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 REPLY/ANSWERING BRIEF

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REPLY ARGUMENTS ON APPEAL

1. The district court erred by limiting cross-examination.

Appellant's opening brief (AOB) established that the district court erred by not allowing cross-examination regarding Dr. Cash's history of being retained by attorney Prince and his firm in numerous other cases, with a financial incentive for the doctor to give testimony favorable to Prince's clients. The respondent's answering brief (RAB) mischaracterizes the AOB's arguments, then responds to the mischaracterized arguments, providing no support for the district court's ruling.

a. Treating physicians are subject to the same cross-examination as other witnesses.

The RAB distinguishes treating physicians from retained medical experts, arguing that treating physicians are not subject to the same cross-examination rules as retained experts. RAB 19-21. The RAB states: "Capanna claims the district court erred in finding Dr. Cash to be a treating physician instead of a retained expert, allowing for a 'different standard for cross-examination.'" RAB 19-20 (citing AOB 12). Actually, the portion of the AOB to which plaintiff's brief refers was **not Capanna's contention**. It was a summary of "**plaintiff's** primary argument." AOB 12 (emphasis added).

As the AOB observed, distinctions between treating physicians and retained medical experts relate to discovery requirements, not cross-examination at trial.

AOB 12-13. Plaintiff contends, however, that bias and credibility are proper subjects for cross-examination "of specially retained expert witnesses." RAB 19. This suggests that bias and credibility are **not** proper cross-examination subjects for other witnesses, such as treating physicians. Plaintiff cites *Robinson v. G.G.C., Inc.,* 107 Nev. 135, 808 P.2d 522 (1991). RAB 19.

Robinson supports the proposition that bias and credibility are proper cross-examination subjects for **all** witnesses, not just specially retained experts. In *Robinson,* the witness happened to be a retained expert, but the opinion did not limit its holding to retained experts. Indeed, *Robinson* relied upon *Delaware v. Van Arsdal,* 475 U.S. 673, 106 S. Ct. 1431, (1986), which did **not** involve a retained expert. *Robinson* also relied on *Frank B. Hall & Co. v. Buck,* 678 S.W.2d 612 (Tex. App. 1984), which did **not** involve an expert witness, and where the court held: "A party has a right to show interest, bias, or prejudice which may affect a witness' credibility." *Id.* at 628. A jury is "entitled to know any fact which would tend to influence the testimony given by a witness." *Id.* The *Robinson* court adopted *Hall*'s holding that a 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 matter which would tend to influence the testimony given by a witness." *Robinson*, 107 Nev. at 143, 808 P.2d at 527.

Robinson also relied on *Wittenberg v. Wittenberg,* 56 Nev. 442, 55 P.2d 619 (1936), which did **not** involve an expert witness.

Accordingly, *Robinson* and the cases cited in *Robinson* do not hold that bias and credibility are proper subjects for cross-examination of only specially retained expert witnesses, as plaintiff suggests at RAB 19.

Our opening brief discussed *Rish v. Simao,* 132 Nev. Adv. Op. 17, 368 P.3d 1203 (2016). AOB 10. *Rish* involved a treating physician, not a specially retained medical expert. The district court precluded cross-examination regarding the doctor's history of litigation testimony. Although this court reversed the judgment on other grounds, the court noted that defense counsel's cross-examination questions **were relevant** to credibility. *Id.* at ___, 368 P.3d at 1210 (fn 5). Plaintiff's RAB ignores *Rish.*

Although it is irrelevant whether Cash is characterized as a treating physician or a retained expert on this issue, the RAB nevertheless contends that Cash was only a treating physician. RAB 19-22. Even if he was only a treating physician, he was undeniably an expert witness. 4 A.App. 833 (plaintiff discloses Cash to "offer expert testimony"); 15 A.App. 3521 (plaintiff offers Cash at trial "as an expert," and district court certifies Cash to "offer expert opinions"). Like any other expert, he cannot escape cross-examination that shows his bias.

Even if there is a difference between treating physicians and retained physicians for purposes of cross-examination—which there is not—Cash was a retained expert by the time this case got to trial. He may have started as a treating physician, but he was later retained by attorney Prince as a forensic medical expert. Prince paid him more than $47,000 for forensic work on this case, including $10,000 to review thousands of pages of medical records; $3,500 to prepare a two-page letter for the lawsuit, dealing with future surgeries; $15,750 for trial preparation; and $18,000 for trial testimony. 7 A.App. 1492-96; 11 A.App. 2495-96; 19 A.App. 4399.

Treating physicians are only exempt from reporting requirements for experts regarding opinions that were "formed during the course of treating the plaintiff." *Pizarro-Ortega v. Cervantes-Lopez,* 133 Nev. Adv. Op. 37, 396 P.3d 783, 787 (2017); *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46, 335 P.3d 183, 189-90 (2014). In *FCH1,* a treating physician was deemed to have changed into a retained expert, where the plaintiff's counsel gave the doctor thousands of pages of medical records for the doctor's review and opinions, and where the doctor did not testify that he reviewed the documents during the normal course of his treatment of the plaintiff. *Id.* at ___, 335 P.3d at 189-90.

Here, Prince paid Cash to review thousands of pages of medical records and to prepare a letter regarding future surgeries (adding $700,000 to plaintiff's special

damages). This alone changed Cash into a retained expert. Plaintiff concedes that his counsel sent Cash medical records, but plaintiff argues that "most of them were already in [Cash's] chart." RAB 28. The RAB contains no appendix citations supporting this statement, and we are aware of none.

In addition, plaintiff concedes that his counsel provided Cash with plaintiff's deposition transcript, which Cash used in forming new opinions. RAB 10 ("After reading Beau's deposition, Dr. Cash addressed the need for future fusion surgery"); RAB 25 (Cash supplemented his opinions based upon "Beau's deposition testimony"). Cash did not testify that he reviewed the deposition transcript as part of his treatment of plaintiff.[1] Further, as discussed in more detail below, the district court permitted Cash to give opinions (over defense counsel's objection) regarding the reasonableness of medical bills for care provided by other doctors and entities. 11 A.App. 2540-46. There was no evidence that Cash's review of bills from other medical providers was part of his regular treatment of plaintiff.

Therefore, after reviewing depositions and thousands of pages of records, then preparing a letter/opinion for plaintiff's counsel, then forming and expressing opinions regarding bills from other medical providers, Cash should be considered a former treating physician **and** a specially retained expert at the time of trial.

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[1] Such testimony would have been ridiculous. Diligent research has revealed no case, from any jurisdiction, where a treating physician reviewed a deposition transcript in the normal course of treating a patient.

b. The district court limited the cross-examination.

Plaintiff argues that there was "no limitation" on cross-examination of Cash regarding financial entanglements with plaintiff's counsel. RAB 13. Plaintiff also argues that the "defense elected not to ask any questions regarding Dr. Cash's potential bias or relationship with Beau's counsel," that the district court did not limit the cross-examination regarding bias, and that defense counsel "elected not to conduct cross-examination on bias." RAB 19-20. Plaintiff argues that defense counsel "had the opportunity to inquire into Dr. Cash's credibility and potential bias, but did not ask a single question about these matters." RAB 20. As such, plaintiff seems to be arguing that this issue was not properly preserved.

Plaintiff's argument is demonstrably false. Plaintiff's pretrial motion in limine broadly sought to preclude the defense from making **any reference** to attorney Prince's connections with physician-witnesses, including the fact that he had worked with the physicians on other cases. 23 A.App. 5404. Plaintiff's motion expressly included Cash. 23 A.App. 5420.

Plaintiff's argument at the hearing was as broad as his motion. Attorney Prince argued that his motion sought to exclude evidence of his "working with" physicians on unrelated cases. 11 A.App. 2494:22-23. Prince then repeated that he was asking 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 (emphasis added).

The district court granted plaintiff's motion, only allowing questions regarding the ratio of a doctor's work for plaintiffs and defendants, and whether the doctors have "worked with attorneys before." 11 A.App. 2500:12-13. But the district court absolutely precluded defense counsel from cross-examining Cash regarding the number of times he has worked with Prince.[2] 11 A.App 2500:13-22.

The district court's ruling at the hearing was broad, prohibiting any reference to the number of times Cash "worked with" Prince or the attorneys in his firm or his former firm. 11 A.App. 2500:17-22. The ruling was not limited to the number of times Cash merely "treated" Prince's clients, because such a narrow limitation was not what Prince wanted or needed. Defense counsel had an obligation to obey that ruling at trial. Now, however, plaintiff attempts to use defense counsel's obedience as a sword, contending that defendant's appellate

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[2] To some extent, plaintiff relies on the district court's written order on the motion in limine. RAB 22, citing 8 R.App. 1718-1721. This order, however, was not filed until December 1, 2015, which was three months after the trial. The district court's definitive ruling on the motion in limine occurred at the pretrial hearing. 11 A.App. 2500. Plaintiff now misleadingly argues that the order precluded questions about the number of times Cash **treated** clients of plaintiff's counsel. RAB 22. The written order was broader. It prohibited questions about doctors "**working with** Plaintiff's counsel in the past." 8 R.App. 1719-1720 (emphasis added).

argument should be impacted by defense counsel's limited cross-examination at trial. RAB 19-21.

An argument on a fully briefed and argued pretrial motion dealing with admission of evidence, on which the district court has ruled, is sufficient to preserve the issue for appeal, without an objection at trial. *BMW v. Roth,* 127 Nev. 122, 136-37, 252 P.3d 649, 659 (2011). In the present case, defense counsel obeyed the district court's ruling by not cross-examining Cash regarding the forbidden topic, and this cannot be held against defendant in this appeal.

c. Dr. Cash's litigation relationship with attorney Prince shows financial motivation and bias.

Plaintiff argues that the number of times Cash and attorney Prince worked together in the past is not probative. RAB 22. Cash's relationship with Prince, including their financial entanglement, was extensive and undisputed. Cash testified at his deposition that he had worked as a retained expert for Prince's law firm up to **four dozen times.**[3] 5 A.App. 1009 (47-48).

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[3] The RAB contends that defendant "mischaracterizes" testimony regarding the number of times Cash was retained as an expert by plaintiff's counsel. RAB 22-23. We did not make this up. **It was Cash's own sworn deposition testimony** that he was retained as an expert by Prince's present partner or by Prince's office "somewhere on the order of two to three to **maybe four dozen times.**" 5 A.App. 1009 (47-48) (emphasis added).

As demonstrated in the opening brief, Prince paid Cash $47,250 for litigation services in this case alone. With Cash being retained by Prince or his law firm up to 48 times in other cases, the doctor's litigation services for Prince was literally a cash cow, potentially generating millions of dollars in fees. AOB 14. This gave Cash a financial incentive to keep Prince happy and to give testimony favorable to Prince's client at trial, because of the potential for huge expert referral fees from Prince's firm in the future.

The RAB misses the point by arguing that plaintiff's counsel did not refer plaintiff to Cash for treatment. RAB 24. Even without an original referral from attorney Prince to Cash, plaintiff's counsel subsequently used Cash for litigation consulting and testimony services in this case. And even if this had not occurred, the retained-expert financial entanglement between Prince and Cash on other cases provided a huge financial incentive that the jury should have been able to consider in evaluating Cash's credibility.[4]

Plaintiff argues that it would be misleading to show Cash's relationship with Prince, without also discussing Cash's work with other attorneys, and that this whole matter is merely a "collateral" issue. RAB 23. Cash's cross-examination

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[4] The opening brief cited other cases involving witness financial incentives. AOB 11-12. Plaintiff's brief ignores these cases. One such case is *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 832 (2003), where the Court recognized that even a **treating physician** can have financial motivations to reach certain opinions.

on this topic would have probably been just a few questions. If Prince wanted to bring out the fact that Cash also works for other attorneys, as somehow ameliorating Cash's bias in favor of Prince, this could have been presented with a few more questions on redirect. The whole thing would have been relatively simple. It was for the jury (not the judge) to determine whether Cash's extensive ongoing financial relationship with Prince created a financial incentive for Cash to be biased in trial testimony involving one of Prince's clients, and whether this impacted the doctor's credibility.

Additionally, plaintiff's brief cites no legal authority for the proposition that large direct financial incentives for a witness are merely "collateral" issues. See *Robinson,* 107 Nev. at 143, 808 P.2d at 527 (holding that a witness's business relationships with counsel can show bias, which the jury should have an opportunity to evaluate).

Plaintiff attempts to distinguish two cases cited in the opening brief regarding cross-examination on doctor-attorney relationships. RAB 23-24, discussing *Noel v. Jones,* 532 N.E.2d 1050 (Ill. App. 1988) and *Flores v. Miami-Dade County,* 787 So.2d 955 (Fla. App. 2001). Plaintiff argues that those cases only deal with a "referral relationship between the doctor and attorney," and that there was no referral from plaintiff's counsel to Cash in this case. RAB 23-24. Those cases may have dealt with referral relationships, but the holdings

were not limited to referrals. Those cases held that cross-examination can include **any** financial motivation impacting credibility and bias. *Noel,* 532 N.E.2d at 1054; *Flores,* 780 So.2d at 957-58.

Treating physicians are subject to general rules of cross-examination that test the accuracy, truthfulness, soundness and credibility of their testimony on direct examination. See *Warner v. DMAX,* 46 N.E.3d 202, 208 (Ohio App. 2015). No Nevada opinion immunizes treating physicians from normal rules of cross-examination, or from having financial motivations for testimony disclosed to juries. Cash had been hired as a retained expert by attorney Prince or his law firms up to four dozen times. Even if Prince did not originally refer plaintiff to Cash, the fact remains that Prince called Cash as a crucial medical witness at trial. The doctor's testimony could have been significantly influenced by his ongoing multimillion dollar relationship with Prince's firm as a retained expert in dozens of other cases. If the jury had known of the relationship, the jury may well have determined that Cash's testimony was tainted by his desire not to spoil his ongoing financial relationship with Prince. The district court prohibited the jury from knowing all the relevant facts relating to Cash's credibility. This was error.

d. The error was not harmless.

Plaintiff argues that the error was harmless, and that defendant has failed to show that cross-examination regarding Cash's financial relationship with attorney

Prince would have changed the outcome. RAB 24-25. Defendant does not need to show that the error definitely impacted the outcome, only that, but for the error, a different result **might** reasonably have been reached. *Sanders v. Sears-Page,* 131 Nev. Adv. Op. 50, 354 P.3d 201, 213 (Ct. App. 2015).

Here, Cash was a key witness for plaintiff; he was the first witness plaintiff called at trial; and he testified three separate times at trial **regarding liability and damages**. 15 A.App. 3507-86; 16 A.App. 3587-3679, 3795-3800; 19 A.App. 4372-4455. Plaintiff's counsel referred to Cash at least 100 times in opening statement, closing argument and rebuttal argument. 15 A.App. 3443; 22 A.App. 5146; 23 A.App. 2578. Reading the trial transcript as a whole, it is clear that Cash was the most important witness at trial for plaintiff. If the district court had allowed appropriate cross-examination, a different result might have been reached by the jury. Accordingly, the error was prejudicial.

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

a. Dr. Cash's opinions were late, without any justification.

On September 17, 2010, Capanna performed surgery on plaintiff's low back, eventually leading to this lawsuit. 16 A.App. 3764-65. Shortly thereafter, Plaintiff saw Cash, who performed surgery on October 22, 2010. 15 A.App. 3526 (first visit), 3579-80 (surgery). Cash testified that when a patient has a

microdiscectomy surgery, such as the surgery plaintiff had in 2010, Cash tells his patients that they are most likely going to require a back fusion 10 to 15 years in the future. 19 A.App. 4378-79. Plaintiff confirmed that in 2010, he was told by Cash that he was going to need a fusion in the future, and this was something plaintiff knew since 2010. 20 A.App. 4575:23-4576:14. Cash conceded on cross-examination that as early as September or October of 2010, Cash had already formed the opinion that plaintiff would require fusion surgery 10 to 15 years in the future. 19 A.App. 4452:18-19.

There were a few follow-up visits with Cash until April 19, 2011. 16 A.App. 3648-49. At that point plaintiff stopped seeing Cash, and plaintiff did not return for another visit until approximately 16 months later, in August 2012. 16 A.App. 3650. This was nearly one year after plaintiff filed this lawsuit. 1 A.App. 1. Plaintiff was having mild pain. 16 A.App. 3650. Plaintiff saw Cash about a month later, complaining of only mild pain. 16 A.App. 3658.

Plaintiff did not see Cash again until approximately 18 months later, in March 2014, when his condition was somewhat worse. 16 A.App. 3659. More than a year later, on May 14, 2015, Cash sent a letter to attorney Prince. Cash opined that plaintiff needs two future fusion surgeries costing nearly $700,000. 5 A.App. 970-71. The only new information that Cash possessed came from his review of plaintiff's deposition. 5 A.App. 970. Plaintiff served supplemental

discovery disclosures dealing with Cash's letter the next day, on May 15, 2015, constituting plaintiff's first disclosure of Cash's opinion about the need for future fusion surgery. 5 A.App. 962:13-14.

At trial, Cash conceded that his opinion regarding plaintiff's need for fusion surgery 10 to 15 years in the future—an opinion which Cash had formed in the fall of 2010—was not mentioned anywhere in his medical records until nearly five years later in May 2015 (when he prepared his litigation letter/report for Prince). 19 A.App. 4388:13-4389:10. Additionally, when he prepared his report in May of 2015, expressing his opinion regarding the need for future surgeries costing approximately $700,000, there was no new information that he did not have at least a year before his report.[5] 19 A.App. 4400:2-10.

When defense counsel objected to Cash's untimely supplemental opinions regarding future surgeries, plaintiff never offered any explanation for the one-year delay between the date of Cash's last visit with plaintiff and the date of Cash's supplemental report regarding future surgeries. Nor did the district court inquire as to the reason why the supplemental report had not been prepared and disclosed earlier. 11 A.App. 2603.

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[5] As discussed later in this brief, Cash's office note in October 2010 did mention a remote possibility of future surgery if two things were to occur; but this was not the opinion that Cash formed and disclosed years later in 2015.

Now, on appeal, plaintiff argues that Cash timely supplemented his report "based on new information" consisting of plaintiff's deposition, an updated MRI, and Capanna's deposition. RAB 25. Cash's May 14, 2015 report, however, only mentions plaintiff's deposition. It does not say a word about Cash having reviewed an updated MRI or Capanna's deposition. 5 A.App. 970-72.

In other parts of his brief, plaintiff also asserts that Cash addressed the need for future fusion surgery after reading plaintiff's deposition. RAB 9-10. This is simply not a plausible excuse for the delay. Although the deposition **transcript** may have been new to Cash, the **information** contained in the transcript was **not** new to plaintiff himself. Plaintiff himself would have known the information all along. He and his attorney could have given the information to his doctors long before defense counsel took plaintiff's deposition. There was no need for plaintiff's attorney to wait until after plaintiff's deposition, before providing plaintiff's doctors with information regarding plaintiff's own condition.

Plaintiff argues that his supplemental disclosures were proper, because they were made more than 30 days before trial. RAB 28-29. Plaintiff's only case authority is his citation to an old 2007 unpublished order, in violation of NRAP 36(c)(2) and (3), which prohibits such citations. Plaintiff also relies on NRCP 16.1(a)(3) and 26(e)(1). RAB 29. Although those rules might allow supplementation in limited circumstances, such as to correct an inaccurate

response, the rules do not provide *carte blanche* authority for supplemental disclosures any time up until 30 days before trial.

Rule 16.1(a)(3), which establishes a 30-day pretrial deadline, does not contemplate disclosures of entirely new and important information being made for the first time only 30 days before trial. After all, discovery will have already closed before 30 days prior to trial, and entirely new disclosures a month before trial would be unfair to the other party. Rule 16.1(a)(3) deals with the fact that discovery in a case may have resulted in the disclosure of a broad range of evidence, much of which might have only marginal relevance. The rule requires a party to parse all of this information, to decide what evidence will actually be presented **at trial**, and to provide the trial judge and the opposing party with a list of trial witnesses and exhibits not later than 30 days before the trial. The rule is essentially a housekeeping rule for trial, and the rule does not contemplate new game-changing disclosures at the eleventh hour before trial.

NRCP 26(e)(1), on which the RAB also relies, allows a party to supplement prior disclosures in limited circumstances, at "appropriate intervals." But nothing in the rule suggests that a party has unlimited authority to provide new expert opinions—such as new opinions adding $700,000 in future damages—any time up to 30 days before trial. Such a reading of the rule would not only be absurd, it

would encourage the type of gamesmanship that occurred here. It would also cause havoc in civil lawsuits, and it would be grossly unfair.

The opening brief noted that there is no Nevada published opinion with guidance on the duty to supplement. Yet the opening brief cited and discussed numerous federal cases explaining that the rules do not provide an absolute right to supplement, and the rules do not "create a loophole" through which parties may simply revise previous disclosures. AOB 24-27. Plaintiff's brief ignores this body of case law, offering no legal authorities to the contrary.

If this court were to accept plaintiff's argument for essentially unlimited supplemental discovery disclosures, up to 30 days before trial, the court would be eviscerating the rules requiring timely disclosures. With such a holding by this court, attorneys who want to use gamesmanship to gain unfair advantages could make bare-bones initial disclosures, then wait until the 31st day prior to trial before making supplemental disclosures that could have a profound influence on the value of the case. This court should not condone such gamesmanship.[6]

This gamesmanship occurred here, where Cash could have formed and expressed his opinions much earlier—at least a year earlier. But he waited until

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[6] This is exactly what happened in the present case regarding Yoo. Plaintiff produced yet **another** supplemental report in July 2015 (i.e., after the doctor's May deposition), and plaintiff concedes: "This was 31 days before trial." RAB 9 fn. 4. This new supplement listed dozens of documents that Yoo had not reviewed before his May deposition. 11 A.App. 2587-89.

shortly before trial, then he prepared a new report at the request of plaintiff's counsel, asserting the need for two future surgeries costing approximately $700,000. Neither Cash nor plaintiff's counsel tendered any excuse for the delay. The district court erred by allowing this to occur.[7]

Plaintiff also contends that Cash was not required to disclose his opinions earlier, because he was merely a treating physician, and he was therefore not required to prepare a full-blown report. RAB 27-28. We have already explained in detail—in the opening brief (AOB 12-14, 19-21) and earlier in this brief—that Cash may have started as a treating physician, but plaintiff's counsel changed him into a retained expert by requesting him to review and give opinions on thousands of pages of records from other doctors, by sending him deposition transcripts to review, and by paying him thousands of dollars for his medical records litigation review and his litigation letter regarding future surgery (not to mention paying him nearly $34,000 for trial preparation and testimony).

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[7] As noted in the opening brief, there is a Las Vegas federal case involving the same Dr. Andrew Cash. AOB 36-37, discussing *Baltodano v. Wal-Mart Stores, Inc.*, 2011 WL 3859724 (D. Nevada 2011). In that case, Cash did not disclose his opinion concerning future surgery (at a cost of $400,000) until his deposition. The federal judge found no substantial justification for Cash's delay. *Id.* at *3-4. The judge accepted the defendant's argument that the late disclosure of Cash's opinion regarding spinal fusion damages was designed to ambush the defendant, and that the late disclosure was willful. *Id.* at *4. The federal judge therefore excluded all evidence regarding the surgery and related medical expenses. *Id.* at *5-6.

This is almost identical to *FCH1*, where the plaintiff's attorney provided a treating physician with medical records from other doctors, and the physician formed and expressed opinions based upon those records. This court held that treating physicians were only exempt from the reporting requirement for opinions formed during the normal course of the doctor's treatment of the plaintiff. But where a treating physician's testimony exceeds that scope, "he or she testifies as an expert and is subject to the relevant [reporting] requirements." *FCH1,* 130 Nev. at ___, 335 P.3d at 189.

FCH1 was applied in *Khoury v. Seastrand,* 132 Nev. Adv. Op. 52, 377 P.3d 81 (2016), where a treating physician was allowed to express opinions that took into consideration the treatment of other doctors. This was allowed only because the treating physician testified that he reviewed information from other doctors during the normal course of his own treatment of the plaintiff. *Id.* at ___, 377 P.3d at 90-91.

In the present case, Cash never testified that his review of thousands of pages of medical records he received from attorney Prince, or his review of deposition transcripts, was somehow part of the normal course of his treatment of plaintiff. This extra work, for which Cash was paid handsomely by Prince, was purely forensic work. Therefore, the limited exception for treating physician disclosures did not apply, at least as to Cash's opinions regarding future damages.

b. Dr. Cash's opinions about future surgery were improperly disclosed.

The RAB creates confusion by stating that Cash made a "recommendation for future fusion surgery," which was made during the course of his treatment of plaintiff. RAB 27. The brief cites 2 R.App. 247. This document is Cash's "Initial Consultation" note dated October 12, 2010, when Cash recommended immediate surgery because plaintiff "appears to be crippled at this time." Cash noted that such an operation "will most likely yield a successful result." 2 R. App. 247 (Recommendations section, ¶ 1). This was not the disclosure of future fusion surgeries, costing $700,000, on which this appeal is focused.

The initial consultation note, to which the RAB refers, does mention a remote possibility of future fusion surgery, but only **if** plaintiff has a recurrent disc herniation at L4-5, and **if** he has another injury at this level. In other words, Cash certainly did not express the opinion that plaintiff will most likely need two future surgeries, as he later opined. The note merely indicates a possibility of the need for a future surgery **if** two conditions occur.

Four and one-half years later, Cash's letter of May 14, 2015, expressed his entirely new opinion that plaintiff's condition worsened to the point that plaintiff will definitely require lumbar reconstruction at two levels in his low back, followed by a fusion at L4-5. 5 A.App. 970-71. This is far beyond the vague and

speculative initial consultation note years earlier. The RAB provides no reference to testimony by Cash indicating that his May 2015 recommendation for future surgeries was made during the normal course of his treatment of plaintiff. The May 2015 letter to counsel, containing the new opinion, was undeniably written to assist plaintiff at the upcoming trial, and the letter was sent after plaintiff's counsel provided Cash with thousands of pages of medical records and deposition transcripts. This forensic work cannot be deemed to have been performed during the normal course of his treatment of plaintiff, as the RAB argues.

The RAB contends that the disclosures regarding Cash were timely because Cash supplemented his opinions "in response to Beau's deposition testimony." RAB 31. As discussed earlier, information regarding plaintiff's condition could have been provided to Cash earlier. Plaintiff's counsel did not need to wait until after defense counsel took plaintiff's deposition. And in any event, as also noted earlier, both plaintiff and Cash testified that in 2010 they were already both aware of Cash's opinion about the need for future fusion surgery.

c. Dr. Cash opined about bills from other medical providers.

Cash's status as a retained expert was also established by Prince's concession regarding one of the purposes of Cash's testimony. At the hearing on motions dealing with this issue, the district court asked Prince: "Was there some

intent on having Dr. Cash talk about the **billing records** of other individuals?" 11 A.App. 2540:6-7 (emphasis added). Counsel answered: "It turned out that way, yes,..." 11 A.App. 2540:8. The district court then commented that a treating physician can testify about treatment rendered by other physicians, so long as the information was obtained during the course of the treating physician's treatment; but it "gets inappropriate" and it is "problematic" when a physician is being used to talk about treatment by other physicians, "even though it wasn't known to him or involved in his treatment at all." 11 A.App. 2541:4-17.

In response to the court's comment, plaintiff's counsel reiterated that he **did** intend to have Cash testify regarding billings from a radiology facility and a hospital. 11 A.App. 2542:23-2543:6. Plaintiff's counsel did not even pretend to argue that Cash's ordinary treatment of plaintiff somehow included reviewing bills from a radiology facility and a hospital, and expressing opinions regarding those bills. Such an argument would have been absurd. Unburdened by evidence that Cash's review of medical bills from other medical providers was somehow within the scope of his treatment of plaintiff, the district court found that such testimony by Cash did not turn the doctor into a retained expert. 11 A.App. 2545-46.

d. The error was not harmless.

Plaintiff contends that any error was harmless. RAB 34-36. It is difficult to see how a last-minute build-up of medical damages—with disclosures of future

surgeries and approximately $700,000 in future damages shortly before trial—would not be prejudicial. The question here is whether a different result **might** reasonably have been reached. *Sanders,* 131 Nev. at ___, 354 P.3d at 213.

The issue of prejudice existed in *Baltodano*, which is the federal case involving Cash, discussed above. The federal judge held that a late disclosure, such as Cash's late disclosure of his opinion regarding the need for future fusion surgery, can prevent the defense from obtaining and preparing expert witnesses or other evidence to support the defense. *Id.* at *3. The court held: "This surprise is prejudicial." *Id.*

Here, the late disclosure of Cash's new opinions cannot be viewed in isolation. His late disclosure was consistent with plaintiff's sandbagging approach to the lawsuit, with an orchestrated last-minute buildup of damages. Cash was not the only medical witness whose opinions were disclosed late. This appeal also deals with late disclosures by two other physicians.

The first was Dr. Yoo. He was a specially retained expert who prepared a new report the night before his deposition (with modifications to the report on the morning of the deposition), containing extremely important new opinions; and he presented his new report to defense counsel for the first time at the deposition. 5 A.App. 978; 17 A.App. 3922. This was years after Yoo had prepared his original expert affidavit that was attached to plaintiff's complaint. 1 A.App. 7-8.

This sandbagging strategy also occurred with Dr. Ruggeroli, who was mentioned by plaintiff in initial NRCP 16.1 disclosures in March 2012, with only a generic description of his testimony. 4 A.App. 831:21-26. More than three years later, on the eve of trial, plaintiff supplemented his disclosure regarding Ruggeroli, disclosing proposed future treatments at a cost of more than $325,000. 5 A.App. 940-43. Ruggeroli later admitted that when he prepared his report dated April 27, 2015, he had neither seen nor talked to plaintiff since nearly a full year earlier, in May 2014. 5 A.App. 946-49. Plaintiff's counsel offered no explanation as to why he did not obtain Ruggeroli's opinion during the year after the doctor had last seen plaintiff.

In complex personal injury litigation such as medical malpractice lawsuits, the attorneys will be diligently preparing for trial during the months leading up to the trial. This is intense and time consuming. A last-minute dump of new expert discovery disclosures will force the receiving attorney to become distracted from trial preparation while the attorney scrambles to deal with the new information.

In the present case, for example, defense counsel informed the district court about the fact that the new opinions regarding future surgeries and future treatment were disclosed two weeks before the close of discovery. 11 A.App. 2549. Defense counsel had prepared for hours getting ready for Yoo's deposition, but counsel ended up being unprepared because the doctor provided his new report for

the first time at the deposition. *Id.* Defense counsel explained that his preparation would have included review of applicable medical literature, but he did not have an opportunity to do that. 11 A.App. 2549. Defense counsel was also "scrambling around" to get his experts to address the late supplemental disclosures. 11 A.App. 2549:15-17.

When there is a last-minute buildup of medical damages and expenses—particularly involving late disclosures regarding three physician witnesses—it is impossible to conclude that a different result "might" not have occurred. Different results might have been reached regarding liability or damages. Accordingly, the error should not be deemed harmless. See *Baltodano*, *supra*, 2011 WL 3859724 at *3 (holding that Cash's late disclosure of opinions concerning future surgery was unfair and violated discovery rules, and: "This surprise is prejudicial.").

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

Detailed facts regarding Yoo's late disclosures are provided at AOB 22-24. In summary, he was retained as an expert in September 2011, and he disclosed a new report nearly four years later at his deposition. AOB 22. He conceded that most of the opinions in his new report were based upon medical records that were a year old. AOB 22-23. He offered no explanation for the delay. The report he disclosed on the day of his deposition expressed new opinions concerning the need

for future fusion surgeries. AOB 23. At the hearing on Capanna's motion to exclude Yoo's new opinions, plaintiff's counsel told the court that Yoo "isn't giving an opinion on future care." 11 A.App. 2604:5-6. On direct examination by plaintiff's counsel, however, Yoo **did** offer his opinion that plaintiff will need future fusion surgery. 17 A.App. 3879-80, 3883-87.

Plaintiff now concedes that Yoo's supplemental opinions were first disclosed at his deposition. RAB 29. Plaintiff argues, however, that the late disclosure should be excused, because it was made in advance of the 30-day deadline for supplemental reports. This contention is meritless, for the same reasons discussed earlier in this reply brief regarding Cash's late disclosures.

Plaintiff also contends that Yoo's opinions were supplemented "based on new information," consisting of plaintiff's deposition transcript. RAB 29-32. Plaintiff's argument is belied by Yoo's own supplemental report served by plaintiff on July 17, 2015, in which Yoo states that his opinion regarding future surgery is "partly based on the MRI of LS Spine 8/31/2012...." 3 R.App. 588. Plaintiff has never explained why the 2012 MRI was not provided to Yoo when it was performed, or why Yoo did not prepare a supplemental report at that time instead of waiting until a month before trial.

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Plaintiff's contention about Yoo relying on plaintiff's deposition for "new information" is also meritless for the same reason discussed earlier in this reply brief regarding Cash's reliance on plaintiff's deposition transcript.

These are the RAB's only arguments supporting Yoo's late supplemental disclosures. Nonetheless, the brief argues that the error in admitting Yoo's opinions was harmless. RAB 35-36. Once again, this contention is discussed in the earlier part of this reply brief dealing with the same contention regarding Cash.

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

Even though plaintiff did not call Ruggeroli as a witness at trial, Ruggeroli's late disclosed supplement, which opined that plaintiff will need more than $300,000 in future thermal treatments, shows the gamesmanship by plaintiff in this lawsuit. After multiple disclosures regarding Ruggeroli, without any mention of future medical expenses, plaintiff served a last-minute supplemental disclosure, on the eve of trial, regarding Ruggeroli's new opinion. There was no excuse, yet the district court ruled for plaintiff when defense counsel objected to the last-minute disclosure. 4 A.App. 808-24; 11 A.App. 2603:2-3. Ruggeroli's late disclosure fit neatly within plaintiff's strategy of creating a last-minute buildup of medical expenses, creating huge distractions from defense counsel's trial preparation. Although plaintiff's counsel ultimately determined that Ruggeroli's opinion concerning future care was

unsupported and would not be used at trial, this does not detract from our showing of counsel's improper strategy.

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

Under NRCP 16.1(a)(1)(C), a party must, without awaiting a discovery request, provide a computation of any category of damages claimed. The opening brief demonstrated that plaintiff made multiple supplemental discovery disclosures, spanning more than three and one-half years, without complying with the rule's requirement for disclosing the amount and computations of future medical expenses. AOB 32-34. The brief discussed federal cases in which Las Vegas plaintiffs' attorneys routinely ignored similar federal mandatory requirements, and where federal courts refused to allow plaintiffs' attorneys to engage in such gamesmanship.[8] AOB 36-43.

The answering brief largely ignores this argument, failing to present any contrary facts, failing to discuss any of the federal cases, and failing to cite any

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[8] One of the Las Vegas federal cases involved Cash, whose opinion regarding future fusion surgery was revealed in the plaintiff's computation of damages late in the litigation. The federal judge excluded Cash's opinion. *Baltodano, supra.* One of the other federal cases involved a plaintiff represented by the same law firm that represents the plaintiff in the present case, *Calvert v. Ellis*, 2015 WL 631284 (D. Nev. 2015). In that case, plaintiff's law firm disclosed more than $400,000 in medical expenses for future surgeries, a year after initial disclosures. The late supplemental disclosure "had the effect of ambushing Defendants," and the federal court therefore excluded all evidence of the future surgeries. *Id.* at *5.

cases supporting a late disclosure of the computation of future damages. Plaintiff's brief makes only a vague, indirect reference to the issue, at RAB 36. The brief states:

> Capanna also complains that the extent of Beau's future damages were not contained in his computation of damages under NRCP 16.1(a)(C). Specifically, the computation contained the cost of Dr. Cash's recommendation for surgery at L3-4 for $342,402, but it did not contain the cost of his recommendation for two-level surgery at L4-5 and L5-S1 for $350,000. However, Dr. Cash clearly set forth the cost in his report produced on May 14, 2015.

8 R.App. 404-424.

The RAB incorrectly characterizes our argument as being limited to plaintiff's omission of the second surgery costing $350,000. Our contention is that plaintiff never disclosed the amount or calculation of his future damages to be claimed at trial until three years after the rule's requirement, on virtually the eve of trial.[9]

The damages claimed for future surgeries were not disclosed until May 14, 2015. RAB 36. This mandatory disclosure should have been made at the Rule

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[9] Plaintiff testified that in 2010, Cash told him of the potential need for fusion surgery in the future. 20 A.App. 4575-76. Cash did not state his opinion regarding the **cost** of the surgeries until five years later, at Prince's request, in a letter dated May 14, 2015. 5 A.App. 970-72; 19 A.App. 4399. When Cash wrote his letter, he already had the information he needed for his opinion at least since March **2014**. 19 A.App. 4389-90. Nobody ever explained why Cash did not provide his opinion regarding the cost of the surgeries earlier.

16.1(b) conference, which would have been shortly after Capanna filed his answer in January 2012. NRCP 16.1(a)(1)(D). This is especially true in light of testimony by plaintiff and Cash that in 2010 they were both already aware of the probable need for future surgeries, as explained above.

After mischaracterizing Capanna's argument, plaintiff provides the following single-sentence response: "NRCP 37(c)(1) only warrants striking evidence that does not comply with NRCP 16.1 if it harms the adverse party, and here, there was no harm to Capanna." RAB 36. This conclusory argument fails to provide an appendix citation, fails to cite any relevant legal authority, and contains no analysis whatsoever. The court should not consider plaintiff's contention. See *SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984) (declining to address issue briefed with two pages of conclusory arguments).

This court recently addressed the damages disclosure requirement in *Pizarro-Ortega, supra* where the court rejected the plaintiff's contention that there is no requirement to provide a cost computation for future damages. *Pizarro-Ortega,* 133 Nev. at ___, 396 P.3d at 787. The requirement for a "computation of any category of damages claimed" includes calculations for future surgeries and future medical expenses; the rule is mandatory, and no request by the defendant is necessary. *Id.* at ___, 396 P.3d at 786-87. The purpose of providing a computation of damages is to enable the defendant to understand the contours of

potential exposure, and to make informed decisions regarding settlement and discovery. *Id.* at ___, 396 P.3d at 787.

Pizarro-Ortega found that the plaintiff's failure to comply with the rule was harmless in the specific circumstances of that case. First, the defendant was not contesting whether the plaintiff's future surgery was necessary, but only whether the cost claimed for the surgery was reasonable. *Id.* at ___, 396 P.3d at 788. Additionally, a defense medical expert was prepared to testify on the issue, and he **did** give his opinions concerning the plaintiff's cost estimate, and concerning the defense doctor's own opinion regarding the reasonable cost for the surgery. *Id.* In those limited circumstances, the plaintiff's failure to comply with the rule was harmless. *Id.*

In the present case, Capanna was not merely contesting the cost of the future surgery; he was contesting whether future surgery is necessary at all. Additionally, nothing in the appendix suggests that there was a defense expert ready to testify regarding plaintiff's newly-disclosed $700,000 figure. Defense counsel was already "scrambling around" to get experts to address the substance of the late supplemental disclosures. 11 A.App. 2549:15-17. Nothing in the record shows that he had sufficient time to obtain another expert to perform a cost analysis of plaintiff's late disclosure of the calculation for future medical expenses;

and in fact, he did not call such an expert at trial, resulting in Cash's testimony regarding future costs to be essentially unchallenged.

A party relying on evidence not properly disclosed in discovery bears the burden of showing justification or harmlessness. See *Cell Genesys, Inc. v. Applied Research Systems*, 499 F.Supp.2d 59, 80 (D. Mass. 2007) (applying FRCP 37(c)(1), which is similar to NRCP 37(c)(1)). As the party who made the late disclosures here, it was plaintiff's burden to prove that his dereliction was harmless. He did not satisfy that burden.

6. Reversal is required because of misconduct by plaintiff's counsel.

a. This appeal properly raises the issue.

Plaintiff argues that defendant "did not file an appeal regarding alleged misconduct," and this issue therefore cannot be considered. RAB 43. Plaintiff bolsters his argument by noting that neither the notice of appeal nor the case appeal statement references attorney misconduct. *Id.* This demonstrates a fundamental misunderstanding of appellate jurisprudence.

A notice of appeal only needs to designate the judgment or order being appealed. NRAP 3(c)(B). An appeal from a final judgment may include challenges to interlocutory orders and rulings that are not independently appealable. *Summerfield v. Coca Cola Bottling Co.,* 113 Nev. 1291, 1293-94, 948

P.2d 704, 705 (1997). In *Summerfield,* the respondent contended that the appellant could not challenge a denial of a pretrial motion, because the denial was not an appealable order. The court held that the respondent "misapprehends the issue," because the appeal was not from the denial; rather, the appeal was from a final judgment. *Id.* at 1293-94, 948 P.2d at 705. Thus, the appellant was allowed to challenge the interlocutory order in the appeal from the final judgment. "[S]uch interlocutory, nonappealable judgments, orders and rulings need not be separately listed in the notice of appeal to be reviewed by the appellate court." *Nev. Appellate Practice Manual,* ¶3:21 (2016). Nor does any legal authority require a case appeal statement to identify every interlocutory ruling or order that will be challenged in an appeal.

Plaintiff also contends that the issue of attorney misconduct must be raised in a motion for new trial, to preserve the issue for appeal. RAB 43-44. Plaintiff cites *Carr v. Paredes,* 2017 WL 176591 (No. 60318, 61301; January 13, 2017; unpublished) and *Gunderson v. D.R. Horton,* 130 Nev. ___, 319 P.3d 606 (2014). RAB 44. Neither case stands for the proposition that a motion for new trial is necessary to preserve an attorney misconduct issue for appeal.

The leading case on attorney misconduct is *Lioce v. Cohen,* 124 Nev. 1, 174 P.3d 970 (2008). Although motions for new trial were made in *Lioce,* the opinion does not hold that such motions are prerequisites for appeals. *Lioce* holds that a

party "must object to purportedly improper argument to preserve this issue for appeal." 124 Nev. at 19, 174 P.3d at 981. We are aware of no Nevada authority holding that if a party has objected to attorney misconduct at trial, the party must also file a motion for new trial that raises the issue again, to preserve the issue for appeal. In the present case, defense counsel objected to the misconduct, and the district court ruled on the objections. The issue was preserved for appeal. In fact, even if there had been no objection, as in three of the four consolidated appeal cases in *Lioce*, persistent and repeated misconduct can still be raised as plain error. *Lioce,* 124 Nev. at 19, 174 P.3d at 981-82.

b. Plaintiff's counsel improperly referred to liability insurance.

The opening brief established that plaintiff's counsel improperly emphasized Capanna's liability insurance for the jury. AOB 45-48. Plaintiff's first response is to blame the jury for raising the topic of insurance. RAB 39-40. This misconstrues the issue. Even if some jurors mentioned the topic of insurance, plaintiff's counsel overly emphasized the subject himself, raising it with 12 potential jurors, and thereby improperly highlighting insurance. 13 A.App. 3006-07. The district court found that plaintiff's counsel had gone beyond established limits regarding insurance. 13 A.App. 3008:1-9. Plaintiff's brief ignores this.

Plaintiff's improper emphasis on insurance was repeated in closing arguments. Before the closings, defense counsel warned the district court about the tactic used by plaintiff's counsel—overly emphasizing a jury instruction that tells the jury not to consider insurance—a tactic defense counsel had seen plaintiff's counsel use in other cases. 20 A.App. 4667. The district court ruled that if plaintiff's counsel displays the jury instruction and improperly emphasizes insurance, such conduct would be "incredibly improper." 20 A.App. 4668:15-21. This is exactly what plaintiff's counsel did, repeatedly emphasizing insurance while discussing the jury instruction. See AOB 47-48. This emphasis on liability insurance was prejudicial, especially in light of other misconduct.[10]

c. Plaintiff's counsel made improper golden rule arguments.

The opening brief established that plaintiff's counsel made prohibited golden rule arguments by persistently asking jurors to place themselves in plaintiff's position. AOB 48-53. Plaintiff's first response is that the misconduct was only "a few paragraphs" in counsel's closing argument. RAB 47. The prohibition

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[10] The RAB discusses Jury Instruction 1.07, arguing that defendant "fails to establish the impropriety" of the instruction. RAB 41-43. The RAB mischaracterizes defendant's arguments. The AOB mentioned the instruction solely to show that plaintiff's counsel improperly used the instruction as a tool to emphasize liability insurance. We are not challenging the propriety of the instruction.

against golden rule arguments was set forth in *Lioce*, where the golden rule argument involved a single paragraph, with two sentences that used the words "you" or "your" only four times. Here, counsel's golden rule argument was made using the words "you" or "your" 19 times, expressly inviting jurors to consider that they were involved in counsel's hypothetical examples and his rhetorical arguments.

Plaintiff contends that defendant did not object to the specific offending argument that appears at 22 A.App. 5202. RAB 47. Just a few moments before that argument, defense counsel objected to plaintiff's golden rule arguments, and the district court overruled the objection. 22 A.App. 5198-99. Plaintiff's counsel continued, and defense counsel made an additional objection regarding a per diem argument. 22 A.App. 5201. The district court overruled this objection as well. 22 A.App. 5202. After the district court overruled both objections, plaintiff's counsel continued with his argument, including the golden rule argument that appears at 22 A.App. 5202:17-20. The argument was nothing but a continuation of the same argument counsel had just made—an argument to which defense counsel had made two unsuccessful objections. The RAB is wrong in its contention that defendant did not object.

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Plaintiff's primary argument is that counsel's hypothetical and rhetorical questions with the words "you" and "your" were simply intended to reference only an unknown third person or reasonable person; and counsel could have substituted the words "one" or "one's" for the words "you" or "your." RAB 48-49. Plaintiff argues that defendant is relying on semantics, rather than substance. RAB 48.

Lioce relied on semantics. It makes no difference what counsel **intended** to tell the jury. The important thing is what counsel **did** tell the jury. This is precisely what *Lioce* holds. In *Lioce*, defense counsel used a hypothetical example in which "your" child is injured in a sliding door, followed by the rhetorical question of whether "you" would sue for negligence. *Lioce*, 124 Nev. at 11, 174 P.3d at 976. In criticizing defense counsel's semantics, the *Lioce* court held that his argument "plainly stated to the jurors" that they and their children were within the hypothetical. Counsel's simple two-sentence argument "amounted to an impermissible golden rule argument." *Id.* at 23, 174 P.3d at 984.

The present case is far worse than *Lioce.* Here, plaintiff's counsel asked each juror to consider if counsel gave "you" a million dollars, and also gave "you" an old man's spine, and if "you" would not be able to finish playing "your" college sports career, and to consider that "you're" going to have discomfort as "you" get older, and "you're" going to need future surgeries. 22 A.App. 5199. Counsel asked jurors to consider how they would feel if somebody put "you" in a situation

where "you've" lost out on "your" opportunity to enjoy "your" life, and now "you" suffer chronic pain. 22 A.App. 502.

These arguments were far more offensive than the arguments in *Lioce*. Although plaintiff's counsel might have secretly intended to reference only unknown people, his actual words were personal to the jurors. And although he **could have** used the words "one" or "one's," he did not do so. Jurors cannot be expected to know what counsel intended to say or what he should have said. They only know what counsel **did** say.[11]

d. Plaintiff's counsel made improper jury nullification arguments.

As established in the opening brief, Nevada law prohibits lawyers from making jury nullification arguments that ask the jury to send a message about social issues and values, and by referring to juries as "the conscience of the community." AOB 53-54. Plaintiff's counsel violated this prohibition by making the arguments detailed at AOB 55-57.

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[11] The RAB provides extensive blocked quotes from the transcript. RAB 49-50. This quoted part ends at 22 A.App. 5199, line 14. The RAB conveniently omits the next sentence in the transcript, where plaintiff's counsel argued: "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. 5199:15-18 (emphasis added)

In response, plaintiff's primary contention is that counsel's argument did not ask jurors to send a message as the conscience of the community. RAB 51-55. But this is exactly what plaintiff's counsel argued, namely, that the jury should speak as the conscience of the community, and as the enforcer of values and beliefs. 22 A.App. 5149. Counsel reinforced his argument by pointing out to the jury that there were "many people here watching this case today." 22 A.App. 5149:8-9. As established by the numerous cases cited and discussed in the opening brief, such arguments are improper.

Plaintiff contends that defendant's argument about "sending a message" was rejected in *Gunderson, supra.* RAB 54. *Gunderson* was a construction defect case, where the jury needed to decide whether homes were safe. Defense counsel asked jurors to send a message to plaintiff homeowners that their houses were safe (and therefore not defective). *Gunderson,* 130 Nev. at ___, 319 P.3d at 613-14. This was not an improper jury nullification argument, because defense counsel was merely asking the jury to determine that the homes were not defective. This is far different from the present case, where plaintiff's counsel asked the jury to speak as the conscience of the community, and as the enforcer of the community's values and beliefs. 22 A.App. 5149:6-8.

Plaintiff also accuses defendant's brief of misrepresenting *Schoels v. State,* 114 Nev. 981, 966 P.2d 735 (1998). RAB 54-55. Plaintiff criticizes our citation

to *Schoels* regarding the "well-established prohibition" against attorneys referring to juries as the conscience of the community. RAB 54. *Schoels* itself recited "the well-established prohibition" against the tactic of referring to the jury as the conscience of the community. *Id.* at 987, 966 P.2d at 739. *Schoels* held that the prohibition was not applicable in that particular case, because in a murder case the jury determines the sentence. The jury **does** act as the conscience of the community, because in a murder case, one purpose of a severe sentence is to send a message to the community, to deter people from committing murders. Thus, the prosecutor may make such an argument. Plaintiff's brief cites no case, from any jurisdiction, holding that it is proper for an attorney to make a "conscience of the community" argument in a civil personal injury case (at least where the issue does not involve punitive damages.)[12]

7. The district court erred by awarding attorneys' fees.

The opening brief established that the district court erred by awarding nearly $170,000 in attorneys' fees, under NRS 18.010(2)(b). AOB 59-60. Fees are available under that statute only if a claim or defense is "not supported by **any** credible evidence at trial." *Id.* In a conclusory argument consisting of less than

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[12] Plaintiff cites two federal cases for the proposition that "community conscience" arguments should be allowed in civil cases. RAB 55. The first, *Barber v. Pointe,* 772 F.2d 982 (1st Cir. 1985), was not a civil case; it was a criminal case. The second is *In re Japanese Electronic Products Antitrust Litigation,* 631 F.2d 1069 (3rd Cir. 1980). That opinion had nothing to do with closing arguments.

two pages, plaintiff relies solely on the district court's finding that defendant's liability defense was not maintained with reasonable grounds. RAB 57.

The question for the district court was whether the defense had "any credible evidence at trial." *Bobby Berosini, Ltd. v. PETA,* 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998). Here, there was credible evidence for the defense, even though the jury ultimately ruled against the defense. The opening brief outlines testimony of a defense medical expert, Dr. Belzberg, who testified that Capanna did not commit malpractice. AOB 61-62. This alone satisfied the "any credible evidence" test. The RAB ignores Belzberg's testimony.

The opening brief also discusses testimony by Dr. Kaye, who supported the defense position regarding the surgery level. AOB 63. Again, the RAB ignores Kaye's testimony. RAB 56-57. The opening brief discussed testimony by Capanna himself. AOB 62-63. Even though he was the defendant, he is an experienced and licensed surgeon, and his testimony satisfied the "any credible evidence" test.

Collectively, the testimony by Doctors Belzberg, Kaye and Capanna shows that the defense position **was** supported by evidence, even though the jury accepted the plaintiff's evidence instead. Under *Berosini,* the fee award must be reversed.

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8. The district court erred in its award of expert witness costs.

This issue is simple. The district court awarded more than 10 times the $1,500 statutory limit for Yoo, and more than 31 times the statutory limit for Cash. Under *Frazier v. Drake,* 131 Nev. Adv. Op. 64, 357 P.3d 365, 377-78 (Ct. App. 2015), such an award "must be supported by an express, careful explanation and analysis of factors pertaining to the requested fees." Here, the entirety of the district court's ruling was that "exceeding the statutory amounts is justified and reasonable for Yoo and Cash based on their roles in the litigation." 11 A.App. 2460:12-14. Thus, the question here is simply whether the district court's finding that an award exceeding the statutory limit "is justified and reasonable" constitutes "an express, careful explanation and analysis of factors pertaining to the requested fees," as required by *Frazier.* Obviously, it does not. The RAB does not even hint that the district court's ruling satisfied *Frazier.*[13]

Frazier held that district courts must consider numerous factors before awarding expert costs in excess of the statutory limit. It is not this court's job to evaluate the numerous factors in the first instance. That is the district court's job. The district court did not satisfy *Frazier,* and the cost award must be reversed.

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[13] It is unclear why plaintiff's brief discusses whether *Frazier* requires a written explanation. RAB 58. The district court's order was written. 11 A.App. 2640.

CONCLUSION REGARDING APPEAL

For the reasons in the opening brief and in this brief, the judgment should be reversed, and the case should be remanded for a new trial.

ARGUMENT REGARDING CROSS-APPEAL[14]

1. Summary of the argument

a. Introduction

In 2004, Nevada voters approved Question 3, which amended NRS Chapter 42 to permit a medical malpractice defendant to introduce evidence of collateral source benefits paid to a plaintiff.[15] The voters passed Question 3 in response to a statewide crisis of doctors leaving the state due to rising malpractice premiums.[16] NRS 42.021 was enacted to remedy "skyrocketing medical malpractice insurance

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[14] Appellant previously moved to dismiss the cross-appeal, on the ground that plaintiff is not an aggrieved party regarding constitutionality of the collateral source statute. On October 3, 2017, this court denied the motion, without prejudice, expressly leaving it to the merits panel to resolve whether to reach cross-appeal issues. Appellant stands by his motion to dismiss; and he hereby renews his argument that plaintiff is not aggrieved by the district court's ruling. Also, for the reasons established in the motion to dismiss, plaintiff does not have standing to assert the subrogation rights of insurance companies.

[15] Voter Initiative Question 3, 2004 General Election Ballot, pp. 20-21 accessible at https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf.

[16] Richmond, Emily, "Nevada doctors face insurance crisis," *Las Vegas Sun*, Jan. 28, 2002, https://lasvegassun.com/news/2002/jan/28/nevada-doctors-face-insurance-crisis/ (last accessed Oct. 24, 2017) (stating that "for every dollar received in premiums from Nevada physicians, $1.88 was paid out (continued)

costs" contributing to the breakdown of healthcare to Nevadans resulting from physicians leaving our state.[17]

Accordingly, in medical malpractice actions, defendants are permitted to introduce evidence of "any amount payable as a benefit to the plaintiff" that the plaintiff receives to help "pay for or reimburse the cost of medical, hospital, dental or other health care services." NRS 42.021(1).

Plaintiff argues that the statute "reduce[s] jury awards for a malpractice victim." RAB 62. However, this does **not** create a constitutional problem, let alone a legally objectionable one. There is no constitutional right to a certain amount of recovery. NRS 42.021 satisfies constitutional scrutiny under the applicable standard of review. In fact, multiple states have similar statutes.[18] Many of these states also have compensatory damage caps similar to Nevada's statutory damage cap, which this court has upheld as constitutional and not a violation of the equal protection clause. See *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 80, 358 P.3d 234, 239 (2015).

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(continued) either in jury awards or to settle claims.").

[17] See note 15, *supra*.

[18] See "State Laws Chart I: Liability Reforms," *American Medical Association*, https://www/ama-assn.ord/sites/default/files/media-broswer/premium/arc/state-laws/chart-1_0.pdf (last accessed Oct. 24, 2017).

Finally, NRS 42.021 is not void for vagueness, as plaintiff contends, because it is easily understood by a person of ordinary intelligence, and, further, the collateral source exception is an evidentiary rule subject to the standards of admissibility set forth in NRS Chapter 48.

Accordingly, NRS 42.021 passes constitutional scrutiny.

b. Plaintiff's arguments

As more fully set out in Dr. Capanna's motion to dismiss the cross-appeal, plaintiff has no standing to challenge the constitutionality of the collateral source rule embodied in NRS 42.021, because he is not an aggrieved party. Only an aggrieved party has standing to appeal. *Hughes' Estate v. First Nat. Bank of Nevada*, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980) *citing* NRAP 3A(a). Plaintiff concedes that the jury did not reduce his award of past medical expenses. RAB 61. This concession is enough for this court to reject the cross-appeal.

Nevertheless, in the event this court decides to consider plaintiff's cross-appeal, he is entitled to no relief, because NRS 42.021 is constitutional. Plaintiff asserts that medical malpractice plaintiffs are a "vulnerable group and depend on courts to provide a complete remedy." RAB 62.

However, plaintiff ignores binding authority from this court that is contrary to his position. Medical malpractice victims are not a suspect class, or even quasi-suspect class, and are no more uniquely situated than other tort plaintiffs.

Barrett v. Baird, 111 Nev. 1496, 1507, 908 P.2d 689 (1996) *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008); *Tam*, 131 Nev. at ___, 358 P.3d at 239. Plaintiff's request for a hybrid "heightened rational basis" review is contrary to applicable law.

Plaintiff also asserts that studies exist showing the admission of collateral source benefits does not affect liability insurance premiums for doctors and medical providers. RAB 62, 77. He further argues the Legislature was so focused on keeping doctors in Nevada that it severely restricted the ability of medical malpractice plaintiffs to obtain full recovery for their injuries. RAB 77. However, Plaintiff ignores the fact that NRS 42.021 was enacted by voter initiative, which is given every presumption of validity unless plaintiff can demonstrate its illegitimacy "beyond a reasonable doubt." *Miller v. Burk*, 124 Nev. 579, 595–96, 188 P.3d 1112, 1123 (2008). Plaintiff also ignores the well-established tenet that a statute will be upheld under rational basis review if there is *any* conceivable reason for the statute; it does not have to be the "only" or the "best reason."

As such, plaintiff is not within a suspect class, or even quasi-suspect class, for purposes of an equal protection analysis. NRS 42.021 satisfies rational basis review and is not void for vagueness. Accordingly, plaintiff's arguments must be rejected and his cross-appeal must be denied.

2. Argument

a. Standard of Review

Statutes are presumed to be valid, and "the challenger bears the burden of showing that a statute is unconstitutional." *Tam*, 131 Nev. at ___, 358 P.3d at 237–38. In order to meet that heavy burden, the challenger must make a clear showing of invalidity. *Zamora v. Price*, 125 Nev. 388, 392, 213 P.3d 490, 492-93 (2009). "In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *Universal Elec., Inc. v. State ex rel. Office of Labor Com'r*, 109 Nev. 127, 129, 847 P.2d 1372, 1374 (1993).

(1) Plaintiff is not within a suspect, or even quasi-suspect, class of persons for purposes of an equal protection violation.

"The standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard." *Barrett*, 111 Nev. at 1509, 908 P.2d at 698. When faced with a challenge to the constitutionality of a statute, a court's first inquiry is to examine the status of the person challenging the statute. Here, respondent is a plaintiff who sued for alleged medical malpractice. He argues medical malpractice plaintiffs are subject to special protection. They are not. This court's authority addressing this issue is

clear: "the right of malpractice plaintiffs to sue for damages caused by medical professionals **does not** involve a fundamental constitutional right." *Barrett,* 111 Nev. at 1507, 908 P.2d at 697 (emphasis added); *Tam*, 131 Nev. at ___, 358 P.3d at 239. Plaintiff has not provided authority holding otherwise. Plaintiff is not part of a suspect or quasi-suspect class entitled to any higher standard of review than rational basis.

(2) Rational basis, not "heightened rational basis," is the appropriate standard of review.

To survive an equal protection challenge, a statute need only be rationally related to a legitimate governmental purpose. *Tam*, 131 Nev. at ___, 358 P.3d at 239. Rational basis is the "lowest level of judicial scrutiny." *Barrett*, 111 Nev. at 1507. Under this standard, courts presume the law is constitutional.

Plaintiff cites *Laakonen v. Eighth Judicial Dist. Court*, 91 Nev. 506, 510, 538 P.2d 574, 576 (1975), and asserts this court must apply a "heightened rational basis" standard to its review of NRS 42.021. RAB 73-74. However, *Laakonen* is distinguishable from this case. In *Laakonen*, the challenged statute completely eliminated an automobile guest's right to recover for negligence from the driver. *Id.* This important fact distinguishes *Laakonen* from the present case. Here, NRS 42.021 merely affects the evidence presented to the jury–it does not

completely eliminate a medical malpractice plaintiff's right to recover or affect his or her access to the courts.

Moreover, the "heightened rational basis" standard proffered by plaintiff stems from the *Laakonen* court's citation to *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251 (1971), which actually addressed a quasi-suspect class. In *Reed*, the Court struck down an Idaho statute that gave mandatory preference to males over females applying to administer the estate of a decedent. The Court concluded the statute violated the equal protection clause because it provided for dissimilar treatment of men and women who were similarly situated. Accordingly, a heightened rational basis review was appropriate. *Id.*

Finally, plaintiff's reliance on *Coburn By & Through Coburn v. Agustin,* 627 F. Supp. 983, 994 (D. Kan. 1985), at RAB 74, is similarly flawed because an injured person's "right to remedy" is a fundamental right embodied in the Kansas Constitution and, therefore, the *Coburn* court found a "heightened rational basis" review was appropriate, given this specific state constitutional right. However, Nevada's Constitution does not contain such a provision and, moreover, this "heightened" rational basis review is not appropriate because, unlike Kansas, this court has held the right of medical malpractice plaintiffs to sue is **not** a fundamental constitutional right. *Barrett,* 111 Nev. at 1507, 908 P.2d at 697.

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Accordingly, NRS 42.021 does not address a suspect class. It does not completely eliminate medical malpractice plaintiffs' right to recover, or even prohibit their right to access the courts. No "heightened rational basis" standard of review is appropriate. Rather, the correct standard of review is rational basis.

b. NRS 41.021 does not violate the equal protection clause of the United States or Nevada Constitutions.

(1) It is not this court's duty to "question the wisdom of the public."

As explained above, NRS 42.021 was enacted pursuant to voter initiative in the 2004 General Election. Question 3 on the ballot fully explained the reasoning for and against enactment of a statute that would permit the introduction of collateral source payments at trial.[19] By almost sixty percent, Nevadan voters approved Question 3, which was enacted into law. It is well established that voter initiatives are given "every reasonable presumption, both of law and fact," and they are "indulged in favor of the legality of the amendment, which will not be overthrown unless illegality appears beyond a reasonable doubt." *Miller v. Burk*, 124 Nev. 579, 595–96, 188 P.3d 1112, 1123 (2008). The presumption of soundness this court affords to the vote of its state citizens is not lightly disregarded. Moreover, the Nevada Legislature has not exercised its right to

[19] See note 15, *supra*.

amend or repeal NRS 42.021, further manifesting the conclusion the statute survives a rational basis analysis. See Nev. Const. art. XIX, § 2(3) *and* NRS 42.021. "It is not function of the Court to question the wisdom of the public," and differences of opinion between the courts and the public are questions for the Legislature. *City of Las Vegas v. Ackerman*, 85 Nev. 493, 500, 457 P.2d 525, 530 (1969). In the absence of illegality beyond a reasonable doubt, NRS 42.021 must be upheld.

(2) "Any conceivable scenario" contemplated by the legislature satisfies the rational basis test.

Rational basis does not require firm evidence or the best reason for enactment of the statute. Rather, if "*any* state of facts *may* be reasonably conceived to justify [the statute], a statutory discrimination will not be set aside." *Barrett*, 111 Nev. at 1510 (emphasis supplied) (alteration in original). "While the legislative history is helpful to understanding the purpose of enacting the statute, this court is not limited to the reasons expressed by the Legislature; rather, if any rational basis exists, or can be hypothesized, then the statute is constitutional." *Tam*, 131 Nev. at ___, 358 P.3d at 239, n. 5 *citing Flamingo Paradise Gaming, LLC v. Chanos,* 125 Nev. 502, 520, 217 P.3d 546, 559 (2009).

Here, the stated purpose of the statute is to combat skyrocketing medical malpractice premiums for doctors and to ensure quality healthcare access to all

Nevadans. Even if application of the statute does not actually reduce malpractice premiums, as plaintiff asserts, this fact does not equate to a finding that NRS 42.021 violates the equal protection clause, because legislation is not invalidated "by tendering evidence in court that the legislature was mistaken." *Barrett*, 111 Nev. at 1510. (giving deference to and hypothesizing that Nevada lawmakers **could have** found physicians experienced higher malpractice premiums than other healthcare professionals).[20] In *Tam*, this court cited to the argument presented to voters in 2004 in support of NRS 42.021 and found this "express goal...[was] rationally related to the legitimate governmental interest of ensuring that adequate and affordable health care is available to Nevada's citizens." 131 Nev. at ___, 358 P.3d at 239. The rational basis for NRS 42.021 is satisfied and there is no equal protection violation.

(3) The Legislature and voters can enact statutes to abolish the collateral source rule because it is a rule of evidence and not a fundamental right.

The collateral source rule is a common law rule of evidence that may be limited or abrogated by legislative action, because "no person has a vested right in

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[20] See also, *State v. Eighth Jud. Dist. Ct. (Logan D.)*, 129 Nev. Adv. Op. 52, 306 P.3d 369, 376 (2013) (the Legislature "need not articulate its purpose in enacting a statute; the statute will be upheld if any set of facts can reasonably be conceived of to justify it," and recognizing a legislative choice "may be based on rational speculation *unsupported by evidence or empirical data*.") (emphasis added).

a rule of law, nor can anyone assert a vested right in any particular mode of procedure." *Cramer v. Peavy*, 116 Nev. 575, 582, 3 P.3d 665, 670 (2000); see also Restatement (Second) of Torts § 920A, comment d (1979) (the collateral source rule may be changed by statute). In *Cramer*, this court upheld the constitutionality of a plaintiff's challenge to NRS 616C.215(10), the statute that permits evidence of collateral source payments in worker's compensation cases. This court found NRS 616C.215(10) was an exception to the per se prohibition on collateral source evidence. *Id.*; see also *Tri-County Equipment & Leasing v. Klinke*, 128 Nev. Adv. Op. 33, 286 P.3d 593 (2012) (recognizing exception to collateral source rule).

The Legislature and voters may properly enact rules of evidence that affect damage awards without violating the equal protection clause. For example, in *Tam*, this court recently upheld a statutory damage cap for medical malpractice claims. 131 Nev. at ___, 358 P.3d at 239. Similarly, in *Zamora*, this court affirmed the Legislature's enactment of NRS 38.250 *et seq.*, which treats plaintiffs differently based on the amount of damages they claim, and further permits introduction of an arbitrator's award into evidence for the jury's consideration. 125 Nev. 388, 213 P.3d 490. This court has also upheld as constitutional statutes that affect damage amounts because a recovery amount "is always uncertain and subject to remarkable variations among claimants." *Martinez v. Maruszczak*, 123

Nev. 433, 448, 168 P.3d 720, 730 (2007) (upholding statutory damage cap for governmental entities). Accordingly, NRS 42.021 does not constitute an equal protection violation, but instead, is a permissible exception to the collateral source rule.

Relatedly, because statutes may properly limit the collateral source rule, plaintiff's arguments (RAB 69-71) regarding treating plaintiffs differently based on their health insurance (or lack thereof) is similarly unavailing–not to mention his lack of standing to even raise these arguments. Whether a plaintiff has health insurance, does not have health insurance, or is covered by a self-funded employee health benefit plan like ERISA, does not matter because this evidentiary rule applies to all plaintiffs in all medical malpractice actions regardless of the type of insurance they have. This is because plaintiffs have no constitutional right to a *specific amount* of recovery. *Martinez*, 123 Nev. at 449, 198 P.3d at 730 (equal treatment with regard to damages is unachievable and, therefore, the equal protection clause is not implicated by limitations on damages). And plaintiff fails to address the fact that nothing in NRS 42.021(1) or (2) precludes malpractice **plaintiffs** from introducing evidence or argument that they must repay any amounts subrogated by ERISA if the defendant elects to introduce such benefits in the first place.

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For example, in *Lee v. Bueno*, 381 P.3d 736 (Okla. 2016), the court denied an equal protection challenge to a statute permitting introduction of amounts paid, not amounts billed, in personal injury actions. The court rejected appellant's argument that plaintiffs with insurance were prevented from recovering the full measure of their damages and thus treated different from those without insurance. Rather, the court held the statute did not prevent any claimant from filing an action and further operated to ensure all members of the class were subjected to the same evidentiary restrictions "that place no meaningful barrier before their quest for a remedy." *Id.* at 745-47. Similarly, here, medical malpractice plaintiffs are subject to the same evidentiary restrictions and the same ability, if applicable, to introduce evidence of amounts paid toward securing collateral benefits. NRS 42.021(1).[21]

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[21] Similarly, in *Miller v. Sciaroni*, 218 Cal. Rptr. 219 (Ct. App. 1985), the California Court of Appeal rejected an argument that its anti-subrogation statute violated the equal protection clause because collateral sources, such as health insurers, had no vested due process right to subrogation and the Legislature may have found it preferable to have collateral sources absorb some of the loss. The court also found the anti-subrogation statute ensured plaintiffs would not suffer a double deduction as a result of admission of collateral source benefits *and* having to repay their health insurers. 218 Cal Rptr. at 223-24.

(4) Multiple state and federal courts have rejected equal protection challenges to statutes abrogating the collateral source rule in medical malpractice cases.

Nevada is not the only state permitting introduction of collateral source benefits by a defendant in a medical malpractice action. In response to rising malpractice insurance premiums, California enacted "MIRCA," Cal. Civ. Code Section 3333.1, whose language mirrors Nevada's statute permitting a defendant in a professional negligence action to introduce collateral source benefits received by the plaintiff and prohibiting subrogation by collateral sources. Cal. Civ. Code § 3333.1(a)-(b). Like Nevada's statute, Section 3333.1 also permits plaintiffs to introduce evidence of "any amount which the plaintiff has paid or contributed" to secure insurance benefits. *Id.* In *Fein v. Permanente Med. Group*, cited by this Court in *Tam*, the California Supreme Court upheld the validity of Section 3333.1 and held, "[A] plaintiff has no vested property right in a particular measure of damages. Thus, the fact that the section may reduce a plaintiff's award does not render the provision unconstitutional, so long as the measure is rationally related to a legitimate state interest." 38 Cal. 3d 137, 166, 695 P.2d 665, 686 (1985).

Many other states besides Nevada and California permit introduction or consideration of collateral source benefits paid to a medical malpractice plaintiff:

Alabama, Ala. Code § 6-5-545; Alaska, Ak. Stat. Ann. § 09.55.548; Arizona, Ariz. Rev. Stat. Ann. § 12-565;[22] California; Cal. Civ. Code § 3333.1; Colorado, Colo. Rev. Stat. Ann. § 13-64-402; Connecticut, Conn. Gen. Stat. Ann. § 52-225a; Delaware, Del. Code Ann. tit. 18, § 6862; Iowa, Iowa Code Ann. § 147.136; Ohio, Ohio Rev. Code Ann. § 2323.41; Pennsylvania, 40 Pa. Stat. Ann. § 1303.508; Rhode Island, 9 R.I. Gen. Laws Ann. § 9-19-34.1; South Dakota, S.D. Codified Laws § 21-3-12; Tennessee, Tenn. Code Ann. § 29-26-119; Utah, Utah Code Ann. § 78B-3-405; Washington, Wash. Rev. Code Ann. § 7.70.080; and, Wisconsin, Wis. Stat. Ann. § 893.55. These states have rejected equal protection or due process challenges to their respective statutes, finding them constitutional despite similar arguments advanced by plaintiff here. This is because the collateral source rule is evidentiary and may be modified by statute. Accordingly, this court should affirm the constitutionality of NRS 42.021 and deny plaintiff's cross-appeal.

c. NRS 42.021 is not void for vagueness.

A statute is impermissibly vague under the due process clause "(1) if it fails to provide a person of ordinary intelligence fair notice of what is being prohibited; or (2) if it is so standardless that it authorizes or encourages seriously

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[22] Plaintiff's reliance on *Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984) is completely flawed. RAB 78. *Kenyon* concerned statutes of limitation for medical malpractice actions and applied a strict scrutiny analysis because the right to recover bodily injury damages is a fundamental right guaranteed by Arizona's Constitution. Ariz. Const. art. 2, §13. Nevada's Constitution contains (continued)

discriminatory enforcement." *Carrigan v. Comm'n on Ethics of State,* 129 Nev. Adv. Op. 95, 313 P.3d 880, 884 (2013) (internal quotations omitted). The nature of the statute affects the degree of vagueness tolerated by the Constitution. *Id.* For example, civil laws are held to a less stringent standard than criminal laws "because the consequences of imprecision are qualitatively less severe." *Id.* Similarly, civil laws that affect freedom of speech or association, such as the First Amendment challenge set forth in the authority cited by plaintiff (RAB 79), *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 129 P.3d 682 (2006), require a more stringent standard because of the right affected. *Id.* In this case, NRS 42.021 must be analyzed under "relaxed standards" because it does not affect plaintiff's First Amendment freedoms. *Id.*

Plaintiff argues NRS 42.021 "leaves open many questions" regarding its application, such as **how** collateral source evidence shall be introduced at trial or **when** such evidence can be introduced. RAB 79. He further argues that the statute is silent concerning what juries are "supposed to do" with collateral source evidence. RAB 80.

However, the statute fairly places persons of ordinary intelligence on notice that (1) collateral source benefits may be admitted in medical malpractice actions by defendants; and, (2) if such benefits are admitted, the plaintiff may likewise

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(Continued) no such provision.

introduce evidence of amounts paid to secure those benefits. In applying the relaxed standards appropriate to this due process challenge, plaintiff's argument fails. *Carrigan*, 129 Nev. at ___, 313 P.3d at 884.

NRS 42.021 is not read or interpreted in a vacuum. *City of Las Vegas v. Eighth Judicial Dist. Court*, 122 Nev. 1041, 1049, 146 P.3d 240, 245 (2006). As discussed, *supra*, the collateral source rule is an evidentiary rule. Collateral source evidence may be introduced in medical malpractice actions where it is relevant and admissible, just like any other evidence. The trial judge, as the gatekeeper, determines the admissibility of such evidence through motions in limine, and both the plaintiff and defendant may offer jury instructions regarding the treatment of such evidence. See, e.g., *Tri-County Equip. & Leasing*, 128 Nev. at ___, 286 P.3d at 595 (jury instructions prohibited speculation on collateral source payments in worker's compensation cases).

Adoption of plaintiff's argument would supersede the fact-finding function of the jury, whose role is to determine the amount of damages a medical malpractice plaintiff is awarded. In fact, it would work to plaintiff's detriment in this case, as the jury in the underlying action received evidence of collateral source benefits and elected to **not reduce** the award to plaintiff. Therefore, plaintiff's argument caves in on itself, as the decision of whether to reduce an award or not is within the function of the jury. The facts of this case demonstrate NRS 42.021 is

not void for vagueness, as the jury clearly understood how to apply the statute fairly. Therefore, plaintiff's challenge to NRS 42.021 must be rejected.

CONCLUSION REGARDING CROSS-APPEAL

Under the rational basis test, NRS 42.021 survives constitutional scrutiny because medical malpractice plaintiffs are not a constitutionally protected class, and there is a conceivable basis for enactment of NRS 42.021. Further, plaintiff failed to demonstrate NRS 42.021 is void for vagueness. As such, plaintiff's cross-appeal arguments must be rejected.

DATED: Nov. 7, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting, typestyle and typeface requirements of NRAP 32, because this brief is double-spaced and it has been prepared in Times New Roman in 14-point font size.

I further certify that this brief complies with the word-count limitation of NRAP 28.1(e)(2) dealing with cross-appeals [14,000 word limit for combined reply/answering brief], because it contains 13,977 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: Nov. 7, 2017

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CERTIFICATE OF SERVICE

I certify that I am employee of Lemons, Grundy & Eisenberg and that on this date the foregoing 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:

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DATED: 11/7/17