

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MIRIAM PIZARRO-ORTEGA, AN  
INDIVIDUAL,

Appellant,

vs.

CHRISTIAN CERVANTES-LOPEZ, AN  
INDIVIDUAL; AND MARIA AVARCA, AN  
INDIVIDUAL,

Respondents.

CASE NO.: 68471

*Submitted by:*  
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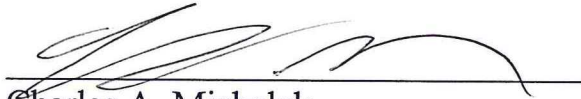
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### **NRAP 26.1 DISCLOSURE**

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 Appellant except current counsel,  
Rogers, Mastrangelo, Carvalho & Mitchell

A handwritten signature in black ink, appearing to read 'Charles A. Michalek', is written over a horizontal line.

Charles A. Michalek

Dawn L. Davis

Attorneys of Record for Appellant

## **I.**

### **REQUEST FOR RELIEF**

- A. Appellant seeks a new trial and/or remittur, and Appellant's Counsel did not intend to waive the relief of remittur.**

In preparation for this Petition for Rehearing, Appellant's counsel reviewed the recording of oral argument. At the end, Appellant's counsel admittedly did state that Appellant desired a new trial and not remittur. Appellant was attempting to argue that if a new trial was not warranted from the violations of NRCP 16.1 alone, then the other claimed errors would justify a new trial. Counsel did not intend to waive a request for remittur, and was inartfully expressing the belief that remittur was an inadequate remedy. Appellant requests that this Petition for Rehearing be granted, based upon a misapprehension of fact and misapplication of law, and grant a new trial or remittur of the future damages.

## **II.**

### **SUMMARY OF ARGUMENT**

A Petition for Rehearing is governed by NRAP 40(a)(2). Appellant contends that this court misapprehended a material question of fact and overlooked, misapplied



or failed to consider controlling authority. The Court has overlooked or misapprehended a material fact, in that Dr. Duke's testimony at trial involved *both the reasonableness and necessity* of both Plaintiffs future medical care, and the costs of such. (6 A.A. 01043-01044); (6 A.A. 01049-01051); (6 A.A. 01053-01054); (6 A.A. 01057-01058); (6 A.A. 01062-01063). Secondly this Court overlooked, misapplied or failed to consider the **mandatory** nature of sanctions under NRCP 37(c). NRCP 37(c) is a self-executing sanction which holds that evidence which is not properly disclosed cannot be used at trial **unless** Respondent's met their burden to show their failure was substantially justified or harmless. (O.B. at page 13); (R.B. at page 10). Respondents had not presented any evidence or argument satisfying that burden. (R.B. at page 10). The trial court could not have acted within its discretion when Plaintiffs did not present evidence of substantial justification or harmlessness.

### III.

#### ARGUMENT

- A. **This Court misapprehended a material fact in that Defendant contested the necessity for future medical care for both Plaintiffs though the testimony of Dr. Duke.**

NRAP 40(a)(2) states in pertinent part:

Any claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue.

In *Ortega v. Cervantes-Lopez*, 133 Nev Adv. Op. 37 at page 9, this Court stated:

Important to our conclusion is that appellant is not contesting whether Christian's future lumbar surgery is *necessary*, but only whether the testified-to cost of that surgery is *reasonable*. (Emphasis in Original.)

Appellant correctly argued that both Plaintiffs had substantial gaps in medical treatment, and that both Plaintiffs failed to disclose future medical care in answers to interrogatories, and to provide disclosure of *necessity* and *costs* of future care. (O.B. at page 6; pages 11-12). Appellant further correctly argued that both Plaintiffs failed to provide a timely computation of **any** future damages sought, which was improper under NRCP 16.1, (8 A.A. 01570-01574); (O.B. at page 9-10).<sup>1</sup>

In response to questions by Justice Parraguirre, Appellant pointed out that, at the

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<sup>1</sup>(O.B. at page 7; R.B at page 5). Defendant's briefing also presented case authority holding that merely identifying a Plaintiff as a "candidate" for future care does not comply with NRCP 16.1 (O.B. pages 5, 8). (R.B. at page 1). Appellant also specifically argued that Dr. Kaplan never opined that a future surgery for Plaintiff Cervantes-Lopez was reasonable and *necessary*, that Dr. Kaplan's medical records did not contain such an opinion, and neither Plaintiff provided proper *notice* of any future care, not just the costs. (R.B. at page 5-7).



time of the motion in limine hearing on Appellant's motion to exclude, Plaintiffs **still** had not made the determination that any future care was actually going to occur. (1 A.A. 00058-00061; 00064-00065). Plaintiffs even acknowledged at the same motion in limine hearing, well after discovery had closed, that it was still unclear if future care was going to occur with Plaintiff Cervantes-Lopez:

If he's talking about future medical care, I can understand the intent of the motion because while back in 2011 one of the physicians, a surgeon, did recommend a surgery for my plaintiff Cervantes-Lopez, he elected not to undergo that surgery. It's still an option, but the whole point is whether or not the plaintiff is actually going to undergo it.

(1 A.A. 00059-00060). Concerning the basis of the trial court's ruling, Appellant further pointed out that the trial court did not consider any sanctions under NRCP 37, because the trial court had improperly placed the burden onto Defendant to discover the scope of, and costs for, Plaintiffs future damages. (O.B. at page 8).

Appellant argued that the computation of damages was required by NRCP 16.1 in order to place Defendant on notice that Plaintiffs were seeking future damages **at all**, and secondarily to provide the amount sought. As this Court's opinion found, Plaintiffs did not comply with the mandatory rule. For these and other reasons, Appellants'

expert Dr. Duke, *contested necessity* for both Plaintiffs' future care at trial. (6 A.A. 01043-01044); (6 A.A. 01049-01051); (6 A.A. 01053-01054); (6 A.A. 01057-01058); (6 A.A. 01062-01063). Regarding Maria Avarca, Dr. Duke stated (6 A.A. 01049):

Q. Did you find in your review of the records and all the evidence in this case that there was a medical basis for interventional pain management for Maria Abarca --

A. No.

Dr. Duke's opined that Maria Avarca did not need any future medical care:

So there's no basis to make the opinion that she had a lumbar facet syndrome, and there's no basis to make the opinion that she had a need for further care, like a radiofrequency ablation.

(6. A.A. 01050-01051). Dr. Duke also opined that Cervantes-Lopez's did not need future surgery. (6 A.A. 01057):

And -- and so -- and just to finish answering the question as to why he's not a candidate for surgery, number one, the MRI doesn't show injury that's amenable to lumbar fusion, number one. Number two, the only basis with which I that I can see that he was recommended to have from review of these records was the discogram. And the discogram is a procedure where, you know, it's highly controversial.

Plaintiffs argued that Dr. Duke only contested necessity of medical care in his report, but Defendant tried to "spoon-feed" opinions on future costs through Dr. Duke once Ms. Rockholt was excluded. (6 A.A. 01064-01065); (6 A.A. 01071-

01077); (A.B. at page 15). Dr. Duke opined that any future care to Plaintiffs was simply not necessary, but that if Plaintiff Cervantes-Lopez's surgery was found necessary, then the costs were "too high". (6 A.A.01079-01082).

The trial court confirmed that Dr. Duke contested necessity of future care:

When I listened to Dr. Duke, if recollection serves, it appears that the issue of Plaintiffs presenting a claim for future damages had previously been presented to Dr. Duke and Dr. Duke nonetheless did not change his opinion that the only treatment that would have been warranted for those plaintiffs was cervical strain/sprain type standard treatment.

(9 A.A. 01733). Appellant agreed with the trial court. (9 A.A.01733-01734):

Sure, your honor. Let me break that down. So there's two points to that. Number one is Dr. Duke. **And you say, well, Dr. Duke's opinion had not changed that nothing was related. And that's true,** Dr. Duke's opinion did not change that it was related, but he was now placed in Tami Rockholt's position.

Appellant objected to Plaintiffs recovering for **any** future damages at trial.

Plaintiffs had not provided notice and opinions as to the reasonableness and

necessity of any future medical care, which included the costs of future care, but the

argument was not limited to simply costs. (O.B. at pages 3, 4, 6, 7, 9-12.)<sup>2</sup>

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<sup>2</sup> Footnote 9 of the opinion notes that Appellant had no individualized arguments concerning Maria's future medical costs. This is correct. Dr. Duke could only attempt to contest those costs for Plaintiff Cervantes-Lopez. Appellant's objections as to future expenses for Maria relied upon the failure to comply with



As this Court's opinion notes, an important consideration in the outcome was the Court's conclusion that Dr. Duke did not contest the *necessity* of future care. If the proper resolution of this case turns on whether Dr. Duke contested *necessity* at trial, then Appellant requests rehearing of this matter based upon the above appendix cites which proves a misapprehension of this material fact. The trial court record substantiates Appellant's position, that Dr. Duke clearly contested the *necessity* of future medical care for both Plaintiffs.

**B. This Court overlooked, misapplied or failed to consider controlling authority in that NRCP 37 sanctions are self-executing and Respondents never provided evidence that their failures were either substantially justified or harmless.**

Secondly this Court overlooked or failed to consider the controlling authority of NRCP 37(c). NRCP 37(c) is a **self-executing** sanction which holds that evidence which is not properly disclosed cannot be used 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).

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NRCP 16.1 by not describing the future care in interrogatory answers and in the required computation of damages prior to the close of discovery.

The Opinion cited *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 615 (2014) for the proposition that Defendant must show an abuse of discretion rather than Plaintiffs showing justification or harmlessness under NRCP 37. *Ortega v. Cervantes-Lopez*, 133 Nev Adv. Op. 37 at page 9. “But “where a trial court exercises its discretion in clear disregard of the guiding legal principles,” it “may constitute an abuse of discretion.” *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 615 (2014).

It is **undisputed** that neither Plaintiff provided a description of their future damages, a computation of such damages, or expert opinion that future care was reasonably certain to occur prior to the close of discovery. (O.B. at page 2); (R.B. at page 7); (8 A.A. 01587, 01600). Appellant’s arguments specifically raised NRCP 37(c) due to the mandatory sanction under the rule. (O.B. at page 13); (R.B. at page 10). Appellant also noted that the burden was upon Respondents to prove substantial justification or harmlessness. (O.B. at page 15; R.B. at page 10). Thus, NRCP 37 **mandated** exclusion unless justified or harmlessness was shown.

At no point during trial or in briefing did Respondents address why they



failed to comply with the discovery rules, or provide any excuse or justification for the failure. Respondents' argument that they had no duty to disclose was rejected as "untenable". *Ortega v. Cervantes-Lopez*, 133 Nev Adv. Op. 37 at page 7.

Just like NRCP 16.1 required Plaintiffs' computation of damages to provide notice they were seeking any future care (the category) and a computation (the amount), NRCP 37 required that such information not properly disclosed is excluded **unless** substantially justified or harmless. NRCP 37 must determine the outcome of this case. The opinion fails to apply NRCP 37's framework and thus overlooks, misapplies or failed to consider the appropriate governing law. The trial court could **not** have considered any excuse or justification under NRCP 37, because Plaintiffs simply never bothered to offered one, either to the trial court or this Court. The trial court could not have acted within its discretion to change the automatic mandatory sanction under NRCP 37, when no evidence was even made to the trial court establishing why Plaintiffs failed to disclose. The trial court's view was that Plaintiffs had not violated NRCP 16.1 by failing to disclose a computation, whereas this Court's opinion deemed such failures an error. The trial court

considered the issue in clear disregard of the mandatory sanction under NRCP 37 because the trial court reversed the burden to discover Plaintiffs future damages, and placed it on Defendant and not on Plaintiffs as the rules required.

**C. NRCP 37 must be interpreted to require mandatory compliance with the disclosure requirements.**

The Rules of Civil Procedure should be interpreted to secure the just and speedy determination of every action. NRCP 1. If NRCP 37 is not interpreted as requiring Plaintiffs to comply with the disclosure rules, then Plaintiffs have been provided no deterrence for any clear violation. This Court's opinion holds that Defendant's substantial rights were not affected because Defendant presented some evidence to dispute the surgical costs for Plaintiff Cervantes-Lopez.

The Court's opinion on this point relies upon the misapprehension of a material fact, in that Dr. Duke disputed *necessity* of future medical care for both Plaintiffs, as well as the surgery costs for Plaintiff Cervantes-Lopez. Additionally, this Court held that the trial courts must utilize the framework of NRCP 37 when a party fails to provide evidence required by NRCP 16.1. *Ortega v. Cervantes-Lopez*,

133 Nev Adv. Op. 37 at page 8. But then this Court ignores or misapplies NRCP 37 by again placing the same burden on Defendant to show her rights were substantially affected, and not on Plaintiffs to show substantial justification or harmlessness for their failure. Plaintiffs are provided no deterrence for their flagrant violation of the rules.

Plaintiffs never complied with NRCP 16.1 by telling Defendant, prior to the close of discovery, what future care Plaintiffs would seek at trial. Plaintiffs never provided a cost estimate of any future care until after trial had already begun. Plaintiffs were allowed to improperly request hundreds of thousands of dollars in future care that they failed to timely disclose, and the admission of this evidence certainly prejudiced Defendant because the verdict was improperly inflated by these future medical expenses. Plaintiffs obtained future damages which they never timely disclosed to the defense.

Without applying NRCP 37 to this case, Defendant is punished for attempting to mitigate the prejudice directly caused by Plaintiffs failures, and on 24 hours



notice, by presenting Dr. Duke's testimony to contest the costs of future surgery.

Plaintiffs did not comply with the discovery rules. And yet, Plaintiffs avoid any sanction for their conduct, while Defendant is punished for her attempt to mitigate the prejudice. This Court should not condone Plaintiffs clear failure to comply with the discovery rules by allowing Plaintiffs to recover for damages which were never timely disclosed, simply because Defendant attempted to mitigate the prejudice.

NRCP 37 was designed to place the burden to justify any failure to disclosure upon the party that fails to disclose. The mandatory sanction of NRCP 37, and the burden to overcome such exclusion, is rendered moot if Defendant must prove harmlessness. Plaintiffs can avoid compliance with the rules, and simply wait until trial to disclose future damages without exclusion of such evidence. Further, failing to apply NRCP 37 would also punish Defendant for filing a Motion for New Trial, in the attempt to remedy the trial court's error before an expensive appeal. The unintended effect would be simply to result in more appellate cases, in instances where the trial court could have and should have fixed the error. Filing a new trial

motion should not result in ignoring the mandatory framework of NRCP 37, and Plaintiffs burden to show substantial justification or harmlessness.

#### IV.

#### CONCLUSION

This Court should grant rehearing to consider the above arguments in determining the proper outcome of this case and grant a new trial or remittur.

DATED this 5<sup>th</sup> day of July, 2017.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Rehearing 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 is 2,998 words.

I hereby certify that I have read this Petition for Rehearing, 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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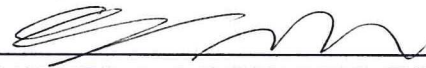
. . .

. . .

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 5<sup>th</sup> day of July, 2017.

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### **CERTIFICATE OF SERVICE**

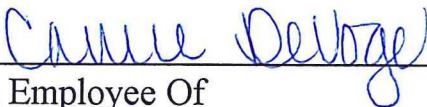
Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 6th day of July, 2017, a true and correct copy of the foregoing **APPELLANT'S PETITION FOR REHEARING** was served via Electronic Service and Hand Delivery, upon the following counsel of record:

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