IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D.,
Appellant/Cross-Respondent,
vs.
BEAU R. ORTH,
Respondent/Cross-Appellant.
_____/

No. 69935

ALBERT H. CAPANNA, M.D.,
Appellant,
vs.
BEAU R. ORTH,
Respondent.
_____/

No. 70227

APPEAL FROM JUDGMENT AND POST-JUDGMENT ORDERS
IN THE EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY,
THE HONORABLE DOUGLAS W. HERNDON, DISTRICT JUDGE

APPELLANT'S OPENING BRIEF

ROBERT L. EISENBERG (Bar No. 0950)
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
Email: rle@lge.net

ANTHONY D. LAURIA (Bar No. 4114)
Lauria, Tokunaga, Gates & Linn, LLP
601 S. Seventh Street, Second Floor
Las Vegas, Nevada 89101
702-387-8633
Email: alauria@ltglaw.net

ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Respondent.
_____/

NRAP 26.1 DISCLOSURE

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

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: *None*

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg
Lauria, Tokunaga, Gates & Linn

3. If litigant is using a pseudonym, the litigant's true name: *None*

DATED: 11/4/16

Robert L. Eisenberg

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
rle@lge.net

ATTORNEYS FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a medical malpractice amended judgment and post-judgment orders. The judgment is appealable under NRAP 3A(b)(1) [final judgment]. The order denying a new trial is appealable under NRAP 3A(b)(2). The orders regarding costs and fees are appealable under NRAP 3A(b)(8) as special orders after final judgment.

Dates establishing timeliness of the appeal are as follows. Notice of entry of the original judgment was served on October 28, 2015. 9 A.App. 1880-86. A motion for new trial or to amend the judgment was filed on November 9, 2015. 9 A.App. 1913-29. On January 28, 2016, an amended judgment was entered, with service of notice of entry on February 3, 2016. 10 A.App. 2279, 2282. An order regarding post-judgment motions was entered on February 10, 2016, with notice of entry served on February 11, 2016. 10 A.App. 2289, 2299. A timely notice of appeal was filed within 30 days, on March 7, 2016. 11 A.App. 2377.

The order granting plaintiff's attorneys' fees was entered on April 15, 2016, with notice of entry served on April 18, 2016. 11 A.App. 2436, 2440. Capanna filed a timely supplemental notice of appeal on April 18, 2016. 11 A.App. 2448. An order awarding costs was entered on April 21, 2016, with notice of entry served on

April 25, 2016. 11 A.App. 2459, 2462. Capanna filed a timely second supplemental notice of appeal on May 2, 2016. 11 A.App. 2469.

ROUTING STATEMENT

This appeal is presumptively retained by the supreme court under NRAP 17(a)(13) and (14), and 17(b)(2), because there are questions of first impression, questions of statewide public importance, and a judgment of more than $250,000 in a tort case.

STATEMENT OF ISSUES

1. Whether the district court erred by preventing defense counsel from cross-examining a key medical witness regarding the witness's financial relationship with plaintiff's counsel.

2. Whether the district court erred by allowing a last-minute build-up of damages, i.e., by allowing late supplemental medical reports regarding damages, allowing untimely disclosures of damages calculations, and allowing doctors to testify beyond the scope of their treatment.

3. Whether the district court erred by allowing plaintiff's counsel to commit repeated and persistent misconduct.

4. Whether the district court erred in its awards of attorneys' fees and costs.

STATEMENT OF THE CASE

Plaintiff filed his medical malpractice complaint on September 8, 2011. 1 A.App. 1. A jury trial was held in August/September of 2015; the verdict was approximately $4.3 million. 7 A.App. 1431-32. Judgment was entered on October 26, 2015 (8 A.App. 1639), and post-judgment motions were decided thereafter. Among other things, the district court ordered entry of an amended judgment, pursuant to medical malpractice statutes; the amended judgment was $941,435.34. 10 A.App. 2279-81. The district court also awarded plaintiff $169,989.58 for attorneys' fees and $123,322.20 for costs. 11 A.App. 2436-39, 2459-61. This appeal followed.

STATEMENT OF FACTS[1]

Plaintiff Beau Orth was having low back pain in August 2009, followed by shooting pain down his leg. 19 A.App. 4515-16, 4521-29; 20 A.App. 4600. Albert

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[1] Unfortunately, the trial transcript is difficult to read. Bench conferences were transcribed, but sometimes they are not in the transcript at the correct chronological location; transcribed bench conferences are sometimes grouped together in locations different from where the conferences actually occurred. Also, some portions of testimony are not in chronological sequence. These problems occasionally require a person reading the transcript to jump between transcript locations. To help the court follow the trial transcript, we have inserted pages into the appendix, providing directions to the reader at various places.

Capanna, M.D., is a neurosurgeon who has been practicing since 1979. 19 A.App. 4307. Plaintiff was referred to Dr. Capanna in the fall of 2010, for evaluation of plaintiff's back/leg pain. 19 A.App. 4529-31. Earlier testing had revealed a small protrusion from a disc in plaintiff's low back between the fifth lumbar and first sacral vertebrae (L5-S1 disc). 18 A.App. 4193-94. An MRI of plaintiff's low back the day after Dr. Capanna first saw plaintiff confirmed a disc bulge at L5-S1. 15 A.App. 3555-56.

Dr. Capanna performed surgery to repair the disc problem at L5-S1 on September 17, 2010. 16 A.App. 3764-65. At trial, medical witnesses had differing views about what happened during the surgery. Some doctors opined that Dr. Capanna operated on a disc at the wrong level of plaintiff's back, namely, the L4-5 disc, immediately above the L5-S1 level; other doctors opined that Dr. Capanna operated on the correct disc. In any event, Dr. Capanna recognized that he entered the L4-5 disc during the operation, causing damage to that disc. 20 A.App. 4782.

The jury ruled in plaintiff's favor. For purposes of this appeal, Dr. Capanna does not contend that there was insufficient evidence to support the jury's presumed finding that he either operated on the wrong disc or damaged the L4-5 disc, and that his operation was below the applicable standard of care.

Other facts will be discussed below.

SUMMARY OF ARGUMENT

Dr. Capanna did not receive a fair trial. During discovery, plaintiff engaged in gamesmanship and sandbagging, failing to make required disclosures regarding expert opinions and medical expenses. The district court essentially allowed a last-minute loading of medical expenses, primarily regarding future treatment amounting to approximately $700,000. The district court erred by failing to require plaintiff to obey the rules, resulting in a miscarriage of justice.

Additionally, defense counsel was entitled to cross-examine the key medical witness regarding financial entanglements with plaintiff's counsel. These financial arrangements gave the doctor a huge incentive to slant his testimony in plaintiff's favor. As such, the evidence was admissible and critical to the jury's evaluation of the doctor's credibility.

The district court also erred by allowing plaintiff's counsel to commit repeated and persistent misconduct consisting of improper comments to the jury regarding insurance, improper golden rule arguments, and improper jury nullification arguments.

Finally, the district court failed to comply with mandatory requirements for awards of attorneys' fees and access fees for experts. There was no statutory basis

for the award of attorneys' fees, and the award of excess expert fees was procedurally improper.

ARGUMENT

Standards of review

Discovery and evidentiary rulings are generally reviewed for abuse of discretion. *Club Vista Fin. Servs. v. District Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (discovery orders); *Mclellan v. State,* 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (evidentiary rulings). *De novo* review applies to whether the district court used the proper legal standard. See *Staccato v. Valley Hospital,* 123 Nev. 526, 530-31, 170 P.3d 503, 505-06 (2007).

An award of attorneys' fees is generally reviewed for abuse of discretion. *Albios v. Horizon Communities, Inc.,* 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006). But *de novo* review applies to whether a district court properly applied legal requirements. See *Yamaha Motor Co., USA v. Arnoult,* 114 Nev. 233, 251-52, 955 P.2d 661, 672-73 (1998) (award of fees reversed).

Although this court reviews an award of costs for abuse of discretion, *Village Builders 96, v. U.S. Laboratories, Inc.,* 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005), interpretations of costs statutes are reviewed *de novo*. *Washoe Med. Ctr. v. District Court,* 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006).

1. Cross-examination of Dr. Cash

a. Additional facts regarding Dr. Cash cross-examination

One of plaintiff's key medical witnesses was Andrew Cash, M.D., an orthopedic spine surgeon. 15 A.App. 3507. Dr. Cash saw plaintiff shortly after Dr. Capanna's surgery, and Dr. Cash performed a second surgery at levels L4-5 and L5-S1. 15 A.App. 3579-80.

Although Dr. Cash was originally a treating physician, he was later retained by plaintiff's counsel as a medical expert for the lawsuit. More than four years after Dr. Cash performed his surgery on plaintiff, Mr. Prince paid Dr. Cash $10,000 to prepare a medical records review of a thousand pages of medical records. 7 A.App. 1492; 11 A.App. 2495:15-16, 2496:9-10; 19 A.App. 4399. Mr. Prince then paid Dr. Cash another $3,500 to prepare a two-page letter for the lawsuit. *Id.* Mr. Prince also paid Dr. Cash $15,750 for trial preparation and $18,000 for trial testimony. 7 A.App. 1494-96. Mr. Prince and his firm paid Dr. Cash a total of $47,250. 7 A.App. 1444, 1492-96.

Before trial, plaintiff sought to limit defense counsel's right to inform the jury that plaintiff's counsel "has a connection to Plaintiff's treating physicians, including, that Plaintiff's counsel has worked with these same treating physicians on other unrelated personal injury cases." 23 A.App. 5404. Defense counsel opposed the motion, arguing that such evidence establishes potential bias. 23 A.App. 5410.

Plaintiff replied, contending that such cross-examination should not be allowed because Dr. Cash was merely a treating physician, not a retained expert. 23 A.App. 5420-21.

At the hearing on the motion, defense counsel discussed Dr. Cash's deposition testimony that he has been retained by plaintiff's counsel dozens of times. 11 A.App. 2495. Although defense counsel mistakenly stated that the doctor had worked with Mr. Prince "two to three dozen times" (11 A.App. 2495:11-12), Dr. Cash actually testified at his deposition that he has worked as a retained expert for Mr. Prince's law firm up to four dozen times. 5 A.App. 1009(47-48).

Defense counsel argued that the jury should know about the extensive relationship between Mr. Prince and Dr. Cash, to show implied bias and potential favoritism in the doctor's testimony. 11 A.App. 2495-97. Even the trial judge recognized the potential for implied bias, "because he's testified for them in the past and in order for him to get work in the future he has to testify favorably." 11 A.App. 2496:15-17. Plaintiff's counsel requested the district court to "exclude any testimony or information concerning any relationship with me, my firm or former firm." 11 A.App. 2498:21-23.

The district court granted plaintiff's request, severely limiting defense cross-examination of Dr. Cash. 11 A.App. 2500. The district court allowed defense

counsel to inquire whether Dr. Cash had ever worked with plaintiff's counsel in the past, but the district court absolutely prohibited defense counsel from cross-examining regarding "the number of times, dozens of times, three dozen times" that Dr. Cash has worked with Mr. Prince. 11 A.App. 2500:13-14, 20-22.

b. The district court erred by limiting Dr. Cash's cross-examination

Exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Robinson v. G.G.C., Inc.,* 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 678-79 (1986)). The *Robinson* court noted that although *Van Arsdall* was a criminal case, "the same reasoning regarding bias applies in a civil trial." *Id.*

In *Robinson,* an injured plaintiff sued a machine manufacturer, and the jury returned a defense verdict. On appeal, the plaintiff contended that the district court erred by excluding testimony regarding the relationship between the defendant, defense counsel, and one of the defense expert witnesses, who had testified many times for both the defendant and its lawyer. The *Robinson* court reversed, holding that exclusion of the evidence was prejudicial error. Exposure of the witness's relationships to the defendant and defense counsel "may have shown bias on the part of the expert." *Id.* at 143, 808 P.2d at 527. Citing a Texas case, *Robinson* held that

the jury "should be given the opportunity to judge for themselves the witness's credibility in light of the relationship between the parties, the witness's motive for testifying, or any other matter which would tend to influence the testimony given by a witness." *Id.*

Robinson also observed that expert witness testimony is, in some respects, similar to a business arrangement between the witness and the attorney. "The trier of fact has the right to take business associations into account when determining the credibility of witnesses and the weight to give their testimony." *Id.*

Robinson was applied in *Rish v. Simao,* 132 Nev. Adv. Op. 17, 368 P.3d 1203 (2016), where defense counsel questioned the plaintiff's doctor regarding the doctor's history of litigation testimony. The district court sustained the plaintiff's objection, on the ground that the question was barred by a pretrial order. In reversing a judgment for the plaintiff (on other grounds), the court noted that defense counsel's cross-examination questions were relevant to credibility. *Id.* at ____, 368 P.3d at 1210 (n.5). The *Rish* court cited *Van Arsdal* and *Robinson* for the rule that exposure of witness motivation is a proper and important function of cross-examination, and for the rule that the jury has the right to take associations into account when determining the credibility and weight of witness testimony. *Id.*

Other courts have recognized financial incentives showing potential bias by medical witnesses. E.g. *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 832 (2003) (Court recognizes that a medical consultant hired by a disability plan administrator may have an incentive to make a finding of "not disabled," in order to preserve the consulting arrangement with the plan administrator).

In *Noel v. Jones,* 532 N.E.2d 1050 (Ill. App. 1988), the plaintiffs were treated by two doctors who testified at trial. The doctors had a referral relationship with the plaintiff's lawyer's firm. The court held that it was proper for the jury to consider "lucrative referrals" from plaintiff's attorney to the treating physicians, when evaluating credibility, bias, and financial interest of the physicians. *Id.* at 1054; see also *Trower v. Jones,* 520 N.E.2d 297, 300 (Ill. 1988) ("We have long recognized that the principal safeguard against errant expert testimony is the opportunity of opposing counsel to cross-examine, which includes the opportunity to probe bias, partisanship or financial interest.").

In *Flores v. Miami-Dade County,* 787 So.2d 955 (Fla. App. 2001), the jury returned a defense verdict in an accident case. The plaintiff contended that the trial court erred by allowing cross-examination into the fact that, at relevant times, the plaintiff's treating physician had an agreement with plaintiff's previous counsel regarding case referrals. The *Flores* court affirmed, holding that the cross-

examination was pertinent and admissible regarding the physician's bias. *Id.* at 957. When an expert testifies, opposing counsel may cross-examine regarding "any matter" going to the weight of the expert's testimony. *Id.* The expert's past pattern of testifying for one side in litigation is admissible to show a possible bias or prejudice on the part of the witness. *Id.* at 957-58. A doctor's relationship with the plaintiff's lawyer can be viewed as creating bias and motive, which are proper subjects for cross-examination. *Id.* at 958; see also *Worley v. Central Florida Young Men's Christian Ass'n.,* 163 So.3d 1240, 1246 (Fla. App. 2015) (recognizing "well established" rule that financial relationship between a law firm and a treating physician "is relevant to show potential bias").

Here, plaintiff's primary argument against the cross-examination evidence was that Dr. Cash was a treating physician, not a retained expert, and he therefore was subject to a different standard for cross-examination. Although there are distinctions between treating physicians and retained medical experts, these distinctions relate primarily to discovery and disclosure requirements. See *FCH 1, LLC* v. *Rodriguez,* 130 Nev. Adv. Op. 46, 335 P.3d 183, 189 (2014) (treating physicians may be exempt from formal discovery report requirements in limited circumstances); see also *Khoury v. Seastrand,* 132 Nev. Adv. Op. 52, 377 P.3d 81, 90 (2016). There is no law holding that a treating physician gets special treatment

and immunity from full cross-examination regarding credibility and potential bias at trial, when the physician gives expert medical opinions. Even if treating physicians are not "retained" experts for pretrial discovery/disclosure purposes, they are nevertheless "expert" witnesses for purposes of evidentiary rules at trial, including cross-examination, because they give expert medical opinions based upon their education, training and experience. See NRS 50.275.

For example, in the present case, plaintiff's initial NRCP 16.1 disclosure identified Dr. Cash as a witness who would "offer expert testimony." 4 A.App. 833:11. At trial, plaintiff's counsel established Dr. Cash's qualifications as an expert medical witness. 15 A.App. 3507-21. Plaintiff's counsel offered Dr. Cash "as an expert in the field of orthopedic spine surgery." 15 A.App. 3521:2-4. The district court ruled that Dr. Cash may "offer expert opinions in his fields of expertise." 15 A.App. 3521:7-10.

Accordingly, Dr. Cash may have started as a treating physician. But he gave expert medical opinions at trial, and he was not immune from the rigors of cross-examination or from adverse evidence relating to his financial incentives and biases, so the jury could fully evaluate his credibility and the weight of his testimony.

Further, a doctor loses "treating physician" status if the plaintiff's attorney gives the doctor medical records, and if the doctor testifies beyond the limited scope

of his treatment of the plaintiff. See *FCH1,* 130 Nev. at ___, 335 P.3d at 189-90. This is exactly what happened with Dr. Cash here. When he testified at trial, he was a treating physician and a retained expert. Thus, even if the permissible scope of cross-examination for expert witnesses at trial is somehow more narrow than usual for treating physician experts (which it is not), this would be inapplicable to Dr. Cash anyway.

Accordingly, even if Dr. Cash started out as a treating physician, he eventually became a retained expert. Mr. Prince paid Dr. Cash $47,250 for litigation services on this case alone. 7 A.App. 1444, 1492-96. Dr. Cash testified (in his deposition) that he had been retained by Mr. Prince or his law firm up to four dozen times in other cases. Applying simple mathematics, an inference can be drawn that Dr. Cash earned (or had the potential to earn) nearly $2.3 million in litigation-related fees on cases in which he was a retained expert for Mr. Prince (assuming an average of $45,250 each, for four dozen cases). Thus, Dr. Cash had a huge, multi-million dollar financial incentive to favor Mr. Prince's clients and thereby to continue doing extremely lucrative litigation work for Mr. Prince. The jury should have been informed of this critical information, which went directly to Dr. Cash's credibility and the weight of his testimony.

Armed with the judge's ruling on this issue, plaintiff's counsel was able to defuse and effectively eliminate any suggestion of bias based upon the extensive financial relationship between Dr. Cash and Mr. Prince. The doctor's direct examination included:

BY MR. PRINCE:

Q. Now, Dr. Cash, before coming to court today, have you and I ever worked together before?

A. Yes.

Q. And have you worked with me both on the plaintiff's side as well as the defense side?

A. Yes, I have.

Q. Have you also been an opposing expert in cases where I've been involved?

A. Yes, I have.

Q. Do you provide your – any services to, you know, the defense in cases, personal injury type cases where they hire you to address spinal issues on their behalf?

A. The defense in general, yes.

15 A.App. 3521:12-24.

Therefore, as a result of the district court's ruling, Mr. Prince was able to leave the jury with the entirely false impression that although Dr. Cash and Mr. Prince had worked together previously, Dr. Cash was essentially a neutral witness who had worked for plaintiffs and defendants. The full extent of Dr. Cash's long-standing

and highly profitable financial relationship with Mr. Prince remained completely hidden from the jury.

Accordingly, the district court erred by prohibiting cross-examination regarding key information going to the doctor's bias and credibility. This error was prejudicial. *Robinson*, 107 Nev. at 144, 808 P.2d at 528 (exclusion of evidence of relationship between witness and parties, showing possible bias of a witness, is reversible error); *Sanders v. Sears-Page*, 131 Nev. Adv. Op. 50, 354 P.3d 201, 213 (Ct. App. 2015) (error is prejudicial where, but for the error, a different result might reasonably have been reached).

Regarding prejudice, evidence of Dr. Cash' extensive ongoing relationship with Mr. Prince would have established that Dr. Cash had an enormous financial incentive to give opinions favorable to Mr. Prince's clients, as the district court recognized (11 A.App. 2496:15-17). Dr. Cash can easily be characterized as one of the most important—if not the most important—witness for plaintiff at trial. He was the first witness for plaintiff. 15 A.App. 3507. His testimony consumes approximately 260 pages of the trial transcript. 15 A.App. 3507-86; 16 A.App. 3587-3679, 3795-3800; 19 A.App. 4372-4455. Plaintiff's counsel relied heavily on Dr. Cash's testimony during opening statement, closing argument and rebuttal argument, mentioning Dr. Cash at least 100 times. 15 A.App. 3443 (opening); 22

A.App. 5146 (closing); 23 A.App. 5278 (rebuttal). And Dr. Cash gave key testimony to the jury on liability and damages, ultimately leading to the verdict of more than $4 million in plaintiff's favor.

Accordingly, but for the error, the jury might reasonably have reached a different result on liability, or the jury might reasonably have rendered a lower verdict on damages. Thus, the error was prejudicial and reversible.

2. Dr. Cash's testimony regarding future damages.

a. Additional facts regarding Dr. Cash's opinions on future damages.

As discussed above, Dr. Cash is a surgeon who performed back surgery on plaintiff shortly after Dr. Capanna's surgery. Plaintiff's initial NRCP 16.1 disclosure identified Dr. Cash, with a vague and general description of his expected testimony. 4 A.App. 833:8-16. More than four years after Dr. Cash's surgery on plaintiff, Dr. Cash reviewed a thousand pages of medical records at the request of plaintiff's counsel, rendering new opinions at that time. 11 A.App. 2495-96; 19 A.App. 4399.

Plaintiff's designation of expert witnesses on November 14, 2014, identified Dr. Cash. 4 A.App. 880. With regard to future damages, plaintiff's disclosure merely stated: "Dr. Cash is also expected to testify regarding any future medical care to be provided to Plaintiff." 4 A.App. 880:26-27. Plaintiff's disclosure did not include a report from the doctor regarding the specific future medical care to be

provided; and the disclosure did not include the doctor's opinion regarding the cost of the future care. *Id.*

On April 8, 2015, after more than three and one-half years of litigation, plaintiff served a "Second Supplement to Designation of Expert Witnesses," which supplemented information regarding Dr. Cash, and which disclosed a 36-page report from Dr. Cash dated April 1, 2015. 5 A.App. 897-932. Dr. Cash had last seen plaintiff more than a year earlier, on March 18, 2014. 5 A.App. 924. Further, Dr. Cash's medical records review shows that the last records he received and reviewed were from June 11, 2014, approximately ten months before his review. 5 A.App. 931. Dr. Cash's report provided to defense counsel was only a medical records review; it did not contain Dr. Cash's opinions regarding plaintiff's need for future medical treatment or future spine surgery. *Id.*

Two weeks after Dr. Cash's report regarding his records review, he prepared a letter dated May 14, 2015, containing new opinions that plaintiff's future medical care will include a two-level lumbar fusion within ten years, at a cost of approximately $350,000. 5 A.App. 970. Plaintiff disclosed this report to defense counsel in a "Seventh Supplement" to NRCP 16.1 disclosures. 5 A.App. 952.

Finally, literally days before trial, plaintiff served a "Tenth Supplement" to NRCP 16.1 disclosures (5 A.App. 1033), disclosing that Dr. Cash had apparently

seen plaintiff on July 28, 2015, approximately two weeks before trial. 5 A.App. 1046-48 (reference to Desert Institute of Spine Care).

Defense counsel filed a pretrial motion to exclude the untimely and improperly disclosed "supplemental" opinions of Dr. Cash. 4 A.App. 808 (countermotion). The district court denied the motion, without any examination of good cause for the late disclosure or even an inquiry into the reasons the disclosure had not been made earlier. 11 A.App. 2603:2-3 (denying countermotion).

b. The district court erred by admitting Dr. Cash's late opinions.

Dr. Cash may have started as a treating physician, but he morphed into a retained expert later in the litigation, at the request of plaintiff's counsel. Regardless of his status, he was required to make timely, adequate disclosures of his expert medical opinions, including his opinions regarding the need for future surgeries costing hundreds of thousands of dollars.

This court dealt with inadmissible testimony by treating physicians in *FCH1*, where the plaintiff's attorney provided treating physicians with medical records from other doctors, and the treating physicians formed and expressed opinions based upon those records. The plaintiff did not provide an expert witness report for these physicians. This court held that although a treating physician is usually exempt from the report requirement, this exemption only extends to opinions formed during the

course of the doctor's treatment. *FCH1,* 130 Nev. at ___, 335 P.3d at 189. "Where a treating physician's testimony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements." *Id.*

FCH1 relied upon *Ghiorzi v. Whitewater Pools & Spas, Inc.,* 2011 WL 5190804 (D. Nevada 2011), where a Las Vegas treating physician was given medical records to review, and where he expressed opinions regarding the care and medical needs of the plaintiff, based upon those records. The *Ghiorzi* court held that the doctor's non-treatment activities changed his status from a treating physician to a retained expert, requiring adequate disclosures. *FCH1* adopted *Ghiorzi's* analysis and holding. 130 Nev. at ___, 335 P.3d at 189-90. In doing so, *FCH1* noted the important purpose of discovery, which is 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." *Id.* at ___, 335 P.3d at 190 (internal quotations omitted).

Here, Dr. Cash was originally a treating physician. But plaintiff's counsel changed him into a retained medical expert (1) by requesting him to review and opine on a thousand pages of records from other doctors (just like what happened in *FCH1*); (2) by paying him $13,500 for the medical records litigation review and the litigation letter—neither of which were performed in the normal course of plaintiff's treatment; and (3) by paying him $33,750 for trial preparation and testimony.

Plaintiff and Dr. Cash then withheld the doctor's opinions regarding plaintiff's need for future surgery until shortly before trial, ramping up the future medical expenses by hundreds of thousands of dollars.[2]

On cross-examination, Dr. Cash expressly admitted that it was his opinion from the very beginning of his treatment of plaintiff (i.e., as early as 2010) that future fusion surgery would be necessary, and the doctor would have advised plaintiff of this opinion at that time. 19 A.App. 4378-79. And plaintiff himself remembered and testified that Dr. Cash told him, in 2010, that he was going to need fusion surgery in the future. 20 A.App. 4575:24-4576:14 (plaintiff testifies that Dr. Cash told him about fusion surgery in the future; "Q. And that's something you've known since basically 2010? A. Yes, sir."). Yet Dr. Cash's 2010 opinion was not disclosed to defense counsel until 2015.

Defense counsel's objections to this last-minute medical expense build-up procedure should have been sustained, and Dr. Cash's new opinions should have been excluded.

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[2] Dr. Cash was guilty of a similar delay in *Baltodano v. Wal-Mart Stores, Inc.*, 2011 WL 3859724 (D. Nevada 2011), discussed later in this brief, where a Las Vegas federal judge excluded his opinions as untimely.

3. Dr. Yoo's late opinions

a. Additional facts regarding Dr. Yoo

Plaintiff filed his complaint on September 8, 2011. 1 A.App. 1. As required by statute, the complaint was supported by an expert affidavit from Frank Yoo, M.D., who opined that Dr. Capanna's surgery did not comply with the applicable standard of care. 1 A.App. 7-8. Dr. Yoo did not give an opinion concerning future medical care. *Id.*

Defense counsel took Dr. Yoo's deposition more than three and one-half years later, on May 26, 2015. 17 A.App. 3896. At the deposition, Dr. Yoo presented a new report dated the same day as the deposition, i.e., May 26, 2015. 17 A.App. 3922. He had prepared the report the night before his deposition, with modifications the morning of the deposition. 5 A.App. 978. He had not prepared a supplemental report during the entire time from his first report in September 2011 until the report he prepared on the day of his deposition in May 2015. 17 A.App. 3922-23.

At his deposition, Dr. Yoo conceded that his original September 2011 report did not discuss the need for future treatment such as fusion surgery. 17 A.App. 3923. He also conceded that the additional materials he had been provided for his May 2015 supplemental opinion consisted largely of medical records dated not later than May 2014, a year before he prepared his supplemental report. 17 A.App. 3924-25.

In fact, when Dr. Yoo rendered his supplemental report on May 26, 2015, plaintiff had not seen any doctors since one year earlier in May 2014. 17 A.App. 3925. Plaintiff never offered an explanation for the year delay between plaintiff's last medical treatment and Dr. Yoo's May 2015 supplemental report. Dr. Yoo's late supplemental report, provided on the day of his deposition, expressed new opinions concerning the need for future treatment, including fusion surgeries.[3]

Before trial, defense counsel objected to plaintiff's last-minute disclosure of Dr. Yoo's new opinions concerning future treatment. 4 A.App. 808-24. The district

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[3] The district court record is somewhat unclear regarding the supplemental report, because the record apparently does not contain a document entitled "supplemental report" with a typed date of May 26, 2015. Plaintiff's opposition to defendant's counter-motion indicated that plaintiff attached Dr. Yoo's supplemental report as Exhibit 4. 5 A. App. 1098:7-8. The document attached to plaintiff's opposition as Exhibit 4 was a supplemental report, but it was dated July 17, not May 26. 6 A.App. 1142-43. Despite this mistake, plaintiff's opposition provided a blocked quote containing two relevant paragraphs from Dr. Yoo's May 26, 2015 report. 5 A.App. 1098. Plaintiff's opposition also referred to Dr. Yoo's July 17, 2015 report (6 A.App. 1142), and plaintiff represented to the court that Dr. Yoo's reports dated May 26 and July 17, 2015, "included the same opinion regarding Plaintiff's future treatment," although the July 17 report included additional documents Dr. Yoo had reviewed. 5 A.App. 1098:21-24. The report was duplicated again at 6 A.App. 1148-49 and 1154-55. Accordingly, plaintiff has expressly conceded that the reports at 6 A.App. 1142-43 and 1148-49 include "the same opinion regarding Plaintiff's future treatment" that was in the May 26, 2015 supplemental report disclosed at Dr. Yoo's deposition. Further, plaintiff provided full quotations of two paragraphs from the May 26, 2015 supplemental report, and these are the only two paragraphs relevant to the issue in this appeal. 5 A.App. 1098.

court allowed the evidence. 6 A.App. 1231-32 (denying countermotion). At the hearing on pending motions, immediately before trial, plaintiff's counsel told the court that Dr. Yoo would not be offering opinions regarding future care. 11 A.App. 2604:5-6 (counsel stating that Dr. Yoo "isn't giving an opinion on future care"). At trial, defense counsel renewed his objection to Dr. Yoo offering testimony regarding future treatment, including fusions, because the doctor's report was untimely. 17 A.App. 4012. The district court refused to change its earlier ruling. 17 A.App. 4019-20.

b. The district court erred by admitting Dr. Yoo's late opinions

Rules of discovery are designed in large part to prevent surprise and to allow parties to prepare fully for trial. See *FCH1,* 130 Nev. at __, 335 P.3d at 190; *Russell v. Absolute Collections Services*, 763 F.3d 385, 396 (4th Cir. 2014) (purpose of discovery rules is to allow parties to prepare adequately for trial). Under NRCP 16.1(a), parties are required to make full disclosures regarding a retained or specially employed expert. Such a report must contain "a complete statement of all opinions to be expressed" at trial. NRCP 16.1(a)(2)(B).

Supplementation of disclosures is governed by NRCP 26(e), which imposes a duty to supplement discovery disclosures in certain circumstances. There is no Nevada published opinion providing guidance on the duty to supplement. The

Nevada rule is similar, if not identical, to the federal rule. Therefore, federal cases provide strong persuasive authority for interpretation of the Nevada rule. See *Exec. Mgmt., Ltd., v. Ticor Title Ins. Co.,* 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

Supplementation under Rule 26(e) is a duty, not a right. In *Luke v. Family Care and Urgent Medical Clinics,* 323 Fed. Appx. 496 (9th Cir. 2009), the plaintiffs made a timely expert disclosure. When the defendant moved for summary judgment, plaintiffs' counsel realized that the disclosure was inadequate. Therefore, plaintiffs served a supplemental expert witness report. The district court excluded the supplemental report and granted summary judgment to the defendant. The Ninth Circuit affirmed, holding that Rule 26(e) creates a duty to supplement, not a right. *Id.* at 500. Further, the rule does not "create a loophole" through which a party who submitted inadequate expert disclosures may simply revise the disclosures to the party's advantage. *Id.* Supplementation means correcting inaccuracies or correcting an incomplete report based upon information not available at the time of the initial disclosure. *Id.*

The *Luke* court cited *Keener v. United States,* 181 F.R.D. 639 (D. Mont. 1998), where the defendant filed an initial expert disclosure, with a doctor's general opinions based upon medical records he reviewed. Less than three months later, the defendant served a supplemental disclosure. The *Keener* court refused to consider

the supplemental reports, and the court ordered that the defendant's trial evidence would be limited to those opinions disclosed in the initial report. *Id.* at 642. The court rejected the defendant's contention that the supplemental report was permissible because it merely expanded the doctor's opinions. *Id.* at 640.

Similarly, in *Plumley v. Mockett,* 836 F.Supp. 2d 1053 (C.D. Cal. 2010), an expert submitted an initial report, followed by a supplemental report with expanded opinions. The court rejected the supplemental report, holding that Rule 26(e) "does not give license to sandbag one's opponent" with opinions that should have been included in the initial expert report. *Id.* at 1062. To rule otherwise "would create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports." *Id.* Enabling this pattern of behavior "would surely circumvent the full disclosure requirement implicit in Rule 26." *Id.*

In *Burger v. Excel Contractors, Inc.,* 2013 WL 5781724 (D. Nevada 2013), a Las Vegas personal injury plaintiff made an initial disclosure of a medical expert report, then served supplemental reports. The court held that the supplemental reports were improper. They did not rely on "new" information, because, although the information was apparently not given to the expert until after his initial report, the information was actually available "well before disclosure of the initial report." *Id.* at *3. Because the supplemental reports did not rely on "new" information, but

instead relied upon information that was available earlier, supplementation was improper. *Id.*

In *Hologram USA, Inc. v. Pulse Evolution Corp.*, 2016 WL 3965190 (D. Nevada 2016), the Las Vegas plaintiff served an initial expert disclosure, followed by a supplemental report. The court granted a defense motion to strike, citing *Keener* for the rule that supplementation does not give an expert the opportunity to "lie in wait" after an initial report. *Id.* at *3. The supplemental report in *Hologram* expressed new opinions based upon information that could have been available to the expert when the initial report was prepared. *Id.* at *1-2. Thus, the supplementation was not appropriate, and it was stricken. *Id.* at *4.

In the present case, plaintiff's counsel retained Dr. Yoo as a specially retained medical expert before the lawsuit was filed in 2011. Dr. Yoo's initial report (in affidavit form) was attached to the complaint. 1 A.App. 7-8. Dr. Yoo opined that Dr. Capanna's surgery was below the standard of care; Dr. Yoo expressed no other opinions. 1 A.App. 8. He had reviewed extensive medical records at that time. 1 A.App. 7:16-20.

Plaintiff's first NRCP 16.1 disclosures did not mention Dr. Yoo as a witness. 4 A.App. 830-36. Nor did plaintiff's multiple supplemental Rule 16.1 disclosures identify Dr. Yoo as a witness. 4 A.App. 839-77. On November 14, 2014, more than

three years after filing the lawsuit, plaintiff served a designation of expert witnesses, which identified Dr. Yoo. 4 A.App. 879-80. An expert disclosure must include a report containing "a complete statement of all opinions to be expressed and the basis and reasons therefor." NRCP 16.1(a)(2)(B). Plaintiff's expert disclosure for Dr. Yoo simply attached the bare-bones report plaintiff had attached to the complaint years earlier. 4 A.App. 885-86.

In November 2014, plaintiff served a supplemental designation regarding Dr. Yoo, but this supplement did not indicate that Dr. Yoo had any opinions in addition to those discussed in his September 2011 report. 4 A.App. 888-92.

In early May of 2015, plaintiff initiated a series of supplemental disclosures, in which plaintiff started to disclose future medical expenses amounting to several hundred thousand dollars. *E.g.,* 5 A.App. 943, 964, 970-71. Then, as noted above, defense counsel took Dr. Yoo's deposition on May 26, 2015. At that time, for the first time, Dr. Yoo presented his supplemental report expressing opinions concerning plaintiff's need for future back fusions. Dr. Yoo's opinions on this subject should have been rendered years earlier, when he first became involved in the case. Additionally, his May 26, 2015 opinions were stated to be based upon additional information he received (presumably from plaintiff's counsel). Yet the additional

information was not newer than May of 2014, a year before his deposition. He offered no explanation for the one-year delay in preparing his supplemental report.

This is the worst form of discovery sandbagging by an expert. Dr. Yoo could have, and should have, expressed his opinions regarding future surgery in his initial September 2011 report. At the very latest, he could have, and should have, expressed the additional opinions by May of 2014. By delaying preparation of the report until the morning of the deposition, Dr. Yoo and plaintiff's counsel effectively deprived defense counsel of meaningful opportunity to conduct discovery and to conduct a thorough deposition. This all occurred less than three months before trial. Yet the district court allowed this last-minute buildup of future medical expenses. This was reversible error.

4. Dr. Ruggeroli's late opinions

a. Additional facts regarding Dr. Ruggeroli

Dr. Ruggeroli is a pain specialist disclosed by plaintiff in initial NRCP 16.1 disclosures. 4 A.App. 831:21-26. Plaintiff's entire description of Dr. Ruggeroli's testimony was: "Dr. Ruggeroli is expected to testify as to the facts and circumstances surrounding this incident and the care and treatment rendered to Plaintiff." *Id.* This disclosure did not provide a hint regarding Dr. Ruggeroli's opinions dealing with future treatment and expenses. *Id.*

Plaintiff supplemented his disclosures later, adding treatment records and billings for Dr. Ruggeroli, with no indication of a claim for future medical expenses. 4 A.App. 854 (Third Supplement). A Fourth Supplement added some additional bills for Dr. Ruggeroli, again with no hint of future medical expenses. 4 A.App. 864-65.

When plaintiff designated experts on November 14, 2014 (4 A.App. 879), plaintiff identified Dr. Ruggeroli as a treating physician, with nothing more than a vague description of his areas of testimony, without any specification of opinions regarding future medical care. 4 A.App. 881.

Finally, in May 2015, virtually on the eve of trial, plaintiff served a "Third Supplement to Designation of Expert Witnesses," providing a letter from Dr. Ruggeroli dated April 27, 2015. 5 A.App. 940, 943. For the first time, Dr. Ruggeroli disclosed his opinion regarding the need for radiofrequency thermal coagulation (RFA) treatments. 5 A.App. 943. Dr. Ruggeroli opined that plaintiff will need such treatments "in excess of twenty years, at a cost of $325,240. 5 A.App. 943.

Dr. Ruggeroli's deposition was taken on May 21, 2015. 5 A.App. 945. He admitted that he had not seen or talked to plaintiff since May of 2014, nearly a full year before he prepared his report dated April 27, 2015. 5 A.App. 946-49. In short, the last time Dr. Ruggeroli treated plaintiff was May of 2014; he did not disclose his

opinion regarding the need for 20 years of RFA treatments until his letter nearly a year later in April of 2015; and his new opinion added another $325,000 to the future damages claim.

Defense counsel objected to Dr. Ruggeroli's last-minute disclosures. 4 A.App. 808-824 (countermotion). The district court ruled for plaintiff. 11 A.App. 2603:2-3.

b. The district court erred by allowing Dr. Ruggeroli's late disclosures

Once again, Dr. Ruggeroli's situation illustrates the hide-the-ball strategy leading to a last-minute buildup of huge medical expenses disclosed by plaintiff's counsel shortly before trial.

Dr. Ruggeroli's situation is somewhat different from Dr. Yoo and Dr. Cash, because Dr. Ruggeroli was more like a treating physician than a retained expert. Nevertheless, the disclosure exemption for treating physicians deals with treatment and opinions developed during the course of the patient's treatment. Presumably a treating physician's medical records and treatment notes will contain at least a hint as to the opinions the physician formed during the course of treatment of the patient. Thus, defense counsel reviewing the records will at least have a general idea about the doctor's opinions, even if the doctor has not rendered a full-blown expert report for the lawsuit.

Additionally, Dr. Ruggeroli's last-minute disclosures regarding future treatment included his opinion regarding the cost of the treatment. 5 A.App. 943. This information, contained in a letter to plaintiff's counsel, was certainly generated solely for purposes of the litigation, to assist plaintiff's claim for a huge amount of future damages; the letter was not written in the course of the doctor's treatment of plaintiff.

There was no excuse for the delay in obtaining and disclosing Dr. Ruggeroli's opinions regarding future medical treatment and expenses. This is particularly true in light of the fact that Dr. Ruggeroli had not seen plaintiff since May of 2014. Dr. Ruggeroli's opinions should have been disclosed much earlier, and the district court committed reversible error by admitting them.

5. Last-minute disclosure of future medical expenses

a. Additional facts regarding failure to disclose future medical expenses

From the time plaintiff's lawsuit was filed in September 2011 until more than three and one-half years later, in May 2015, plaintiff made discovery disclosures and multiple supplements, without complying with NRCP 16.1's requirement for disclosure of the amount to be claimed at trial for future medical expenses. 11 A.App. 2535-36, 2584-85. For example:

- March 2, 2012; plaintiff's initial NRCP 16.1 disclosure; mentions past medical expenses; ignores future expenses. 4 A.App. 836.
- June 21, 2012; plaintiff answers interrogatories, which ask for "every item of special damages" being sought; plaintiff identifies "past medical expenses," but no future expenses. 23 A.App. 5494.
- November 14, 2012; plaintiff's second supplemental disclosures; mentions past medical expenses; ignores future expenses. 4 A.App. 845.
- May 21, 2013; plaintiff's response to defendant's request for production of documents, which asks for "an updated statement of damages," including "all of the special damages you are claiming beyond your past medical expenses." Plaintiff's entire response: "Plaintiff will supplement the requested information as discovery continues." 23 A.App. 5506.
- August 7, 2014; plaintiff's third supplement; mentions past medical expenses; ignores future expenses. 4 A.App. 854-55.
- August 13, 2014; plaintiff's fourth supplement; mentions past medical expenses; ignores future expenses. 4 A.App. 865.
- October 1, 2014; plaintiff's fifth supplement; mentions past medical expenses; ignores future expenses. 4 A.App. 875-76.

- November 14, 2014; plaintiff's designation of expert witnesses; mentions "future medical care" generally, without identifying the actual future care or stating the amount of the future medical expenses. 4 A.App. 879-82.
- November 19, 2014; plaintiff's supplemental expert disclosure; no mention of future medical expenses. 4 A.App. 888-89.
- April 8, 2015; plaintiff's second supplemental expert disclosure; discloses Dr. Cash's medical records review, but no information about future medical expenses. 5 A.App. 894-932.

Plaintiff did not make a full disclosure of claimed future medical expenses from the time he filed his complaint in 2011 until May of 2015. 5 A.App. 962-64. For the first time at that late date, plaintiff claimed several hundred thousand dollars in future medical expenses, including more than $300,000 for RFA treatments and more than $700,000 for future surgeries. 5 A.App. 943, 970-71.

Defense counsel filed a pretrial motion to exclude the improper supplemental disclosures and the late claims for future damages. 4 A.App. 808. The district court denied the motion without inquiry regarding good cause for the untimely disclosure. 11 A.App. 2603:2-3 (denying countermotion). Defense counsel also objected at trial. 11 A.App. 2532-38, 2584-92. The district court overruled the objection. 11

A.App. 2541:2-3 ("So I don't have any problem with the [plaintiff's] disclosure that occurred.").

b. The district court erred by allowing untimely disclosures of future medical expenses

Early disclosure of future medical expenses is mandatory. Pursuant to NRCP 16.1(a)(1)(C), "a party must, without awaiting a discovery request, provide . . . [a] computation of any category of damages claimed," including copies of documents supporting the computation. (Emphasis added.) The computation applies to any special damages. NRCP 16.1(a)(1)(C) (Drafter's Note). Special damages are damages that can be established with reasonable mathematical certainty; in the context of a tort action, special damages include medical expenses. 25 C.J.S. Damages §3 (2011).

Because the Nevada rule is nearly identical to its federal counterpart [FRCP 26(a)(1)(A)], federal cases provide strong persuasive authority. *Exec. Mgmt.*, 118 Nev. at 53, 38 P.3d at 876. The Second Circuit has held that the rule requires more than providing undifferentiated financial statements; instead, the rule requires a computation supported by documents. *Design Strategy, Inc. v. Davis,* 469 F.3d 284, 295 (2d Cir. 2006). When a plaintiff fails to comply, an appropriate sanction is exclusion of any evidence supporting the omitted category of special damages. *Id.* at 294-99; see NRCP 16.1(e)(3)(B) (authorizing district court to prohibit evidence

for violating disclosure requirement). A plaintiff's claim that supplemental disclosures cured any prior defect, and thereby rendered the prior inadequate disclosures harmless, is also without merit. *Carrillo v. B&J Andrews Enterprises, LLC,* 2013 WL 420401, at *4 (D. Nevada 2013).

There are numerous recent cases in which federal courts have required Las Vegas personal injury plaintiffs' attorneys to comply with the rule, and thereby to prevent litigation sandbagging and to deter a late buildup of medical expenses. These cases include a case with a late disclosure by the same Dr. Andrew Cash as in the present case. In *Baltodano v. Wal-Mart Stores, Inc.*, 2011 WL 3859724 (D. Nevada 2011), the plaintiff's initial disclosure contained a placeholder paragraph stating that she was claiming future medical bills "not yet received," and she "reserves the right to supplement and/or amend this Computation of Damages as discovery is continuing." *Id.* at *1. The computation "did not contain any information or details about spinal fusion surgery." *Id.* Plaintiff supplemented her disclosures at various times, without providing information regarding the future medical expenses. *Id.*

Late in discovery, plaintiff's counsel informed defense counsel that plaintiff was scheduled for spinal fusion with her treating physician, Dr. Cash. At Dr. Cash's deposition, defense counsel obtained information regarding the future spinal fusion

surgery and its cost ($400,000). *Id.* The defendant moved to exclude evidence of Dr. Cash's recommended spinal fusion and the related medical expenses that Dr. Cash disclosed late in the litigation. The federal judge granted the motion. *Id.* at *5. The court held: "Disclosing a computation of damages under Rule 26(a)(1) is necessary for the opposing party to produce responding evidence, such as an expert opinion." *Id.* at *3. "Without a computation of damages that includes the estimated costs of the spinal fusion surgery and related expenses, [the defendant] has been unable to obtain and prepare expert witnesses or other evidence to support its defense. This surprise is prejudicial." *Id.*

Additionally, plaintiff's counsel in *Baltodano* argued that his failure was substantially justified because defense counsel had obtained medical authorizations and could have acquired the information on its own. The court flatly rejected this argument because the argument "ignores the discovery obligations of Rule 26(a)." *Id.* at *4.

> Plaintiff has an affirmative duty, without awaiting a discovery request, to provide a computation of each category of damages claimed. Fed.R.Civ.P. 26(a). Harris [plaintiff's counsel] failed to fulfill that duty and has not shown substantial justification for that failure. *Id.*

In another Las Vegas federal case, with facts virtually identical to the present case, the plaintiff was represented by the same law firm that represents the plaintiff in the present case. In *Calvert v. Ellis,* 2015 WL 631284 (D. Nevada 2015), the plaintiff's initial disclosures "did not include a computation, or even a mention of, future medical expenses." *Id.* at *1. The disclosure "did not even provide a placeholder for a future damages category." *Id.* Plaintiff supplemented her disclosure, but still failed to include a computation for future medical expenses. *Id.* A year after the initial disclosures, plaintiff served another supplement, in which she disclosed more than $400,000 in medical expenses for future surgeries. *Id.* This was approximately three months before the discovery deadline. *Id.* These facts are all identical to the present case.

The *Calvert* court granted the defense motion to exclude all evidence of the plaintiff's future surgeries. The court rejected the plaintiff's contention that she was not required to disclose her future damages computation until she received input from her treating physicians. A "future expert analysis does not relieve [plaintiff] of the obligation to provide information reasonably available." *Id.* at *2. After all, a plaintiff's lawyer can obtain the information by simply asking the doctor to provide the information at the onset of the case. In holding that the plaintiff violated disclosure requirements, the court noted that plaintiff's counsel knew plaintiff was

treating, and knew that her physicians were recommending future surgery, but: "Nevertheless, Plaintiff chose to wait over a year to provide a computation for a category of future damages." *Id.* at *3.

The court also rejected the plaintiff's argument that she was not required to disclose future medical expenses until the need for the future surgery became certain. In a personal injury case, the amount, nature and extent of future damages "is a central issue" in the case. *Id.* at *4. "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." *Id.* Exclusion of the evidence was proper because: "By waiting over a year to disclose over $400,000, Plaintiff's second supplemental disclosure had the effect of ambushing Defendants." *Id.*

The present case is identical to *Calvert*, with the same plaintiff's law firm. Here, plaintiff made multiple disclosures, never identifying future medical expense until long after such a disclosure should have been made under the rule, then, in 2015, belatedly disclosing a claim for nearly $700,000 for the future surgeries. When Dr. Cash performed his surgery in 2010, a few weeks after Dr. Capanna's surgery, at that time Dr. Cash told plaintiff about the need for future fusion surgeries. 19 A.App. 4378-79. Plaintiff himself expressly conceded that in 2010 he had been

informed by Dr. Cash that future fusion surgery would be needed. Plaintiff testified at trial:

> Q. [by defense counsel] * * * [S]oon after the first time you saw Dr. Cash back in 2010 he was already telling you at that point that you were going to need a fusion, true?
>
> A. [by plaintiff] Yes, sir.
>
> * * *
>
> Q. All right. But Dr. Cash told you, as I guess he told us yesterday, that right from the start it was known that kind of the future path he predicted for you anyway – we've heard different opinions on that, but his prediction was that you were going to go on and have a fusion.
>
> A. Yes, sir.
>
> Q. And that's something you've known since basically 2010?
>
> A. Yes, sir.

20 A.App. 4575-76 (emphasis added).

Nearly five years later, Dr. Cash wrote a letter dated May 14, 2015, at Mr. Prince's request, stating his opinion on the future fusion surgeries. 5 A.App. 970-72; 19 A.App. 4399. Even then, Dr. Cash had all the information he needed for his opinion more than a year earlier. 19 A.App. 4389-90 (Dr. Cash had the information since March 2014; he obtained no new information before he wrote his May 14, 2015 letter). The record contains no explanation for the lengthy delays in disclosing

Dr. Cash's opinion about future surgeries. Like *Calvert*, this had the effect of ambushing the defense.

In *Patton v. Wal-Mart Stores, Inc.*, 2013 WL 6158461 (D. Nevada 2013), the plaintiff was represented by a Las Vegas personal injury firm. She disclosed past medical expenses, but not future medical expenses. She supplemented her disclosures twice, each time itemizing past medical expenses but not future medical expenses. The *Patton* court excluded the plaintiff's untimely disclosed future damages, holding that "litigants should not indulge in gamesmanship with respect to the disclosure requirements." *Id.* at *3. Supplemental disclosures do not create a "loophole" for a party who wishes to revise initial disclosures after deadlines have passed. *Id.* Supplementation allows correcting of inaccuracies; but supplementation does not allow a party simply to add additional information. *Id.*; see also *Shakespeare v. Wal-Mart Stores, Inc.*, 2013 WL 6498898 *3-4 (D. Nevada 2013) (on deadline for expert reports, Las Vegas personal injury attorney produced medical reports with future medical expenses; court excluded such evidence because disclosures regarding future medical expenses should have been made earlier).

The case of *Smith v. Wal-Mart Stores, Inc.*, 2014 WL 3548206 (D. Nevada 2014), also dealt with the trend of some personal injury lawyers in Las Vegas to engage in gamesmanship regarding mandatory disclosures of future medical

expenses, with a last-minute buildup of damages. In *Smith,* the plaintiff's counsel served initial disclosures, without a computation for future medical expenses. He supplemented the initial disclosures multiple times, never including a computation for future medical expenses. Finally, in a seventh supplemental disclosure, plaintiff's counsel listed more than $100,000 in future medical expenses. *Id.*

The *Smith* court found that plaintiff's counsel violated disclosure requirements and engaged in gamesmanship. *Id.* at *2. The plaintiff's failure to make adequate disclosures of the future medical expenses not only violated the disclosure rule, it also impaired defense counsel's ability to prepare for trial. *Id.* The court cited factually analogous situations in other Las Vegas cases, in which courts excluded untimely disclosed damages. *Id.*; see also *Montilla v. Walmart Stores, Inc.,* 2015 WL 5458781 (D. Nevada 2015) (plaintiff supplemented initial disclosures seventeen times, but did not itemize future medical expenses; court granted motion to exclude the evidence); *Clasberry v. Albertson's LLC,* 2015 WL 9093692 (D. Nevada 2015) (failure to disclose future medical expenses; motion to exclude was granted).

In *Alaya v. Wal-Mart Stores, Inc.,* 2012 WL 3262875 (D. Nevada 2012), a Las Vegas personal injury firm made initial disclosures indicating that future medical expenses had not yet been received, and the disclosures would be

supplemented. The firm served two supplements, but did not expand on the damages categories. The firm eventually claimed more than $1 million in previously undisclosed damages. The defendant moved to exclude the evidence. The *Alaya* court granted the motion, rejecting the plaintiff's argument that supplemental disclosures cured the initial failure to disclose future expenses. Although plaintiff's counsel apparently did not receive information from experts until long after the initial disclosures, this was not a legitimate excuse. Instead, the plaintiff had the burden to obtain information from the doctors early. *Id.* at *3-4.

The present case is nearly identical to the numerous Nevada federal cases in Las Vegas, where plaintiffs' attorneys routinely ignored mandatory discovery requirements calling for early disclosures of itemized future medical expenses. Federal courts enforce the applicable rule, refuse to allow plaintiffs' attorneys to engage in gamesmanship, and exclude the late evidence. This court should follow the lead of the federal courts.

Here, plaintiff filed multiple supplemental disclosures, each time failing to itemize future medical expenses. In fact, plaintiff never disclosed future medical expenses until late in the case, after years of litigation, and on the eve of trial. Dr. Plaintiff had been aware of Dr. Cash's opinion about the need for future fusion surgery since 2010. Plaintiff's counsel never offered a plausible excuse for the

delay. Because these damages were not timely disclosed in plaintiff's computation of damages, as required by NRCP 16.1, plaintiff should have been prohibited from offering the evidence and requesting the damages. Defendant was clearly prejudiced by the district court's error, as reflected in the jury's verdict.[4]

6. Reversal is required because of repeated, persistent and extreme misconduct by plaintiff's counsel

In an order in limine, the district court prohibited plaintiff's counsel from making comments about Dr. Capanna's medical malpractice insurance. 11 A.App. 2501. Additionally, this court has prohibited various categories of arguments by counsel, including golden rule and jury nullification arguments. *Lioce v. Cohen,* 124 Nev. 1, 174 P.3d 970 (2008); *DeJesus v. Flick,* 116 Nev. 812, 819, 7 P.3d 459 (2000), overruled on other grounds in *Lioce.*

In *Lioce*, this court held that "[a]n attorney may not make a golden rule argument, which is an argument asking jurors to place themselves in the position of one of the parties." *Lioce*, 174 P.3d at 984. An attorney violates this prohibition by posing hypothetical examples that place jurors in the position of a party. *Id.*

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[4] The jury filled out a verdict form that itemized damages, awarding $350,000 in future medical expenses. 7 A.App. 1432. The judgment includes this amount. 10 A.App. 2280. Thus, the appellate remedy for this error can consist of striking the future medical expenses from the judgment.

Similarly, *Lioce* held that arguments asking a jury to remedy a social ill or send a message about a larger social issue are "irrelevant to the cases at hand and improper in a court of law and constitute a clear attempt at jury nullification." *Lioce*, 124 Nev. at ___, 174 P.3d at 983; see *DeJesus,* 116 Nev. at 818-19, 7 P.3d at 463-64 (attorney's argument, among other things, that jury should "send a message" was "improper and inflammatory, and constituted egregious misconduct").

Here, plaintiff's counsel engaged in all these categories of misconduct during opening statement and closing arguments. Counsel repeatedly referred to Dr. Capanna's medical malpractice insurance; he made forbidden golden rule arguments; and he made improper arguments for jury nullification. Because the district court did nothing to stop this repeated and persistent misconduct, despite defendant's objections, this court should remand for a new trial.

Whether an attorney's comments are misconduct is a question of law reviewed *de novo*. *Lioce,* 124 Nev. at 20, 174 P.3d at 982. This court gives deference to the district court' findings and application of standards to the acts. *Id.*

a. Plaintiff's counsel improperly referred to Dr. Capanna's liability insurance

Misconduct by plaintiff's counsel started at the outset of the trial. Defense counsel previously moved in limine to exclude evidence regarding medical malpractice insurance. 1 A.App. 157. Plaintiff agreed with the motion, and the

district court granted it. 11 A.App. 2501. Nonetheless, plaintiff's counsel started talking to jurors about liability insurance almost immediately, during jury selection. *E.g.*, 13 A.App. 3001-06. Defense counsel objected, pointing out that plaintiff's counsel had raised the subject of insurance with 12 potential jurors, thereby attempting to highlight insurance. 13 A.App. 3006-07. The district court indicated that although plaintiff's counsel had been given permission to discuss limited insurance topics, plaintiff's counsel had gone beyond that limitation. 13 A.App. 3008. Defense counsel moved for a mistrial, which the district court denied. 14 A.App. 3230-35.

In closing argument, plaintiff's counsel again violated the order in limine precluding references to Dr. Capanna's malpractice insurance. Earlier, when the judge and attorneys were settling jury instructions, the judge suggested an instruction telling the jury not to consider whether Dr. Capanna has insurance. 20 A.App. 4665. Defense counsel objected on the ground that the instruction would tend to highlight insurance; and defense counsel reminded the court of the earlier improper insurance comments by plaintiff's counsel. 20 A.App. 4665. Indeed, defense counsel informed the court that, in other trials, defense counsel had personally seen plaintiff's counsel's tactic of using such an instruction to emphasize insurance improperly. 20 A.App. 4667.

The district court decided to give the contested instruction regarding insurance. 7 A.App. 1402; 20 A.App. 4668. Defense counsel then asked that plaintiff's counsel not be permitted to comment on insurance. *Id.* The district court recognized that if plaintiff's counsel displays the instruction and says "don't consider insurance, insurance, insurance," thereby improperly emphasizing insurance, such conduct would be "incredibly improper." 20 A.App. 4668:15-21.

Plaintiff's counsel then did exactly what defense counsel had predicted, and exactly what the district court said would be "incredibly improper." Plaintiff's counsel displayed the jury instruction regarding "whether or not the defendant was carrying insurance," and plaintiff's counsel told the jury that "whether or not the defendant was insured is immaterial." 22 A.App. 5185:17-20. Plaintiff's counsel then told the jury not to consider "where the money comes from." 22 A.App. 5185:21. Plaintiff's counsel then emphasized insurance again, for the fourth time, telling the jury: "But if [during deliberations] someone starts to talk about whether Dr. Capanna has insurance or where the money was going to come from, please remind them that under instruction 20 you can't do that." 22 A.App. 5185:24-5186:1.

Plaintiff's counsel had already violated the order in limine during jury selection, by repeatedly asking potential jurors about insurance. Then, before the

closing arguments even started, the district court was correct in determining that it would be "incredibly improper" for plaintiff's counsel to take unfair advantage of the jury instruction which told jurors not to consider Dr. Capanna's insurance. Yet plaintiff's counsel did take advantage of the instruction, displaying it, emphasizing it, and mentioning liability insurance multiple times. This is precisely what defense counsel had warned the judge about, based upon defense counsel's prior experience with plaintiff's counsel in other trials. The repeated references to liability insurance in the presence of the jury were, indeed, incredibly improper. Under these circumstances, the references were unduly prejudicial, particularly when considered in light of the cumulative impact of other misconduct discussed below.

b. Plaintiff's counsel made improper "golden rule" arguments

Plaintiff's golden rule argument was flagrant. Counsel repeatedly asked jurors to place themselves in the position of a plaintiff, persistently using hypothetical and rhetorical questions with the words "you" and "your," thereby placing jurors in plaintiff's position. 22 A.App. 5198-99. Again, defense counsel objected. 22 A.App. 5198, 5207. The district court overruled the objection. 22 A.App. 5210.

The *Lioce* opinion included four consolidated appeals. In one case (*Lang*), a child was scratched by a dog while at a babysitter's house. 124 Nev. at __, 174 P.3d

at 976. Defense counsel used the following rather innocuous hypothetical example in his closing argument, with no objection:

> *You* send *your* son or *your* daughter over to a slumber party and they're running around, maybe there's a pool in the backyard, running around, opening closing the slider, playing tag, something happens. One of them runs into the slider or shut[s] the door and hurts one of the other boy's fingers, is that an opportunity, does that mean *you* just go out and sue-negligence. It's an accident. If this is not an incident [sic], what is[?]

Id. (emphasis added). On appeal, this court held that the slumber party analogy was a prohibited golden rule argument:

> During his closing argument, Emerson plainly stated to the jurors, '*You* send *your* son or daughter' to a friend's house, where he or she was injured, and questioned, '[D]oes that mean *you* just go out and sue [?]' (Emphasis added.) He invited the jurors to make a decision as if they and their children were involved in his hypothetical situation-a situation that somewhat paralleled the scenario of the Langs' daughter's injuries. This question indicated that the jury could make a decision based on the personal hypothetical designed to trivialize the daughter's injuries instead of deciding the case on negligence law and the evidence that the Langs and Knippenberg presented. Thus, Emerson's comment amounted to an impermissible golden rule argument.

Id. at __, 174 P.3d at 984 (emphasis in original).

In short, *Lioce/Lang* defense counsel's use of the words "you" and "your" in the slumber party hypothetical was enough for the *Lioce* court to find a golden rule violation. In the present case, the hypothetical analogies that plaintiff's counsel gave jurors during his closing argument were far more offensive than the slumber party argument held improper (and thereby justifying a new trial) in *Lioce*. Here, plaintiff's counsel argued:

> [MR. PRINCE:] But let's think about this: Who would volunteer -- what reasonable person would volunteer to --
>
> MR. LAURIA: Your Honor, may we approach, please?
>
> MR. PRINCE: -- give up their hopes and dreams and suffer a lifetime --
>
> * * *
>
> [Bench conference begins at 12:31 p.m.]
>
> MR. LAURIA: That's a little bit like a Golden Rule --
>
> MR. PRINCE: No --
>
> MR. LAURIA: -- argument if he's -- excuse me. That is clearly a Golden Rule argument because he's asking them who would do that which is putting them in that same position, who would give up those opportunities for money. It is -- whether he phrased it as you personally or a third person --
>
> THE COURT: No.
>
> MR. LAURIA: -- would give it up --
>
> THE COURT: No, no, no, no. I disagree.

22 A.App. 5198.

> MR. PRINCE: And what reasonable person would give up their hopes, their dreams and agree to suffer a lifetime of pain, discomfort and limitation for money? Would it be a million dollars -- if I give you a million dollars today, but I give you a 65-year-old man's spine, you won't be able to finish playing your college career, you're going to have discomfort and as you get older, it's going to get worse with time, you're going to need future surgeries, who would do that? Who would sign up for something like that?
>
> * * *
>
> And pain's kind of an interesting cycle because if you have increased pain, then you have anxiety and stress and fear and it affects you and affects your mood, and then, you know, affects your activities and is kind of like in this weird, vicious cycle and pattern.

22 A.App. 5199 (emphasis added).

> MR. PRINCE: * * * But when someone else puts you in a situation where you've lost out on your opportunity to enjoy the prime of your life, that now you suffer chronic pain and that it's going to get worse with time -- when you have to listen to that, that it's going to get -- my condition's going to get worse with time, it'll never improve. There'll be times sure he's have his good days and he's going to have his bad days, but he's going to have a lot to endure.
>
> * * *

22 A.App. 5202 (emphasis added).

[Jury out at 12:45 p.m.]

[Hearing outside presence of jury; defense counsel makes further record of objection based on prohibited golden rule argument; court overrules objection.]

22 A.App. 5207-08, 5210.

Such appeals to jurors to put themselves in the shoes of a plaintiff are improper golden rule arguments. *Lioce* held that defense counsel's use of the words "you" and "your" only four times in the slumber party hypothetical example was sufficient to suggest that jurors should put themselves into the shoes of a person in the hypothetical (i.e., the plaintiff), thereby violating the prohibition against golden rule arguments and calling for a new trial. Here, plaintiff's counsel did the exact same thing, but here he used those words a staggering 19 times.

Indeed, *Lioce* held that arguments parallel to those made by plaintiff's counsel here were improper. In the present case, as in *Lioce*, plaintiff's counsel personalized an emotional appeal to jurors, asking them to consider hypothetical examples involving their own long-term pain and suffering. Immediately after asking the jurors how much money a reasonable person would want for a lifetime of pain, counsel asked jurors to consider an amount of money if "you" have pain, if "you" have anxiety and stress, how pain "affects you and affects your mood" and "affects your activities." 22 A.App. 5199.

Plaintiff's counsel then continued by personalizing arguments to the jurors, asking them to consider "when someone else puts you in a situation where you've lost out on your opportunity to enjoy the prime of your life," and to consider how it would feel if "you suffer chronic pain." 22 A.App. 5202 (emphasis added). As in *Lioce*, such arguments were improper and prejudicial.

c. Plaintiff's counsel made improper jury nullification arguments

Jury nullification is "a jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Lioce*, 124 Nev. at 20, 174 P.3d at 982-83.

Lioce and *DeJesus* make clear that attorneys are absolutely prohibited from arguing that jurors should consider societal values, social ills, and social issues beyond the case itself. *See Lioce*, 124 Nev. at 20-21, 174 P.3d at 982-83; *DeJesus*, 116 Nev. at 818-19, 7 P.3d at 463-64. In *Lioce*, for example, defense counsel discussed frivolous lawsuits, asking jurors to "send a message" about such lawsuits. 124 Nev. at 21, 174 P.3d at 983. The court held that such arguments are improper in civil cases, amounting to prejudicial misconduct justifying a new trial. 124 Nev. at 21-22, 174 P.3d at 983.

Nevada has a "well-established prohibition" against attorneys referring to juries as "the conscience of the community" in closing arguments. *Schoels v. State*, 114 Nev. 981, 987, 966 P.2d 735, 739 (1998). The rule against arguing that the jury is the "conscience of the community" has been applied in medical malpractice cases in other states. For example, in *Suarez Matos v. Ashford Presbyterian Comm. Hosp.*, 4 F.3d 47 (1st Cir. 1993), the plaintiff's counsel in a medical malpractice case argued that the jury was the "conscience of this community." The court held that counsel's argument, when combined with other arguments, "was outrageous," requiring a reversal of a $1.3 million wrongful death verdict. *Id.* at 50-51.

A California court applied the rule in *Regalado v. Callaghan*, 207 Cal. Rptr. 3d 712 (Cal. App. 2016), holding: "The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." *Id.* at 725. A closing argument is improper if it tells the jury that its verdict will have an impact on the community or that the jury's verdict will reflect the conscience of the community. *Id.* at 725-26.

In *Westbrook v. Gen. Tire and Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985), a personal injury plaintiff's counsel argued: "You're going to be the conscience of the community with this verdict." *Id.* at 1238. The court held that this constituted misconduct. *Id.* at 1238-39; see also *Maercks v. Birchansky,* 549 So.2d 199, 199

(Fla. App. 1989) (in the absence of a claim for punitive damages, court would "not condone" argument that jury was "conscience of the community" or asking jury to "send a message with its verdict"); *Erie Ins. Co. v. Bushy,* 394 So.2d 228, 229 (Fla. App. 1981) (reversing because of plaintiff's counsel's "send a message" argument).

The present case is a textbook example of improper jury nullification arguments.

> MR. PRINCE: And your decision here is important because, well, it affects the public. A jury speaks as the conscious (sic) of our community, as the enforcer of our values and our beliefs. And you can see that there's many people here watching this case today because it's open to the public. Everything that we've said and done over the last two weeks is recorded for all time and eternity, and for that reason your decision here is very important.
>
> * * *
>
> And the only protection Beau has -- his only option is to come to court. His only protection is in the law. He has no other protection available to him because Dr. Capanna has always refused to accept any responsibility for what he did.
>
> MR. LAURIA: Your Honor, may we approach, please?
>
> MR. PRINCE: And so for –
>
> [Bench conference begins at 11:05 a.m.]
>
> MR. LAURIA: I believe counsel is making an improper social justice argument here in closing argument, suggesting that they have to

protect society, that this is – from Dr. Capanna (indiscernible) so I'm concerned you know that's improper –

THE COURT: Well --

MR. LAURIA: -- closing argument.

THE COURT: -- I would say generally speaking that comment about responsibility is troublesome. The only thing I would say about this case is that there was a lot of testimony about whether he ever acknowledged anything --

MR. PRINCE: Right.

THE COURT: -- To Beau about the kind of surgery he did or whatnot then or I'm sorry, you know, even if he didn't intend it that he caused him any kind of injury, anything like that, so -- I mean, don't bring it up again in that kind of a contest --

MR. PRINCE: About what?

THE COURT: -- saying he refuses to accept responsibility and that's why we had to come to court. Everybody has --

MR. PRINCE: Okay.

THE COURT: -- everybody has a right to be in court. So it's one thing to say Dr. Capanna has refused to accept responsibility and the evidence shows --

* * *

[Bench conference ends at 11:06 a.m.]

22 A.App. 5149-51 (emphasis added).

[MR. PRINCE:] Dr. King said it best: Injustice anywhere is a threat to justice anywhere -- everywhere.

22 A.App. 5200.

MR. PRINCE: And remember Dr. Capanna, he needs to hear from you. He's not going to -- he's not going to accept any responsibility. You're the only one who has the authority and the power to hold him accountable for what he did to Beau. Thank you.

22 A.App. 5206 (emphasis added).

[Hearing outside presence of jury; defense counsel makes further record of objection based on prohibited argument by plaintiff's counsel regarding sending a message; court overrules objection.]

22 A.App. 5208-10.

These arguments were flagrant violations of *Lioce*, and clear attempts to invoke jury nullification. Counsel asked jurors to render their verdict based on their status as the conscience of the community, and to enforce the community's values and beliefs. Counsel asked jurors to consider the fact that there were "many people watching the case" in the courtroom, and the case was therefore very important to the community. And counsel asked jurors to send a message to Dr. Capanna because he refused to accept responsibility (despite the judge's observation that everyone has the right to be in court). These persistent arguments were improper and highly prejudicial.

As *Lioce* recognized, where counsel engages in persistent misconduct, the opposing party is "placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point."

Lioce at 18, 174 P.3d at 981. In such instances, an attorney who commits repeated misconduct cannot hide behind the veil of harmless error by contending that the misconduct had no effect on the verdict; rather, by engaging in continued misconduct, "the offending attorney has accepted the risk that the jury will be influenced by his misconduct." *Id.* at 18-19, 174 P.3d at 931. As a result, district courts must give "great weight" to the fact that repeated or persistent misconduct might not be curable. *Id.*

Dr. Capanna's counsel made far more objections during closing arguments than counsel in any of the four consolidated cases in *Lioce*. The first consolidated case in *Lioce* was *Castro*, in which the defense attorney made two improper closing arguments. Plaintiffs' counsel did not object. *Id.* at 7-8, 174 P.3d at 974-75. This court characterized the two items of misconduct as "repeated," justifying a new trial. *Id.* at 23-24, 174 P.3d at 984-85. Similarly, in the *Lioce* trial, defense counsel gave improper arguments in two portions of his closing. Plaintiff's counsel did not object (*see id.* at 9-10, 174 P.3d at 975-76), but this court vacated the district court's order denying a new trial and remanded for further proceedings (*id.* at 24-25, 174 P.3d at 985).

The third consolidated case was *Lang,* where the plaintiff's attorney objected to three arguments, but did not object to the slumber party hypothetical. *Id.* at 10-

11, 174 P.3d at 976. This court held that three prior objections were sufficient to preserve the golden rule issue, despite the lack of objection to that argument. *Id.* at 23, 174 P.3d at 984. This court characterized defense counsel's three instances of misconduct as "persistent." *Id.* The fourth consolidated case was *Seasholtz*, in which one portion of defense counsel's closing argument contained an improper jury nullification argument. *Id.* at 12-14, 174 P.3d at 977-78. The plaintiff's counsel did not object. *Id.* This court held that a new trial was appropriate, characterizing defense counsel's argument as irreparable error despite the absence of any objection. *Id.* at 24, 174 P.3d at 985.

Thus, defense counsel in the present case made significantly more objections to attorney misconduct than in any of the four consolidated cases in *Lioce*. As in those cases, therefore, Dr. Capanna adequately preserved his attorney misconduct arguments for review. And as in the four consolidated cases in *Lioce*, the misconduct requires a new trial.

7. The district court erred by awarding attorneys' fees

After trial, plaintiff moved for attorneys' fees. 9 A.App. 1939. The motion was based solely on NRS 18.010(2)(b), which allows a fee award when a party's claims or defenses are brought without reasonable grounds. Dr. Capanna opposed the motion. 9 A.App. 1993. The district court granted the motion, awarding

$169,989.58. 11 A.App. 2439. The district court found that Dr. Capanna's defense on the issue of damages "was made in good faith and with reasonable grounds." 11 A.App. 2437:19. Nonetheless, the district court found that Dr. Capanna's liability defense was not maintained with reasonable grounds.[5] 11 A.App. 2437:18.

Under NRS 18.010(2)(b), a claim is groundless if it is "not supported by any credible evidence at trial." *Bobby Berosini, Ltd. v. PETA,* 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (emphasis added).

In awarding fees, the district court concluded that evidence of Dr. Capanna's liability "was overwhelming." 11 A.App. 2437:22. This is not the correct legal standard. Instead, the standard is whether there was "any credible evidence" supporting Dr. Capanna's position regarding liability. Clearly there was such evidence, as discussed below. Significantly, plaintiff never obtained a pretrial order granting partial summary judgment against Dr. Capanna on the liability issue; nor did plaintiff obtain a judgment as a matter of law against Dr. Capanna at trial. If

---

[5] Plaintiff's motion included information regarding settlement offers during trial. 9 A.App. 1942, 1944. Such evidence is not admissible. NRS 48.105(1); *Torres v. Nevada Direct Ins. Co.,* 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1208 (2015). The purpose of this rule is to prevent evidence of settlement offers from haunting future legal proceedings. *Id.* at ___, 353 P.3d at 1208-09. Fortunately, it appears that the district court did not consider plaintiff's improper assertion of information regarding settlement negotiations.

there was truly no evidence whatsoever supporting Dr. Capanna's defense on liability, surely plaintiff would have moved for partial summary judgment or JMOL, and surely the district court would have granted such motions. This did not occur. See *Bobby Berosini,* 114 Nev. at 1353-54, 971 P.2d at 386 (defendant's failure to obtain summary judgment or post-trial JNOV tended to establish that plaintiff's case was brought on reasonable grounds).

The primary issues at trial regarding liability were whether Dr. Capanna operated on the wrong spine level; whether he inadvertently injured the L4-5 disc while attempting to address the herniation at L5-S1; and whether, even if he did injure the L4-5 disc, this was below the standard of care for a surgeon (which is required for a finding of negligence). Evidence was hotly contested on these issues.

One key defense medical witness was Dr. Belzberg, who is a neurosurgeon and a professor of neurosurgery at Johns Hopkins School of Medicine, and who specializes in spine and nerve surgery. 16 A.App. 3697. He testified that Dr. Capanna was targeting the disc herniation at L5-S1 when Dr. Capanna probed the L4-5 disc, entering that disc. 16 A.App. 3745-46. Dr. Belzberg testified that this was a recognized risk and complication from the surgery. 16 A.App. 3746-47. Dr. Belzberg further testified that inadvertent entry into a disc is something he and his colleagues have done in the past, and such an incident is not considered malpractice.

Q. And in your opinion would an inadvertent entry into the disc as you're probing, would that be malpractice or below the standard of care?

A. No, that would not be considered malpractice.

Q. You have had an inadvertent entry into a disc yourself when probing?

A. Yes, I have.

Q. It's happened to your colleagues at Johns Hopkins?

A. Yes. It has.

Q. Doesn't mean you're being careless or not paying attention to what you're doing?

A. You certainly don't want it to happen and you're trying not to do something like that, but I would not consider it malpractice just because it happened.

16 A.App. 3747:2-12.

Dr. Belzberg also testified that, contrary to Dr. Cash's opinions, it is possible to approach the L5-S1 disc coming from above, and this would be within the consent given by the patient. 16 A.App. 3747-49. He also testified that Dr. Capanna's recommendation for conservative treatment after the operation was reasonable. 16 A.App. 3754-55. Finally, he testified that a surgeon can inadvertently enter a disc at the wrong level without violating the standard of care. 16 A.App. 3760-3761.

Dr. Capanna, who has been a neurosurgeon for more than 30 years (19 A.App. 4307), testified consistent with Dr. Belzberg's testimony. Dr. Capanna testified that

doing a microdiscectomy at a wrong level is a recognized complication and is not below the standard of care. 18 A.App. 4233-35. Additionally, Dr. Marc Kaye, a radiologist, testified that there were indications on MRIs that Dr. Capanna performed surgery at the correct L5-S1 level. 21 A.App. 4843-44.

Although the district court may have personally viewed the liability evidence against Dr. Capanna as strong, the legal question on the motion for attorneys' fees was whether there was "any credible evidence" supporting the defense on the liability issue. Considering testimony of doctors Belzberg, Capanna and Kaye, there was, without a doubt, credible evidence at trial supporting Dr. Capanna's position that his surgery on plaintiff did not fall below the standard of care, and therefore he did not commit negligence.

Even if the liability evidence against Dr. Capanna was strong, as the district court found, Dr. Capanna still had the right to defend himself on the issue of damages. On this issue the district court specifically found that Dr. Capanna's defense was made "in good faith and with reasonable grounds." 11 A.App. 2437:19. Neither plaintiff's motion nor the district court's order cited cases holding that liability and damages presentations in a medical malpractice trial can be evaluated separately, in determining whether a defendant has any credible evidence at trial, for purposes of an award of attorneys' fees pursuant to NRS 18.010(2)(b).

Accordingly, the district court applied the wrong legal standard in awarding attorneys' fees, and the district court therefore abused its discretion. The award must be reversed.

8. The district court erred in its award of costs

The district court awarded plaintiff $69,975.95 in expert witness costs. 11 A.App. 2460:12. Dr. Capanna objected to these costs. 7 A.App. 1622-25.

Because statutes permitting costs are in derogation of the common law, they should be strictly construed. *Gibellini v. Klindt,* 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994). Under NRS 18.005(5), a party may recover "not more than $1,500 for each witness," unless extraordinary circumstances exist. When a district court awards expert fees in excess of this limit, the court must state the basis for its decision. *Frazier v. Drake,* 131 Nev. Adv. Op. 64, 357 P.3d 365, 378 (Ct. App. 2015).

In the present case, the district court exceeded the statutory limit for Dr. Yoo ($15,125) and Dr. Cash ($47,250). 7 A.App. 1444:21-22; 11 A.App. 2460:12-14. As the basis for its decision, the district court made a vague, generic finding as follows: "The Court specifically finds that all named experts were necessary to Plaintiff's case, and exceeding the statutory amounts is justified and reasonable for Dr. Yoo and Dr. Cash based on their roles in the litigation." 11 A.App. 2460:12-14.

The *Frazier* court established mandatory guidelines for excess expert witness fees. First, the court concluded "that any award of expert witness fees in excess of $1,500 per expert must be supported by an express, careful explanation and analysis of factors pertaining to the requested fees and whether 'the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.'" *Frazier,* 131 Nev. at ___, 357 P.3d at 377 (emphasis added). In evaluating such requests, district courts should consider numerous factors, which *Frazier* identified. *Id.* at ___, 357 P.3d at 377-78. Evidence must demonstrate that the excess fees were reasonable, necessary and actually incurred. *Id.* at ___, 357 P.3d at 378.

In the present case, the district court awarded more than 10 times the statutory limit for Dr. Yoo, and more than 31 times the statutory limit for Dr. Cash. Rather than articulating an express, careful analysis of the applicable factors, as required by *Frazier*, the district court made only a vague and general comment. The order came nowhere near satisfying the *Frazier* court's requirements. Accordingly, the award must be reversed.

CONCLUSION

For the foregoing reasons, the judgment should be reversed, and this case should be remanded for a new trial. At the very least, the judgment should be reduced by the amount awarded for future damages.

DATED: 11/4/16

ROBERT L. EISENBERG (NV Bar No. 950)
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
Email: rle@lge.net

ANTHONY D. LAURIA (NV Bar No. 4114)
Lauria, Tokunaga, Gates & Linn, LLP
601 S. Seventh Street, 2nd Floor
Las Vegas, Nevada 89101
702-387-8633
Email: alauria@ltglaw.net

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman in 14 point font size.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, beginning with the statement of the case [NRAP 32(a)(7)(C)] and excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 13,995 words.

Finally, I hereby certify that I have read this appellate 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 NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume numbers, if any, 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: 11/4/16

Robert L. Eisenberg

ROBERT L. EISENBERG

CERTIFICATE OF SERVICE

I certify that I am employee of Lemons, Grundy & Eisenberg and that on this date Appellant's Opening Brief was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Dennis Prince dprince@egletlaw.com
Tracy Eglet teglet@egletlaw.com
Attorneys for Respondent

Anthony Lauria alauria@ltglaw.net
Kimberly Johnson kjohnson@ltglaw.net
Attorneys for Appellant

and that a copy of Appellant's Opening Brief was served by U.S. Mail, postage prepaid, to:

Danielle Tarmu
Eglet Prince
400 S. Seventh Street, #400
Las Vegas, Nevada 89101

I further certify that on this date I filed Appellant's 23 volumes of Appendix by hand with the Clerk of the Nevada Supreme Court and sent disks of same by U.S. mail, postage prepaid, to:

Dennis Prince
Tracy Eglet
Danielle Tarmu
Eglet Prince
400 S. Seventh Street, #400
Las Vegas, Nevada 89101
Attorneys for Respondent

Anthony Lauria
Lauria, Tokunaga
Gates & Linn LLP
601 S. Seventh St.
Las Vegas, NV 89101
Attorneys for Appellant

DATED: 11/4/16