant and that the Defendant herself is not going to pay him. All he had to say is "No." Dr. Duke knows exactly who was paying for his services and clearly tried to be evasive when responding to Plaintiffs' counsel's question.

It was Defendant's counsel and Defendant's expert, Dr. Duke, that referenced the term "insurance" several times throughout trial and, in fact, an admonishment, Jury Instruction No. 7, was read to the jury. (8A.A.01509) The only times in which Plaintiffs' counsel referenced the term "insurance" was during voir dire and he only quoted from the jury instruction given in this case. The jurors were advised that they will not be able to consider whether any party is carrying insurance and nothing more. (2A.A.274-281) Plaintiffs' counsel never elicited a response inviting insurance, and Defendant's desperate attempt to blame counsel should not be considered, especially when the Defense equally had inadvertent insurance answers. This is why it was agreed by the Defense and the Plaintiffs that the curative instruction would be read to the jury. In speaking with the jury after the verdict, they acknowledged that they did not consider insurance so there can be no demonstrated prejudice to warrant a new trial. Plaintiffs' counsel did not impermissibly reference insurance in this matter as set forth above, and this argument is certainly not grounds to warrant a new trial.

4. Plaintiffs' Counsel Did Not Disparage Defendant's Case

Defendant claims that Plaintiffs' counsel argued that the Defendant was "avoiding responsibility," and this amounts to Disparagement of the Defense case. (O.B. 28:14-15) However, not once did Plaintiffs' counsel utter the words that the Defendant was "avoiding responsibility." The authority in which Defendant relies,

Fasani v. Kowalski, 43 So. 3d.805, 809 (Fla.Dist.Ct.App.2005), has ***no*** application to the instant matter. In *Fasani*, a plaintiff was injured by an elevator. During trial, plaintiff's attorney continuously told the jury that the defense was only motivated by "corporate greed" and statements like "they wanted a pretty elevator and they didn't care who got hurt or how bad it was. And when someone got hurt, they said, you know what, yeah, we made a mistake but we're not giving you anything." *Id.* However, the Appellate Court held that these comments were improper and served no other purpose than to inflame and prejudice the jury, because there was never any evidence of corporate greed introduced in the case. Unlike *Fasani,* in the instant case, the evidence clearly shows that Defendant filed an Answer denying liability and then, without leave of the Court, filed an Amended Answer accepting liability. (1A.A.0005-00015) Defendant objected to Plaintiffs' counsel's recitation of the pleadings and the Court properly overruled the objection because the evidence of the case (i.e. the pleadings) actually showed that Defendant denied liability and then accepted liability. (3A.A.00442-00448) Plaintiffs' counsel never once made any improper argument "disparaging the defense case," and *Fasani* and the other cases relied upon by defense have no application to this case.

It is disingenuous for the defense to accuse Plaintiffs' counsel for disparagement of their case, as Plaintiffs' counsel's argument were proper. Once again, Defendant's interpretation of the record was not what was actually said.

D. Defendant Was Properly Precluded From Presenting Evidence Of Liens

The Trial Court properly precluded evidence that Plaintiffs' medical treatment was on a lien. (1A.A.00056-000057) Defendant would like this Court to simply ignore Nevada precedent and apply California law because it is more favorable to them. Plaintiffs address this more fully above in Section III.B.3 in regards to Nurse Rockholt's testimony and incorporate such arguements hereto. Liens are merely a form of payment in place for someone who does not have insurance. As Defendant has complained about using the term "insurance," any referense to a lien invites testimony about insurance or the lack thereof and the purpose of this payment source.

E. The Sub Rosa Surveillance Video Was Properly Excluded.

Defendant summarily argues that she "timely produced a copy of the video surveillance" pursuant to a stipulation to extend the discovery plan to January 9, 2015. (O.B. 29:20-21) The stipulation that Defendant is referring to, was not an extension to extend *all* discovery in this matter. (8 A.A. 01603-01605) Instead, as was argued right before trial started, the stipulation and order that Defendant is relying on was intended only to supplement *new* evidence 30 days prior to trial, as

required by NRCP 16.1. It was not until January 29, 2015, just days before this trial was to begin, that Defendant chose to disclose the surveillance video taken from December 14, 2013 - January 23, 2014, over a year prior to its disclosure. (1A.A.00109-00115) This is a video manufactured by the Defendant without the knowledge of the Plaintiffs and where the Plaintiffs had no ability to get on their own. This video was solely in the possession of the Defense for over a year prior to its disclosure while discovery was still open. (1R.A.00244-00248). Defendant never provided an aduquate reason as to its concealment for this length of time. This is quite different than evidence that was created by an independent third party and available to both parties during discovery. Defendant cannot hold on to evidence for over a year and then disclose on the eve of trial long after the discovery cut-off and argue that she was somehow prejudiced by the Trial Court's exclusion of this untimely evidence on the eve of trial.

The Trial Court properly excluded this untimely surreptitious evidence, and, simply because Defendant chose to disregard the Nevada Rules of Civil Procedure and attempt to ambush Plaintiffs on the eve of trial, does not prejudice Defendant at all and certainly does not warrant a new trial.

F. Dr. Duke Was Properly Precluded From Offering Testimony Regarding Secondary Gain.

It is well-known in the Las Vegas legal community that Dr. Duke believes and commonly opines that personal injury plaintiffs have secondary gain motives in seeking medical treatment. This case is no different and Plaintiffs filed a motion in limine to preclude such opinions at the time of trial. The Trial Court heard this argument during the October 14, 2014, hearing and properly ruled that Dr. Duke could not testify that Plaintiffs had secondary gain motives for seeking treatment in this case. (1A.A.00088-00097) In fact, Dr. Duke testified in his deposition and during trial that he believed that the Plaintiffs were truthful. (1R.A.00114) Rather than focusing on the facts of this particular case, Defendant argues that she should be able to present evidence to the jury that ***generally*** there is a "possibility that patients involved in ligation could also exaggerate their symptoms due to secondary gain motivations," and that Dr. Duke should be able to offer these opinions. (O.B. 29:25-28) Defendant's argument fails on many levels. First, none of Plaintiffs' experts testified that Plaintiffs' had secondary gain motivations in this case. Dr. Duke lacked the requisite foundation to give such an opinon as to these particular patients. Second, Dr. Duke admitted that the Plaintiffs were truthful. (1R.A.00114) Third, any testimony of secondary gain by any witness has to be supported by the evidence in this case, which does not exist in this particular case. Defendant cannot argue that

she suffered prejudice and should receive a new trial by this Court's exclusion of Dr. Duke's ***general*** testimony regarding a general hypothetical based on facts that do not exist in this case. Since there is no evidence in this case that suggests Plaintiffs had secondary gain motivations, this argument is without merit. This type of opinion also requires a psychological opinion that Dr. Duke openly admits that he is not qualifed to give. Thus, this limited testimony was properly precluded by the Trial Court.

IV.

CONCLUSION

The District Court did not abuse its discretion in denying Defendant's Motion for New Trial because, based upon the foregoing, a new trial is not warranted. Plaintiffs respectfully request that the Jury Verdict, Judgments and Trial orders be affirmed in their entirety.

Dated this 18th day of April, 2016.

By _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answering 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 point font. I further certify that this brief complies with the page or tye volume limitation 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 Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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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 18th day of April, 2016.

By _____

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Simon Law and on this 18th day of April, 2016, I served a copy of the foregoing **RESPONDENTS' ANSWERING BRIEF** by the Nevada Supreme Court's E-Flex System and Hand Delivery, upon the following counsel of record, as follows:

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