IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANTS' REPLY BRIEF

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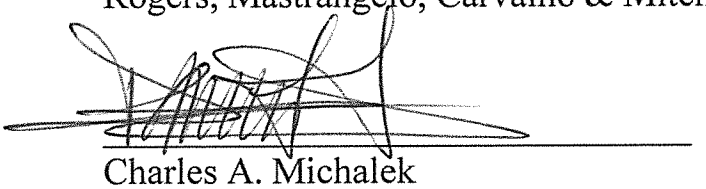
NRAP 26.1 DISCLOSURE

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



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I.

SUMMARY OF ARGUMENT

Plaintiffs argue that Defendants were made "fully aware" of Plaintiffs' need for future medical treatment. Plaintiffs even provide their own appendix allegedly supporting this notice. However, a review of the medical records shows that no opinion as to future medical care was provided. Moreover, there was no computation of damages ever provided to Defendants until after trial commenced.

Plaintiffs had the burden to produce evidence of any future medical care, including providing an estimate of its costs pursuant to NRCP 16.1. Merely providing medical records, or identifying Plaintiff as a " candidate" for surgery does not comply with NRCP 16.1. Defendants were unfairly prejudiced by allowing this evidence.

Plaintiffs' counsel also made repeated improper arguments in violation of *Lioce v. Cohen*, 124 Nev. 1, 23, 174 P.3d 970, 984 (2008). The trial court improperly excluded Tami Rockholt as an expert. These errors should be addressed before re-trial.

II.

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).

III.

ARGUMENT

A. A New Trial Was Warranted as Defendant Was Unfairly Prejudiced by Plaintiffs' 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.

Plaintiffs' Answering Brief argues that Defendants have "abandoned" Nevada law in favor of Federal law[1], and that Defendants were "fully aware" of Plaintiffs' need for future medical treatment. (Answering Brief at page 3). A review of Respondent's Appendix of the records cited in support of this claim (1 R.A. 00143-00188) shows this argument is wholly without merit. Nowhere in the medical records is there an opinion, provided to a reasonable degree of medical probability, that Plaintiff will have a future surgery. Nor is there a detail of the specific surgery, and the expected costs it would entail.

1. Nevada and Federal Authority Require a Computation of Damages and Disclosure of Opinions Concerning Future Medical Care.

Plaintiffs argue that Defendants have "abandoned" Nevada authority by relying upon Federal cases, and argue that the "standards" under NRCP 16.1 are somehow different from Federal standards. (Answering Brief at page 7). This argument is without merit.

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[1] Federal cases support and aid interpretation of Nevada law. See *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

NRCP 16.1(a)(1)(c) clearly requires a Plaintiff to provide an actual computation of future damages. NRCP 26(e) further requires a party to timely supplement the disclosures made under NRCP 16.1(a). These requirements are the same under the Federal Rules of Civil Procedure, which likewise requires a Plaintiff to provide a computation of damages. See *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 593 94 (D. Nev. 2011).

Thus, the standards under Nevada and Federal law are actually the same: both have a mandatory requirement that a Plaintiff provide a computation of damages they will seek at trial. It is undisputed that Plaintiffs did not provide a computation of future damages during discovery. (5 A.A. 00748-00752).

NRCP 16.1 says that a party **must** provide such information without a discovery request. 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 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 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 clearly did not comply with the disclosure requirements of NRCP 16.1.

2. <u>The Documents Cited in Respondent's Appendix Do Not Show Notice of an Upcoming Future Surgery.</u>

Plaintiffs argue that Dr. Kaplan "opined" in his medical records, and in deposition, that a lumbar fusion was necessary and related to this case. (Answering Brief at page 8). Plaintiffs attached and cited to these records in their own appendix. (1 R.A. 00143-00188).

However, these records do not show an upcoming surgery was going to occur, nor did these records put Defendants "on notice" of an upcoming surgery. Both the medical records and the deposition testimony establish that no surgery was scheduled to occur. The medical records state that Plaintiff Cervantes-Lopez will live with his pain instead of surgery:

> Mr. Cervantes Lopez is a man status post MVA with back pain. He had leg pain. The leg pain has resolved. The leg pain is on the posterior aspect of the leg in an apparent S1 nerve root distribution. He has evidence of obvious pathology at L5-S1. I have recommended an L6-S1 fusion for him. The risks, benefits and alternatives to surgery were discussed with him. All questions were answered. He would like to live with the pain as long as he can. I think this is a very reasonable approach and appropriate. He states at this stage he can live with the pain as he has it. All questions were answered. If his symptoms worsen, I would be happy to see him back in the office.

(1 R.A. 00144). Plaintiffs thus argue that a "candidate" for future surgery constitutes

"actual notice" of the future damages. It does not.

Dr. Kaplan did **not** testify during deposition that Plaintiff 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 doctor's file. (9 A.A. 01720-01721). Dr. Kaplan did not know. 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). Likewise, no documentation of Plaintiff Avarca's future care was ever disclosed.

In any event, such "notice" of a potential future surgery is insufficient as a matter of law to comply with the rule requirements. See *Calvert v. Ellis*, 2015 WL 631284, at *4 (D. Nev. Feb. 12, 2015).

A plaintiff seeking future medical expenses "must establish that such future medical expenses are reasonably necessary," *Hall v. SSF, Inc.*, 112 Nev. 1384, 1390, 930 P.2d 94, 97 (1996), and that the contemplated damages are reasonably certain to be incurred. See *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 249, 955 P.2d 661, 671 (1998) (in order to recover future medical expenses, a plaintiff must show "a reasonable probability that such expenses will be incurred."). See also Nev. J.I. 10.02 (providing that recoverable future medical expenses are those that a jury believes a

plaintiff "is reasonably certain to incur.").

Plaintiffs did not present any expert opinion prior to the close of discovery, stated to a reasonable degree of medical probability, that such future surgery or medical care was reasonably certain to occur. Nor did any treating provider disclose the scope of such potential surgery, or the potential costs for it. Plaintiffs simply did not comply with the rule requiring a computation of future damages.

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). Dr. Kaplan should not have been allowed to testify regarding any future damages at trial.

3. No Computation of Future Damages Was Provided until Trial.

Plaintiffs did not provide 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).

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 final NRCP 16.1 supplement produced by

Plaintiffs during discovery did not include any costs for future care. (8 A.A. 01570-01574).

4. The Trial Court Ignored the Plain Language of the Rule and Placed the Burden of Discovery upon Defendants.

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**. (9 A.A. 01812). The trial court mis-interpreted NRCP 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, has 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. 2011).

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 Defendants the burden of attempting to determine the amount of Plaintiffs future damages.

Plaintiffs and the trial court improperly place the burden to discover future damages upon the Defendants. This is a complete reversal of the burden of discovery and production.

The Plaintiffs assert that, if the Defendants failed to ask the "right" question, such alleged failure is their own fault. (Answering Brief at page 9).This assertion is clearly wrong.

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

Plaintiffs do not bother to discuss any of the Federal cases cited in the Opening brief and ignore all of the pertinent case law of the Federal District Courts in Nevada. Plaintiffs simply assert that the "standards" of the Federal courts are somehow different. However, Plaintiffs provide no explanation of how the standards are "different," nor do Plaintiffs provide any sufficient reason for this Court to ignore the several Federal District Court cases directly on point[2].

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[2]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.

c. 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. NRCP 37 makes clear that if a party fails to disclose information required under NRCP 16.1 or NRCP 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).

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). Plaintiffs have not demonstrated that the failure to disclose was justified or harmless. In fact, Plaintiffs argue that they had no duty to disclose at all, Defendants had "notice" of a potential surgery, and that any problem with discovery was the Defendants' own fault. These arguments fail in face of the plain language of the rule.

20, 2013); *Smith v. Wal-Mart Stores, Inc.*, 2014 WL 3548206, at *5 (D. Nev. July 16, 2014).

See *Smith v. Wal Mart Stores, Inc.*, 2014 WL 3548206, at *4 (D. Nev. July 16, 2014).

Though Defendant had Dr. Duke available to testify, he was simply unable to provide any substantive opinion to contest many of the future costs requested. (6 A.A. 01079-01082). There was simply not enough time for Dr. Duke to review all of the potential costs and compare them to Plaintiffs' argued costs in order to determine whether such costs were reasonable. Defendants were unfairly prejudiced at trial by admission of this evidence, and reversal of the judgment is warranted.

B. Tami Rockholt Was Qualified to Testify as an Expert Witness.

Plaintiffs' treating physician, Dr. Koka, who was not designated as an expert and did not prepare a report, 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). Despite utilizing the same data, Ms. Rockholt was precluded from testifying on the same subject.

Tami Rockholt utilized one of two popular medical databases as foundation for her opinion on the reasonableness of Plaintiffs medical care. Dr. Koka, utilized one of those **same databases**, in book form, to form his own opinions as to the reasonable charges for medical care. Thus, Tami Rockholt and Dr. Koka had the same information and foundation necessary to determine the reasonable charges for medical care. (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 (5 A.A. 00877).

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). Dr. Koka should not have been allowed to testify regarding the reasonableness and necessity of medical bills of other medical providers while precluding Ms. Rockholt from providing the same testimony.

C. Plaintiffs' Counsel Made Several Improper Opening and Closing Arguments in Violation of *Lioce*.

Plaintiffs argue that "send a message" arguments to the jury are allowed if it is based on the evidence. (Answering Brief at page 20). What was impermissible, however, was that Plaintiffs repeatedly implored the jury to possibly put itself in the news with its verdict. *Lioce v. Cohen*, 124 Nev. 1, 18, 19, 174 P.3d 970, 981 (2008).

Plaintiffs began trial by telling the jury that its verdict will affect the community. (3 A.A. 00470). Defendants 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 its verdict. (8 A.A.

01426). Defendants objected, and the trial court told Plaintiffs to modify the argument. However, Plaintiffs quickly returned to the argument. (8 A.A. 01426).

Plaintiff 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, attempting to influence the jury with the prospect of making the newspapers and "preventing" future harm to the community. These arguments were clearly improper. See *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985):

> Our condemnation of a "community conscience" argument is not limited to the use of those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation.

Additionally, Plaintiffs' counsel blames Dr. Duke for the references to insurance at trial. (Answering brief at page 22). Plaintiffs' counsel, who knew that Dr. Duke was paid by counsel and not directly paid by Defendant, injected the idea of insurance coverage through "payment" for his testimony. (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 Defendants had insurance coverage. (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 Defendants do not pay for the expert but Defendants "act" as if they do. (6 A.A. 01107). This excuse is nonsensical. The questioning was designed to inject insurance further into the minds of the jury. (6 A.A. 01107-01108). The misconduct in totality warrants a new trial.

IV.

CONCLUSION

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

DATED this 16 day of June, 2016.

ROGERS, MASTRANGELO,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 15 pages.

I hereby certify that I have read this Reply 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), 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

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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 10 day of June, 2016.

ROGERS, MASTRANGELO,
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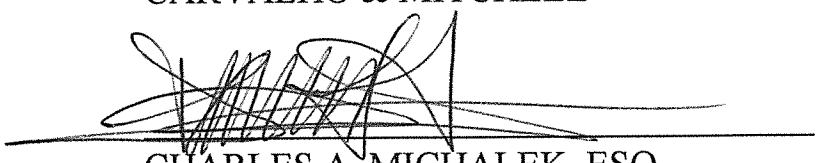

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CERTIFICATE OF SERVICE

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 16th day of June, 2016, a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** was served via Electronic Service and Hand Delivery, upon the following counsel of record:

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