

EXHIBIT 8

EXHIBIT 8

1 [2540]
2 DOMINIQUE A. POLLARA, Nevada SBN 5742
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15 Attorneys for Defendants STEPHEN C. BALKENBUSH, ESQ.
16 and THORNDAL ARMSTRONG DELK BALKENBUSH &
17 EISINGER

18 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
19
20 IN AND FOR THE COUNTY OF WASHOE

21 ANGELA DeCHAMBEAU and JEAN-
22 PAUL DeCHAMBEAU, both individually
23 and as Special Administrator of the Estate
24 of NEIL DeCHAMBEAU,

25 Plaintiffs,

26 vs.

27 STEPHEN C. BALKENBUSH, ESQ.; and
28 THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER, a Nevada
Professional Corporation,

Defendants.

CASE NO. CV-12-00571

DEPT. 7

Trial Date: January 17, 2017

NOTICE OF ENTRY OF ORDER DENYING
PLAINTIFFS' MOTION FOR NEW TRIAL

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

NOTICE OF HEREBY GIVEN that on March 31, 2017, the Court entered an
Order Denying Plaintiffs' Motion for New Trial. A copy of the Order is attached hereto

1 and incorporated herein by reference as if set forth in full as Exhibit 1.

2 **AFFIRMATION**

3 The undersigned does affirm, pursuant to NRS 239B.030, that the foregoing
4 document does not contain the social security number of any person.

5 Dated: March 31, 2017

6 **POLLARA LAW GROUP**

7
8 By 

DOMINIQUE A. POLLARA
Nevada Bar No. 5742
3600 American River Drive, Suite 160
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(916) 550-5880
Attorneys for Defendants STEPHEN C.
BALKENBUSH, ESQ. and THORNDAL
ARMSTRONG DELK BALKENBUSH &
EISINGER

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CERTIFICATE OF SERVICE BY SERVICE

Pursuant to NRCP 5(b), I hereby certify I am an employee of Reno Carson Messenger and that on 31ST day of March, 2017, I caused the foregoing NOTICE OF ENTRY OF ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL to be served on all parties in this action by:

- ☐ placing an original or true copy thereof in a sealed envelope, postage prepaid, in the United States mail at Reno, Nevada.
- ☒ personal delivery.
- ☐ facsimile (courtesy copy).
- ☐ electronically served by the Court upon filing of document(s).
- ☐ email (courtesy copy).
- ☐ UPS/Federal Express or other overnight delivery.

☉fully addressed as follows:

Attorney
Charles R. Kozak, Esq.
3100 Mill Street, Suite 115
Reno, NV 89502

Representing
Plaintiff

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(775) 322-1239
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An employee of RENO CARSON
MESSENGER

EXHIBIT 7

EXHIBIT 7

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ANGELA DECHAMBEAU, et al., Case No.: CV12-00571
 Plaintiff, Dept. No.: 7
 vs.
STEPHEN C. BALKENBUSH, ESQ.,
et al.,
 Defendants.

ORDER

Currently before the Court is Plaintiffs ANGELA DECHAMBEAU ET AL.'s (hereinafter "Plaintiffs") *Motion for a New Trial*, filed on February 8, 2017. On February 17, 2017, Defendants STEPHEN C. BALKENBUSH ET AL. (hereinafter "Defendants") filed *Opposition to Plaintiffs' Motion for New Trial*. On February 27, 2017, Plaintiffs filed *Reply Brief In Support of Plaintiffs' Motion for New Trial*. On March 7, 2017, this matter was submitted to the Court for decision.

Factual Background

The legal malpractice lawsuit arose from a medical malpractice lawsuit filed in Washoe County by Defendants on behalf of Plaintiffs. On September 7, 2006, the decedent Neil DeChambeau died after an atrial fibrillation ablation procedure performed by David Smith, M.D. failed. The underlying malpractice suit was filed in September 2007 by Defendants. Attached to the underlying *Complaint* was the *Affidavit* of Dr. Fred Morady, dated August 29, 2007. Based on review of the medical

1 records provided to him, Dr. Morady opined that Dr. Smith's conduct fell below the
2 standard of care. However, after review of the "Prucka" recording, also called the
3 "EPS data," Dr. Morady changed his opinion and no longer believed that Dr. Smith's
4 conduct fell below the standard of care. Dr. Smith was represented by Edward
5 Lemons, Esq., who disclosed in March 2010 Hugh Calkins, M.D. as his standard of
6 care expert in the underlying malpractice action. Mr. Lemons proffered a declaration
7 signed by Dr. Calkins setting forth his opinions that Dr. Smith complied with the
8 standard of care. After Dr. Morady's change of opinion, the medical malpractice action
9 was voluntarily dismissed and subsequently, the legal malpractice action against the
10 Defendants was commenced.

11 In their legal malpractice lawsuit, Plaintiffs asserted that Defendants had
12 breach their duty to Plaintiffs by mismanaging the medical malpractice case and
13 voluntarily dismissing the action without obtaining necessary discovery to move the
14 case to trial. The district court entered an *Order* granting Defendants' *Motion for*
15 *Summary Judgment*, finding that the Plaintiffs failed to demonstrate the causation
16 element of their cause of action, that is, whether Defendants' failure to engage in
17 written discovery and move the case to trial caused any damages. On November 30,
18 2015, the Nevada Supreme Court issued *Order of Reversal and Remand*, finding that
19 there was a triable issue of material fact and directing the district court to conduct
20 proceedings consistent with the Court's *Order*.

21 The primary issues in which Plaintiffs' *Motion for a New Trial* arises is
22 whether the disclosure of Hugh Calkins M.D. was improper and whether the district
23 court erred in precluding Plaintiffs' proffered rebuttal witness. The Court finds that
24 it was not an improper expert witness disclosure and the preclusion of the rebuttal
25 witness was appropriate.

26 Standard of Review

27 A new trial may be granted where an aggrieved party's substantial rights have
28 been materially affected by an: (1) irregularity in the proceedings...or abuse of

1 discretion by which either party was prevented from having a fair trial; or (7) an error
2 in law occurring at the trial and objected to by the party making the motion.¹ A new
3 trial should be granted if the jury verdict resulted in manifest injustice.² A trial court
4 is obliged to use "great caution" in exercising its power to set aside a jury verdict.³
5 The decision to grant or deny a motion for a new trial rests within the sound
6 discretion of the trial court, and this court will not disturb that decision absent
7 palpable abuse.⁴

8 Discussion

9 Plaintiffs argue that they are entitled to a new trial due this Court's abuse of
10 discretion when issuing its February 2, 2016 *Scheduling Order* and reopening of
11 discovery, and for permitting Dr. Calkins to testify as to what Plaintiffs' believe was
12 a new theory of the case. Furthermore, it was improper for the Court to preclude a
13 rebuttal witness after the testimony of Dr. Calkins. By permitting such disclosure of
14 Dr. Calkins and permitting him to testify, Plaintiffs assert that they were precluded
15 from having a fair trial under NRCP 59. Essentially, Plaintiffs assert that
16 Defendants' expert disclosures are bound by the August 17, 2012, *Joint Case*
17 *Conference Report*, requiring the disclosure of expert witness be 120 days prior to
18 June 17, 2013. Therefore, Plaintiff argues that Defendants' expert disclosure of Hugh
19 Calkins, M.D., on September 2, 2016 is untimely and should be stricken.

20 Plaintiffs rely on *Douglas v. Burley*, wherein the Mississippi Supreme Court
21 held that an order reversing a district court's ruling and remanding it back consistent
22 with the order did not eliminate the trial court's prior scheduling order and discovery
23 deadlines, so as to permit plaintiffs to designate new accident reconstruction expert
24 on remand.⁵ Therefore, because Defendants did not file a motion to extend the
25 deadline for expert disclosures, they were bound by the deadline set forth in the *Joint*

26 ¹ NRCP 59(a); *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1035, 923 P.2d 569, 576 (1996).

27 ² *Frances v. Plaza Pac. Equities*, 109 Nev. 91, 847 P.2d 722 (1993).

28 ³ *Fox v. Cusick*, 91 Nev. 218, 220, 533 P.2d 466 (1975).

⁴ *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

⁵ 134 So. 3d 692 (Miss. 2012).

1 *Case Conference Report*. The Court does not agree. The present case is
2 distinguishable in that the court in *Douglas v. Burley* did not issue a new scheduling
3 order, therefore their designation of an expert witness was bound by the initial
4 scheduling order. In the present case, this Court did issue a new *Scheduling Order*,
5 under its discretion to do so, and the Defendants timely disclosed Dr. Calkins as an
6 expert witness. Pointedly, that very same court clearly stated that the decision to
7 "reopen discovery and other pretrial matters in a case is left squarely within the
8 sound discretion of the trial court."⁶ The finds that it was within its discretion to issue
9 a new scheduling order.

10 By entering its *Order* granting *Defendants' Motion for Summary Judgment*,
11 this Court dismissed Plaintiff's claims set forth in their *Complaint*. Thus, the Court
12 does not find that the parties should not have been bound by the August 17, 2012
13 *Joint Case Conference Report* discovery deadline. Therefore, the Court finds that the
14 February 2, 2016, *Scheduling Order* is appropriate and properly sets forth the
15 discovery deadlines in this matter and the disclosure of Dr. Calkins was timely and
16 appropriate.

17 Plaintiffs' next argument is that Dr. Calkins' testimony was not proper expert
18 testimony because his testimony exceeded the scope of disclosure and that Dr.
19 Calkins did not base his opinions on the medical records. The Court finds there is no
20 evidence to support either contention. Looking at the expert disclosure of Dr. Calkins
21 on September 2, 2016, Defendants indicated that: "Dr. Calkins is anticipated to
22 testify regarding the underlying standard of care as to the medical care and
23 treatment of decedent Neil DeChambeau, causation, and the standard of care as to
24 Defendant David Smith M.D."⁷ After reviewing the testimony, the Court finds that
25 Dr. Calkins' testimony was proper and within the scope of the disclosure. Plaintiffs
26 cannot point to any testimony that deviates from the disclosed nature of Dr. Calkins

27 ⁶ *Id.* at 697.

28 ⁷ Pl.s *Motion*, Ex. 6.

1 testimony and it appears to this Court that his testimony was in line with the NRCP
2 16.1 disclosure.

3 As to Plaintiffs' contention that Dr. Calkins did not base his opinion on the
4 medical records but rather the testimony of Dr. Smith, the Court finds this argument
5 is without merit. From Dr. Calkins' testimony, it appears to this Court that his
6 opinion was based on the records of Washoe Medical Center, Dr. Smith's office, and
7 the office of Mr. DeChambeau's primary care doctor. The Court does not find any
8 evidence that Dr. Calkins' testimony was based on anything other the medical records
9 of Neil DeChambeau and the facts adduced at trial. In conjunction with the special
10 knowledge, skill, experience, training, and education of Dr. Calkins, the Court finds
11 that Dr. Calkins expert opinion on the present case was proper.

12 Plaintiffs' next argument is that Dr. Calkins' testimony against Dr. Morady's
13 August 29, 2007 *Affidavit* essentially raised a new theory of liability. After due
14 consideration, the Court does not find any merit in Plaintiffs' argument. As stated
15 above, Dr. Morady had changed his opinion as to causation and liability after he was
16 given the opportunity to review the "Prucka" or EPS data. Therefore it would be
17 inconsistent, to say the least, for Plaintiffs' to rely on an *Affidavit* of an expert of
18 whom subsequently changed his opinion to one different than the one stated in the
19 *Affidavit*. As such, the crux of Plaintiffs' argument seems to be bellied by the
20 subsequent opinion of very doctor to which the Plaintiffs rely. Therefore, the Court
21 does not find that Dr. Calkins' testimony raised a new theory of liability.
22 Furthermore, the fact that Plaintiffs' counsel had the opportunity to depose Dr.
23 Calkins prior to trial but chose not to, supports the finding there is no evidence of a
24 manifest injustice as a result of Dr. Calkins' testimony that would warrant an order
25 for a new trial.

26 Plaintiffs' next argument rests on the Court's refusal to allow Plaintiffs to
27 recall Mark Seifert, M.D. Plaintiffs assert that they should have been permitted to
28 recall Dr. Seifert after Dr. Calkins allegedly raised a new theory of causation and

1 liability based on "unsupported speculation." As to the Court's refusal to allow
2 Plaintiffs to recall Dr. Seifert, the Nevada Supreme Court has held that the trial court
3 possesses the inherent power to "control the disposition of the causes on its docket
4 with economy of time and effort for itself, for counsel, and for litigants."⁸
5 Furthermore, this Court is obligated to "secure fairness in administration, [and
6 ensure] elimination of unjustifiable expense and delay, and promotion of growth and
7 development of the law of evidence to the end that the truth may be ascertained and
8 proceedings justly determined."⁹ The Court made its determination to refuse recalling
9 Dr. Seifert based on the fact that Dr. Seifert was no longer in the state and thus the
10 proceedings would have had to be extended unnecessarily, causing undue delay and
11 expenses. Based on judicial economy, the nature of Dr. Seifert's testimony, and the
12 fact that Plaintiffs could have deposed Dr. Calkins prior and thereafter question Dr.
13 Seifert regarding on such deposition testimony, the Court finds that it did not abuse
14 its discretion in refusing Plaintiffs' request to recall Dr. Seifert.

15 After due consideration of all the evidence submitted herein, the Court does
16 not find that Plaintiffs have met their burden in establishing that a new trial is
17 warranted. Accordingly, and good cause permitting, Plaintiffs Motion for a New Trial
18 is DENIED.

19 IT IS SO ORDERED.

20 DATED this 31st day of March, 2017.

21 
22 PATRICK FLANAGAN
23 District Judge
24
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27 ⁸ See *Maheu v. Eighth Judicial Dist. Court in and For Clark County*, Dept. No. 6, 89 Nev. 214, 216,
28 510 P.2d 627, 629.

⁹ NRS 47.030.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 31st day of March, 2017, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Charles R. Kozak, Esq., attorney for Plaintiff; and
Dominique A. Pollara, Esq., attorney for Defendants.



Judicial Assistant

EXHIBIT 6

EXHIBIT 6

1 [2535]

2 DOMINIQUE A. POLLARA, Nevada SBN 5742
3 POLLARA LAW GROUP
4 3600 American River Drive, Suite 160
5 Sacramento, California 95864
6 (916) 550-5880 - telephone
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10 MANDELBAUM ELLERTON & MCBRIDE
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12 Las Vegas, Nevada 89106
13 (702) 367-1234
14 Email: filing@memlaw.net

15 Attorneys for Defendant STEPHEN C. BALKENBUSH, ESQ.
16 and THORNDAL ARMSTRONG DELK BALKENBUSH &
17 EISINGER

18
19 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
20
21 IN AND FOR THE COUNTY OF WASHOE

22 ANGELA DeCHAMBEAU and JEAN-
23 PAUL DeCHAMBEAU, both individually
24 and as Special Administrator of the Estate
25 of NEIL DeCHAMBEAU,

26 Plaintiffs,

27 vs.

28 STEPHEN C. BALKENBUSH, ESQ.; and
THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER, a Nevada
Professional Corporation,

Defendants.

CASE NO. CV-12-00571

DEPT. 7

Trial Date: January 17, 2017

NOTICE OF ENTRY OF AMENDED JUDGMENT ON JURY VERDICT

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

NOTICE IS HEREBY GIVEN that on February 13, 2017, the Court entered an Amended Judgment on Jury Verdict. A copy of the Amended Judgment on Jury Verdict is attached hereto and incorporated herein by reference as if set forth in full as Exhibit 1.

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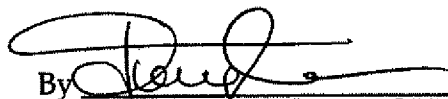
AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding does not contain the social security number of any person.

Dated: February 13, 2017

POLLARA LAW GROUP

By 

DOMINIQUE A. POLLARA
Nevada Bar No. 5742
3600 American River Drive, Suite 160
Sacramento, CA 95864
(916) 550-5880
Attorneys for Defendant STEPHEN C.
BALKENBUSH, ESQ. and THORNDAL
ARMSTRONG DELK BALKENBUSH &
EISINGER

EXHIBIT 1

EXHIBIT 1

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 ANGELA DeCHAMBEAU and JEAN-
10 PAUL DeCHAMBEAU, both individually
and as Special Administrators of the Estate
11 of NEIL DeCHAMBEAU,

Case No. CV 12-00571
Dept. 7

12 Plaintiffs,

13 vs.

14 STEPHEN C. BALKENBUSH, ESQ.; and
THORNDAL ARMSTRONG DELK
15 BALKENBUSH & EISINGER, a Nevada
Professional Corporation,

16 Defendants.
17

18 AMENDED JUDGMENT ON JURY VERDICT
19

20 WHEREAS, pursuant to the Court Order dated August 27, 2013 granting
21 Defendants' Motion to Bifurcate the underlying medical malpractice matter from the legal
22 malpractice matter, trial as to the medical malpractice matter commenced January 17, 2017,
23 Honorable Patrick Flanagan, District Court Judge Presiding, at the completion of which,
24 after due deliberation, the jury rendered a verdict finding "No Negligence" by David
25 Smith, M.D. in the underlying medical malpractice matter, and as a verdict of "Negligence"
26 by David Smith, M.D., as a matter of law, is a necessary element of the legal malpractice
27
28

1 claim asserted against Defendants STEPHEN C. BALKENBUSH, ESQ. and THORNDAL
2 ARMSTRONG DELK BALKENBUSH & EISINGER, the Court rules, finds, and orders as
3 follows:
4

5 IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered on the
6 Plaintiffs' complaint in favor of Defendants STEPHEN C. BALKENBUSH, ESQ. and
7 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER and the action will be
8 dismissed with prejudice, and Defendants STEPHEN C. BALKENBUSH, ESQ. and
9 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER shall recover their costs
10 of suit in the amount of Seventy-Five Thousand, Eight Hundred Eighty-Six Dollars and
11 Forty-Nine Cents (\$75,886.49).
12

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14 Dated: *FEBRUARY 13, 2017.*
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16 *Patrick Flanagan*
17 HONORABLE PATRICK FLANAGAN
18 DISTRICT JUDGE
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CERTIFICATE OF SERVICE BY SERVICE

Pursuant to NRCP 5(b), I hereby certify I am an employee of Reno Carson Messenger and that on 4th day of February, 2017, I caused the foregoing NOTICE OF ENTRY OF AMENDED JUDGMENT ON JURY VERDICT to be served on all parties in this action by:

- ☒ placing an original or true copy thereof in a sealed envelope, postage prepaid, in the United States mail at Reno, Nevada.
- ☐ personal delivery.
- ☐ facsimile (courtesy copy).
- ☐ electronically served by the Court upon filing of document(s).
- ☐ email (courtesy copy).
- ☐ UPS/Federal Express or other overnight delivery.

Fully addressed as follows:

Attorney	Representing	Phone/Fax/E-Mail
Charles R. Kozak, Esq.	Plaintiff	(775) 322-1239
3100 Mill Street, Suite 115		
Reno, NV 89502		<u>chuck@kozaklawfirm.com</u>


An employee of RENO CARSON
MESSENGER

EXHIBIT 5

EXHIBIT 5

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 ANGELA DeCHAMBEAU and JEAN-
10 PAUL DeCHAMBEAU, both individually
and as Special Administrators of the Estate
of NEIL DeCHAMBEAU,

Case No. CV 12-00571
Dept. 7

11 Plaintiffs,
12

13 vs.

14 STEPHEN C. BALKENBUSH, ESQ.; and
THORNDAL ARMSTRONG DELK
15 BALKENBUSH & EISINGER, a Nevada
Professional Corporation,

16 Defendants.
17

18 AMENDED JUDGMENT ON JURY VERDICT
19

20 WHEREAS, pursuant to the Court Order dated August 27, 2013 granting
21 Defendants' Motion to Bifurcate the underlying medical malpractice matter from the legal
22 malpractice matter, trial as to the medical malpractice matter commenced January 17, 2017,
23 Honorable Patrick Flanagan, District Court Judge Presiding, at the completion of which,
24 after due deliberation, the jury rendered a verdict finding "No Negligence" by David
25 Smith, M.D. in the underlying medical malpractice matter, and as a verdict of "Negligence"
26 by David Smith, M.D., as a matter of law, is a necessary element of the legal malpractice
27
28

1 claim asserted against Defendants STEPHEN C. BALKENBUSH, ESQ. and THORNDAL
2 ARMSTRONG DELK BALKENBUSH & EISINGER, the Court rules, finds, and orders as
3 follows:
4

5 IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered on the
6 Plaintiffs' complaint in favor of Defendants STEPHEN C. BALKENBUSH, ESQ. and
7 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER and the action will be
8 dismissed with prejudice, and Defendants STEPHEN C. BALKENBUSH, ESQ. and
9 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER shall recover their costs
10 of suit in the amount of Seventy-Five Thousand, Eight Hundred Eighty-Six Dollars and
11 Forty-Nine Cents (\$75,886.49).
12

13
14 Dated: *FEBRUARY 13, 2017.*
15

16 *Patrick Flanagan*
17 HONORABLE PATRICK FLANAGAN
18 DISTRICT JUDGE
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EXHIBIT 4

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EXHIBIT 4

1 [2535]

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 ANGELA DeCHAMBEAU and JEAN-
10 PAUL DeCHAMBEAU, both individually
11 and as Special Administrators of the Estate
12 of NEIL DeCHAMBEAU,

11 Plaintiffs,

12 vs.

13 STEPHEN C. BALKENBUSH, ESQ.; and
14 THORNDAL ARMSTRONG DELK
15 BALKENBUSH & EISINGER, a Nevada
16 Professional Corporation,

16 Defendants.

Case No. CV 12-00571
Dept. 7

Trial Date: January 17, 2017

17
18 NOTICE OF ENTRY OF JUDGMENT ON JURY VERDICT
19

20 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

21 NOTICE IS HEREBY GIVEN that on January 25, 2017, the Court entered Judgment
22 on Jury Verdict in favor of Defendants STEPHEN C. BALKENBUSH, ESQ. and
23 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER. A copy of the Judgment
24 on Jury Verdict is attached hereto as Exhibit 1.
25

26 \\\

27 \\\
28

1 AFFIRMATION

2 The undersigned does affirm, pursuant to NRS 239B.030, that the foregoing
3 document does not contain the social security number of any person.
4

5 Dated: January 25, 2017

POLLARA LAW GROUP

6
7 By: 

8 DOMINIQUE A. POLLARA, ESQ.

9 Nevada Bar No. 5742

10 3600 American River Drive, Ste. 160

11 Sacramento, CA 95864

12 (916) 550-5880

13 Attorneys for Defendants STEPHEN C.

14 BALKENBUSH, ESQ. and THORNDAL

15 ARMSTRONG DELK BALKENBUSH &

16 EISINGER
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Messenger and that on 07th day of January, 2017, I caused the foregoing NOTICE OF ENTRY OF JUDGMENT ON JURY VERDICT to be served on all parties in this action by:

~~X~~ personal delivery.

_____ electronically served by the Court upon filing of document(s).

____ UPS/Federal Express or other overnight delivery.

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chuck@kozaklawfirm.com

Rennus M. Messinger
An employee of RENO CARSON
MESSENGER

EXHIBIT 3

EXHIBIT 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ANGELA DeCHAMBEAU and JEAN-PAUL DeCHAMBEAU, both individually and as Special Administrators of the Estate of NEIL DeCHAMBEAU,

Case No. CV 12-00571

Dept. 7

Plaintiffs,

vs.

STEPHEN C. BALKENBUSH, ESQ.; and THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, a Nevada Professional Corporation,

Defendants.

JUDGMENT ON JURY VERDICT

WHEREAS, pursuant to the Court Order dated August 27, 2013 granting Defendants' Motion to Bifurcate the underlying medical malpractice matter from the legal malpractice matter, trial as to the medical malpractice matter commenced January 17, 2017, Honorable Patrick Flanagan, District Court Judge Presiding, at the completion of which, after due deliberation, the jury rendered a verdict finding "No Negligence" by David Smith, M.D. in the underlying medical malpractice matter, and as a verdict of "Negligence" by David Smith, M.D., as a matter of law, is a necessary element of the legal malpractice claim asserted against Defendants STEPHEN C. BALKENBUSH, ESQ. and THORNDAL

1 ARMSTRONG DELK BALKENBUSH & EISINGER, the Court rules, finds, and orders as
2 follows:

3 IT IS ORDERED, ADJUDGED AND DECREED that judgment shall be entered on
4 the Plaintiffs' complaint in favor of Defendants STEPHEN C. BALKENBUSH, ESQ. and
5 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER and the action will be
6 dismissed with prejudice, and Defendants STEPHEN C. BALKENBUSH, ESQ. and
7 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER shall recover their costs
8 of suit according to proof in their Verified Memorandum of Costs.

9 Dated this 25 day of January, 2017.

10 Patrick Flanagan
11 PATRICK FLANAGAN
12 DISTRICT JUDGE

13 APPROVED AS TO FORM:

14
15 By: _____
16 Charles R. Kozak, Esq.
17 Nevada Bar No. 4245
18 3100 Mill Street, Suite 115
19 Reno, NV 89502
20 Attorney for Plaintiffs
21
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EXHIBIT 2

EXHIBIT 2

Code 2120
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ANGLEA DECHAMBEAU, et al.,
Plaintiffs

Case No.: CV12-00571

Dept. No.: 7

vs.

STEPHEN C. BALKENBUSH, ESQ,
et al.,

Defendants.

PLAINTIFFS' MOTION FOR NEW TRIAL

Plaintiffs, by and through their counsel of record, hereby move for a new trial under NRCP 59. In support of their motion, Plaintiffs submit the following Memorandum of Points and Authorities in addition to the record on file.

POINTS AND AUTHORITIES

I. Introduction

Plaintiffs objected to and moved to strike Defendants' late and improper disclosure of Dr. Hugh Calkins as an expert witness in this case. This Court's issuance of its February 2, 2016 Scheduling Order and abuse of discretion in reopening discovery, as well as its permission for Calkins to testify as to a new theory of the case, prevented Plaintiffs from having a fair trial under NRCP 59. Calkins' testimony was based on his personal opinion and

1 not substantiated by the medical record. His testimony was admitted and left unchallenged
2 because Plaintiffs' were denied a rebuttal witness. Therefore, a new trial may be granted on
3 grounds materially affecting Plaintiffs' rights. NRCP 59(a)(1), (a)(7).

4 **II. Summary of Relevant Facts and Procedure Leading Up to Trial**

5 This Court's Pretrial Order, entered April 30, 2012, states that "A continuance of trial
6 does not extend the deadline for completing discovery. A request for an extension of the
7 discovery deadline, if needed, must be included as part of any motion for continuance."
8 (Exhibit 1.) Defendants did not request a discovery extension or move for a continuance.
9 (See Court Docket.) Accordingly, Plaintiffs' counsel sent defense counsel a letter, dated
10 September 4, 2013, stating that they "will object to any experts being called in the trial on
11 behalf of Mr. Stephen Balkenbush or Dr. Smith, other than those designated in your expert
12 witness designation filed June 17, 2013." (Exhibit 2.)

13 This Court subsequently granted Defendants' summary judgment motion on
14 September 24, 2013, which Plaintiffs appealed. (Court Docket.) The Supreme Court found
15 that summary judgment should have been denied, and on November 24, 2015 reversed and
16 remanded the matter to this Court. (Exhibit 3 at 4-5.) It had been only 20 days until trial
17 when the summary judgment motion was granted; yet, this Court issued a new Scheduling
18 Order on February 2, 2016, nearly two and a half years after granting summary judgment in
19 2013. (Exhibit 4; Court Docket.)

20 The Supreme Court stated in its order that a triable issue of fact existed such that
21 summary judgment shouldn't have been granted. (Exhibit 3 at 4-5.) The Supreme Court's
22 order was not based on Calkins's testimony that was slipped in for the first time at trial. (See
23 *Id.*) And the Supreme Court's order did not remand the case to this Court in order to reopen
24 discovery for that purpose. (See *Id.*)

25 Even though Defendants had already made their initial expert disclosures on June 14,
26 2013, the February 2, 2016 Scheduling Order requested that initial expert disclosures be made
27 "on or before September 3, 2016" and that all discovery was to be completed by "December
28 2, 2016." (Exhibit 5; Exhibit 4.)

1 Over Plaintiffs' objections and their Motion to Strike, filed November 15, 2016, and
2 despite inconsistencies with its own Pretrial Order, this Court permitted Defendants to name
3 Calkins as their expert and allowed him to testify at trial. (Court Docket; Exhibit 4; Exhibit 6;
4 Exhibit 7.)

5 The Judgment on Jury Verdict, dated January 25, 2017, states that the jury found no
6 negligence by Dr. Smith in the underlying medical malpractice matter, which was found to
7 negate an element required under Plaintiff's legal malpractice claim. (Exhibit 8.)

8 **III. Irregularities in Discovery Proceedings Materially Affected Plaintiffs' Rights**
9 **and Prevented Them from Having a Fair Trial.**

10 NRCP, Rule 59, provides that a "new trial may be granted to all or any of the parties
11 and on all or part of the issues for...causes or grounds materially affecting the substantial
12 rights of an aggrieved party," such as where there's an irregularity in the proceedings, an
13 order of the court, or an abuse of discretion that prevents a party from having a fair trial.
14 NRCP 59(a)(1). A new trial may also be granted where there's an "error in law occurring at
15 the trial and objected to by the party making the motion." NRCP 59(a)(7).

16 Judicial discretion on discovery matters is not boundless. *Douglas v. Burley*, 134 So.
17 3d 692, 697 (Miss. 2012). "[U]pon remand, prior orders governing discovery remain in place
18 absent a party's motion to extend deadlines and a subsequent order by the trial court." *Id.*
19 The policy behind this is to "prevent confusion and potential conflict." *Laws v. Louisville*
20 *Ladder, Inc.*, 146 So. 3d 380, 387 (Miss. Ct. App. 2014) Here, as outlined above and in
21 Plaintiffs' Motion to Strike, Defendants never filed a motion to extend the deadline for expert
22 disclosures and were therefore bound by the deadlines set forth in the Joint Case Conference
23 Report.

24 NRCP 26(e) sets forth the parties' duty to timely supplement their witness disclosures.
25 Defendants' September 2, 2016 disclosure of Calkins was not made in the spirit of the statute,
26 as it was a last ditch attempt at finding a defense expert after they dropped Morady and their
27 summary judgment ruling was overturned. Defendants could have, for instance, offered
28 Calkins for deposition prior to their motion for summary judgment hearing; but, they did not.

1 Defendants opted for the element of surprise at trial, including a new theory of the case,
2 which is exactly what the mandatory and supplementary disclosures intend to avoid. *See*
3 *Jama v. City and County of Denver*, 304 F.R.D 289, 295 (D. Colo. 2014). Defendants' undue
4 delay and failure to provide complete information earlier in the proceedings substantially
5 affected Plaintiff's case and provide grounds for a new trial under NRCP 59(a)(1).

6 Plaintiffs pointed out the errors in the discovery proceedings and conflict between this
7 Court's Pretrial Order and subsequent Scheduling Order in their correspondence with defense
8 counsel and in their Motion to Strike. To go forward with Calkins's testimony, and to allow a
9 jury to make a determination based on his personal opinions, was an error in law and in
10 discretion. It was further error to let Calkins's testimony stand unchallenged by denying
11 Plaintiffs a rebuttal witness. Thus, Plaintiffs also seek a new trial under NRCP 59(a)(7).

12 **IV. Dr. Calkins's Testimony Was Not Proper Expert Testimony.**

13 Calkins's Testimony Exceeded the Scope of Disclosure.

14 The extent to which Calkins was permitted to testify far exceeded the scope for which
15 he had been disclosed. (Exhibit 6; Exhibit 9; Exhibit 10; Exhibit 11.) Defendants' 16.1
16 document disclosures relating to expert witnesses in the underlying matter stated that his
17 testimony "will be *based on the medical records produced* in the case, depositions he may
18 review, and *his training and practice experience*." (Exhibit 10 at 2:6-19, emphasis added.)
19 Calkins's report in the underlying complaint is deficient under NRCP 16.1 because it fails to
20 provide the basis for his opinion; namely, that he believes Dr. Smith. (Exhibit 10.)
21 Defendants' Pretrial Disclosures dated September 13, 2013 provided only Calkins's name,
22 employer, and address, and proposed his curriculum vitae as an exhibit. (Exhibit 11.)

23 Neither was Calkins properly disclosed as per the Scheduling Order. As outlined
24 above, discovery was not reopened after the Supreme Court remanded, and it was in error for
25 discovery to have reopened without a properly made request for an extension or a motion for
26 a continuance. Regardless, Defendants' September 2, 2016 disclosures vaguely stated that
27 "Calkins is anticipated to testify regarding the underlying case as to the medical care and
28

1 treatment of decedent Neil DeChambeau, causation, and the standard of care as to defendant
2 David Smith, M.D.,” and attached his curriculum vitae. (Exhibit 6.)

3 **Calkins submitted no expert witness report** pursuant to NRS 16.1(A), (B), and (C),
4 and as discussed in further detail below, he presented trial testimony in violation of the
5 requirement in *Daubert* that expert opinions be based on reliable or trustworthy scientific
6 evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-594 (1993).

7 Calkins Did Not Base His Opinions on the Medical Records.

8 Calkins testified as to his personal opinion which was not substantiated by anything in
9 the medical record. He admitted he hasn’t been in the exact situation Smith faced in this case;
10 yet, he outlined the “necessary” steps and opined that Smith met the standard of care.
11 (Exhibit 9 at 37:11-13, 43:1-19.) Despite having outlined the steps Smith should have
12 followed to meet the standard of care, Calkins was not concerned about Smith’s 2013
13 deposition testimony in which Smith was unable to remember the sequence of steps taken.
14 (Exhibit 9 at 43:20-44:6.)

15 It is clear from the trial testimony that Calkins based his opinions on Dr. Smith’s
16 testimony rather than on the medical records. Though he denied this at trial, Calkins
17 repeatedly took Smith’s word over the gaps documented in the medical records. (Exhibit 9 at
18 63:4-18, 74:23-75:15.) Calkins agreed there was nothing in the medical record to substantiate
19 Smith’s testimony that he’d immediately started the pericardiocentesis. (Exhibit 9 at 63:10-
20 18.) He also agreed that it was not documented in the records that there was a
21 pericardiocentesis initiated at 12:41. (Exhibit 9 at 78:5-8.) He hadn’t seen anything
22 showing Smith had not waited to perform the pericardiocentesis until the echo machine was
23 present. (Exhibit 9 at 47:22-48:8.)

24 It was therefore Calkins’s personal opinion that Smith was truthful when he said he’d
25 started the pericardiocentesis almost immediately after the code sounded at 12:39. His
26 personal opinion was based on his belief that no reasonable electrophysiologist would stand
27 around for ten minutes waiting for the stat echo to arrive. (Exhibit 9 at 63:4-18.) But this is
28 what Plaintiffs claimed happened, based on the evidence and medical record, and what led to

1 Mr. DeChambeau's mortality. Calkins's personal and conclusory opinions, particularly those
2 that contradict earlier opinions, are not acceptable as a basis for expert opinion and should not
3 have passed the *Daubert* (or *Frye*) gatekeeping standards.

4 Calkins's Testimony Against Morady's Affidavit Raised a New Theory of Liability.

5 This Court effectively allowed Defendants to present a new theory of the case. As
6 mentioned above and in Plaintiffs' Motion to Strike, Calkins should have never been allowed
7 to testify in this case due to the gross irregularities of expert discovery following the Supreme
8 Court's reversal of Defendants' motion for summary judgment. Discovery had been closed
9 prior to the appeal, except for Dr. Morady's trial deposition. Once Calkins got in, Defendants
10 dropped Morady because their expert witnesses disagreed with one another. At trial, for
11 example, Calkins testified he disagreed with Morady's affidavit in which Morady stated his
12 opinion that Smith failed to timely perform a pericardiocentesis. (Exhibit 9 at 52:17-53, 54:2-
13 9, 54:15-55:7.) Of note, Plaintiffs were not allowed to use Morady's affidavit, due to
14 scheduling issues, even though there'd been a ruling at the pretrial conference that they could
15 have done so.

16 Thus, in addition to Calkins being offered as a new expert witness who would testify
17 at trial, Defendants were able to present new theories of liability that Plaintiffs had no
18 opportunity to rebut with expert witnesses of their own. To add to the egregiousness of the
19 irregularities, Calkins had submitted no expert witness report in the instant legal malpractice
20 case, pursuant to NRS 16.2(A), (B), and (C). Calkins's report in the underlying complaint is
21 deficient under NRCP 16.1 because it fails to provide the basis for his opinion; namely, that
22 he believes Dr. Smith. (Exhibit 10.) He also relied on Smith's attorney for the conclusion
23 that Smith did the pericardiocentesis timely. (Exhibit 9 at 48:2-21, 51:20-52:6.) This is not
24 the quality of information that experts are entitled to rely on in an expert report or opinion.
25 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-594 (1993).

26 **V. Abuse of Discretion in Denying Plaintiffs a Rebuttal Expert Witness**

27 It is an abuse of discretion to deny rebuttal "if it appears the court's discretion was
28 abused to the prejudice of the party offering the rebuttal evidence." *Morrison v. Air*

1 *California*, 101 Nev. 233, 237, 699 P.2d 600, 603 (1985) (citations omitted). Rebuttal
2 evidence is proper where it “tends to counteract new matters by the adverse party.” *Id.* at 602.

3 Here, Plaintiffs were denied the opportunity to call Dr. Siefert in rebuttal to Calkins’s
4 testimony. Plaintiffs anticipate the argument that a rebuttal witness to Calkins was not
5 designated by the deadline stated in the 2016 Scheduling Order. However, as outlined above,
6 Plaintiffs have challenged and continue to object to the Scheduling Order as an irregularity in
7 the proceedings and an abuse of discretion that prejudiced Plaintiffs and materially affected
8 the outcome of trial. Defendants were permitted to offer the trial testimony of a new expert
9 who presented on new theories in the case.

10 Dr. Siefert has since reviewed Calkins’s trial testimony. (See Exhibit 12). Had this
11 Court allowed Plaintiffs to move forward with Dr. Siefert as a rebuttal witness, Dr. Seifert
12 would have testified that Dr. Calkin’s testimony was unsupported speculation. (Exhibit 12).

13 Had Calkins’s testimony not gone unchallenged, the jury may have found Dr. Smith to
14 have been negligent in the underlying action, such that the remaining elements of legal
15 malpractice in the instant case could have been tried.

16 VI. Conclusion

17 Based on the above, Plaintiffs request this Court grant them a new trial. Should this
18 Court permit Calkins to offer expert opinion testimony, Plaintiffs respectfully request
19 permission to designate a rebuttal expert in accordance with its ruling.

20 Pursuant to NRS 239B.030 the undersigned certifies no Social Security numbers
21 are contained in this document.

22 Dated February 8, 2017

23 /s/ Charles R. Kozak
24 CHARLES R. KOZAK, ESQ.
25 Kozak Lusiani Law, LLC
26 Attorneys for the Plaintiffs
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LIST OF EXHIBITS

<u>No.</u>	<u>Document</u>	<u>Pages</u>
1	Pretrial Order entered April 30, 2012	8
2	Letter to Defendants' counsel dated September 4, 2013	2
3	Order of Reversal and Remand dated November 24, 2015	6
4	Scheduling Order dated February 2, 2016	5
5	Defendants' Initial Disclosures dated June 14, 2013	5
6	Defendants' Disclosures dated September 2, 2016	8
7	Plaintiffs' Motion to Strike filed November 15, 2016	38
8	Judgment on Jury Verdict dated January 25, 2017	3
9	Trial Testimony of Hugh Calkins dated January 20, 2017	82
10	Defendants' 16.1 document disclosure pp. SB 01894-SB 01901 (Exhibit 2 to Defendants' Opposition to Motion to Strike) xx	9
11	Defendants' Pretrial Disclosures dated September 13, 2013 (Exhibit 3 to Defendants' Opposition to Motion to Strike) xx	7
12	Affidavit of Dr. Seifert	5

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EXHIBIT 1

EXHIBIT 1

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Clerk of the Court

Transaction # 2920420

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ANGELA DECHAMBEAU, et al.,

Plaintiffs,

Case No.: CV12-00571

Dept. No.: 7

vs.

STEPHEN C. BALKENBUSH, ESQ.,
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH and EISINGER, a Nevada
Professional Corporation, & DOES 1-X,
inclusive,

Defendants.

PRETRIAL ORDER

IT IS HEREBY ORDERED THAT:

No later than twenty (20) days after entry of this order, counsel for the parties shall set an Initial Mandatory Pretrial Conference, Pretrial Conference and Trial. Please contact the Judicial Assistant of the department (775) 328-3158 to schedule a setting appointment. Plaintiff's counsel is to prepare the Application for Setting form; and should the setting be a telephonic setting, the form shall be delivered to chambers prior to setting.

I. PRETRIAL CONFERENCES

A. The Initial Mandatory Pretrial Conference shall be held within sixty (60) days of this Order. The purpose of this conference is to expedite settlement or other appropriate disposition of the case. Attendance by counsel for each party will be required; however, if

1 counsel is located out of the Reno area, telephonic appearance will be acceptable and is to be
2 discussed with the Judicial Assistant during the setting appointment.

3 Counsel must be prepared to discuss the following:

- 4 (1) The status of settlement discussions and any possible court assistance;
- 5 (2) Any alternative dispute resolution techniques appropriate to this case;
- 6 (3) Any possible simplification of issues;
- 7 (4) The nature and timing of all discovery;
- 8 (5) Any special case management procedures appropriate to this case;
- 9 (6) Whether there is good cause to waive the requirements for expert witness
10 reports (NRCp 16.1(2)(B));
- 11 (7) Whether there is good cause to limit the number and duration of
12 depositions;
- 13 (8) Whether there is good cause to limit requests for production, or to increase
14 the number of interrogatories;
- 15 (9) Whether discovery, and any other disputes, may be handled by a meeting
16 or telephonic conference with the parties and the Court without the need
17 for written motions; or without submitting discovery disputes to the
18 Discovery Commissioner;
- 19 (10) Whether any or all of the requirements of NRCp 16.1 should be waived
20 pursuant to NRCp 16.1(f);
- 21 (11) Any possible amendments to the pleadings or additional parties; and,
- 22 (12) Other matters as may aid in the prompt disposition of this action.

23 (See, NRCp 1).

24 B. The Final Pretrial Conference is held approximately two weeks prior to trial. The
25 parties should be prepared to discuss the status of Motions in Limine, and formulate a program
26 for facilitating the admission of evidence

27 The conference shall be attended by:

- 28 (1) Trial or lead counsel for all parties;

- 1 (2) The parties (if the party is an entity, an authorized representative);
2 (3) A representative with negotiating and settlement authority of any insurer
3 insuring any risk pertaining to this case may attend, in person or
4 telephonically; and
5 (4) Any unrepresented parties.

6 II. PRETRIAL MOTIONS

7 A. Any motions which should be addressed prior to trial – including motions for
8 summary judgment – shall be served, filed and submitted for decision no later than thirty (30)
9 days before trial.

10 B. Motions in limine shall be served, filed and submitted for decision no later than
11 fifteen (15) days before trial. Except upon a showing of unforeseen extraordinary circumstances,
12 the Court will not entertain any pretrial motions filed or orally presented after these deadlines.

13 C. Legal memoranda submitted in support of any motion shall not exceed fifteen
14 (15) pages in length; opposition memoranda shall not exceed fifteen (15) pages in length; reply
15 memoranda shall not exceed five (5) pages in length. These limitations are exclusive of exhibits.
16 This limitation also applies to post-trial motions. The parties may request leave to exceed these
17 limits in extraordinary circumstances.

18 III. DISCOVERY

19 A. Prior to filing any discovery motion, the attorney for the moving party must
20 consult with opposing counsel about the disputed issues. Counsel for each side must present to
21 each other the merits of their respective positions with candor, specificity, and supporting
22 material.

23 B. Unless a discovery dispute is submitted directly to this Court pursuant to § IB(10),
24 supra, and if both sides desire a dispute resolution conference pursuant to NRCP 16.1(d), counsel
25 must contact the Discovery Commissioner's office at (775) 328-3293 to obtain a date and time
26 for the conference that is convenient to all parties and the Discovery Commissioner. If the
27 parties cannot agree upon the need for a conference, the party seeking the conference must file
28 and submit a motion in that regard.

1 C. A continuance of trial does not extend the deadline for completing discovery. A
2 request for an extension of the discovery deadline, if needed, must be included as part of any
3 motion for continuance.

4 D. A party objecting to a written discovery request must, in the original objection,
5 specifically detail the reasons that support the objection, and include affidavits or other evidence
6 for any factual assertions upon which an objection is based.

7 IV. TRIAL STATEMENT

8 A. A trial statement on behalf of each party shall be hand delivered to opposing
9 counsel, filed herein and a copy delivered to chambers no later than 5:00 p.m. five (5) court days
10 prior to trial.

11 B. In addition to the requirements of WDCR 5, the trial statement shall contain:

- 12 (1) Any practical matters which may be resolved before trial (e.g. suggestions
13 as to the order of witnesses, view of the premises, availability of audio or
14 visual equipment);
- 15 (2) A list of proposed general voir dire questions for the Court or counsel to
16 ask of the jury;
- 17 (3) A statement of any unusual evidentiary issues, with appropriate citations
18 to legal authorities on each issue; and
- 19 (4) Certification by trial counsel that, prior to the filing of the trial statement,
20 they have personally met and conferred in a good faith-effort to resolve
21 the case by settlement.

22 V. JURY INSTRUCTIONS

23 A. The parties shall exchange all proposed jury instructions and verdict forms ten
24 (10) court days prior to trial.

25 B. All original instructions shall be accompanied by a separate copy of the
26 instruction containing a citation to the form instruction, statutory or case authority supporting
27 that instruction. All modifications made to instructions taken from statutory authority, Nevada
28 Pattern Jury Instructions, *Devitt and Blackmar*, CALJIC, BAJI or other form instructions shall be

1 specifically noted on the citation page.

2 C. The parties shall confer regarding the proposed jury instructions and
3 verdict forms and submit these instructions and verdict forms jointly to the Court five (5) court
4 days prior to trial. The parties shall indicate which instructions and verdict forms are jointly
5 agreed upon and which are disputed.

6 D. At the time Jury Instructions are settled, the Court will consider the disputed
7 instructions and any additional instructions which could not have been readily foreseen prior to
8 trial.

9 VI. MISCELLANEOUS

10 A. The Court expects that all counsel will cooperate to try the case within the time
11 set. Trial counsel are ordered to meet and confer regarding the order of witnesses, stipulations
12 and exhibits and any other matters which will expedite trial of the case.

13 B. Jurors will be permitted to take notes during trial. Jurors will be permitted to ask
14 reasonable questions in writing during trial after the questions are screened by the Court and
15 counsel. Any party objecting to this procedure shall set forth this objection in the trial statement.

16 C. Counsel and/or the parties are ordered to specifically inform every witness that
17 they call about any orders in limine, or similar rulings, that restrict or limit testimony or evidence
18 and to further inform them that they may not offer, or mention, any evidence that is subject to
19 such an Order.

20 D. Trial counsel for all parties shall speak with the courtroom clerk, Ms. Kim Oates
21 (775) 328-3140 or Maureen Conway (775) 325-6593 no later than five (5) court days prior to
22 trial, to arrange a date and time to mark trial exhibits. All exhibits shall be marked in one
23 numbered series (Exhibit 1, 2, 3, etc.) and placed in binder(s) provided by counsel. Counsel
24 shall cooperate to insure that three identical sets of exhibits (one for the Court, one for the Clerk
25 and one for testifying witnesses) are provided to the Court. Once trial exhibits are marked by the
26 clerk, they shall remain in the custody of the clerk. When marking the exhibits with the clerk,
27 counsel should advise the clerk of all exhibits which may be admitted without objection and
28 those that may be admissible subject to reserved objections.

1 E. Any memorandum of costs and disbursements must comply with Bergman v.
2 Boyce, 109 Nev. 670, 856 P.2d 560 (1993) and Bobby Berosini v. PETA, 114 Nev. 1348, 971
3 P.2d 383 (1998).


4 F. All applications for attorney's fees shall state services rendered and fees incurred
5 for such services with sufficient specificity to enable an opposing party and the court to review
6 such application, and shall specifically address the factors set out in Schouweiler v. Yancy, 101
7 Nev. 827, 712 P.2d 786 (1985).

8 VII. CIVILITY

9 The use of language which characterizes the conduct, arguments or ethics of another is
10 strongly discouraged and is to be avoided. In the appropriate case, the Court will upon motion or
11 sua sponte, consider sanctions, including monetary penalties and/or striking the pleading or
12 document in which such improprieties appear, and may order any other suitable measure the
13 Court deems to be justified. This section of this order applies to written material exchanged
14 between counsel, briefs or other written materials submitted to the Court and conduct at
15 depositions, hearings, trial or meetings with the Court.


16 Failure to comply with any provision of this Pretrial Order may result in the imposition of
17 sanctions.

18 DATED this 30 day of April, 2012.

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21 PATRICK FLANAGAN
22 District Judge
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Margo Piscevich, Esq. and Mark Lenz, Esq. for Thorndal, Armstrong, et al.


Judicial Assistant

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Clerk of the Court
Transaction # 5941839 : yvilorla

EXHIBIT 2

EXHIBIT 2

Charles R. Kozak, Attorney at Law, LLC

3100 Mill Street, Suite 115

Reno, Nevada 89502

(775) 322-1239

chuck@kozaklawfirm.com

September 4, 2013

Margo Piscevich, Esq.
Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, Nevada 89509

RE: DeChambeau v Balkenbush

Dear Margo:

We have the following positions on the matters discussed today with regards to the above case.

1. We will make arrangements to attend the deposition of Dr. Fred Morady on October 2, 2013.
2. We will object to any experts being called in the trial on behalf of Mr. Stephen Balkenbush or Dr. Smith, other than those designated in your expert witness designation filed June 17, 2013.
3. In addition, we will be filing a motion in limine with regards to Dr. Smith testifying as an expert witness in his own case in the medical malpractice portion of the bifurcated trial, as this is prohibited by Nevada rules and statutes.

The discovery cut off has long passed for any discovery depositions of any other medical experts. You indicated you intend to call expert witnesses from the designation of Mr. Lemon several years ago. We simply cannot allow our client's rights to be jeopardized by allowing undesignated experts who have not been previously deposed to testify in the underlying case at this late date.

Sincerely,

Charles R. Kozak, Esq.

CRK/na

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Transaction # 5941839 : yvitoria

EXHIBIT 3

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELA DECHAMBEAU AND JEAN-PAUL DECHAMBEAU, BOTH INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF NEIL DECHAMBEAU,
Appellants,

vs.

STEPHEN C. BALKENBUSH, ESQ.; AND THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, A NEVADA PROFESSIONAL CORPORATION,
Respondents.

No. 64463

FILED

NOV 24 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: [Signature]
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a legal malpractice action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellants Angela and Jean-Paul DeChambeau sued respondents for legal malpractice, alleging in pertinent part that respondents, who represented the DeChambeaus in a medical malpractice action, breached their duty to the DeChambeaus by mismanaging the medical malpractice case and instead voluntarily dismissing the action without obtaining necessary discovery to move the case to trial.

Respondents moved for summary judgment, arguing that the DeChambeaus could not establish the elements of the underlying medical malpractice claim, namely the physician's breach of the standard of care

and causation, and that they likewise could not establish that any of the alleged negligent acts in the legal malpractice action caused the DeChambeaus damages, i.e., that if respondents had handled the medical malpractice case differently, the DeChambeaus would have prevailed in the medical malpractice case. The DeChambeaus opposed the motion, arguing that two disputed factual issues precluded summary judgment: (1) whether the defendant doctor in the medical malpractice action, David Smith, M.D., failed to timely perform a heart procedure on Neil DeChambeau, and thus breached the medical standard of care, and (2) whether respondent Stephen Balkenbush failed to identify and prosecute the medical malpractice given the weight of evidence that existed against the doctor, and thus breached the legal standard of care. The district court granted summary judgment, finding that the DeChambeaus failed to demonstrate the causation element of their cause of action, that is, whether Balkenbush's failure to engage in written discovery and move the case to trial caused any damages. This appeal followed.

A legal malpractice claim requires proof of "an attorney-client relationship; a duty owed to the client by the attorney, breach of that duty, and the breach as proximate cause of the client's damages." *Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 667-68, 765 P.2d 184, 185 (1988). Proof of such a claim generally requires expert evidence to establish the attorney's breach of care and "an expert witness may be required to prove the causation issue." *Allyn v. McDonald*, 112 Nev. 68, 71, 910 P.2d 263, 266 (1996). In a medical malpractice action, medical expert testimony regarding standard of care and causation must be stated to a reasonable

degree of medical probability. *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 158, 111 P.3d 1112, 1116 (2005).

Here, although respondents contend that the DeChambeaus' expert witness, Dr. Mark Seiffert, did not offer any testimony on causation, Dr. Seiffert opined that Dr. Smith breached the standard of care by not immediately performing a pericardiocentesis procedure following Neil's cardiac arrest, and more specifically, he testified that to a reasonable degree of medical certainty, Dr. Smith did not perform a pericardiocentesis until after the echocardiogram results were obtained, which was more than 10 minutes after the cardiac arrest. Dr. Seiffert testified that the medical records showed that an echocardiogram machine arrived about 10 minutes after Neil's cardiac arrest, his pulse was restored about 5 minutes later, and to a reasonable degree of medical certainty, the restoration of the pulse occurred immediately following the pericardiocentesis procedure, as that procedure removed the blood from the pericardial space, allowing the heart to pump again. While Dr. Seiffert did not use the word causation, there is no dispute that Neil's death was caused by an anoxic brain injury as a result of his pulse not being restored for about 15 minutes, and Dr. Seiffert opined that Dr. Smith breached the standard of care by not immediately performing the procedure necessary to restore Neil's pulse.

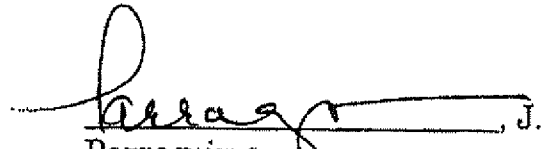
Although respondents also contend that the DeChambeaus' expert legal witness did not testify that Balkenbush's conduct was a proximate cause of any damages, their expert testified that there was a breach of the standard of care with regard to Balkenbush actively pursuing the case. In particular, the expert concluded that, given the

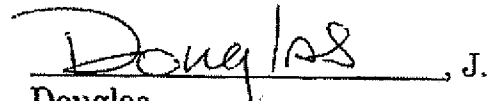
medical records indicating that Dr. Smith did not immediately perform the procedure necessary to restore Neil's pulse, Balkenbush breached his duty to the DeChambeaus in handling discovery, failing to take depositions of fact witnesses and defendants, failing to obtain a certain medical record for close to three years by subpoena or by seeking a court order while not engaging in any written discovery during that period, failing to get the case to a settlement conference, failing to communicate with expert witnesses, and failing to obtain an extension for retaining a new expert to replace an expert who changed his opinion. Without using the word causation, the expert indicated that these breaches led to the loss of a meritorious medical malpractice claim in that the medical malpractice action had sufficient issues to go to trial.

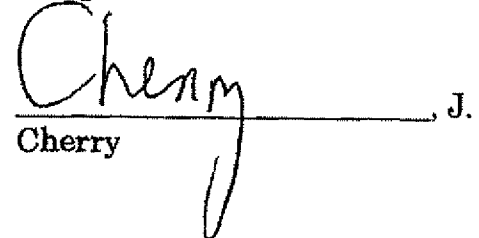
The DeChambeaus supported their arguments against summary judgment with admissible evidence, including transcripts of deposition testimony and medical records. Viewing the evidence in the light most favorable to the DeChambeaus, and drawing reasonable inferences in their favor, summary judgment should have been denied. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (providing that in reviewing a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party" and recognizing that summary judgment is appropriate only when "the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains"); *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 249, 849 P.2d 320, 322 (1993) (explaining that summary judgment is improper when "a reasonable jury could return a verdict for the nonmoving party"); see

Wood, 121 Nev. at 731, 121 P.3d at 1031 (noting that the "[t]he substantive law controls which factual disputes are material" and that a "factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party"). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 J.
Parraguirre

 J.
Douglas

 J.
Cherry

cc: Hon. Patrick Flanagan, District Judge
David Wasick, Settlement Judge
Charles R. Kozak
Pollara Law Group
Thorndal Armstrong Delk Balkenbush & Eisinger/Reno
Washoe District Court Clerk

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Clerk of the Court
Transaction # 5941839 : yvilorla

EXHIBIT 4

EXHIBIT 4

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ANGELA DECHAMBEAU, et al.,

Plaintiffs,

Case No.: CV12-00571

Dept. No.: 7

vs.

STEPHEN C. BALKENBUSH, ESQ.,
et al.,

Defendants.

SCHEDULING ORDER

Nature of Action: Legal Malpractice

Date of Filing Joint Case Conference Report(s): Nothing filed

Time Required for Trial: (2) weeks; Jury Demand Filed: Yes

Charles Kozak, Esq. for Angela Dechambeau; and

Pollara Law Group for Stephen Balkenbush, et al.

Counsel representing all parties have been heard and after consideration by
the Court,

IT IS HEREBY ORDERED:

1. Complete all discovery by December 2, 2016 (45 days prior to trial).
2. File motions to amend pleadings or add parties on or before September 3, 2016 (at least 90 days prior to close of discovery).

1 3. Make initial expert disclosures pursuant to N.R.C.P. 16.1(a)(2) on or
2 before September 3, 2016 (at least 90 days prior to close of discovery; and 30 days
3 thereafter for rebuttal).

4 4. Make rebuttal expert disclosures pursuant to N.R.C.P. 16.1(a)(2) on or
5 before October 3, 2016.

6 a. Written reports of experts waived: Yes _____ No _____

7 5. Dispositive motions submitted on or before December 17, 2016 (30 days
8 prior to trial pursuant to Pretrial Order).

9 6. Motions in Limine to be submitted on or before January 1, 2016 (15
10 days prior to trial pursuant to Pretrial Order).

11 In the absence of extraordinary circumstances and except as otherwise
12 provided in subdivision (2), all required pretrial disclosures pursuant to NRCP
13 16.1(a)(2) shall be made at least 90 days before the discovery cutoff date. Unless
14 otherwise directed by the Court, all pretrial disclosures pursuant to NRCP
15 16.1(a)(3) must be made at least thirty (30) days before trial.

16 Motions for extensions of discovery shall be made to the Discovery
17 Commissioner prior to the expiration of the discovery deadline above. Any
18 modification of discovery deadlines **must** be in writing, signed by the parties or their
19 attorneys (or authorized representatives) and the Discovery Commissioner. A
20 continuance of the trial date does not modify, alter, change or continue the
21 discovery schedule unless specifically agreed to by the parties, in writing, and
22 ordered by the Court.

23 Unless other ordered, all discovery disputes (except disputes presented at a
24 pretrial conference or at trial) must be first heard by the Discovery Commissioner.

25 ///

26 ///

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1 If this matter is a bench trial, findings of fact are to be submitted, not filed, to
2 the Court with the trial statement, but not in lieu of the trial statement.

3 DATED this 1st day of February, 2016.
4

5 Patrick Flanagan
6 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 1st day of February, 2016, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Charles Kozak, Esq. for Angela Dechambeau; and

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Pollara Law Group
3600 American River Dr., #160
Sacramento, CA 95864


Judicial Assistant

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Clerk of the Court
Transaction # 5941839 : yvilorla

EXHIBIT 5

EXHIBIT 5

Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, NV 89509 775.329.0958

1 **DISC**

2 **MARGO PISCEVICH**

3 Nevada State Bar No. 0917

4 **MARK J. LENZ**

5 Nevada State Bar No. 4672

6 **PISCEVICH & FENNER**

7 499 West Plumb Lane, Suite 201

8 Reno, Nevada 89509

9 775-329-0958

10 Attorneys for Defendants

11 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

12 **IN AND FOR THE COUNTY OF WASHOE**

13 **ANGLEA DECHAMBEAU and**
14 **JEAN-PAUL DECHAMBEAU, both**
15 **Individually and as SPECIAL**
16 **ADMINISTRATORS of the ESTATE**
17 **Of NEIL DECHAMBEAU,**

Case No. CV12-00571

Dept. No. 7

18 **Plaintiffs,**

19 **vs.**

20 **STEPHEN C. BALKENBUSH, ESQ.,**
21 **THORNDAL, ARMSTRONG, DELK,**
22 **BALKENBUSH and EISINGER,**
23 **a Nevada Professional Corporation,**
24 **and DOES I through X, inclusive,**

25 **Defendants.**

26 **DEFENDANTS STEPHEN C. BALKENBUSH, ESQ., AND THORNDAL, ARMSTRONG,**
27 **DELK, BALKENBUSH AND EISENGER'S DISCLOSURE OF**
28 **POTENTIAL EXPERT WITNESSES**

1 **Defendants, by and through their counsel, Piscevich & Fenner, herewith disclose persons**
2 **who may be called as expert witnesses at the time of trial:**

- 3 1. Fred Morady, MD, FACC
4 University of Michigan Cardiovascular Center
5 1500 East Medical Center Drive, SPC 5853
6 Ann Arbor, MI 48109-5853
7 Tel: 734-763-7141

1 Fred Morady, M.D., is a cardiologist in clinical practice in the State of Michigan, board-
2 certified in cardiology, in clinical cardiac electrophysiology and in internal medicine. Dr.
3 Morady is McKay Professor of Cardiovascular Disease at the University of Michigan School of
4 Medicine, and was an expert for the Plaintiffs in the underlying medical malpractice case,
5 number CV07-02028, *Angela DeChambeau, Jean-Paul DeChambeau v. David, M.D., David*
6 *Kang, M.D., et al.* Dr. Morady will testify regarding the underlying case as to the medical care
7 and treatment of decedent Neil DeChambeau, causation, and the standard of care as to Defendant
8 David Smith, M.D. Dr. Morady's expert information was previously provided in the underlying
9 case.
10

11 2. David Smith, M.D.
12 Reno Heart Physicians
13 343 Elm Street, Suite 400
14 Reno, NV 89503
15 Tel: 775-323-6700

16 David Smith, M.D., a Defendant in the underlying case, is a cardiologist in clinical
17 practice and licensed in the State of Nevada. Dr. Smith will testify as to his medical care and
18 treatment of Mr. DeChambeau. Dr. Smith's professional information was previously provided in
19 the underlying case.

20 3. Edward Lemons, Esq.
21 Lemons, Grundy & Eisenberg
22 6005 Plumas Street, Third Floor
23 Reno, NV 89519
24 Tel: 775-786-6868

25 Edward Lemons, Esq., is an attorney licensed and in practice in the State of Nevada who
26 represented Defendant David Smith, M.D., in the underlying case.

27 4. Michael Navratil, Esq.
28 Cotton, Driggs, Walch, Holley, Woloson & Thompson
400 South Fourth Street, Third Floor
Las Vegas, NV 89101
Tel: 702-791-0308

1 Michael Navratil, Esq., is an attorney licensed and in practice in the State of Nevada who
2 represented Co-Defendant David Kang, M.D. in the underlying case.

3 5. Peter Durney, Esq.
4 Durney & Brennan
5 190 West Huffaker Lane, Suite 406
6 Reno, NV 89511
7 Tel: 775-322-2923

8 Peter Durney is an attorney licensed and in practice in the State of Nevada since 1974.
9 Mr. Durney will testify as to the legal standard of care as to Defendant Stephen C. Balkenbush.
10 Mr. Durney's fees are \$400/hour for review, consultation and deposition testimony, with a two-
11 hour minimum for deposition testimony, payable in advance.

12 6. Defendants reserve the right to call as an expert witness any person identified by
13 any party in the instant case and the underlying case, or any other witnesses who may be
14 necessary to address opinions rendered by Plaintiffs' witnesses.

15 7. Defendants reserve the right to identify rebuttal expert witnesses.

16 NOTICE: Defendants will object to Plaintiffs calling any expert witness at trial who has
17 not been timely disclosed under strict compliance with NRCP 26(b)(5).

18 **AFFIRMATION**

19 The undersigned does hereby affirm that the preceding document DOES NOT
20 contain the Social Security number of any person.

21 DATED this 14th day of June, 2013.

22 PISCEVICH & FENNER

23
24
25 By: 

26 Margo Piscevich
27 Attorneys for Defendants
28

Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, NV 89509 775.329.0938

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of PISCEVICH & FENNER, and that on this date I caused to be served a true and correct copy of the document described herein by the method indicated below, and addressed to the following:

Document Served:

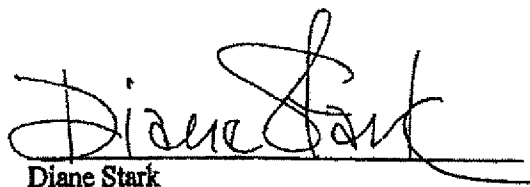
Defendants Stephen C. Balkenbush, Esq., and
Thorndal, Armstrong, Delk, Balkenbush &
Eisenger's Disclosure of Potential Expert
Witnesses

Person(s) Served:

Charles Kozak
1225 Tarleton Way
Reno, NV 89523
P: 622-0711

_____	Electronic Filing
_____	Hand Deliver
<u> X </u>	U.S. Mail
_____	Overnight Mail
_____	Facsimile (775)

DATED this 14th day of June, 2013.


Diane Stark

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Clerk of the Court
Transaction # 5941839 : yvilorla

EXHIBIT 6

EXHIBIT 6

1 [1610]

2 DOMINIQUE A. POLLARA, Nevada SBN 5742
3 POLLARA LAW GROUP
4 3600 American River Drive, Suite 160
5 Sacramento, California 95864
6 (916) 550-5880 - telephone
7 (916) 550-5066 - fax

8 KIM MANDELBAUM
9 Nevada Bar No. 318
10 MANDELBAUM ELLERTON & MCBRIDE
11 2012 Hamilton Lane
12 Las Vegas, Nevada 89106
13 (702) 367-1234
14 Email: filing@memlaw.net

15 Attorneys for Defendants STEPHEN C. BALKENBUSH, ESQ.
16 and THORNDAL ARMSTRONG DELK BALKENBUSH &
17 EISINGER

18
19 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
20
21 IN AND FOR THE COUNTY OF WASHOE

22 ANGELA DeCHAMBEAU and JEAN-
23 PAUL DeCHAMBEAU, both individually
24 and as Special Administrator of the Estate
25 of NEIL DeCHAMBEAU,

26 Plaintiffs,

27 vs.

28 STEPHEN C. BALKENBUSH, ESQ.; and
THORDAHL ARMSTRONG DELK
BALKENBUSH & EISINGER, a Nevada
Professional Corporation,

Defendants.

CASE NO. CV-12-00571

Trial Date: January 17, 2017

DEFENDANTS' DISCLOSURE OF EXPERT WITNESSES

Pursuant to 26(b) Defendants, by and through their counsel, Pollara Law Group,
hereby disclose the names of witnesses who may be called as expert witnesses at the time
of trial:

\\

- 1 1. Fred Morady, MD, FACC
2 University of Michigan Cardiovascular Center
3 1500 East Medical Center Drive, SPC 5853
4 Ann Arbor, MI 48109-5853
5 Tel: 734-763-7141

6 Fred Morady, M.D., is a cardiologist in clinical practice in the State of Michigan,
7 board-certified in cardiology, clinical cardiac electrophysiology and in internal medicine.
8 Dr. Morady is McKay Professor of Cardiovascular Disease at the University of Michigan
9 School of Medicine, and was an expert for the Plaintiffs in the underlying medical
10 malpractice case, Case Number CV07-02028, *Angela DeChambeau, Jean-Paul DeChambeau v.*
11 *David, M.D., David Kang, M.D., et al.* Dr. Morady will testify regarding the underlying case
12 as to the medical care and treatment of decedent Neil DeChambeau, causation, and the
13 standard of care as to Defendant David Smith, M.D. Dr. Morady's expert information was
14 previously provided in the underlying case.
15

- 16 2. David Smith, M.D.
17 Renown Institute for Heart & Vascular Health
18 1500 E. 2nd Street, Suite 400, Center B
19 Reno, NV 89502
20 Tel: 775-982-2400

21 David Smith, M.D., a defendant in the underlying case, is a cardiologist in clinical
22 practice and licensed in the State of Nevada. Dr. Smith will testify as to his medical care
23 and treatment of Mr. DeChambeau. Dr. Smith's professional information was previously
24 provided in the underlying case.
25

26 \\

27 \\

1 3. Hugh Calkins, M.D.
2 Johns Hopkins Hospital
3 Carnegie Building, Room 530,
4 600 North Wolfe St., Baltimore, MD 21287-0409

5 Hugh Calkins, M.D., is a cardiologist in clinical practice in the State of Maryland,
6 board-certified in cardiology, in clinical cardiac electrophysiology and in internal medicine.
7 Dr. Calkins was an expert for the defendant David Smith, M.D. in the underlying medical
8 malpractice matter, Case No.: CV07-02028, *Angela DeChambeau, Jean-Paul DeChambeau v.*
9 *David Smith, M.D., David Kang, M.D., et al.* Dr. Calkins is anticipated to testify regarding
10 the underlying case as to the medical care and treatment of decedent Neil DeChambeau,
11 causation, and the standard of care as to defendant David Smith, M.D. Dr. Calkins current
12 curriculum vitae is attached hereto as Exhibit 1. Dr. Calkins charges \$485.00 per hour for
13 deposition with a 3 hour minimum and \$483.00 per hour for trial testimony.
14
15
16
17

18 4. Edward Lemons, Esq.
19 Lemons, Grundy & Eisenberg
20 6005 Plumas Street, Third Floor
21 Reno, NV 89519
22 Tel: 775-786-6868

23 Edward Lemons, Esq. is an attorney licensed and in practice in the State of Nevada who
24 represented Defendant David Smith, M.D. in the underlying case. He is anticipated to
25 testify regarding his representation of Dr. Smith in the underlying case as further set forth
26 in his previous deposition taken in this matter.
27
28

\\

1 5. Michael Navratil, Esq.
2 John H. Cotton & Associates, Ltd.
3 7900 West Sahara Avenue, Suite 200
4 Las Vegas, NV 89711
5 Tel: 702-791-0308

6 Michael Navratil, Esq., is an attorney licensed and in practice in the State of Nevada
7 who represented co-defendant David Kang, M.D. in the underlying case. He is anticipated
8 to testify regarding his representation of Dr. Kang in the underlying case as further set
9 forth in his previous deposition taken in this matter.
10

11 5. Peter Durney, Esq.
12 Durney & Brennan
13 190 West Huffaker Lane, Suite 406
14 Reno, NV 89511
15 Tel: 775-322-2923

16 Peter Durney is an attorney licensed and in practice in the State of Nevada since 1974.
17 Mr. Durney will testify as to the legal standard of care as to defendant Stephen C.
18 Balkenbush.
19

20 Mr. Durney's fees are \$400 per hour for review, consultation and deposition testimony,
21 with a two-hour minimum for deposition testimony, payable in advance.
22

23 6. Defendants reserve the right to call any expert witness or person identified by
24 any party in the instant case and the underlying case.

25 The above expert witnesses may not be the only ones called by defendants to testify at
26 the time of trial. Defendants reserve the right to later name other expert witnesses prior
27 to trial. Defendants also reserve the right to call to testify at trial experts not named whose
28

1 testimony is needed to aid in the trial of this action and/or to refute and rebut the
2 contentions and testimony of plaintiffs' experts and/or other witnesses.
3

4 7. Defendants reserve the right to identify rebuttal expert witnesses.
5

6 NOTICE: Defendants will object to plaintiffs calling any expert witness at trial who has
7 not been timely disclosed under strict compliance with NRCP 26(b)(5).
8

9 **AFFIRMATION**

10 The undersigned does hereby affirm that the preceding document does not
11 contain the Social Security number of any person.
12

13 Dated: September 1, 2016
14

POLLARA LAW GROUP

15 By 
16

DOMINIQUE A. POLLARA

Nevada Bar No. 5742

3600 American River Drive, Suite 160

Sacramento, CA 95864

Phone: (916) 550-5880

17 Attorneys for Defendant STEPHEN C.
18 BALKENBUSH, ESQ. and THORNDAL,
19 ARMSTRONG, DELK, BALKENBUSH and
20 EISINGER, a Nevada Professional
21 Corporation
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INDEX OF EXHIBITS

<u>No.</u>	<u>Description</u>	<u>Pages</u>
1.	Curriculum Vitae and fee schedule of Hugh Calkins, M.D.	81

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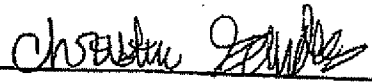
CERTIFICATE OF SERVICE BY SERVICE

Pursuant to NRCP 5(b), I hereby certify I am an employee of Reno Carson Messenger and that on the 2nd day of September, 2016, I caused DEFENDANTS' DISCLOSURE OF EXPERT WITNESSES to be served on all parties in this action by:

- ☒ placing an original or true copy thereof in a sealed envelope, postage prepaid, in the United States mail at Reno, Nevada.
- ☐ personal delivery.
- ☐ facsimile (courtesy copy).
- ☐ electronically served by the Court upon filing of document(s).
- ☐ email (courtesy copy).
- ☐ UPS/Federal Express or other overnight delivery.

fully addressed as follows:

Attorney	Representing	Phone/Fax/E-Mail
Charles R. Kozak, Esq. 3100 Mill Street, Suite 115 Reno, NV 89502	Plaintiffs	(775) 322-1239 - phone (775) 800-1767 - fax chuck@kozaklawfirm.com


An employee of RENO CARSON
MESSENGER

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Jacqueline Bryant
Clerk of the Court
Transaction # 5941839 : yvilorla

EXHIBIT 7

EXHIBIT 7

1 On April 30, 2012, this Court entered its Pretrial Order. With regard to discovery, the
2 Order states: "A continuance of trial does not extend the deadline for completing discovery. A
3 request for an extension of the discovery deadline, if needed, must be included as part of any
4 motion for continuance."
5

6 Pursuant to NRCP 16.1(b), counsel for the parties are required to participate in an early
7 case conference where, among other things, they are to develop a discovery plan and determine
8 when discovery will be completed. The case conference occurred on May 9, 2012.
9

10 On May 29, 2012, an Application for Setting was filed, establishing October 14, 2013 as
11 the date set for trial.

12 On August 17, 2012, the parties filed their Joint Case Conference Report. According to
13 the Report, the parties "agreed" that the final date for "expert disclosures" would be 120 days
14 prior to trial or June 17, 2013 and that discovery would close 90 days prior to trial or July 16,
15 2013.
16

17 In a paper dated June 14, 2013, Defendants disclosed a total of five expert witnesses,
18 Fred Marady, M.D., David Smith, M.D., Edward Lemons, Esq., Michael Navratil, Esq., and
19 Peter Durney, Esq. (See Exhibit 1).
20

21 On July 11, 2013, a Stipulation and Order to Amend Joint Case Conference Report was
22 filed. Pursuant to it, the parties agreed that the depositions of experts Richard Teichner, Gerald
23 Gillock and Peter Durney along with the depositions of lay witnesses Doris Stewart and Pastor
24 Dave Smith may go forward beyond the July 16, 2013 "close of discovery" date previously set.
25

26 Aside from the July 11, 2013 Stipulation, no other agreements were made to change the
27 discovery dates set forth in the parties' Joint Case Conference Report.

28 On August 14, 2013, Defendants filed their Motion for Summary Judgment.

1 In a letter to Defendants' counsel dated September 4, 2013, Plaintiffs' counsel
2 confirmed: "We will object to any experts being called in the trial on behalf of Mr. Stephen
3 Balkenbush or Dr. Smith, other than those designated in your expert witness designation filed
4 June 17, 2013... The discovery cut off has long passed for any discovery depositions of any
5 other medical experts." (See Exhibit 2).

7 On September 3, 2013, Plaintiffs filed their Opposition to Motion for Summary
8 Judgment and on September 6, 2013, Defendants filed their Reply. Following oral argument
9 and on September 24, 2013, this Court granted Defendants' Motion for Summary Judgment.
10 (See 9/24/13 Minutes filed herein). The Court's Order came 20 days before the date set for
11 trial.
12

13 Subsequently, Plaintiffs appealed. On November 24, 2015, the Nevada Supreme Court
14 entered its Order of Reversal and Remand. In doing so, the Supreme Court returned the matter
15 "to the district court for proceedings consistent with this order." Nowhere in the Order did it
16 state that discovery was re-opened. A Supreme Court's decision and remand does not alter
17 discovery deadlines. Discovery deadlines "remain in place absent a party's motion to extend
18 deadlines and a subsequent order by the trial court." Douglas v. Burley 134 So.3d 692, 697
19 (Miss 2012).
20

21 In fact, this Court's 4/30/12 Pretrial Order specifically stated that a "continuance of trial
22 does not extend the deadline for completing discovery" and a request for such extension must
23 be made by Motion. (See 4/30/12 Pretrial Order filed herein).
24

25 Although no such Motion was made, this Court would enter a Scheduling Order on
26 February 2, 2016 that "initial expert disclosures" be made "on or before September 3, 2016"
27 and that all discovery be completed by "December 2, 2016". The Court's Scheduling Order
28

1 clearly contradicts its Pretrial Order. Furthermore, "initial expert disclosures" were made by
2 Defendants on June 14, 2013, thirty-two months prior to the Scheduling Order. (See Exhibit 1).

3
4 On September 2, 2013, Defendants submitted a Disclosure identifying six experts, Fred
5 Morady, M.D., David Smith, M.D., Edward Lemons, Esq., Michael Navratil, Esq., Peter
6 Durney, Esq. and, for the first time, Hugh Calkins, M.D. (See Exhibit 3). Of significance in
7 terms of added costs and fees from this late addition of this expert is Dr. Calkins resides in
8 Baltimore, Maryland. (See below in this regard).

9
10 In a letter dated September 28, 2016, Plaintiffs' counsel addressed the Disclosure as
11 follows: "We are taking the position that this case was fully prepared for trial at the time the
12 Motion for Summary Judgment was granted by the trial judge. The only outstanding matter that
13 needed to be completed was the trial deposition of Dr. Morady. On this point, were Dr. Calkin,
14 Bhandari and Doshi disclosed as experts in this case?" (See Exhibit 4).

15
16 In her letter dated October 18, 2016, Dominique Pollara responded that neither Bhandari
17 nor Doshi have been disclosed as experts but Dr. Calkin is being disclosed as an expert pursuant
18 to the September 2, 2016 Disclosure. (See Exhibit 5).

19
20 In his letter dated October 27, 2016, Plaintiffs' counsel Craig Lusiani informed Ms.
21 Pollara as follows:

22 You have confirmed to us the intent on disclosing a further expert
23 witness for the very first time in this [September 2, 2016] letter.

24 We feel that this attempted disclosure is late for a number of reasons
25 which will be recited below. We intend on filing a Motion to Strike in
that regard, accordingly.

26 Please note the Joint Case Conference Report filed August 17, 2012.
27 Pursuant to that agreement expert disclosures were cut off 120 days
28 prior to trial. The trial date to which this disclosure cut off was relevant
eventually became October 14, 2013.

1
2 There has been no agreement to extend any discovery since that date
3 and, in fact, you will recall at the Settlement Conference that we attended
4 last month that our position was, and continues to be, that there was no
further disclosure of experts possible.

5 There is no reason why a further expert could not have been named
6 previously up to and including as this matter moved towards the October,
2013 trial date.

7 To allow testimony from a newly identified expert at this point, we believe
8 would be an abuse of discretion on behalf of the trial judge. In that regard,
9 we ask you to note the case of Douglas v. Burley, 134 So. 3d 692 (2012).

10 Please provide us with your position as it relates to this issue by not later
11 than 5 PM on November 1, 2016. As noted above, we shall be filing a
12 Motion to Strike your current attempt at identifying a new expert subsequent
to that.

13 (See Exhibit 6).

14 In her letter faxed on November 1, 2016, Ms. Pollara failed to cite any further discovery
15 agreement between the parties and failed to dispute the contention that Defendants could have
16 disclosed Dr. Caulkin as an expert prior to the agreed upon cut-off date of June 17, 2013. In
17 arguing the disclosure of Dr. Caulkin was indeed proper, Ms. Pollara failed to cite any Rule
18 supporting her position. She failed to cite to any case law controverting Douglas v. Burley.
19 (See Exhibit 7).

20 Douglas is remarkably similar to the case at hand. According to the Opinion, James
21 Burley filed a wrongful death action on June 7, 2004 for the deaths of his daughter and
22 grandchildren resulting from a vehicular accident between his daughter and an employee
23 (Douglas) of Yazoo Valley Electric Power Association (YVEPA).

24 In response to an interrogatory, Burley identified Ricky Shivers as his expert witness on
25 March 17, 2005.
26
27
28

1 Subsequently, the trial court entered a Scheduling Order that plaintiff's experts be
2 designated on or before May 30, 2005, defendants' experts be designated on or before June 30,
3 2005 and that all discovery be completed on or before October 30, 2005. Trial was set for April
4 3, 2006.
5

6 The parties eventually stipulated that discovery be completed on or before December 31,
7 2005 but all other terms of the Scheduling Order would remain in effect.

8 Burley would withdraw Shivers as an expert and trial was reset for December 3, 2007.

9 YVEPA moved for Summary Judgment and on November 7, 2007, the trial court
10 granted the Motion. Burley appealed. On November 5, 2009, the Supreme Court reversed and
11 remanded the case to the trial court "for further proceedings consistent with [its] opinion."
12

13 On October 8, 2010, Burley filed an expert designation of Alvin Rosenhan. According
14 to the designation, Burley stated he would make Rosenhan available for deposition at an
15 agreeable time and would be responsible for the associated charges of Rosenhan along with
16 those of a court reporter.
17

18 In response to the expert designation, YVEPA moved to strike Rosenhan. YVEPA
19 argued that the designation was untimely since it was filed 5½ years after the expert designation
20 deadline and 5 years after the close of discovery. YVEPA further argued the disclosure failed to
21 comply with Rule 26.
22

23 At hearing on the Motion to Strike, Burley argued, that on remand, the Scheduling Order
24 had no effect as there was a "clean slate". The trial court noted that neither party had moved
25 to extend the Scheduling Order and queried why, if Rosenhan was so important, Burley did not
26 initially designate him as an expert.
27
28

1 Following hearing, the trial court refused to strike Rosenhan and directed the parties to
2 enter into a new agreed Scheduling Order. YVEPA then filed an Interlocutory Appeal.

3 On Appeal, the Supreme Court found the trial court abused its discretion in refusing to
4 strike the designation of Rosenhan. In rendering its Opinion, the Supreme Court stated "the
5 plaintiffs are incorrect that, when this Court remands a case, it completely starts over as with a
6 'clean slate.'" "Thus, upon remand, prior orders governing discovery remain in place absent a
7 party's motion to extend deadlines and a subsequent order by the trial court." Since there was
8 no such Motion, the Supreme "Court's decision and remand did not alter discovery deadlines".
9

10 The Opinion goes on to point out "plaintiffs designated Rosenhan approximately six
11 years after filing the Complaint, five and a half years after the expert-designated deadline, and
12 five years after the close of discovery." Moreover, all discovery was completed at the time of
13 the first Appeal. Under Rule of Civil Procedure 26, a party has a duty to timely supplement its
14 responses respecting expert witness disclosures. Burley failed in this regard. As found, "the
15 plaintiffs presented no evidence of an excusable oversight."
16

17 With respect to the case at hand, NRCP 26(e) also provides that a party has a duty to
18 timely supplement its expert witness disclosures. The disclosure of Calkin as an expert comes
19 54 months after the Complaint was filed, 39 months after the agreed upon deadline for expert
20 disclosures, 38 months after the agreed upon deadline for discovery and 10 months after the
21 Supreme Court's Order of Reversal.
22

23 At no time did Defendants file a Motion to extend the deadline for expert disclosures set
24 forth in the Joint Case Conference Report. When Summary Judgment was granted on
25 September 24, 2013, all discovery was completed, but for the deposition of Dr. Morady, and the
26 case was ready for trial.
27
28

1 In Jama v. City and County of Denver 304 F.R.D. 289 (D. Colo. 2014), the court granted
2 a Motion to Strike witnesses, finding the supplemental disclosure untimely.² As cited therein:
3 “The mandatory disclosures serve several purposes, including eliminating surprise, promoting
4 settlement, and giving the opposing party information about the identification and locations of
5 persons with knowledge so as to assist that party in contacting the individual and determining
6 which witness should be deposed.” Id at 295. Rule 26(e) requires that any supplemental
7 disclosures be made timely. “The obligation to supplement arises when the disclosing party
8 reasonable should know that its prior discovery responses are incomplete, e.g. because the party
9 had now obtained information it did not previously have.” Id at 299-300. As the court found,
10 “Plaintiffs untimely production poses prejudice to Denver in the form of additional and undue
11 delay in the resolution of this already-aged matter.” “As the adage goes, ‘time is money.’ undue
12 delay necessarily translates to additional attorney’s fees, incurred in revising strategies in light
13 of the new disclosures, attorneys re-familiarizing themselves with the proceedings after delays,
14 and even intangible costs relating to maintaining files for an ongoing action.” Id at 300-301.

18 Considering that Dr. Caulkin resides in Baltimore, the costs and fees Plaintiffs will come
19 to bear will be significantly magnified.

21 In Santana v. City and County of Denver 488 F.3d 860 (10th 2007), it was held that the
22 magistrate judge did not abuse discretion in excluding witnesses and denying a request to re-
23 open discovery. As cited therein: “It is generally not an abuse of discretion for a court to
24 exclude evidence based upon a failure to timely designate.” Id at 867.

27 ² “Federal cases interpreting the Federal Rules of Civil Procedure ‘are strong persuasive authority, because the
28 Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.” Executive
Management, LTD. v. Tigor Title Insurance Company 118 Nev. 46, 53, 38P.3d 872, 876 (2002).

1 NRCP 37(c)(1) provides: "A party that without substantial justification fails to disclose
2 information required by Rule 16.1, 16.2 or 26 (e)(1), or to amend a prior response to discovery
3 as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence
4 at a trial, at a hearing, or on a motion any witness or information not so disclosed." A failure to
5 timely disclose expert testimony is not substantially justified where "the need for such
6 testimony could reasonably have been anticipated." Plumley v. Mockett 836 F.Supp.2d 1053,
7 1064 (C.D. Cal. 2010).
8

9
10 Citing Rule 37 (c), the court in Miksis v. Howard 106 F.3d 754 (7th 1997) found no
11 abuse of discretion in striking defendant's experts for failing to make timely disclosures. As
12 noted therein, defendants failed to provide their expert disclosures until 60 days after the
13 deadline. *Id* at 760.

14
15 In Marolf v. Aya Aguire 2011 WL 6012203 (D. Neb. Dec. 1, 2011), the plaintiff filed a
16 Motion for Leave to identify an additional expert. The Motion was filed on August 12, 2011,
17 more than four months after the March 25, 2011 deadline for disclosing plaintiff's liability
18 experts. In denying the Motion, it was ruled that the plaintiff did not make a threshold showing
19 of due diligence. The need or want of an additional expert "could have been anticipated before
20 the March 25, 2011 expert disclosure deadline." *Id* at *5. Citing to Rule 1, it was noted: "In all
21 cases involving the interpretation and application of the Federal Rules of Civil Procedure, the
22 court must fairly balance the obligations and positions of the parties to promote the 'just,
23 speedy, and inexpensive determination of every action.'" *Id.* at *4
24

25
26 Certainly, the expert testimony of Dr. Calkin could have reasonably been anticipated
27 when Defendants disclosed their experts in a paper dated June 14, 2013. (See Exhibit 1).
28

1 Discovery deadlines are “designed, at least in part, ‘to offer a measure of certainty in
2 pretrial proceedings, ensuring that at some point both the parties and the pleadings will be
3 fixed.” Wingates, LLC v. Commonwealth Insurance 21 F.Supp.3d 206, 214 (E.D. Ny. 2014).
4 According to the recitation of the Wingates, LLC case, discovery closed on August 14, 2013.
5 On December 16, 2013, Commonwealth moved for Summary Judgment dismissing the
6 Complaint. In opposing, plaintiffs submitted the Affidavit of Hess in which, at times, he
7 purports to give his expert opinion regarding common insurance claim standards and practices.
8

9 On April 24, 2014, Commonwealth moved to strike Hess’s Affidavit on the basis
10 plaintiffs failed to disclose him as an expert.
11

12 On April 29, 2014, plaintiffs moved to re-open discovery to disclose Hess and Zendler
13 as experts. The Motion was made more than 8 months after the close of discovery and plaintiffs
14 sought no extensions in order to disclose these experts prior to the conclusion of discovery.
15

16 The court would deny the Motion to re-open discovery and strike those portions of the
17 Affidavit where Hess proffered expert testimony. As the court cited, “the discovery period
18 should not be extended when a party has had ample opportunity to pursue the evidence during
19 discovery.” The court also noted the fact that plaintiffs previously disclosed Hess as a possible
20 lay witness “does not cure their failure to disclose him as an expert”. *Id* at 215-216.
21

22 In the case at bar, the exclusion of Calkins as an expert would not hamper the
23 defense of the case since Defendants have timely designated two other medical experts upon
24 which they can rely. Dr. Calkins’ testimony would be merely cumulative. Further, there can be
25 no prejudice to defendants in excluding this added attempt at adding an expert when the expert
26 could have been added, timely, but was not.
27
28

1 As shown above, an Order striking Defendants' expert disclosure of Hugh Calkins, M.D.
2 is well warranted.

3 Pursuant to NRS 239B.030, the undersigned certifies that this document does not
4 contain a Social Security number.

5 DATED: November 15th, 2016.

6
7 /s/ R. Craig Lusiani, Esq.
8 R. CRAIG LUSIANI, ESQ.
9 Kozak Lusiani Law Firm
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Dominique Pollara, Esq.
Pollara Law Group
3600 American River Dr., #160
Sacramento, CA 95864

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EXHIBIT LIST

<u>No</u>	<u>Document</u>	<u>Pages</u>
1	Defendants' Disclosure of Potential Expert Witnesses	5
2	9/4/13 letter to Defendants' counsel from Charles Kozak, Esq.	2
3	9/2/16 letter from Dominique Pollara, Esq. with Disclosure of of Expert Witnesses attached	7
4	9/28/16 letter to Dominique Pollara, Esq. from Charles Kozak, Esq.	2
5	10/18/16 letter from Dominique Pollara, Esq. to Charles Kozak, Esq.	2
6	10/27/16 letter from Craig Lusiani, Esq. to Dominique Pollara, Esq.	3
7	Letter from Dominique Pollara, Esq. to Craig Lusiani, Esq. faxed on November 1, 2016	3

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2016-11-15 04:29:38 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5807912 : pmsewell

EXHIBIT 1

EXHIBIT 1

Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, NV 89509 775.329.0958

1 **DISC**
2 MARGO PISCEVICH
3 Nevada State Bar No. 0917
4 MARK J. LENZ
5 Nevada State Bar No. 4672
6 PISCEVICH & FENNER
7 499 West Plumb Lane, Suite 201
8 Reno, Nevada 89509
9 775-329-0958
10 Attorneys for Defendants

11 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12
13 **IN AND FOR THE COUNTY OF WASHOE**

14 ANGLEA DECHAMBEAU and
15 JEAN-PAUL DECHAMBEAU, both
16 Individually and as SPECIAL
17 ADMINISTRATORS of the ESTATE
18 OF NEIL DECHAMBEAU,

Case No. CV12-00571

Dept. No. 7

19 Plaintiffs,

20 vs.

21 STEPHEN C. BALKENBUSH, ESQ.,
22 THORNDAL, ARMSTRONG, DELK,
23 BALKENBUSH and EISINGER,
24 a Nevada Professional Corporation,
25 and DOES I through X, inclusive,

26 Defendants.

27 **DEFENDANTS STEPHEN C. BALKENBUSH, ESQ., AND THORNDAL, ARMSTRONG,**
28 **DELK, BALKENBUSH AND EISENGER'S DISCLOSURE OF**
POTENTIAL EXPERT WITNESSES

29 Defendants, by and through their counsel, Piscevich & Fenner, herewith disclose persons
30 who may be called as expert witnesses at the time of trial:

- 31 1. Fred Morady, MD, FACC
32 University of Michigan Cardiovascular Center
33 1500 East Medical Center Drive, SPC 5853
34 Ann Arbor, MI 48109-5853
35 Tel: 734-763-7141

1 Fred Morady, M.D., is a cardiologist in clinical practice in the State of Michigan, board-
2 certified in cardiology, in clinical cardiac electrophysiology and in internal medicine. Dr.
3 Morady is McKay Professor of Cardiovascular Disease at the University of Michigan School of
4 Medicine, and was an expert for the Plaintiffs in the underlying medical malpractice case,
5 number CV07-02028, *Angela DeChambeau, Jean-Paul DeChambeau v. David, M.D., David*
6 *Kang, M.D., et al.* Dr. Morady will testify regarding the underlying case as to the medical care
7 and treatment of decedent Neil DeChambeau, causation, and the standard of care as to Defendant
8 David Smith, M.D. Dr. Morady's expert information was previously provided in the underlying
9 case.
10

11 2. David Smith, M.D.
12 Reno Heart Physicians
13 343 Elm Street, Suite 400
14 Reno, NV 89503
Tel: 775-323-6700

15 David Smith, M.D., a Defendant in the underlying case, is a cardiologist in clinical
16 practice and licensed in the State of Nevada. Dr. Smith will testify as to his medical care and
17 treatment of Mr. DeChambeau. Dr. Smith's professional information was previously provided in
18 the underlying case.

19 3. Edward Lemons, Esq.
20 Lemons, Grundy & Eisenberg
21 6005 Plumas Street, Third Floor
22 Reno, NV 89519
Tel: 775-786-6868

23 Edward Lemons, Esq., is an attorney licensed and in practice in the State of Nevada who
24 represented Defendant David Smith, M.D., in the underlying case.

25 4. Michael Navratil, Esq.
26 Cotton, Driggs, Walch, Holley, Woloson & Thompson
27 400 South Fourth Street, Third Floor
28 Las Vegas, NV 89101
Tel: 702-791-0308

1 Michael Navratil, Esq., is an attorney licensed and in practice in the State of Nevada who
2 represented Co-Defendant David Kang, M.D. in the underlying case.

3 5. Peter Durney, Esq.
4 Durney & Brennan
5 190 West Huffaker Lane, Suite 406
6 Reno, NV 89511
7 Tel: 775-322-2923

8 Peter Durney is an attorney licensed and in practice in the State of Nevada since 1974.
9 Mr. Durney will testify as to the legal standard of care as to Defendant Stephen C. Balkenbush.
10 Mr. Durney's fees are \$400/hour for review, consultation and deposition testimony, with a two-
11 hour minimum for deposition testimony, payable in advance.

12 6. Defendants reserve the right to call as an expert witness any person identified by
13 any party in the instant case and the underlying case, or any other witnesses who may be
14 necessary to address opinions rendered by Plaintiffs' witnesses.

15 7. Defendants reserve the right to identify rebuttal expert witnesses.


16 NOTICE: Defendants will object to Plaintiffs calling any expert witness at trial who has
17 not been timely disclosed under strict compliance with NRCPP 26(b)(5).

18 **AFFIRMATION**

19 The undersigned does hereby affirm that the preceding document **DOES NOT**
20 contain the Social Security number of any person.

21 DATED this 14th day of June, 2013.

22
23 PISCEVICH & FENNER

24
25 By: 
26 Margo Piscevich
27 Attorneys for Defendants
28

Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, NV 89509 775.329.0958

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of PISCEVICH & FENNER, and that on this date I caused to be served a true and correct copy of the document described herein by the method indicated below, and addressed to the following:

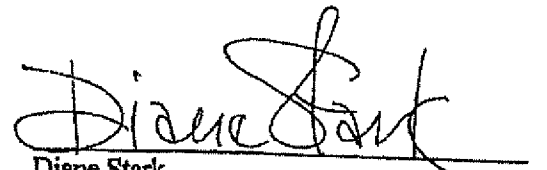
Document Served: Defendants Stephen C. Balkenbush, Esq., and Thorndal, Armstrong, Delk, Balkenbush & Eisenger's Disclosure of Potential Expert Witnesses

Person(s) Served:

Charles Kozak
1225 Tarleton Way
Reno, NV 89523
F: 622-0711

_____	Electronic Filing
_____	Hand Deliver
<u> X </u>	U.S. Mail
_____	Overnight Mail
_____	Facsimile (775)

DATED this 14th day of June, 2013.


Diane Stark

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2016-11-15 04:29:38 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5807912 : pmsewell

EXHIBIT 2

EXHIBIT 2

Charles R. Kozak, Attorney at Law, LLC

3100 Mill Street, Suite 115

Reno, Nevada 89502

(775) 322-1239

chuck@kozaklawfirm.com

September 4, 2013

Margo Piscevich, Esq.
Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, Nevada 89509

RE: DeChambeau v Balkenbush

Dear Margo:

We have the following positions on the matters discussed today with regards to the above case.

1. We will make arrangements to attend the deposition of Dr. Fred Morady on October 2, 2013.
2. We will object to any experts being called in the trial on behalf of Mr. Stephen Balkenbush or Dr. Smith, other than those designated in your expert witness designation filed June 17, 2013.
3. In addition, we will be filing a motion in limine with regards to Dr. Smith testifying as an expert witness in his own case in the medical malpractice portion of the bifurcated trial, as this is prohibited by Nevada rules and statutes.

The discovery cut off has long passed for any discovery depositions of any other medical experts. You indicated you intend to call expert witnesses from the designation of Mr. Lemon several years ago. We simply cannot allow our client's rights to be jeopardized by allowing undesignated experts who have not been previously deposed to testify in the underlying case at this late date.

Sincerely,

Charles R. Kozak, Esq.

CRK/na

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2016-11-15 04:29:38 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5807912 : pmsewell

EXHIBIT 3

EXHIBIT 3

Dominique A. Pollara, Esq.*
Jason S. Baras, Esq.*
Vanessa N. Hunter, Esq.
Jacqueline C. Zet, Esq.

Pollara
LAW GROUP

3600 American River Dr.
Suite 101
Sacramento, CA 95864
(916) 551-5400
(916) 551-5466 fax

*Also admitted in Nevada

September 2, 2016

VIA FACSIMILE AND FIRST CLASS MAIL (775) 800-1767

Charles R. Kozak, Esq.
3100 Mill Street, Suite 115
Reno, NV 89502

Re: DeChambeau v. Balkenbush

Dear Chuck:

Enclosed please find our Expert Witness Disclosure relative to the above matter as well as our Pretrial Disclosures. These are courtesy copies. The originals are being served on you today.

I understand from reviewing the file and speaking with Ms. Piscevich that depositions of the experts previously disclosed have already occurred. If you have a different understanding please advise.

I understand you previously represented to Ms. Piscevich that you did not intend to call any of the percipient witnesses listed in your prior disclosures. If your position on this issue has changed, please advise so we can get those depositions set.

I understand that you have possession of the EPS tape relative to this matter. I need to make arrangements to take possession of the tape so it can be re-reviewed by my experts. Please advise how you would like to handle this issue. I am happy to sign a reasonable stipulation relative to the same to facilitate this.

Lastly, I was disappointed in how the mandatory settlement conference unfolded. Your stated position received through Judge Freeman surprised me given our previous

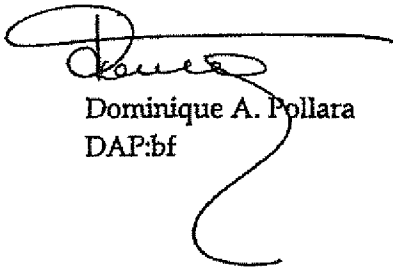
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Charles R. Kozak, Esq.
Re: DeChambeau v. Balkenbush
September 2, 2016
Page 2

telephone conversation about your desire to schedule this settlement conference. If there is any interest in resolving this case reasonably then we remain willing to have further conversations about this.

Very truly yours,

POLLARA LAW GROUP



Dominique A. Pollara
DAP:bf

1 [DISC]

2 DOMINIQUE A. POLLARA, Nevada SBN 5742
3 POLLARA LAW GROUP
4 3600 American River Drive, Suite 160
5 Sacramento, California 95864
6 (916) 550-5880 - telephone
7 (916) 550-5066 - fax

8 KIM MANDELBAUM
9 Nevada Bar No. 318
10 MANDELBAUM ELLERTON & MCBRIDE
11 2012 Hamilton Lane
12 Las Vegas, Nevada 89106
13 (702) 367-1234
14 Email: filing@memlaw.net

15 Attorneys for Defendants STEPHEN C. BALKENBUSH, ESQ.
16 and THORNDAL ARMSTRONG DELK BALKENBUSH &
17 EISINGER

18
19
20 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
21
22 IN AND FOR THE COUNTY OF WASHOE

23 ANGELA DeCHAMBEAU and JEAN-
24 PAUL DeCHAMBEAU, both individually
25 and as Special Administrator of the Estate
26 of NEIL DeCHAMBEAU,

27 Plaintiffs,

28 vs.

STEPHEN C. BALKENBUSH, ESQ.; and
THORDAHL ARMSTRONG DELK
BALKENBUSH & EISINGER, a Nevada
Professional Corporation,

Defendants.

CASE NO. CV-12-00571

Trial Date: January 17, 2017

DEFENDANTS' 16.1 PRETRIAL DISCLOSURES

Defendants STEPHEN C. BALKENBUSH, ESQ. and THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER, a Nevada professional corporation, by and through
their counsel, Pollara Law Group, hereby submit their pretrial disclosure of information in
accordance with an N.R.S. 16.1(4)(A)(B)(C):

1 I. LIST OF PROSPECTIVE WITNESSES, INCLUDING REBUTTAL WITNESSES

- 2 a. Stephen Balkenbush, Esq., c/o Pollara Law Group
- 3 b. Angela DeChambeau, c/o Charles Kozak, Esq.
- 4 c. Jean Paul DeChambeau, c/o Charles Kozak, Esq.
- 5 d. David Smith, M.D., Renown Institute for Heart & Vascular Health, 1500 E.
- 6 2nd Street, Suite 400, Center B, Reno, NV 89502.
- 7 e. Fred Morady, M.D., Professor of Internal Medicine, McKay Professor of
- 8 Cardiovascular Disease, University of Michigan, 1500 E. Medical Center
- 9 Drive, SPC 5853, Ann Arbor, MI 48106-5853.
- 10 f. Rahul Doshi, M.D., 1520 San Pablo Street, Suite 4600, Los Angeles, CA 90033.
- 11 g. Hugh G. Calkins, M.D., Johns Hopkins Hospital, Carnegie Building, Room
- 12 530, 600 North Wolfe St., Baltimore, MD 21287-0409.
- 13 h. Anil Bhandari, M.D., Los Angeles Cardiology Associates, 1245 Wilshire
- 14 Blvd., Suite 703, Los Angeles, CA 90017.
- 15 i. Peter Durney, Esq., Durney & Brennan, 6900 So. McCarran Blvd., Suite 2060,
- 16 Reno, NV 89509 or 190 West Huffaker Lane, Suite 406, Reno, NV 89511.
- 17 j. Michael Navartil, Esq., John H. Cotton & Associates, Ltd., 7900 West Sahara
- 18 Avenue, Suite 200, Las Vegas, NV 89711.
- 19 k. Thomas Vallas, Esq., Hoy Chrissinger Kimmel Vallas, PC, 50 West Liberty
- 20 Street, Suite 840, Reno, NV 89501.
- 21 l. Edward J. Lemons, Esq., 6005 Plumas St., Suite 300, Reno, NV 89519-6069.

22 II. LIST OF PROPOSED EXHIBITS AND DOCUMENTS, INCLUDING REBUTTAL

23 EXHIBITS

- 24 a. The file of Stephen Balkenbush, Esq. in the underlying case, Bates Stamped
- 25 SB0001-SB02835, including emails SB2836-2930. It is anticipated the medical
- 26 records from Reno Heart Physicians (pages SB01071-01230) and Renown
- 27 Regional Medical Center, formerly known as Washoe Medical Center, (pages
- 28 SB01329-01501) will be used in the medical malpractice portion of the case,

1 together with the expert disclosures, expert reports and curriculum vitae
2 of the physicians that were disclosed in the underlying case. It is anticipated
3 that the balance of the file will be used during the legal malpractice case.

- 4 b. The email from plaintiffs' expert Mark Selfert, M.D. to plaintiff's counsel
5 Charles Kozak, Esq. dated April 26, 2013. This document was discovered on
6 September 19, 2013. It is not intended to be marked as an exhibit or
7 introduced at the time of trial but it is defendants' position this document
8 needs to be identified as a potential impeachment document.
- 9 c. The FICA summary of earnings for Mr. and Mrs. DeChambeau.
- 10 d. The file from White, Meany & Weatherall, Bates Stamped WMW00001-
11 WMW00064.
- 12 e. The EPS tape (in plaintiffs' counsel's possession.)
- 13 f. The current curriculum vitae of Fred Morady, M.D.
- 14 g. The current curriculum vitae of Hugh Calkins, M.D.
- 15 h. The current curriculum vitae of Anil Bhandari, M.D.

16 Dated: September 1, 2016

17 POLLARA LAW GROUP

18
19 By 

20 DOMINIQUE A. POLLARA, ESQ.

21 Nevada Bar No. 5742

22 3600 American River Drive, Suite 160

23 Sacramento, CA 95864

24 (916) 550-5880

25 Attorneys for Defendants STEPHEN C.
26 BALKENBUSH, ESQ. and THORNDAL,
27 ARMSTRONG, DELK, BALKENBUSH
28 and EISINGER, a Nevada Professional
Corporation

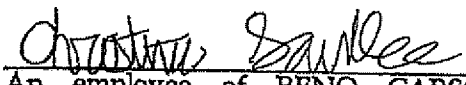
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CERTIFICATE OF SERVICE BY SERVICE

Pursuant to NRCP 5(b), I hereby certify I am an employee of Reno Carson Messenger and that on the 2nd day of September, 2016, I caused DEFENDANTS' 16.1 PRETRIAL DISCLOSURES to be served on all parties in this action by:

- ☒ placing an original or true copy thereof in a sealed envelope, postage prepaid, in the United States mail at Reno, Nevada.
- ☐ personal delivery.
- ☐ facsimile (courtesy copy).
- ☐ electronically served by the Court upon filing of document(s).
- ☐ email (courtesy copy).
- ☐ UPS/Federal Express or other overnight delivery.

fully addressed as follows:

Attorney	Representing	Phone/Fax/E-Mail
Charles R. Kozak, Esq. 3100 Mill Street, Suite 115 Reno, NV 89502	Plaintiffs	(775) 322-1239 - phone (775) 800-1767 - fax chuck@kozaklawfirm.com
		 An employee of RENO CARSON MESSENGER

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Jacqueline Bryant
Clerk of the Court
Transaction # 5807912 : pmsewell

EXHIBIT 4

EXHIBIT 4



KOZAK LUSIANI LAW, LLC

3100 Mill Street
Suite 115
Reno, NV 89502
P: 775.323.1239
F: 775.800.1767
KozakLusianiLaw.com

September 28, 2016

Sent Via Regular US Mail

Dominique Pollara, Esq.
Pollara Law Group
3600 American River Dr.
Suite 160
Sacramento, CA 95864

Re: Expert Witness Disclosures

Attorneys:

Charles R. Kozak
Chuck@KozakLusianiLaw.com
Admitted States:
Nevada
California

R. Craig Lusiani
Craig@KozakLusianiLaw.com
Admitted States:
Nevada
California
US Supreme Court

Susan M. Leeder
Susan@KozakLusianiLaw.com
Admitted States:
California

Dear Dominique,

We address the issues in your letter of September 2, 2016 in the order presented.

First, the depositions of the experts have been taken.

Second, we do not intend to call the percipient witnesses disclosed in our previous 16.1 filing.

Third, I believe we do have the copy of the EPS tape and will attempt to locate it. However, the tape has already been reviewed by Dr. Morady, so I am wondering what it is needed for at this point.

We are taking the position that this case was fully prepared for trial at the time the motion for Summary Judgment was granted by the trial judge. The only outstanding matter that needed to be completed was the trial deposition of Dr. Morady. On this point, were Dr. Caulkin, Bhandari and Doshi disclosed as experts in this case? In addition, I do not recall Thomas Vallas, Esq., being designated as a witness or expert in this case. Can you clarify this issue for me?

In the meantime, we will try to get the EPS tape to you as soon as possible.

Sincerely,

Charles R. Kozak, Esq.

CRK/dls

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Transaction # 5807912 : pmsewell

EXHIBIT 5

EXHIBIT 5

Dominique A. Pollara, Esq.*
Jason S. Bohnke, Esq.*
Yanessa N. Hunter, Esq.
Jacqueline C. Zee, Esq.

*Also admitted in Nevada

Pollara
LAW GROUP

3000 American River Dr.
Suite 160
Sacramento, CA 95834
(916) 551-5000 ext 600
(916) 551-5000 fax

October 18, 2016

VIA FACSIMILE AND FIRST CLASS MAIL (775) 800-1767

Charles R. Kozak, Esq.
Kozak Lusitani Law, LLC
3100 Mill Street, Suite 115
Reno, NV 89502

Re: DeChambeau v. Balkenbush

Dear Chuck:

Thank you for your letter dated September 28, 2016. I also appreciate your assistance in allowing us to pick up the EPS tape.

In addition, thank you for clarifying the issue regarding percipient witnesses.

Judge Flanagan issued a Scheduling Order signed by him February 1, 2016. We served our expert disclosure pursuant to that Scheduling Order. In addition, we also served our 16.1 Pretrial Disclosure. I am confused as to your question regarding Drs. Bhandari and Doshi. We have not disclosed them as expert witnesses. Dr. Caulkin is disclosed as an expert witness. Mr. Vallas was previously listed as a witness pursuant to 16.1. We have reiterated that he will potentially be called as a witness at the time of trial. We do not consider him an expert and he is not disclosed as such.

We remain willing to discuss resolution of this matter if it can be done reasonably.

Very truly yours,

POLLARA LAW GROUP

DOMINIQUE A. POLLARA
Dominique A. Pollara
DAP:bf

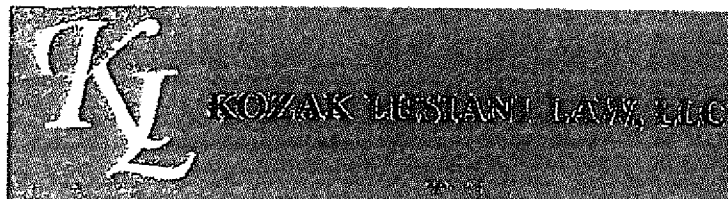
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EXHIBIT 6

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EXHIBIT 6



3100 Mill Street
Suite 315
Reno, NV 89502
P: 775.322.1239
F: 775.300.4767
KozakLusianiLaw.com

October 27, 2016

Dominique Pollara

Pollara Law Group

3600 American River Dr., Suite 160

Sacramento, CA 95864

By Fax and First Class Mail // (916) 550-5066

Re: DeChambeau v. Balkenbush

Attorneys:

Charles R. Kozak
Chuck@KozakLusianiLaw.com
Admitted States:
Nevada
California

R. Craig Lusiani
Craig@KozakLusianiLaw.com
Admitted States:
Nevada
California
US Supreme Court

Susan M. Leeder
Susan@KozakLusianiLaw.com
Admitted States:
California

Dear Dominique,

We write to you in response to your September 2, 2016 letter in attempting to identify further experts in this matter.

You have confirmed to us the intent on disclosing a further expert witness for the very first time in this letter.

We feel that this attempted disclosure is late for a number of reasons which will be recited below. We intend on filing a Motion to Strike in that regard, accordingly.

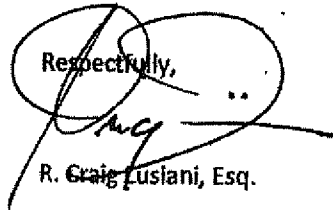
Please note the Joint Case Conference Report filed August 17, 2012. Pursuant to that agreement expert disclosures were cut off 120 days prior to trial. The trial date to which this disclosure cut off was relevant eventually became October 14, 2013.

There has been no agreement to extend any discovery since that date and, in fact, you will recall at the Settlement Conference that we attended last month that our position was, and continues to be, that there was no further disclosure of experts possible.

There is no reason why a further expert could not have been named previously up to and including as this matter moved towards the October, 2013 trial date.

To allow testimony from a newly identified expert at this point, we believe would be an abuse of discretion on behalf of the trial judge. In that regard, we ask you to note the case of Douglas v. Burley, 134 So. 3d 692 (2012).

Please provide us with your position as it relates to this issue by not later than 5 PM on November 1, 2016. As noted above, we shall be filing a Motion to Strike your current attempt at identifying a new expert subsequent to that.

Respectfully,

R. Craig Lusiani, Esq.

RCL/rci

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Clerk of the Court
Transaction # 5807912 : pmsewell

EXHIBIT 7

EXHIBIT 7

Dominique A. Pollara, Esq.
Jason S. Berman, Esq.*
Vanessa N. Hinton, Esq.
Jacqueline C. Zee, Esq.

Pollara

LAW GROUP

2600 American River Dr.
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(916) 530-5880 office
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*Also admitted in Nevada

October 01, 2016

R. Craig Lusiani, Esq.
Kozak Lusiani Law, LLC
3100 Mill Street, Suite 115
Reno, NV 89502

Re: DeChambeau v. Balkenbush

Dear Mr. Lusiani:

I am writing in response to your letter dated October 27, 2016. Although you mention my September 2, 2016 letter in fact, Mr. Kozak wrote to me September 28, 2016 regarding this issue and I further responded to him October 18, 2016.

After this case was remanded to the District Court we held a further case conference with Judge Flanagan on January 21, 2016. As a result of that conference the Court issued a scheduling order which was served on your office after it was electronically filed February 1, 2016. In that scheduling order Judge Flanagan made it clear that discovery remained open. In fact he ordered that all discovery be complete by December 2, 2016. He also ordered that initial expert disclosure occur on or before September 3, 2016 and that rebuttal expert disclosure was due on or before October 3, 2016. At no point did your office object to the scheduling order or complain that it was somehow erroneous.

I would note you have not cited to any Nevada authority with respect to this matter. It is my position *Douglas v. Burley* does not apply as the court in that case did not issue a new scheduling order after the case was remanded. That is not true here. The Court in this case issued a scheduling order February 1, 2016. There was no objection to the scheduling order by your office at that time nor at any point thereafter.

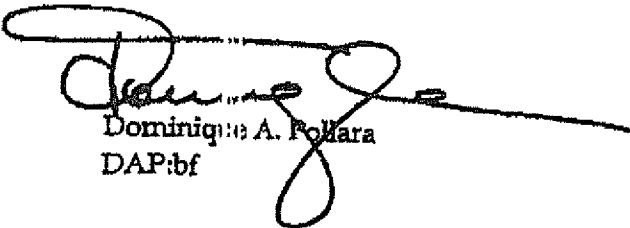
Charles R. Kozak, Esq.
R. Craig Lusiani, Esq.
Re: DeChambeau v. Balkenbush
October 31, 2016
Page 2

Furthermore, I would note that all of the individuals identified in our expert disclosure served September 2, 2016 have been known by your office since the beginning of this lawsuit. In fact, all of them were disclosed in prior 16.1 documents. The only difference is that we have identified Dr. Calkins as an expert witness in addition to his prior designation.

I remain available to discuss this matter further with you should you so desire.

Very truly yours,

POLLARA LAW GROUP



Dominique A. Pollara
DAP:bf

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EXHIBIT 8

EXHIBIT 8

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 ANGELA DeCHAMBEAU and JEAN-
10 PAUL DeCHAMBEAU, both individually
and as Special Administrators of the Estate
of NEIL DeCHAMBEAU,

Case No. CV 12-00571

Dept. 7

11 Plaintiffs,

12 vs.

13 STEPHEN C. BALKENBUSH, ESQ.; and
14 THORNDAL ARMSTRONG DELK
15 BALKENBUSH & EISINGER, a Nevada
Professional Corporation,

16 Defendants.
17
18

19 JUDGMENT ON JURY VERDICT

20 WHEREAS, pursuant to the Court Order dated August 27, 2013 granting
21 Defendants' Motion to Bifurcate the underlying medical malpractice matter from the legal
22 malpractice matter, trial as to the medical malpractice matter commenced January 17, 2017,
23 Honorable Patrick Flanagan, District Court Judge Presiding, at the completion of which,
24 after due deliberation, the jury rendered a verdict finding "No Negligence" by David
25 Smith, M.D. in the underlying medical malpractice matter, and as a verdict of "Negligence"
26 by David Smith, M.D., as a matter of law, is a necessary element of the legal malpractice
27 claim asserted against Defendants STEPHEN C. BALKENBUSH, ESQ. and THORNDAL
28

1 ARMSTRONG DELK BALKENBUSH & EISINGER, the Court rules, finds, and orders as
2 follows:

3 IT IS ORDERED, ADJUDGED AND DECREED that judgment shall be entered on
4 the Plaintiffs' complaint in favor of Defendants STEPHEN C. BALKENBUSH, ESQ. and
5 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER and the action will be
6 dismissed with prejudice, and Defendants STEPHEN C. BALKENBUSH, ESQ. and
7 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER shall recover their costs
8 of suit according to proof in their Verified Memorandum of Costs.

9 Dated this 25 day of January, 2017.

10 Patrick Flanagan
11 PATRICK FLANAGAN
12 DISTRICT JUDGE

13 APPROVED AS TO FORM:

14
15 By: _____
16 Charles R. Kozak, Esq.
17 Nevada Bar No. 4245
18 3100 Mill Street, Suite 115
19 Reno, NV 89502
20 Attorney for Plaintiffs
21
22
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Clerk of the Court
Transaction # 5941839 : yviloria

EXHIBIT 9

EXHIBIT 9

1 4185
2 STEPHANIE KOETTING
3 CCR #207
4 75 COURT STREET
5 RENO, NEVADA
6

7 IN THE SECOND JUDICIAL DISTRICT COURT
8 IN AND FOR THE COUNTY OF WASHOE
9 THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

10 --oOo--
11 ANGELA DECHAMBEAU, et)
12 al.,)
13 Plaintiffs,) Case No. CV12-00571
14 vs.) Department 7
15 STEPHEN BALKENBUSH, et)
16 al.,)
17 Defendants.)

18 PARTIAL TRANSCRIPT OF PROCEEDINGS
19 TRIAL TESTIMONY OF HUGH CALKINS
20 January 20, 2017
21 9:00 a.m.
22 Reno, Nevada
23

24 Reported by: STEPHANIE KOETTING, CCR #207, RPR
Computer-Aided Transcription

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APPEARANCES:

For the Plaintiff:

KOZAK LUSIANI
By: CHARLES KOZAK, ESQ.
3100 Mill Street
Reno, Nevada

For the Defendant:

POLLARA LAW GROUP
By: DOMINIQUE POLLARA, ESQ.
3600 American River Dr.
Sacramento, California

1 RENO, NEVADA, January 20, 2017, 9:00 a.m.

2

3 --oOo--

4 THE COURT: Good morning, ladies and gentlemen.

5 Will counsel stipulate to the presence of the jury?

6 MR. KOZAK: We will.

7 MR. POLLARA: Yes, your Honor.

8 THE COURT: Ms. Pollara, your next witness.

9 MR. POLLARA: Thank you, your Honor. At this
10 time, we'll like to call Dr. Hugh Calkins to the stand.

11 (One witness sworn at this time.)

12 THE COURT: Ms. Pollara, your witness.

13 MR. POLLARA: Thank you, your Honor.

14 HUGH CALKINS

15 called as a witness and being duly sworn did testify as

16 follows:

17 DIRECT EXAMINATION

18 BY MS. POLLARA:

19 Q. Good morning, Dr. Calkins.

20 A. Good morning.

21 Q. Are you a medical doctor?

22 A. Yes.

23 Q. And what is your specialty?

24 A. Cardiology and electrophysiology.

1 Q. Can you tell us where do you hold licenses to
2 practice medicine?

3 A. In the state of Maryland.

4 Q. Were you contacted at some point in 2008 or 2009
5 by an attorney here in Reno who was representing Dr. Smith
6 asking if you would be willing to review this case for him?

7 A. Yes, I was contacted.

8 Q. Did you agree to do that?

9 A. Yes, I did.

10 Q. And did you subsequently receive and review
11 records from Washoe Medical Center and Dr. Smith's office and
12 the primary care doctor?

13 A. I did.

14 Q. Based upon your background, experience and
15 training and your review of those records, did you reach any
16 conclusions when you reviewed the records back at that time?

17 A. Yes, I did. I felt that Dr. Smith met the
18 standard of care.

19 Q. And then at some point, were you advised that that
20 case was terminated or over in some fashion?

21 A. Yes, I was.

22 Q. And then later were you once again contacted at
23 that point by an attorney representing Mr. Balkenbush to ask
24 if you would again review the record?

1 A. I was.

2 Q. Did you rereview the records at that time?

3 A. Yes, I did.

4 Q. Did you also review Dr. Smith's deposition
5 transcript?

6 A. I did.

7 Q. Did you review Dr. Morady's deposition transcript?

8 A. Yes.

9 Q. And as a result of that review and your background
10 and experience and training, what opinions did you have at
11 that time?

12 A. My initial opinion was that Dr. Smith met the
13 standard of care, and after rereviewing it, after reviewing
14 the depositions, I still felt he met the standard of care.

15 Q. And do those remain your opinions today?

16 A. Yes.

17 Q. Are the opinions that you're going to express here
18 today to a reasonable degree of medical certainty?

19 A. They are.

20 Q. Thank you. When you reviewed the records, and
21 focusing now on your current opinions, do you conclude that
22 Dr. Smith acted reasonably and prudently after Mr. Dechambeau
23 developed cardiac tamponade in the way that he handled the
24 situation, including performing the pericardiocentesis?

1 A. Yes, I did.

2 Q. I want to talk with you a little bit about your
3 background and your education. Dr. Calkins, where did you go
4 to medical school?

5 A. I went to Harvard Medical School.

6 Q. What year did you graduate?

7 A. 1983.

8 Q. And then after that, did you complete an
9 internship and residency?

10 A. Yes. It was Mass General Hospital in Boston.

11 Q. What was that in?

12 A. In internal medicine.

13 Q. Can you tell us when you completed that program?

14 A. 1986.

15 Q. Now, after you completed your internship
16 residency, did you then complete a fellowship?

17 A. Yes. I went to Johns Hopkins and did my
18 cardiology and electrophysiology fellowships.

19 Q. And how many years were those?

20 A. Three years.

21 Q. Are you board certified in any specialties?

22 A. Yes. I'm board certified in internal medicine,
23 cardiology, and electrophysiology.

24 Q. Can you tell us approximately when you were first

1 board certified in those areas?

2 A. Well, internal medicine would have been 1986,
3 cardiology would have been about 1990, and electrophysiology
4 in about 1992 or 3.

5 Q. All right. Thank you. Have you maintained your
6 board certifications?

7 A. Yes, I have.

8 Q. Does that require -- are you grandfathered in,
9 I've heard that term, or do you take the exams again?

10 A. So for internal medicine and cardiology, I'm
11 grandfathered in so I don't have to retake the exams. For
12 electrophysiology, I do, and I last took it three or
13 four years ago and passed.

14 Q. And where are you currently working?

15 A. I'm currently at Johns Hopkins.

16 Q. And that the School of Medicine or the Medical
17 Center or both?

18 A. It's all the same, but it's at the Hospital and
19 University and School of Medicine.

20 Q. And can you tell us, what professional
21 appointments do you currently have at Johns Hopkins?

22 A. I'm director of the electrophysiology laboratory
23 and the arrhythmia service.

24 Q. How long have you been director of the

1 electrophysiology lab?

2 A. Since 1992.

3 Q. Quite a while?

4 A. Yes.

5 Q. Do you know Dr. Fred Morady?

6 A. Yes, I do.

7 Q. How do you know him?

8 A. My first faculty job, I left my training in 1999,
9 I went to University of Michigan to work with Dr. Morady. He
10 was one of the pioneers of cath ablations in its broader
11 sense. I wanted to work with a world expert at that time, so
12 I was successful in getting my first doctor appointment at
13 the University of Michigan.

14 Q. How long were you at the University of Michigan?

15 A. I was there for three years.

16 Q. Now, we're here, as you understand it, about
17 Mr. Dechambeau, who had atrial fibrillation as an underlying
18 condition, correct?

19 A. Correct.

20 Q. We've heard a lot about this, but can you just
21 explain to us briefly what is atrial fibrillation, and then
22 tell us what has been the evolution of the treatment of that
23 disease from an electrophysiology standpoint, if you could
24 tell us about that?

1 A. So atrial fibrillation is the most common
2 arrhythmia there is. It's a total irregular and rapid
3 beating of the upper chamber. So the upper chambers are sort
4 of like a bag of worms. They're sort of fibrillating.
5 They're going extremely fast and not pumping effectively.

6 It turns out this is the most common arrhythmia
7 that is age-related. Rare before 50, by the time you're 80,
8 one in ten people have it. It's significant because can it
9 can cause symptoms, palpitations, shortness of breath --

10 Q. Doctor, let me tell you, slow down a little bit
11 for our court reporter.

12 A. It also increases your risk of having a stroke
13 five-fold. It also increases your mortality. It increases
14 your risk of dementia. Increases your risk of heart failure.
15 So it's a very significant and very common arrhythmia, but
16 it's very, very complex. It's not one single circuit. It's
17 not one single mechanism. It's sort of the most complex of
18 all the arrhythmias we deal with.

19 Right now, there's about two and a half million
20 Americans with atrial fibrillation. By 2050, it will be
21 about 12 million. So as we all age, the tsunami of afib is
22 increasing and also obesity plays a role. So as we all get
23 older and fatter, we're going to have more atrial
24 fibrillation.

1 Q. And so is catheter ablation a fairly recent
2 technique or manner in which atrial fibrillation is treated?

3 A. Well, it was first -- the current technique we
4 use, the underpinnings of that were first described in 1998.
5 So it's actually been around for about 20 years. And it
6 keeps getting better and the tools keep changing. Right now,
7 it's the most commonly performed ablation procedure in the
8 world.

9 So most electrophysiology laboratories, this is
10 how electrophysiologists spend their time performing this
11 procedure, which started about 20 years ago and it keeps sort
12 of advancing. We aren't perfect yet, but we keep trying to
13 get there.

14 Q. And so what was used before the current
15 technology?

16 A. It started out with open heart surgery to treat
17 atrial fibrillation. That was in the early '80s. Jim Cox, a
18 surgeon at Duke, developed that technique where you would
19 open a patient up, cut their chest, cut their atrium into
20 many different pieces and sew it back together. He showed
21 that you could treat atrial fibrillation with this huge
22 surgery, but it didn't catch on, because the surgery had a
23 huge complication rate, and very few surgeons were skilled
24 enough to perform it.

1 The next thing that happened is that
2 electrophysiologists like myself tried to replicate that
3 procedure from the inside with a catheter by cauterizing the
4 heart, cauterizing precise areas, and that didn't work very
5 well.

6 And then in 1998, a group in Bordeaux, France,
7 Michel Haissaguerre, discovered that afib is triggered from
8 the pulmonary vein. Pulmonary veins bring blood from the
9 lungs back into the heart. It turns out that afib is started
10 in those veins. It's like the starter for your snowblower,
11 which you'll be starting up this afternoon.

12 That starter is in the pulmonary veins. There's
13 little muscle fibers, there's nerves that extend around these
14 veins, the nerves go crazy, the muscle fibers start firing,
15 then that starts afib where you have multiple circuits going
16 in the entire atrium. But it's all about pulmonary veins,
17 and if you can get rid of the starter, if you can get those
18 pulmonary veins isolated, then you can control atrial
19 fibrillation in most patients.

20 Q. You said it's the most common ablation procedure
21 performed today. Take us back, you were doing these
22 procedures in 2006?

23 A. Yes.

24 Q. Compare 2006 to today. Has it continued to evolve

1 as far as the number of ablations that are being done? How
2 frequently was it being done in 2006?

3 A. If you think about it, in 1998, there was about
4 two hospitals in the world doing it. And then very quickly
5 over the next three years, most major leading medical centers
6 started to do it.

7 So I'd been performing it for a while, but using
8 the new technique started in 1999, 2000, and then it very
9 quickly caught on. So by the mid 2000's, the time we're
10 talking about, it had moved to smaller community hospitals
11 and was really catching on, you know, everywhere.

12 But it was compared to today, we have better tools
13 today, we have better techniques today, we have better
14 appreciation of all the aspects of the procedure. So I would
15 call that the early days of catheter ablations, atrial
16 fibrillation. It wasn't experimental. It was commonly
17 accepted, commonly performed. We had standard indications
18 for the procedure, but it was the early days.

19 Q. All right. And at the University of Michigan when
20 you were there, was that one of the centers where they were
21 working on and developing these techniques?

22 A. No. I was there from '89 to '92. So at the
23 University of Michigan then, they were the main center
24 developing catheter ablation for the simple arrhythmias where

1 there's one circuit, one pathway. So Fred Morady, Mel
2 Scheinman from San Francisco were the two world leaders and
3 they were doing arrhythmias where there's one, single burn,
4 you get one burn and the patient is cured.

5 That started at the University of Michigan in 1989
6 when I got there, but afib didn't start until about ten years
7 later as we moved on to more complex arrhythmias.

8 Q. Got it. Thank you. So while you were at the
9 University of Michigan, were you a professor there, an
10 attending?

11 A. Yeah. I was an attending and assistant professor
12 of medicine.

13 Q. Okay. Have you remained in touch with Dr. Morady?
14 Do you see him from time to time at meetings?

15 A. Yes. I see him intermittently at meetings.

16 Q. Have you ever talked with him about this case?

17 A. Never.

18 Q. Now, after you left the University of Michigan, is
19 that when you went to Johns Hopkins?

20 A. Yes. They recruited me back to be director of
21 electrophysiology at Johns Hopkins.

22 Q. In addition to being the director of
23 electrophysiology lab and the arrhythmia service, do you also
24 hold any teaching positions?

1 A. Well, I'm a Nicholas Fortuin Professor of
2 Medicine, so I have an endowed chair that supports my time to
3 teach and do research and things like that.

4 Q. Tell us a little bit about what your duties and
5 responsibilities are as a professor in that position.

6 A. Well, you know, I have teaching responsibilities,
7 clinical care responsibilities, and administrative
8 responsibilities. So from a teaching perspective, for many
9 years, I give the lectures to the medical students on the
10 cardiac arrhythmias. And after about 20 years, I let one of
11 my junior colleagues take that on.

12 Mainly, I teach the cardiology fellows, the people
13 training to be cardiologists, and the electrophysiologists,
14 people training to electrophysiologists, and it's really an
15 apprenticeship where they work by your side, work with you,
16 watch you, help you. So they learn by sort of working with
17 us. They do a lot of the -- it's sort of it works well.

18 I also give a lot of lectures both to the fellows,
19 to the residents and so forth. So education wise, I do a
20 fair amount of teaching within Hopkins and mainly it 's
21 teaching as I take care of patients and they sort of
22 participate and watching.

23 Administratively, I direct the EP lab, so I'm
24 responsible on the whole EP service, the schedules, the

1 monthly complication report, the volumes, the budgets, things
2 like that. And then I have, you know, research
3 responsibilities where I also do research.

4 Q. And so then as director of the electrophysiology
5 lab, do you also have meetings where you're reviewing cases
6 and you're looking at complications and things like that?

7 A. There's ten electrophysiologists in my group, so
8 it's a pretty big group, and we have four procedure rooms.
9 But every morning we meet every morning from 7:30 to 8:00 and
10 we go over patients we're doing that day, their history, what
11 we're planning to do. We go over the patients the day
12 before, how did the procedure go? Were there any
13 complications? And we go over the procedures the next day,
14 what's coming up? Is there anything that we need to think
15 about now and so forth? And then every month we -- so I hear
16 about complications as they occur. And then every month we
17 review all complications together in a separate one-hour
18 conference.

19 Q. And then are you also, it sounds like you've got a
20 lot on your plate, but are you also actually doing these
21 ablation procedures yourself?

22 A. Anyone in academic medicine, everyone has to pay
23 their way. Either you have grants from the NIH and that's
24 how you pay your way, or you pay your way by taking care of

1 patients, which is what I do. I go to clinic on Monday and
2 Fridays and see about 20 to 30 patients each day. And then I
3 do procedures Tuesday, Wednesday and Thursday. Usually, I'll
4 do two atrial fibrillations ablations each of those days. So
5 in an average week, I'll see about 50 patients in clinic, do
6 six procedures of which probably four are atrial fibrillation
7 procedures, and then the academic stuff is done nights and
8 weekends and things like that.

9 Q. Can you give us an estimate, Dr. Calkins, of how
10 many atrial fibrillation ablations you've done up to the
11 present time, just a ballpark?

12 A. Over 2,000.

13 Q. Now, is it your opinion in this case, Dr. Calkins,
14 that Dr. Smith is a well-trained and experienced
15 electrophysiologist?

16 A. Yes. He got very good training.

17 Q. Did you see any indication from anything that
18 you've reviewed that he just didn't know what he was doing on
19 September 7th of 2006?

20 A. No. He had completed his training years earlier
21 and he had a lot of experience. I would consider him a
22 well-trained and experienced electrophysiologist.

23 Q. Just very quickly, was Mr. Dechambeau an
24 appropriate candidate for the procedure?

1 A. Yes, he was. The indications for catheter
2 ablation at that time were symptomatic afib, refractory
3 medical therapy. The best results were if he had
4 intermittent afib. So he did exactly what the class one
5 indication, symptomatic atrial fibrillation having failed, he
6 had tried two or three different medications, so he would be
7 considered an optimal candidate for the procedure.

8 And then there was also the question about whether
9 he had a separate SVT arrhythmia which would be a further
10 reason to do the procedure.

11 Q. Ultimately, he didn't have that, but Dr. Smith
12 checked for it?

13 A. Yes.

14 Q. And he was given appropriate informed consent?

15 A. Yes.

16 Q. And let's talk about the ablation procedure
17 itself, Dr. Smith, and there is a couple of points in
18 particular. I know we saw some drawings the other day. Your
19 Honor, could I have your permission to have Dr. Calkins step
20 off the stand?

21 THE COURT: Absolutely. Mr. Kozak, you can come
22 around over here. Don't worry about the Court, just make
23 sure the jury can see.

24 THE WITNESS: Okay. I'm going to give you a

1 little tutorial on afib ablation.

2 BY MS. POLLARA:

3 Q. Let me ask a question first so we can have a good
4 record. Okay. Can you just start out and tell us, give us a
5 diagram of the heart and give us a little atrial fibrillation
6 refresher here.

7 A. Yes. So here's the heart. Let me get you
8 oriented. This is the right atrium, the right up chamber,
9 your own body's pacemaker. The sinus nodes are there. This
10 is the right ventricle, the right lower chamber where the
11 blood comes from the legs and from the head back into the
12 right atrium.

13 Q. Could you just put an RV and RA there?

14 A. RV and there's the RA. And then here's the AV
15 node. That's the normal connection system that brings the
16 impulse from the upper chamber down to the lower chamber.
17 There's special wires the impulse goes through.

18 Now, when you think atrial fibrillation, you have
19 to think about the left atrium. So this is the left
20 ventricle and this structure is the left atrium. And these
21 tubes are the pulmonary veins. I told you that afib is
22 triggered by the pulmonary veins. So there's little muscle
23 fibers in those veins, in each of the four veins. And then
24 there's nerves that sit outside the veins that have tentacles

1 that sort of extend over these veins like this that.

2 Here's the nerves that sort of -- and the
3 discovery in 1998 that the group in France discovered was
4 that afib is multiple reentry circuits swirling around the
5 atrium. But it's triggered, it starts from these veins.
6 These veins start firing about 300 beats a minute, bop, bop,
7 bop. And then in susceptible individuals that are of a
8 certain age, when you're young your atrium can handle it, as
9 you get older, your tissue gets a little older and saggier
10 and scarred and then that starts the afib.

11 So the catheter ablation of afib, initially, when
12 the group in France described it, they described doing little
13 burns around these veins of areas that seemed to be
14 irritable. And then very quickly over the next three years,
15 it was discovered that the better procedure was to put a
16 roadblock around the entire pulmonary veins.

17 And so the way -- so here's the roadblock here.
18 This roadblock is created by doing a sequence of burns. Each
19 burn is the size of a small marble. And you basically will
20 get line up of burn after burn after burn after burn after
21 burn and you go around burning all of these areas until you
22 create this rim of dead tissue.

23 So the dead tissue muscle is left, it's like a
24 wire, the dead tissue scar is like an insulator like rubber.

1 So you in essence you put a rubber gasket around the veins to
2 insulate -- you aren't blocking the blood flow, but the
3 electrical impulses that go crazy then can't get into the
4 atrium to give you afib and you also do the same thing on the
5 other side.

6 Now, to accomplish that, let me just show you the
7 catheters that we use. I'll need a different color. So to
8 do this, it was not an easy procedure. So you put a number
9 of catheters from the leg up to the heart, these catheters
10 are called sheathes are put up. And what you do is you poke
11 the septum and the sheathes go into the left atrium. So you
12 put two different sheathes from the leg. And here's another
13 sheathe coming up from the leg. And you put two sheathes
14 into the left atrium. And these sheathes are like tubes that
15 have a little gasket, a little door where we can put a
16 catheter in.

17 The patient is there, they're fully asleep. You
18 anticoagulate them, you put in your various catheters, and
19 then you poke from one side to the other side. There's a
20 natural door here that's open before we're born. So you poke
21 through that door, you reopen it, in order to do the
22 procedure.

23 And then through these tubes, you'll put two
24 catheters. One is the ablation catheter. So the ablation

1 catheter is the catheter that you use to do the actual
2 burning. And that catheter you can move with your thumb and
3 twist and this is guided by an electro anatomic mapping
4 system or GPS system. So you have sort of this GPS system
5 showing exactly where you are in free space and an X, Y and Z
6 coordinates.

7 And then the other sheathe, you put in what's
8 called a lasso catheter. It's a catheter that looks like a
9 lasso. It's a circular catheter that has 20 electrical poles
10 on it, and you put that on the veins. And the end point of
11 the procedure is having all the electrical impulses on that
12 circular catheter disappear, because you've gotten a complete
13 roadblock.

14 When you have the complete roadblock, the impulses
15 that were flowing into the veins are then blocked and there
16 will be no signals on this catheter. So this catheter you'll
17 move from this vein, this vein and this vein, as you do the
18 procedure. And between the GPS mapping system and this
19 catheter, you have what allows us to do the procedure.

20 So it takes, the procedure will typically take,
21 you know, two to four hours, three to four hours is the usual
22 length of the procedure. Some patients also have an atrial
23 flutter as Mr. Dechambeau did, which is a circuit that goes
24 around the right atrium like that.

1 When someone has that, you put in another
2 catheter, you know, into the right atrium called a decapolar
3 catheter that tells you where the circuit is, and then you
4 end up cauterizing. Again, you're down here, so the
5 procedure that Mr. Dechambeau underwent was he had these
6 veins isolated and then Dr. Smith had just completed or was
7 working on this last little flutter line, this little
8 two-inch piece.

9 One other comment, in order to kill the tissue,
10 here's the heart muscle tissue here and here's your catheter
11 against the tissue. And the way catheter ablation works is
12 you give radio frequency energy of 500,000 cycles per second,
13 very fast current, through this catheter to a patch that's on
14 the patient's back. And as the current goes through the
15 tissue, the tissue, the muscle of your heart acts like
16 resistant element. When you look at your toaster, you have
17 resistors that turn red. In the catheter ablations, it's the
18 muscle that the resistant element that starts to warm up.

19 When you get to over 50 degrees, then the tissue
20 is dead. If you get it too hot, if you get above 100
21 degrees, you'll have what's called a steam pop. You'll boil
22 the fluid and you'll have a small explosion. And I think one
23 of the hypotheses of why this tamponade occurred is as the
24 burning was going on, an area may have overheated and had a

1 steam pop, a little hole in the heart, and that's what caused
2 the tamponade. And the catheters can also poke a hole in the
3 heart at some critical parts. But that's the gist of the
4 procedure.

5 Q. Great. And, doctor, you can retake the stand.
6 We'll come back to this in a few moments.

7 Are you familiar with something called an
8 intracardiac echo catheter? We've also heard it called an
9 ICE catheter.

10 A. Yes.

11 Q. What is that?

12 A. Typically it's made by a company called Acuson.
13 It's a little ultrasound transducer that you place in the
14 heart. It's like a bread slicer where it will show you the
15 image of the heart in one view, and then by twisting it, you
16 can get a broader view of the heart. And the catheter is
17 deflectable where there's a way to manipulate it and you get
18 it up there.

19 And, typically, you know, many people use it to
20 guide the transseptal to help get from one side of the heart
21 to the other side. When this procedure was performed, it was
22 also used to help guide the procedure, because you could see
23 where the ablation catheter was relative to where you were
24 burning.

1 And I would say back when this procedure was done,
2 probably half of the centers used it and half the centers
3 didn't. I never used it, maybe once a year. More recently
4 in the last three years, I started using it more frequently.

5 Q. There's been some testimony the other day that
6 when Mr. Dechambeau arrested, that all Dr. Smith had to do
7 was turn or twist that catheter where it was located in the
8 right atrium, and he would have been able to diagnose the
9 pericardiocentesis from there, is that accurate?

10 A. No, that's not accurate. In order to look for an
11 effusion, the ICE catheter was in the ventricle, not the
12 atrium. So when you're using it to guide the procedure the
13 way Dr. Smith was to sort of see where he was burning and to
14 guide the transseptal, it's in that right upper chamber, the
15 right atrium, where it says RA on the diagram.

16 In order to see an effusion, you got to put it in
17 the right ventricle, at the tip of that right ventricle. And
18 getting the catheter from the right atrium to the right
19 ventricle is not simple, because the catheter only deflects
20 to one direction, it's fairly cumbersome, you need x-ray
21 guidance. So it's not something easy to do.

22 And in this situation, someone with no blood
23 pressure, and you say, am I going to start futzing with the
24 ICE catheter, which was already out in this case, are you

1 going to put it back in or then futz with it? Or are you
2 going to do the pericardiocentesis? If course you're going
3 to start to do the pericardiocentesis.

4 Even if it was in the heart, no, it's not simply
5 twisting it. That would be only if you previously placed it
6 in the right ventricle, and it was in the right atrium,
7 because it was being used to guide the procedure. So I
8 respectfully disagree with Dr. Seifert on that.

9 Q. Now, let's talk about pericardial effusions and
10 cardiac tamponade. First of all, tell us what is a
11 pericardial effusion and what is a cardiac tamponade?

12 A. So a pericardial effusion is fluid in the sack.
13 The heart I just drew sits in a sack and a pericardial
14 effusion is an excess of fluid in that sack. Now, everyone
15 has fluid in that sack. You'll have your 50 ccs or whatever,
16 a small amount of fluid in that sack.

17 But a pericardial effusion refers to when there's
18 an abnormal amount of fluid in that sack, where the sack
19 starts to fill up with fluid or blood or something else.
20 That's what a pericardial effusion.

21 Cardiac tamponade is when that effusion gets so
22 big that it starts putting pressure on the heart where blood
23 can't get into the heart and the blood pressure starts to
24 drop. That's referred to as cardiac tamponade.

1 Q. And is there an exact amount of fluid that you
2 know as a cardiologist, well, if we have 100 ccs, all
3 patients are going to get cardiac tamponade, or does it vary
4 from patient to patient?

5 A. It varies dramatically from patient to patient and
6 also on rate of accumulation. You know, some patients'
7 pericardial sack is relatively stiff. Other people, it's
8 much more floppy. Depending on how floppy or how stiff it is
9 will depend how much fluid you need to get in the sack to
10 start affecting the filling of the heart. So it's highly
11 variable.

12 I mean, there can be people with two liters in the
13 pericardial sack and with a normal blood pressure with no
14 tamponade. There's other patients with 300 ccs that have
15 tamponade. So it's very variable.

16 Q. And, then, doctor, is it accurate that for
17 patients who are undergoing this procedure, they are
18 typically placed on heparin?

19 A. Yes. Absolutely.

20 Q. Why do you say absolutely?

21 A. Well, one of the -- there's a number of
22 significant risks with the procedure, but, you know, one of
23 the serious ones is stroke I think is one of the more
24 important ones and that occurs in about .5 to 1 percent of

1 patients. And the way we lower that risk of stroke to what
2 we consider that low level is by aggressively anticoagulating
3 the patient.

4 So every time you put a catheter in the heart, a
5 clot can form on that catheter. It's sort of an area where
6 clots can form. So any catheter in the heart will start to
7 form clots. And we have lots of catheters in the heart for a
8 long period of time, so if we didn't anticoagulate the
9 patient, you'd have a huge risk of stroke, 15, 20 percent,
10 something like that. By aggressive anticoagulation, there's
11 guidelines as to how aggressively these patients have to be
12 anticoagulated, we can drop that risk to .5 or 1 percent. So
13 it's very important.

14 Q. So even though there's a risk of bleeding in
15 cardiac tamponade, you can't stop using the heparin because
16 of these other risks?

17 A. Correct.

18 Q. We're going to talk about the code in a moment,
19 but, first of all, I want to ask you this, doctor. Do you
20 agree that the standard of care is defined generally as
21 requiring a physician to have the knowledge and skill
22 ordinarily possessed and to use the care and skill ordinarily
23 used by reputable specialists practicing in the same field?

24 A. I do.

1 Q. Do you believe that you have the background,
2 experience and training and knowledge sufficient to discuss
3 what the standard of care is in this case?

4 A. Yes, I do.

5 Q. And why do you believe that you have that
6 background and experience in order to provide that type of
7 testimony here?

8 A. I think the most important thing is I know a lot
9 about this procedure and do this procedure. I've done over
10 2,000 of these procedures over 20, 30 years. So I do a lot.
11 I care for a lot of patients. But more importantly than
12 that, I interact with a lot of colleagues around the country
13 and around the world that do the procedure.

14 And one of the things that I've been doing in my
15 free time is I've led what's called the Heart Rhythm Society
16 Consensus Document On Catheter Ablation in Atrial
17 Fibrillation. So this is a 40- or 50-page document where
18 between 40 and 60 of the world's experts get together and put
19 together a document saying what are the standards, who should
20 get the procedure, who should not get the procedure, what are
21 the complications, what are the risks, what are the outcomes,
22 what are the best techniques.

23 So that document I first published, I was the lead
24 author in 2007, and now it was completely redone in 2012 and

1 case was 300 milliliters, correct?

2 A. That was the number that was documented. I don't
3 think anyone was precisely measuring how much blood was taken
4 off. But that was the estimate.

5 Q. That's Dr. Smith's own record, isn't it?

6 A. Yes. That was his estimate.

7 Q. So he's telling us that there's 300 milliliters of
8 blood that was evacuated from the pericardium, isn't that
9 true?

10 A. That's correct. That's what he estimated.

11 Q. That's not a large effusion, is it? That's a kind
12 of a medium effusion, right?

13 A. I would consider that to be a large effusion. 300
14 ccs is a large effusion.

15 Q. Now, assuming that the large pericardial effusion
16 was observed at 12:50, because they had to hookup the
17 machine. How long does it take to hookup the stat echo
18 machine?

19 A. Well, it takes a while. Depending on the machine,
20 you have to turn it on, it takes a minute or two for it to
21 rev up. Then whether you put the patient's information in,
22 you start imaging and you got to find the window, it takes a
23 little bit of time.

24 Q. Would it take a couple of minutes?

1 A. A minute or two, yes.

2 Q. So once the pericardial effusion was observed,
3 then the 300 ccs of blood was drawn off by a pericardial
4 drain, correct?

5 A. We know the echo -- when the first echo images
6 were done, there was still considerable blood in the
7 pericardial space. And the last echo images, they aren't
8 time stamped, shows that the fluid is gone. So, yes, during
9 that period of time, we have documentation of blood in the
10 sack and then no blood in the sack. We don't have a precise
11 time line, because the echo images aren't time stamped.

12 We also don't know how much blood originally was
13 in the pericardial space. It might have been 500 ccs
14 initially and then that was down to 300. I don't know.

15 Q. Well, at 12:54 was when the pulse was restored,
16 correct?

17 A. That's correct.

18 Q. So it took approximately three minutes to draw off
19 the blood that was in the pericardial sack and restore the
20 pulse, correct?

21 A. Somewhere around -- I mean, during that, I think
22 we certainly know whenever the echo was first done, there was
23 fluid in the sack, and then when the pulse was back, that's
24 when the fluid was gone. So that's the time period.

1 Exactly what the time stamps are, since the echo
2 images unfortunately aren't time stamped, I don't think we
3 can say precisely when that was. We have some times to put
4 in the chart. But, again, everyone in the room, their main
5 effort is to save the patient. It's not to document things
6 for 15 years later when we're sitting here today in a
7 snowstorm going over these records.

8 Again, people were taking care of the patient.
9 Those are the times we have. The echo images aren't time
10 stamped. The fluid eventually was evacuated and the
11 patient's blood pressure came up.

12 Q. It's Nurse Newton's job to record things as they
13 occur in the cath lab, correct? She's not involved in
14 actually treating the patient at that point, is she?

15 A. No. She's there to be documenting. But exactly
16 how well she was doing her job, we don't really know.
17 Whether she documented everything contemporaneously, I just
18 can't speak for her.

19 Q. So getting back to my time line from 12, say, 52,
20 to 12:55, that 300 milliliters of blood was evacuated from
21 the pericardial sack and the pulse returned, correct?

22 A. Again, I think we're putting too much emphasis on
23 the times. We know that the medical records don't all jive
24 in terms of the time. If you look at the anesthesia record,

1 it wasn't until 1:15 that the patient had a blood pressure.
2 We know that wasn't true, because we know at 12:54, he did
3 have a pulse. So all the times are a little bit confusing.
4 So I think we have to take that with that in mind. That,
5 again, everyone's attention is on the patient. It's not on
6 documenting. There's no timer that is set. Everyone's
7 watches are somewhat different. The echo images aren't time
8 stamped. That's too bad. I wish they were, then I could
9 agree with you on your proposed time lines.

10 Q. We don't know that the time lines are incorrect.
11 We have Nurse Newton and the defense counsel referred to the
12 code sheet, she's assuming those time lines are correct,
13 right?

14 MR. POLLARA: Your Honor, that calls for
15 speculation.

16 THE WITNESS: It's clear that you have your
17 opinion about the time line and you're entitled to hold your
18 opinion. I place less emphasis on the time line, because
19 what I've seen is that different people's clocks were
20 differing. And in my experience, when you have this kind of
21 cardiac arrest, again, people are taking care of the patient.
22 They're not talking care of the clock or the timing.

23 BY MR. KOZAK:

24 Q. Well, there's no doubt in your mind that if

1 Dr. Smith waited for the stat echo machine to get into the
2 cath lab before he did the pericardiocentesis, he was acting
3 beneath the standard of care, isn't that correct?

4 A. Well, if he had sat there for ten minutes doing
5 nothing, not trying to do the pericardiocentesis, that would
6 be negligence. But he's very clear in his deposition, and I
7 don't know what he said yesterday, but certainly his
8 deposition makes it very clear that he immediately started
9 the pericardiocentesis.

10 Q. That's just his testimony. There's nothing in
11 this medical record to substantiate that, is there?

12 A. No. But it's also, I mean, it would be -- any
13 physician would absolutely -- you know, he knew it was
14 tamponade. He knew how to treat tamponade. You get the
15 needle, you get the kit, you stick it in, and, you know,
16 that's what he's testified to. That's what any reasonable
17 physician would do. And that's what I believe occurred. But
18 I agree that documentation is less than perfect.

19 Q. In fact, it's very poor in this case, isn't it?

20 A. I wouldn't say it's very poor, but it's imperfect.
21 And exactly, you know, why was it that when we saw the fluid
22 go from a certain amount of fluid to no fluid, and how that
23 corresponds with the echo machine, was the drain adjusted,
24 was a bigger syringe used, exactly what was done differently

1 at that point that allowed, you know, there's blood coming
2 in, there's blood going out to sort of win the race. I don't
3 know.

4 Q. Well, Dr. Smith testified yesterday that he didn't
5 have any problem placing the needle and the drain and he got
6 a return of blood and a lot of blood immediately. Were you
7 aware of that?

8 A. I wasn't here for his testimony yesterday.

9 Q. You're not aware of that?

10 A. No.

11 Q. Then Dr. Smith testified that he took the
12 20-milliliter syringe and it would only take him five to
13 ten seconds to fill syringe. Were aware of that testimony?

14 A. No.

15 Q. So he's in there very quickly with his
16 pericardiocentesis tube. He's extracting blood very rapidly.
17 He's got a 20-milliliter syringe. Wouldn't you expect all of
18 that blood to be aspirated if there's just 300 milliliters
19 within three minutes at the most?

20 A. It depends, again, how much blood is coming in
21 versus how much was going out. That was his estimate of
22 time. But, again, people's sense of time in this situation,
23 your time stamp really goes to the wind as you're worrying
24 about the patient.

1 You know, all you can say is he was pulling the
2 blood out as fast as he can. Was he initially in the RV
3 instead of the pericardial space, so some of the blood was
4 from the RV and not the pericardial space? I just can't say.
5 But it's clear from what you're telling me that he was doing
6 the right thing. He was pulling blood off as fast as he
7 could and that's what you expect someone to do.

8 Q. So if he was pulling off blood as fast as he could
9 and he was evacuating it properly, you would expect the pulse
10 to be returned in five minutes, wouldn't you, at the most?

11 A. Again, it would depend on how much blood was
12 coming in. At 20 ccs every ten seconds is coming in, 20 ccs
13 going out, then you're even.

14 Q. If you're having that kind of cardiac tamponade,
15 you wouldn't expect that at 12:54 when they looked in there
16 and they saw 300 milliliters of blood and they extracted that
17 out, and there's no further bleeding, you would have to have
18 a major effusion, wouldn't you, to have 300 milliliters of
19 blood extracted and have blood still coming in? You would
20 have to call the surgeon?

21 A. It has to do with how big of a tear or hole or
22 whatever, and then a clot is forming on the hole, so at one
23 point, the clot finally plugged the hole in the heart, and
24 then he was able to get ahead of the race and get the fluid

1 off.

2 Q. Well, doctor, isn't it true, you don't have to get
3 all the fluid off before the pulse returns, do you?

4 A. That's correct.

5 Q. You just have to get a certain fraction of the
6 blood off and the pulse starts going up, correct?

7 A. How much that is varies patient by patient, varies
8 considerably. But, no, you don't have to get every last cc
9 of blood out before you see some response.

10 Q. So you would expect to see a pulse after three
11 minutes of the type of pericardiocentesis that was being done
12 by Dr. Smith, wouldn't you?

13 A. I would say you would hope to, but whether you do,
14 again, depends on all of these other factors.

15 Q. But we know that the pulse returned almost
16 instantaneously when he extracted the 300 milliliters at
17 12:52, isn't that correct?

18 A. We certainly know that a pulse eventually was
19 restored and the echo eventually showed no fluid. Exactly
20 the relative timing of those two things, again, we don't
21 know, because the echo wasn't time stamped. But there's some
22 relationship between the two, that's correct.

23 Q. Dr. Calkins, this is from the procedure report by
24 Dr. Smith and he wrote this. Did you review that?

1 A. Yes, I did. I've seen this.

2 Q. And he states that stat echo gram, echocardiogram
3 was performed, which showed a fairly large pericardial
4 effusion. That's not a massive one, is it, fairly large?

5 A. No. It's significant. It's not 2,000 ccs.

6 Q. CPR was performed and we removed approximately
7 300 milliliters of frank blood from the pericardial space
8 after doing a pericardiocentesis. A common sense reading of
9 that would indicate that when he saw the effusion, because he
10 called the stat echo to observe the effusion, right?

11 A. Correct.

12 Q. And then he drew off 300 milliliters of frank
13 blood in the pericardial space after doing a
14 pericardiocentesis. So the common sense reading of that
15 would be that he looked in the echo machine, he saw what he
16 needed to see, and he evacuated the blood at that point,
17 right?

18 A. Well, that's your interpretation of what this
19 says. I think what he said and what his deposition says is
20 that he started the pericardiocentesis well before the echo
21 machine arrived.

22 Q. I know what he said in his deposition. But
23 according to his record, that's the chronology, correct?
24 That's the record we have to deal with?

1 A. Well, it doesn't state in this note when he
2 started the pericardiocentesis. So it doesn't say -- you
3 know, there's no sentence saying, I started the
4 pericardiocentesis after the echo arrived and showed a large
5 effusion. I don't see that sentence. That sentence isn't
6 there.

7 And what he's told us is, I started the
8 pericardiocentesis blindly before the echo machine arrived.
9 When the echo machine finally arrived, there still was a
10 residual 300 ccs of fluid, and eventually we got the fluid
11 off, and the patient's blood pressure came up.

12 Q. That's part of the problem here, isn't it? We
13 don't have a good complete record by Dr. Smith as to the
14 consequence of events that happened. And this was written a
15 day after the operation, correct?

16 A. That's correct.

17 Q. Wouldn't you expect he would be able to remember
18 with a little more detail and specificity about that
19 particular -- since it led to a morbidity?

20 A. Well, again, he's documenting what went on. The
21 purpose of a procedure note is not some legal defense note.
22 You know, the purpose of a procedure note is to document what
23 happened. And certainly in procedure notes, I don't document
24 in minute detail every little step of what happened first and

1 what happened second and what time it was. Again, that's for
2 the medical records. That's for the CPR log and other things
3 to document that. I wouldn't expect that to be in here and
4 he certainly doesn't include that in his report about what
5 time the pericardiocentesis was started.

6 Q. Isn't one of the purposes of the medical records
7 to guard against liability in case of a malpractice situation
8 like this?

9 A. Yes.

10 Q. Now, the heart stops beating, every minute that
11 goes by, the brain is not getting proper oxygen, isn't that
12 correct?

13 A. Yes. There's a certain amount of oxygen left in
14 the blood initially, but, yes, that oxygen gets consumed and
15 time matters.

16 Q. So after five minutes, isn't it true that there's
17 a very high risk of anoxia for a patient?

18 A. It varies tremendously on each patient. There's
19 patients that have been in cardiac arrest for 45 minutes and
20 woken up completely. There's patients who have been in
21 cardiac arrest for three minutes that have had severe damage.
22 It's highly variable depending on other factors.

23 Q. If it's over five minutes, you're getting into the
24 area where there's an extremely high risk, correct?

1 A. Well, whether it's five minutes, 10 minutes,
2 15 minutes, certainly the longer a cardiac arrest goes on,
3 the higher the chance of injury to the brain.

4 Q. In this case, we know that there wasn't any oxygen
5 to the brain for approximately 15 minutes, correct?

6 A. Well, to say there wasn't any oxygen to the brain,
7 I think is a bit of an overstatement. There's oxygen in the
8 blood. At the time someone has a cardiac arrest, the blood
9 that's in the head or in the vessels has oxygen in it. And
10 by doing CPR, you move other oxygenated blood to the brain.

11 So it's not that the oxygen suddenly disappears
12 from the blood. The oxygen that is in the blood is being
13 consumed and cells are beginning to get hypoxic, but it's a
14 dynamic process. It's not you have a lot of oxygen and then
15 you have no oxygen. The oxygen gradually gets burned up over
16 time.

17 Q. At 15 minutes, you would expect brain damage,
18 would you not?

19 A. I think 15 minutes is a pretty long cardiac
20 arrest. I've had patients go through a cardiac arrest that
21 lasted 15 minutes and do fine and others have severe brain
22 damage.

23 Q. Now, you stated there's oxygenated blood going
24 through the body during a cardiac arrest when you're doing

1 CPR? That's not correct, is it?

2 A. There's some blood movement from doing CPR by
3 changing the intrathoracic pressure. There's a certain
4 amount of blood, oxygen in the blood. And once you have a
5 cardiac arrest and the blood flow slows or stops, the oxygen
6 that is there gradually gets consumed. So it takes so many
7 numbers of minutes for all it to be used up.

8 Q. How many minutes?

9 A. Somewhere between five and 15. I mean, it's -- I
10 mean, I think the general number is starting at about five
11 minutes. I think then you're concerned about hypoxia and not
12 enough oxygen, and then more than ten minutes, more than 15
13 minutes, more than 20 minutes, more than an hour.

14 Q. Well, when you have a cardiac arrest as a result
15 of a cardiac tamponade, isn't it true that what is going on
16 is the heart can't fill with blood, right, because it's not
17 pumping? You have a filling problem?

18 A. Yes. The pressure in the pericardiac sack is
19 greater than the pressure in the inferior vena cava. So the
20 blood that comes from the head and the feet doesn't flow
21 because you have a dam upstream pressure.

22 Q. So CPR isn't going to circulate oxygenated blood,
23 is it?

24 A. It will circulate some blood just by the

1 mechanical force by the chest squeezing in, the pressure in
2 the chest goes up. That means the blood that is outside the
3 chest gets a sudden pulse, a sudden increase in pressure that
4 moves some of the other blood around.

5 Q. Certainly not enough to stave off anoxia?

6 A. Again, it depends on all these different
7 variables. But to say it's unhelpful and you shouldn't do
8 it, I think is a misstatement. I think that's incorrect.
9 You always do CPR in any arrest situation where you have no
10 blood pressure.

11 Q. Doctor, you would be extremely concerned if you're
12 not restoring the pulse during a cardiac tamponade within
13 five minutes?

14 A. You want to do it as quickly as possible. You
15 hope to do it with five minutes, 10 minutes, 15 minutes,
16 20 minutes. You do it as quick as you can.

17 Q. You've never had a situation where you didn't
18 restore the pulse within five minutes when you have a cardiac
19 tamponade, have you?

20 A. I've never had a situation where I've completely
21 lost the pulse.

22 Q. No. My question was, you've never had a situation
23 where you did not restore the pulse within five minutes when
24 you had a cardiac tamponade and you were doing a catheter

1 ablation, correct?

2 A. That's because I've never experienced this
3 situation. But in patients that are hypotensive, I told you
4 it takes between 20 and 30 minutes to do the
5 pericardiocentesis, typically.

6 Q. So your statement is if it takes 20 or 30 minutes
7 to do a pericardiocentesis, that's acceptable?

8 A. That's the standard, yes. It takes that long to
9 do it. It depends on the clinical situation. What I'm
10 referring to are patients where their blood pressure is 60
11 and then you give them pressers, you get their blood pressure
12 up to 90. This was a really unusual case where the blood
13 pressure was literally zero or 20 and it was an emergency and
14 you had to -- everyone was moving as fast as they could.

15 Q. So Dr. Seifert testified that he's had about 20 of
16 these situations where there was a very sudden drop in blood
17 pressure and he was able to resuscitate the patient within
18 five minutes. Would you agree that that's probable?

19 A. Well, I'm shocked by his high complication rate.
20 It's a little bit worrisome if he's had so many of these.
21 I've had zero and he's had 20, I don't know what that says
22 about his skills and experience as an electrophysiologist.
23 I'm glad he was successful in resuscitating all of these
24 patients, but he should be a little bit more careful when he

1 does the procedure.

2 Q. Regardless of that, doctor, if he was able to
3 resuscitate the patient, that's the issue in this case, isn't
4 it?

5 A. I suspect those were not patients with no blood
6 pressure where CPR was going. That's what I suspect. I
7 think he's the most experienced person in the world dealing
8 with this, then. He's really a world's authority on this,
9 but he also has the highest complication rate of any
10 electrophysiologist that I've heard of.

11 Q. You know Dr. Seifert, don't you?

12 A. Yes. I knew him many years ago.

13 Q. He's respected physiologist, isn't he?

14 A. I have no knowledge of his -- what his reputation
15 is now. I know 30 years ago, he was a nice guy training at
16 Hopkins. But I have no idea about what kind of
17 electrophysiologist he's become. But this data you just told
18 me makes me a little concerned about his skills.

19 Q. He's done thousands of these operations just like
20 you have, hasn't he?

21 A. I don't know. I wasn't here for his testimony and
22 I haven't seen him in probably 10, 15 years.

23 Q. So, really, the basis of your opinion here is the
24 testimony of Dr. Smith, not the medical records, is that

1 correct?

2 A. No. That's not correct. What the medical records
3 say is that we have somewhere between, whatever, 12:42 and
4 12:54, so it's about 12 minutes that this whole thing took
5 place from CPR to returning a pulse. And I think 12 minutes
6 is doggone acceptable to restoring the pulse within 12
7 minutes. I think he did a very good job. It didn't turn out
8 the way we all would hope and I think we all feel terribly
9 sorry about that.

10 But I think to say, you have an unbelievably rare
11 situation occurs, and within 12, 13 minutes you've restored
12 the pulse, despite having to call for the echo machine,
13 despite the patient being obese, despite all the other
14 problems, I think this is very respectable and certainly well
15 within the standard of care.

16 Q. So did you review that anesthesiology report and
17 the statements there by Dr. Kang?

18 A. I did.

19 Q. Now, Dr. Kang says that the cardiac arrest
20 occurred at 12:50, chest compression, and then he
21 administered atropine and vasopressor, whatever it is?

22 A. Yeah.

23 Q. Would you do that in a situation of a cardiac
24 arrest in this situation? Would you prescribe those drugs?

1 A. Yes.

2 Q. Then he says at 13:00, they had the transthoracic
3 echo, correct?

4 A. Correct.

5 Q. And then he says they observed a large pericardial
6 effusion, correct?

7 A. Yeah.

8 Q. And then there was several hundred ccs aspirated
9 and there was a pericardial drain in place, right?

10 A. Yes.

11 Q. So apparently Dr. Kang supports the record that
12 says that the echo machine was used to observe the
13 pericardial effusion and then we had the pericardiocentesis,
14 correct?

15 A. That's not correct. I mean, one, you can see they
16 have problems with the time stamp. So here the
17 anesthesiologist states that at 12:50 the cardiac arrest
18 occurred. We've heard earlier, it's 12:41 or 12:42, so he's
19 off by eight minutes. And then he's saying by 1:00 the echo
20 machine arrives. We know by 12:54, he already had a pulse,
21 so we know these times are way off, and the echo machine
22 arrives and you got to hook it up and do all these other
23 things.

24 So, again, I think the anesthesiologist was

1 focused on the patient. He was getting the lines in, he was
2 getting the fluid in, and he was giving these medications,
3 and then retrospectively he went in and put the rough times
4 down. We all agree they don't jive. He didn't say
5 transthoracic echo, pericardiocentesis then started to be
6 performed. You know, it doesn't say anything about when did
7 the initial attempts at pericardiocentesis start. That's not
8 mentioned in this anesthesia note. Just like it's not
9 mentioned in the procedure note. So that time point is not
10 documented in these medical documents with variable clocks
11 going.

12 Q. Aside from the time, which we agree is off, the
13 events is what we're talking about here. And he describes
14 the events just the way Dr. Smith did in his procedure notes,
15 right? These were the same events he's talking about that
16 Dr. Smith was talking about in his procedure note?

17 A. Yeah. I think the question at hand is whether
18 Dr. Smith sat there for ten minutes and didn't try to do a
19 pericardiocentesis waiting until the echo machine showed up.
20 I know your perspective and Dr. Seifert's perspective is that
21 he sat on his hands and waited ten minutes.

22 Certainly, Dr. Smith is very clear and any prudent
23 physician, you would start doing it. Whether he was
24 successful or not, that's another story. But, again, this

1 note doesn't document the time of initial attempts at
2 pericardiocentesis. And the standard of care isn't that you
3 be successful, it's that you try. And that's the time that
4 is not documented in these notes.

5 Q. And neither is it documented that there was a
6 pericardiocentesis initiated at 12:41, isn't that correct?
7 That's not in the records?

8 A. Yes, I agree.

9 MR. KOZAK: No further questions.

10 MR. POLLARA: Just a couple of questions.

11 REDIRECT EXAMINATION

12 BY MS. POLLARA:

13 Q. You would agree, Dr. Calkins, the code note
14 actually says cardiac tamponade at either 12:41 or 12:42,
15 depending on which number you're looking at?

16 A. Yes. It's very clear that it says cardiac
17 tamponade, 12:41. And any electrophysiologist, you know
18 cardiac tamponade, you got to do a pericardiocentesis. It's
19 a largely mechanical problem.

20 Q. All right. And what you're saying is it would be
21 unreasonable to think that Dr. Smith was not being honest
22 when he gave his deposition about the fact that when he made
23 that diagnosis, he immediately initiated that process?

24 A. Correct.

1 Q. One last point -- well, two last points. The
2 anesthesiologist, is he generally documenting as the code is
3 going?

4 A. No. The anesthesiologist, he's a member of the
5 team caring for the patient. So in this case, we knew he put
6 in extra lines, he got three liters of fluid in, gave all
7 these medications, so he's working hard. He's not sitting
8 there writing down the times. He's taking care of the
9 patient trying to save his life.

10 Q. Lastly, with regard to Dr. Morady, you understood
11 that he had one opinion at the time that he authored or
12 signed the declaration, correct?

13 A. Correct.

14 Q. But you later learned, did you not, and you read
15 his deposition, where you he testified that he changed that
16 opinion, correct?

17 A. That's correct.

18 Q. And, in fact, when he changed his opinion, he
19 concluded Dr. Smith complied with the standard of care in all
20 respects, just like you did?

21 A. Correct.

22 Q. Seems reasonable to you?

23 A. Yes.

24 MR. POLLARA: Thank you. That's all I have.

1 THE COURT: Mr. Kozak.
2 RE CROSS EXAMINATION
3 BY MR. KOZAK:
4 Q. Doctor, Dr. Morady never said why he changed his
5 opinion, did he, in his deposition?
6 A. No, he didn't.
7 Q. Okay. And you testified you haven't talked to Dr.
8 Morady at all, right?
9 A. That's correct.
10 Q. As we sit here today, we don't know why Dr. Morady
11 changed his opinion, do we?
12 A. No. We just know he changed his opinion.
13 MR. KOZAK: Thank you.
14 THE COURT: Thank you, doctor. Just leave that
15 there and watch your step going down. Good time to take a
16 break?
17 MR. POLLARA: It's a wonderful time.
18 --oOo--
19
20
21
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23
24

1 STATE OF NEVADA)
2 County of Washoe) ss.

3 I, STEPHANIE KOETTING, a Certified Court Reporter of the
4 Second Judicial District Court of the State of Nevada, in and
5 for the County of Washoe, do hereby certify;

6 That I was present in Department No. 7 of the
7 above-entitled Court on January 20, 2017, at the hour of 9:00
8 a.m., and took verbatim stenotype notes of the proceedings
9 had upon the trial in the matter of ANGELA DECHAMBEAU,
10 Plaintiff, vs. STEPHEN BALKENBUSH, et al., Defendant, Case
11 No. CV12-00571, and thereafter, by means of computer-aided
12 transcription, transcribed them into typewriting as herein
13 appears;

14 That the foregoing transcript, consisting of pages 1
15 through 81, both inclusive, contains a full, true and
16 complete transcript of my said stenotype notes, and is a
17 full, true and correct record of the proceedings had at said
18 time and place.

19
20 DATED: At Reno, Nevada, this 27th day of January 2017.

21
22 S/s Stephanie Koetting
23 STEPHANIE KOETTING, CCR #207

24

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2017-02-08 03:35:44 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5941839 : yvitoria

EXHIBIT 10

EXHIBIT 10

1 1610
2 EDWARD J. LEMONS, ESQ.
3 Nevada Bar No. 699
4 LEMONS, GRUNDY & EISENBERG
5 6005 Plumas Street, Suite 300
6 Reno, Nevada 89519-6069
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8 Attorneys for Defendants
9 DAVID SMITH, M.D. and
10 BERNDT, CHANEY-ROBERTS,
11 DAVEE, GANCHAN, ICHINO,
12 JUNEAU, NOBLE, SEHER, SMITH,
13 SWACKHAMER, THOMPSON,
14 WILLIAMSON and ZEBRACK, LTD.

15
16 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
17
18 IN AND FOR THE COUNTY OF WASHOE

19 -oOo-

20 ANGELA DECHAMBEAU, individually
21 JEAN-PAUL DECHAMBEAU and
22 ANGELA DECHAMBEAU as Special
23 Administrator of the Estate of Neil
24 DeChambeau,

25 Plaintiffs,

26 vs.

27 DAVID SMITH, M.D., BERNDT,
28 CHANEY-ROBERTS, DAVEE,
GANCHAN, ICHINO, JUNEAU,
NOBLE, SEHER, SMITH,
SWACKHAMER, THOMPSON,
WILLIAMSON and ZEBRACK, LTD., a
Nevada professional corporation, DAVID
KANG, M.D., RINEHART, LTD., a
Nevada professional corporation, and
DOES 1-10 inclusive,

Defendants.

CASE NO.: CV07 02028

DEPT. NO.: 10

DEFENDANTS DAVID SMITH, M.D. AND BERNDT,
CHANEY-ROBERTS, DAVEE, GANCHAN, ICHINO, JUNEAU,
NOBLE, SEHER, SMITH, SWACKHAMER, THOMPSON,
WILLIAMSON and ZEBRACK'S DESIGNATION OF EXPERT WITNESSES

///

1 Defendants DAVID SMITH, M.D. and BERNDT, CHANEY-ROBERTS,
2 DAVEE, GANCHAN, ICHINO, JUNEAU, NOBLE, SEHER, SMITH,
3 SWACKHAMER, THOMPSON, WILLIAMSON and ZEBRACK, LTD., by and
4 through their counsel, EDWARD J. LEMONS, ESQ. and LEMONS, GRUNDY &
5 EISENBERG, hereby offers the following designation of expert witnesses:

6 1. Hugh G. Calkins M.D.
7 The Johns Hopkins Hospital
8 Carnegie Building, Room 530
9 600 N. Wolfe Street
10 Baltimore, Maryland 21287-0409

11 Hugh G. Calkins, M.D. is Board Certified in Internal Medicine and
12 Cardiovascular Disease with a subspecialty in Electrophysiology. He is
13 licensed to practice medicine in the states of Michigan and Maryland and is the
14 Director of the Arrhythmia Service, Clinical Electrophysiology Laboratory, and
15 the Arrhythmogenic Right Ventricular Dysplasia Program at The Johns Hopkins
16 Hospital in Baltimore, Maryland. It is expected that Dr. Calkins may be
17 requested to testify regarding standard of care, causation and damages issues
18 in this case. His testimony will be based upon the medical records produced in
19 this case, depositions he may review, and his training and practice experience.
20 Dr. Calkins' report, curriculum vitae and fee schedule are attached hereto as
21 Exhibits 1, 2 and 3, respectively.

22 2. Anil K. Bhandari, M.D.
23 Los Angeles Cardiology Associates
24 1245 Wilshire Blvd., Suite 703
25 Los Angeles, California 90017

SB01895

26 Anil Bhandari, M.D. is Board Certified in Internal Medicine and
27 Cardiovascular Disease with a subspecialty in Clinical Cardiac
28 Electrophysiology. He is the Director of the Electrophysiology Laboratory at
good Samaritan Hospital in Los Angeles, California and at San Antonio
Community Hospital in Upland, California. It is expected that Dr. Bhandari may
be requested to testify regarding standard of care, causation and damages

1 issues in this case. His testimony will be based upon the medical records
2 produced in this case, depositions he may review, and his training and practice
3 experience. Dr. Bhandari's report, curriculum vitae and fee schedule are
4 attached hereto as Exhibits 4, 5 and 6, respectively.


5 3. Such other expert witnesses as may become necessary to address
6 any opinions expressed by expert witnesses called on behalf of Plaintiff on the
7 issue of alleged negligence of the Defendant herein. If the need for such
8 additional expert testimony arises, this designation will be supplemented in
9 writing.

10 4. Such treating physicians as may be listed in the medical records;
11 although, at present, it is anticipated that such physicians would likely be called
12 only to testify regarding the medical care provided by them.

13 PURSUANT TO NRS 239B.030 THE UNDERSIGNED DOES HEREBY
14 AFFIRM THAT THE PRECEDING DOCUMENT DOES NOT CONTAIN THE
15 SOCIAL SECURITY NUMBER OF ANY PERSON.

16 DATED this 23rd day of March, 2010.

17
18 LEMONS, GRUNDY & EISENBERG
19 Attorney for Defendants
20 DAVID SMITH, M.D. and
21 BERNDT, CHANEY-ROBERTS,
22 DAVEE, GANCHAN, ICHINO,
23 JUNEAU, NOBLE, SEHER, SMITH,
24 SWACKHAMER, THOMPSON,
25 WILLIAMSON and ZEBRACK, LTD.

26
27 BY: 
28 EDWARD J. LEMONS, ESQ.
Nevada Bar No. 699

SB01896

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of
LEMONS, GRUNDY & EISENBERG and that on this date I caused to be served
a true and correct copy of the document described herein by the method
indicated below, and addressed to the following:

Document Served:

***Defendants David Smith, M.D. and Berndt,
Chaney-Roberts, Davee, Ganchan, Ichino,
Juneau, Noble, Seher, Smith, Swackhamer,
Thompson, Williamson And Zebrack's
Designation Of Expert Witnesses***

Person(s) Served:

Stephen C. Balkenbush, Esq.
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISENGER
6590 S. McCarran Blvd., Suite B
Reno, Nevada 89509

☒ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail
☐ Facsimile

Michael D. Navratil
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2300 W. Sahara Blvd., Suite 420
Las Vegas, Nevada 89102

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☐ U.S. Mail
☐ Overnight Mail
☐ Facsimile

DATED this 23rd day of March, 2010.

D. Hesse

INDEX OF EXHIBITS

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4	Report of Anil Bhandari, M.D.	5
5	Curriculum Vitae of Anil Bhandari, M.D.	25
6	Fee Schedule of Anil Bhandari, M.D.	1

DECLARATION OF HUGH G. CALKINS, M.D.

HUGH G. CALKINS, M.D. does hereby swear, under penalty of perjury, that the assertions of this Declaration are true

Qualifications and Experience

I am the Director of the Arrhythmia Service and Clinical Electrophysiology Laboratory at Johns Hopkins Hospital. I am also Professor of Medicine at the Johns Hopkins University School of Medicine. I received my medical degree from Harvard Medical School in 1983. I trained in Internal Medicine at the Massachusetts General Hospital. I completed my training in cardiology and electrophysiology at Johns Hopkins. I am board certified in Internal Medicine, Cardiology, and Electrophysiology. I am a fellow of the Heart Rhythm Society, the American College of Cardiology, and the American Heart Association. My attached curriculum vitae include publications of over 350 peer-reviewed manuscripts and 50 book chapters. I spend approximately 75% of my time involved in the care and treatment of patients with cardiac arrhythmias with a much of this time involved in the care and treatment of patients with atrial fibrillation. I have performed over 1000 catheter ablation of atrial fibrillation procedures. I have 20 years of experience as a practicing cardiologist and electrophysiologist.

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Materials Reviewed:

Records of David Smith, M.D.

Records of Patricia Levan, M.D.

Records of Washoe Medical Center

Summary and Conclusions

I was asked to review the available medical records and testimony and render an opinion in the care which Dr. David Smith provided to Mr. DeChambeau. After reviewing the patient's medical records that were provided to me it is my opinion to a reasonable degree of medical certainty that the Mr. DeChambeau's death in September 2007 following a catheter ablation procedure was not a result of medical negligence. All opinions herein are to a reasonable, or higher, degree of medical or scientific certainty or probability based on my review of the medical records and documentation that was provided to me.

Medical Summary of Mr. Neil DeChambeau's Medical Care

Mr. Neil DeChambeau was a 56 year old man with a long history of atrial fibrillation, hypertension, and obesity. His atrial fibrillation was highly symptomatic and did not respond to medical therapy with atenolol, digoxin, and flecainide. He also had a history of SVT. Dr. Smith discussed the option of catheter ablation of atrial fibrillation with the patient in July 2006. He informed the patient of the efficacy and complications associated with the procedure at a clinic appointment

In July 2006, After considering these risks the patient elected to proceed with the procedure. Mr. Smith underwent catheter ablation of atrial fibrillation on September 7, 2006. Near the end of the procedure the patient experienced cardiac tamponade resulting in a cardiac arrest. The cardiac tamponade was diagnosed, appropriate measures were undertaken, including an immediate Code, and pericardiocentesis was successfully performed. During the cardiac arrest the patient experienced a significant anoxic injury to his brain which ultimately resulted in his death.

Comments on this Case

Based on my review of this case and my medical experience and training that I can make the following conclusions:

1) Mr. DeChambeau was an appropriate candidate for catheter ablation of atrial fibrillation. In particular, he had highly symptomatic atrial fibrillation refractory to medical management.

2) Informed consent was appropriately obtained. The patient decided to proceed with catheter ablation after carefully considering the risks and benefits of the procedure.

3) Dr. Smith performed the AF ablation procedure appropriately.

4) Cardiac tamponade is a well established complication of all EP procedures and also of catheter ablation of atrial fibrillation. The diagnosis and treatment of the patient's cardiac arrest resulting from cardiac tamponade was appropriate.

DATED this 22 day of March, 2010.

HUGH G. CALKINS, M.D.

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Jacqueline Bryant
Clerk of the Court
Transaction # 5941839 : yvilonia

EXHIBIT 11

EXHIBIT 11

Dominique A. Pollara, Esq.*
Jason S. Borras, Esq.*
Vanceen N. Hunter, Esq.
Jacqueline C. Zee, Esq.

Pollara
LAW GROUP

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*Also admitted in Nevada

September 2, 2016

VIA FACSIMILE AND FIRST CLASS MAIL (775) 800-1767

Charles R. Kozak, Esq.
3100 Mill Street, Suite 115
Reno, NV 89502

Re: DeChambeau v. Balkenbush

Dear Chuck:

Enclosed please find our Expert Witness Disclosure relative to the above matter as well as our Pretrial Disclosures. These are courtesy copies. The originals are being served on you today.

I understand from reviewing the file and speaking with Ms. Piscevich that depositions of the experts previously disclosed have already occurred. If you have a different understanding please advise.

I understand you previously represented to Ms. Piscevich that you did not intend to call any of the percipient witnesses listed in your prior disclosures. If your position on this issue has changed, please advise so we can get those depositions set.

I understand that you have possession of the EPS tape relative to this matter. I need to make arrangements to take possession of the tape so it can be re-reviewed by my experts. Please advise how you would like to handle this issue. I am happy to sign a reasonable stipulation relative to the same to facilitate this.

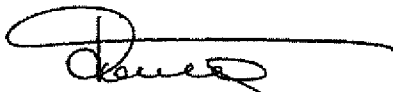
Lastly, I was disappointed in how the mandatory settlement conference unfolded. Your stated position received through Judge Freeman surprised me given our previous

Charles R. Kozak, Esq.
Re: DeChambeau v. Balkenbush
September 2, 2016
Page 2

telephone conversation about your desire to schedule this settlement conference. If there is any interest in resolving this case reasonably then we remain willing to have further conversations about this.

Very truly yours,

POLLARA LAW GROUP



Dominique A. Pollara
DAP:bf

1 [DISC]

2 DOMINIQUE A. POLLARA, Nevada SBN 5742

3 POLLARA LAW GROUP

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9 Attorneys for Defendants STEPHEN C. BALKENBUSH, ESQ.
10 and THORNDAL ARMSTRONG DELK BALKENBUSH &
11 EISINGER

12 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
13 IN AND FOR THE COUNTY OF WASHOE
14

15 ANGELA DeCHAMBEAU and JEAN-
16 PAUL DeCHAMBEAU, both individually
17 and as Special Administrator of the Estate
of NEIL DeCHAMBEAU,

18 Plaintiffs,

19 vs.

20 STEPHEN C. BALKENBUSH, ESQ.; and
21 THORDAHL ARMSTRONG DELK
BALKENBUSH & EISINGER, a Nevada
Professional Corporation,

22 Defendants.
23

CASE NO. CV-12-00571

Trial Date: January 17, 2017

24 DEFENDANTS' 16.1 PRETRIAL DISCLOSURES

25 Defendants STEPHEN C. BALKENBUSH, ESQ, and THORNDAL, ARMSTRONG,
26 DELK, BALKENBUSH & EISINGER, a Nevada professional corporation, by and through
27 their counsel, Pollara Law Group, hereby submit their pretrial disclosure of information in
28 accordance with an N.R.S. 16.1(4)(A)(B)(C):

1 I. LIST OF PROSPECTIVE WITNESSES, INCLUDING REBUTTAL WITNESSES

- 2 a. Stephen Balkenbush, Esq., c/o Pollara Law Group
- 3 b. Angela DeChambeau, c/o Charles Kozak, Esq.
- 4 c. Jean Paul DeChambeau, c/o Charles Kozak, Esq.
- 5 d. David Smith, M.D., Renown Institute for Heart & Vascular Health, 1500 E.
- 6 2nd Street, Suite 400, Center B, Reno, NV 89502.
- 7 e. Fred Morady, M.D., Professor of Internal Medicine, McKay Professor of
- 8 Cardiovascular Disease, University of Michigan, 1500 E. Medical Center
- 9 Drive, SPC 5853, Ann Arbor, MI 48106-5853.
- 10 f. Rahul Doshi, M.D., 1520 San Pablo Street, Suite 4600, Los Angeles, CA 90033.
- 11 g. Hugh G. Calkins, M.D., Johns Hopkins Hospital, Carnegie Building, Room
- 12 530, 600 North Wolfe St., Baltimore, MD 21287-0409.
- 13 h. Anil Bhandari, M.D., Los Angeles Cardiology Associates, 1245 Wilshire
- 14 Blvd., Suite 703, Los Angeles, CA 90017.
- 15 i. Peter Durney, Esq., Durney & Brennan, 6900 So. McCarran Blvd., Suite 2060,
- 16 Reno, NV 89509 or 190 West Huffaker Lane, Suite 406, Reno, NV 89511.
- 17 j. Michael Navartil, Esq., John H. Cotton & Associates, Ltd., 7900 West Sahara
- 18 Avenue, Suite 200, Las Vegas, NV 89711.
- 19 k. Thomas Vallas, Esq., Hoy Chrissinger Kimmel Vallas, PC, 50 West Liberty
- 20 Street, Suite 840, Reno, NV 89501.
- 21 l. Edward J. Lemons, Esq., 6005 Plumas St., Suite 300, Reno, NV 89519-6069.

22 II. LIST OF PROPOSED EXHIBITS AND DOCUMENTS, INCLUDING REBUTTAL

23 EXHIBITS

- 24 a. The file of Stephen Balkenbush, Esq. in the underlying case, Bates Stamped
- 25 SB0001-SB02835, including emails SB2836-2930. It is anticipated the medical
- 26 records from Reno Heart Physicians (pages SB01071-01230) and Renown
- 27 Regional Medical Center, formerly known as Washoe Medical Center, (pages
- 28 SB01329-01501) will be used in the medical malpractice portion of the case,

1 together with the expert disclosures, expert reports and curriculum vitae
2 of the physicians that were disclosed in the underlying case. It is anticipated
3 that the balance of the file will be used during the legal malpractice case.

4 b. The email from plaintiffs' expert Mark Seifert, M.D. to plaintiff's counsel
5 Charles Kozak, Esq. dated April 26, 2013. This document was discovered on
6 September 19, 2013. It is not intended to be marked as an exhibit or
7 introduced at the time of trial but it is defendants' position this document
8 needs to be identified as a potential impeachment document.

9 c. The FICA summary of earnings for Mr. and Mrs. DeChambeau.

10 d. The file from White, Meany & Weatherall, Bates Stamped WMW00001-
11 WMW00064.

12 e. The EPS tape (in plaintiffs' counsel's possession.)

13 f. The current curriculum vitae of Fred Morady, M.D.

14 g. The current curriculum vitae of Hugh Calkins, M.D.

15 h. The current curriculum vitae of Anil Bhandari, M.D.

16 Dated: September 1, 2016

17 POLLARA LAW GROUP

18
19 By 

20 DOMINIQUE A. POLLARA, ESQ.

21 Nevada Bar No. 5742

22 3600 American River Drive, Suite 160

23 Sacramento, CA 95864

24 (916) 550-5880

25 Attorneys for Defendants STEPHEN C.

26 BALKENBUSH, ESQ. and THORNDAL,

27 ARMSTRONG, DELK, BALKENBUSH

28 and EISINGER, a Nevada Professional
Corporation

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☒ placing an original or true copy thereof in a sealed envelope, postage prepaid, in the United States mail at Reno, Nevada.

☐ personal delivery.

☐ facsimile (courtesy copy).

☐ electronically served by the Court upon filing of document(s).

☐ email (courtesy copy).

☐ UPS/Federal Express or other overnight delivery.

fully addressed as follows:

Representing
Plaintiffs

Phone/Fax/E-Mail
(775) 322-1239 - phone
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Christina Banks
An employee of RENO CARSON
MESSENGER

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Jacqueline Bryant
Clerk of the Court
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EXHIBIT 12

EXHIBIT 12

1
2
3 **AFFIDAVIT OF DR. MARK SEIFERT, M.D.**

4 STATE OF Arizona)
5 COUNTY OF Maricopa) SS.

6 COMES NOW WHO DEPOSES AND SAYS AS FOLLOWS,

7 I, Dr. Mark Seifert, being first duly sworn, deposes and states as follows:

- 8 1. On January 18, 2017, I testified as an expert witness in the field of cardiac electrophysiology in
9 the case of Neil DeChambeau et al v Steven Balkenbush.
10 2. Subsequent to that testimony I reviewed the testimony of Dr. Hugh Calkin, M.D., who testified
11 on behalf of the defense in the case.
12 3. I was notified by Plaintiff's counsel that he wished to make me available as a rebuttal expert to
13 Dr. Calkin. I agreed to testify by video or skype on the following Monday, January 23, 2016,
14 if the court approved.
15 4. My testimony would have been as follows:
16 a. Dr. Calkin testified that he believed Dr. Smith's testimony that he commenced a
17 pericardiocentesis procedure immediately following the cardiac arrest at 12:39.
18 b. However, Dr. Calkin admitted there was nothing in the medical records to substantiate
19 Smith's testimony that he had immediately started the pericardiocentesis.
20 c. He also admitted that it was not documented in the records that there was a
21 pericardiocentesis initiated at 12:41.
22 d. He further testified that he hadn't seen anything showing Smith waited to perform the
23 pericardiocentesis until the echo machine was present.
24
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1 e. He then testified that his basis for believing Dr. Smith over the medical record was that the
2 suggestion that he (Smith) just sat there sitting on his hands waiting ten minutes for the echo
3 machine to come up...of course you wouldn't do that. No electrophysiologist would sit
4 there with a patient getting CPR
5 And do nothing.
6

7 f. The medical records contradict Dr. Smith's testimony in the following regards.

8 (1) The medical scribe in the operating room did not note in the code blue sheet that Dr.
9 Smith commenced a pericardiocentesis at 12:41. This was her sole responsibility
10 during the emergency.
11

12 (2) Dr. Smith's own record in his Procedure Report clearly states as follows:

13 (3) Dr. Smith testified he had no trouble placing the needle in order to initiate the
14 pericardiocentesis upon visualizing a fairly large pericardial effusion once the echo
15 machine arrived in the catheter lab at 12:49.
16

17 (4) Dr. Smith in his own records reported the effusion was 300 ccs of blood when
18 evacuated.
19

20 (5) The Code records state that the pulse was restored immediately after the
21 pericardiocentesis was completed at 12:54.

22 (6) Had Dr. Smith begun the pericardiocentesis when he said he did at 12:41 instead of
23 calling and waiting for the stat echo before doing so, it would have resulted in a
24 pulse being restored within just a few minutes, typically under 5 minutes time. This
25 is particularly true when the pericardiocentesis procedure is described as not being a
26 difficult one to perform, there is not a large effusion volume to withdraw, and there
27 is no ongoing bleeding into the pericardial space following initial drainage.
28

- 1 5. Unfortunately, Dr. Calkin's opinion that Dr. Smith did not breach the standard of care in this
2 case, is based entirely on his personal belief, rather than the medical record. His conclusions are
3 inconsistent with the overwhelming medical and scientific evidence in this case and amount to
4 little more than personal speculation.
5
6 6. I would further testify that my opinions are consistent with Dr. Morady, the other defense expert
7 in this case. His affidavit states:

8 "10. I believe to a reasonable degree of probability that the care provided by
9 David Smith, M.D. was negligent and breached the standard of care to Neil
10 DeChambeau in the following particulars:
11

12 a) David Smith M.D. failed to timely diagnose that Neil DeChambeau
13 was experiencing cardiac tamponade.
14

15 b) David Smith, M.D. failed to timely perform a pericardiocentesis
16 procedure on Neil DeChambeau.
17

18 e) A transthoracic echocardiogram was not ordered until approximately
19 12:44 p.m. on September 7, 2006 and did not arrive until approximately
20 12:49 p.m. The transthoracic echocardiogram was performed too late to
21 benefit Neil DeChambeau."

- 22 7. I would further testify that all of my testimony regarding my opinions in this case are to a
23 reasonable degree of medical probability.

24 ///

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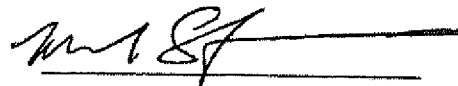
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3
4 FURTHER YOUR AFFIANT SAYETH NAUGHT.

5 Dated this 8th day of February 2017.

6
7 

8 DR. MARK SEIFERT

9
10 Subscribed and sworn to before me
11 this 8 day of February 2017.

12 
13 Notary Public



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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 ANGELA DeCHAMBEAU and JEAN-
10 PAUL DeCHAMBEAU, both individually
and as Special Administrators of the Estate
11 of NEIL DeCHAMBEAU,

12 Plaintiffs,

13 vs.

14 STEPHEN C. BALKENBUSH, ESQ.; and
THORNDAL ARMSTRONG DELK
15 BALKENBUSH & EISINGER, a Nevada
Professional Corporation,

16 Defendants.
17

Case No. CV 12-00571
Dept. 7

18 AMENDED JUDGMENT ON JURY VERDICT
19

20 WHEREAS, pursuant to the Court Order dated August 27, 2013 granting
21 Defendants' Motion to Bifurcate the underlying medical malpractice matter from the legal
22 malpractice matter, trial as to the medical malpractice matter commenced January 17, 2017,
23 Honorable Patrick Flanagan, District Court Judge Presiding, at the completion of which,
24 after due deliberation, the jury rendered a verdict finding "No Negligence" by David
25 Smith, M.D. in the underlying medical malpractice matter, and as a verdict of "Negligence"
26 by David Smith, M.D., as a matter of law, is a necessary element of the legal malpractice
27
28

1 claim asserted against Defendants STEPHEN C. BALKENBUSH, ESQ. and THORNDAL
2 ARMSTRONG DELK BALKENBUSH & EISINGER, the Court rules, finds, and orders as
3 follows:
4

5 IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered on the
6 Plaintiffs' complaint in favor of Defendants STEPHEN C. BALKENBUSH, ESQ. and
7 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER and the action will be
8 dismissed with prejudice, and Defendants STEPHEN C. BALKENBUSH, ESQ. and
9 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER shall recover their costs
10 of suit in the amount of Seventy-Five Thousand, Eight Hundred Eighty-Six Dollars and
11 Forty-Nine Cents (\$75,886.49).
12
13

14 Dated: *FEBRUARY 13, 2017.*
15

16 *Patrick Flanagan*
17 HONORABLE PATRICK FLANAGAN
18 DISTRICT JUDGE
19
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EXHIBIT 1

EXHIBIT 1

FILED

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Joey Orduna Hastings

Clerk of the Court

Transaction # 2805996

1 CHARLES R. KOZAK, ESQ.

2 Nevada State Bar No. 11179

3 1225 Tarleton Way

4 Reno, NV 89523

(775) 622-0711

5 Kozak131@charter.net

6 Attorney for the Plaintiff

7 **IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA**

8 **IN AND FOR THE COUNTY OF WASHOE**

9
10 ANGELA DECHAMBEAU and
11 JEAN-PAUL DECHAMBEAU, both.

Case No.

12 Individually and as SPECIAL
13 ADMINISTRATORS of the ESTATE
14 of NEIL DECHAMBEAU,

Dept. No.

15
16 Plaintiff,

17 Vs.

18 STEPHEN C. BALKENBUSH, ESQ.,
19 THORNDAL, ARMSTRONG, DELK,
20 BALKENBUSH and EISINGER,
21 A Nevada Professional Corporation,
22 & DOES I through X, inclusive,

23 Defendants.

24 **COMPLAINT**

25 **COME NOW** Plaintiffs, ANGELA DECHAMBEAU and JEAN-PAUL

26 DECHAMBEAU both individually and as SPECIAL ADMINISTRATORS of the ESTATE of
27 NEIL DECHAMBEAU, by and through their attorney, CHARLES R. KOZAK, ESQ., and for
28 their COMPLAINT against the Defendants, STEPHEN C. BALKENBUSH, ESQ.,
THORNDAL, ARMSTRONG, DELK, BALKENBUSH and EISINGER, a Nevada Professional

1 Corporation, and DOES I – X, hereby allege as follows:

2 **PARTIES**

3
4 1. Plaintiff, ANGELA DECHAMBEAU, at all material times hereto was a competent, adult
5 resident of Reno, Nevada including at the time of the incidents set forth in this Complaint. At
6 all material times hereto, said Plaintiff was the wife and/or widow of NEIL DeCHAMBEAU.

7 2. Plaintiff, JEAN-PAUL DECHAMBEAU, at all material times hereto was a competent,
8 adult resident of Reno, Nevada including at the time of the incidents set forth in this Complaint.
9 At all material times hereto, said Plaintiff was the son and/or survivor of NEIL DeCHAMBEAU.

10 3. On September 8, 2006, NEIL DeCHAMBEAU, the husband of Plaintiff, ANGELA
11 DECHAMBEAU and the father of Plaintiff, JEAN-PAUL DECHAMBEAU, died while
12 undergoing a procedure on his heart at Washoe Medical Center in Reno, Nevada.

13
14 4. On or about December 26, 2006 Plaintiffs, ANGELA DECHAMBEAU and JEAN-
15 PAUL DECHAMBEAU, were appointed Special Administrators of the Estate of NEIL
16 DeCHAMBEAU

17
18 5. Defendant, STEPHEN C. BALKENBUSH, ESQ. (hereinafter "BALKENBUSH"), at all
19 material times hereto was a competent, adult resident of Reno, Nevada, licensed to practice law
20 in the State of Nevada.

21
22 6. Defendant, THORNDAL, ARMSTRONG, DELK, BALKENBUSH and EISINGER
23 (hereinafter "THORNDAL LAW FIRM" or "TADBE"), at all material times hereto was and is a
24 Reno, Nevada law firm and resident with offices located at 6590 South McCarran Blvd., Suite B,
25 Reno, Nevada 89509. THORNDAL LAW FIRM members and employees at all material times
26 hereto were and continue to be engaged in the practice of law in Reno, Washoe County, Nevada.

27
28 7. Defendants, JOHN DOES I – X, are individuals who reside in Nevada and who may have

1 aided and abetted other defendants in the actions which form the basis for the Plaintiffs' various
2 complaints as set forth herein below and thereby may be liable to Plaintiffs as discovery may
3 reveal. Upon their true identities becoming known by Plaintiffs, Plaintiffs' counsel will move the
4 Court to have them added as Named Defendants.
5

6 **FIRST CAUSE OF ACTION**
7 **(Legal Malpractice)**

8 8. On or about September 5, 2007, Defendants filed a medical malpractice lawsuit on behalf
9 of the Plaintiffs, alleging that DAVID SMITH, M.D., BERNDT, CHANEY-ROBERTS,
10 DAVEE, GANCHAN, ICHINO, JUNEAU, NOBLE, SEHER, SWACKHAMER, THOMPSON,
11 WILLIAMSON and ZEBRACK, LTD., a Nevada Professional Corporation, DAVID KANG,
12 M.D., RINEHART, LTD., a Nevada Professional Corporation and DOES 1 – 10 caused the
13 wrongful death of NEIL DeCHAMBEAU on September 8, 2006 through medical professional
14 negligence.
15

16 9. Defendant, BALKENBUSH was the lead attorney among the Defendants named herein.
17 As such he retained two medical experts, Cardiologist FRED MORADY, M.D. and
18 Anesthesiologist WILLIAM MEZZEI, M.D. Both of these experts provided sworn expert
19 witness reports in which they stated that Cardiologist, DAVID SMITH, M.D. and
20 Anesthesiologist DAVID KANG, M.D. had failed to meet the standard of care in treating NEIL
21 DeCHAMBEAU and thereby caused the death of NEIL DeCHAMBEAU in the operating room
22 on September 7, 2006.
23

24 10. As set forth in paragraphs 20 through 31 of Defendants' medical malpractice lawsuit filed
25 on behalf of Plaintiffs, the defendants hereto alleged the following facts, with their signature to
26 said lawsuit verifying the truth thereof:
27
28

20. On September 7, 2006, Neil DeChambeau was [sic] 57 year old male in good physical health who was admitted to Washoe Medical Center to undergo an atrial fibrillation ablation procedure to address a previously diagnosed paroxysmal atrial fibrillation.
21. On the morning of September 7, 2006, Neil DeChambeau was brought to the cath lab at Washoe Medical Center where David Kang, M.D. Induced anesthesia. Neil DeChambeau was intubated and anesthesia was maintained throughout the atrial fibrillation ablation procedure.
22. At or about 12:39 p.m., Neil DeChambeau suddenly developed cardiac arrest. In response to the cardiac arrest cardio pulmonary resuscitation was instituted on Neil DeChambeau and multiple doses of vasoactive drugs were administered as chest compressions were performed.
23. At or about 1:00 p.m., an echo-cardiogram of the heart showed a cardiac tamponade.
24. At or about 1:00 p.m., a pericardiocentesis was performed and approximately 300 ccs of blood were removed from Neil DeChambeau's pericardial sac.
25. David Smith, M.D. failed to timely diagnose that Neil DeChambeau experienced a cardiac tamponade.
26. David Smith, M.D. failed to timely perform a pericardiocentesis procedure on Neil DeChambeau.
27. David Kang, M.D. failed to timely diagnose that Neil DeChambeau experienced a cardiac tamponade.
28. David Kang, M.D. failed to timely recommend to David Smith, M.D. that he perform a pericardiocentesis [sic] on Neil DeChambeau.
29. David Kang, M.D. failed to timely perform a pericardiocentesis [sic] on Neil DeChambeau.
30. The conduct of David Smith, M.D. set forth in paragraphs 25 and 26 fell below the standard of care owed by David Smith, M.D. to Neil DeChambeau and caused Neil DeChambeau to suffer irreversible brain damage and death.
31. The conduct of David Kang, M.D. set forth in paragraphs 27, 28, and 29 fell below the standard of care owed by David Kang, M.D. to Neil DeChambeau and caused Neil DeChambeau to suffer irreversible brain damage and death.
11. Trial of the above described medical malpractice suit was eventually set for July 12,

1 2010.

2 12. In June 2010, Plaintiffs were informed by BALKENBUSH that their case had been
3 dismissed against all of the Defendants.
4

5 13. In actuality, BALKENBUSH had stipulated to a dismissal with prejudice of their
6 Complaint on May 5, 2010 **without ever informing Plaintiffs he was doing this and without**
7 **ever obtaining their permission or authority to do so before he did.**

8 14. BALKENBUSH'S stated reason for dismissing Plaintiffs' case was that as a result of a
9 review of an EPS tape recorded during the operation, DR. MORADY, one of Plaintiffs' experts,
10 had reversed his opinion as to the negligence of DR. DAVID SMITH. BALKENBUSH never
11 provided Plaintiffs with any written communication from DR. MORADY to him in which DR.
12 MORADY explained his alleged reversal of his original opinion of DR. SMITH'S malpractice.
13 In fact no such opinion exists in any written form.
14

15 15. No reason was given to Plaintiffs by BALKENBUSH for the dismissal of the case
16 against DR. KANG. They were simply told that the case against DR. KANG had been dismissed
17 with prejudice as well a month or so after BALKENBUSH had done so without Plaintiffs'
18 knowledge or permission.
19

20 16. At no time did BALKENBUSH conduct any written discovery of any Defendants in the
21 case, other than to request production of the medical records of the various Defendants.
22

23 17. The critical issue in the medical malpractice case was the timing of DR. SMITH'S
24 reaction to NEIL DeCHAMBEAU going into cardiac arrest during the scheduled six (6) hour
25 cardiac ablation procedure. Instead, the procedure lasted over nine (9) hours.
26

27 18. At no time during the pendency of the medical malpractice case from its filing date of
28 September 5, 2007 until BALKENBUSH dismissed it on May 5, 2010 without Plaintiffs'

1 knowledge or permission, did BALKENBUSH take the depositions of DR. SMITH, DR. KANG,
2 DR. KROLLI (a resident physician who was present with DR. SMITH and DR. KANG during
3 the procedures performed on NEIL DeCHAMBEAU on September 7, 2010), or the thoracic
4 surgeon who was called in to consult after the patient had suffered cardiac arrest due to a hole
5 being punched in the decedent's heart during the ablation procedure. These physicians were all
6 present in the operating room and witnessed each other's actions, omissions and malfeasance
7 which caused the premature death of NEIL DeCHAMBEAU.
8

9
10 19. In order to meet the acceptable standard of care for physicians, DR. SMITH and/or DR.
11 KANG should have immediately performed the procedure known as "pericardiocentesis"
12 immediately after becoming aware that the patient had gone into cardiac arrest. Instead, both
13 DR. SMITH and DR. KANG violated the standard of care by waiting until an echocardiogram
14 could be ordered and performed, after a useless ten (10) minutes of CPR were administered. By
15 the time the futile CPR measures had been performed (they did absolutely no good as the CPR
16 only acted to push the blood out of the heart through the tamponade) and then the
17 echocardiogram ordered and performed, the patient's brain had been deprived of oxygen for at
18 least ten (10) minutes, resulting in irreversible brain damage.
19

20 20. The Defendants provided an EPS tape allegedly recorded during the operation to
21 BALKENBUSH. Defendants claimed this tape contradicted the written medical records and
22 proved that DR. SMITH had acted in accordance with the acceptable standards of practice when
23 responding to the cardiac arrest of NEIL DeCHAMBEAU. Other than DR. SMITH'S Counsel's
24 representations as to the authenticity of the EPS tape, BALKENBUSH made no attempt to verify
25 its authenticity or even explore the spoliation of evidence issues attendant with the isolated
26 appearance of the EPS tape long after the other medical records had been produced by the
27
28

1 Defendants. BALKENBUSH made no attempts through discovery to verify that the tape was
2 authentic or was in fact made during NEIL DeCHAMBEAU'S operation. BALKENBUSH also
3 failed to have the tape examined and tested by a properly credentialed expert to determine if the
4 tape had been tampered with or altered in any way. BALKENBUSH failed to use any discovery
5 tools whatsoever to determine whether the tape, if genuine, in any way exonerated DR. SMITH
6 and DR. KANG from medical malpractice in the operating room.
7

8 21. DR. SMITH'S own records of the events leading up to and causing the premature death
9 of NEIL DeCHAMBEAU, transcribed on September 8, 2006 specifically state:
10

11 At the end of the ablation, the patient had evidence of hemodynamic compromise
12 with hypotension and some bradycardia. Stat echocardiogram was performed,
13 which showed a fairly large pericardial effusion. CPR was also performed for
approximately 10 minutes.

14 Later in DR. SMITH'S transcription he repeats:

15 Please note that there was approximately 5 to 10 minutes of CPR.

16 22. A simple reading of the records in DR. SMITH'S own words immediately after the
17 operation confirms the opinions of DR. MORADY and DR. MESSEI, Plaintiffs' experts, that
18 DR. SMITH and DR. KANG, in delaying the pericardiocentesis until after futile CPR was
19 performed and then the echocardiogram ordered and performed instead of immediately doing the
20 pericardiocentesis, caused the needless death of NEIL DeCHAMBEAU on September 8, 2007.
21

22 23. This delay was medical malpractice and BALKENBUSH dismissed the case with no
23 sworn evidence to the contrary, without taking any Depositions, asking any Interrogatories,
24 making any Requests for Admissions and without giving Plaintiffs the chance to pursue their
25 Causes of Action with other counsel competent to handle a medical malpractice case as he,
26 **without their permission, dismissed their case with prejudice.**
27
28

1 24. The Defendants breached their duty to the Plaintiffs and failed to perform legal services
2 that met the acceptable standard of practice for attorneys handling medical malpractice cases in
3 the following respects:

4 A. Defendants failed to keep the Plaintiffs informed of the status of their case.

5 B. Defendants dismissed Plaintiffs case without consulting with Plaintiffs and obtaining
6 their consent before entering into an agreement with opposing counsel and dismissing Plaintiffs
7 case with prejudice.
8

9 C. Defendants failed to provide legal services reasonably required to investigate the
10 merits of Plaintiffs' case. In a wrongful death case involving medical malpractice, failure to
11 take depositions of the treating physicians and other physicians who were present in the
12 operating room where the fatal injury occurred violates the acceptable legal standard of care for
13 attorneys handling such cases. Furthermore, Defendants were negligent in not asking
14 Interrogatories, failing to make any Requests for Admissions or using any or the normal
15 discovery tools expected of litigation attorneys handling a medical malpractice case.
16

17 D. Defendants failed to provide Plaintiffs with the opportunity to obtain new counsel
18 who could have substituted in on the case and verified the reasonableness of DR. MORADY'S
19 claimed change of opinion approximately five (5) months prior to Trial or obtained another
20 expert cardiologist.
21

22 E. Defendants failed to properly investigate the authenticity of the EPS tape and to
23 allow the Plaintiffs to obtain a second opinion from qualified technical and/or medical experts
24 as to the significance of the EPS tape to the ultimate issues in the case. Defendants also failed
25 to investigate the spoliation of evidence issues attendant with a tape which had not been
26 produced with the other medical records, including whether the tape was even from the
27
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1 operation on NEIL DeCHAMBEAU on September 7, 2006 or whether the tape had been
2 tampered with or altered in any manner.

3 F. Defendants' actions and omissions were so egregious, wanton, willful, reckless and in
4 such complete disregard of Plaintiffs' rights that they are thereby liable for punitive or
5 exemplary damages.
6

7 **WHEREFORE**, Plaintiffs, ANGELA DECHAMBEAU and JEAN-PAUL
8 DECHAMBEAU, pray for the following relief against the Defendants and each of them for:
9

10 1. General damages, including damages for pain and suffering and disfigurement of the
11 decedent in an amount to be proven at trial.

12 2. Special damages, pecuniary damages for grief, loss of probable support,
13 companionship, love and affection in an amount to be proven at trial.
14

15 3. Punitive or exemplary damages.

16 4. All costs and expenses of this action, prejudgment interest and attorneys fees.

17 5. Such other and further relief as the Court deems equitable in the premises.

18 **WHEREFORE**, the Special Administrators of the Estate of Neil DeChambeau,
19 ANGELA DECHAMBEAU and JEAN-PAUL DECHAMBEAU, pray for relief on behalf of
20 said Estate against the Defendants and each of them for:
21

22 1. Special damages including medical expenses which the decedent incurred or sustained
23 before his death and for his funeral expenses.

24 2. Punitive or exemplary damages.

25 3. All costs and expenses of this action, prejudgment interest and attorneys fees.
26

27 \\\

28 \\\

1 4. Such other and further relief as the Court deems equitable in the premises.

2 Pursuant to NRS 239B.030 the undersigned certifies no Social Security numbers are contained in this document.

3 Dated this 5th day of March, 2012.

4
5
6 /s/ Charles R. Kozak
7 CHARLES R. KOZAK, ESQ.
8 Nevada State Bar No. 11179
9 1225 Tarleton Way
10 Reno, NV 89523
11 (775) 622-0711
12 Kozak131@charter.net
13 Attorney for the Plaintiff
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VERIFICATION

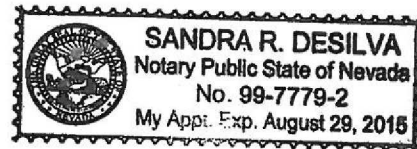
STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

ANGELA DeCHAMBEAU, under penalties of perjury being first duly sworn, deposes and says: That she is a Plaintiff in the above-entitled action, and has read the Complaint and Jury Demand, that the same is true of her own knowledge, except for those matters therein contained stated upon information and belief, and as to those matters she believes it to be true.

Angela DeChambeau
ANGELA DeCHAMBEAU

SUBSCRIBED and SWORN to before me
this 2nd day of March, 2012.

Sandra R. Desilva
NOTARY PUBLIC



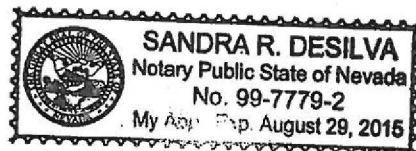
ACKNOWLEDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

On this 2nd day of March, 2012, personally appeared before me, ANGELA

DeCHAMBEAU, proven to me to be the person whose name is subscribed to the above instrument, and who acknowledged to me that she executed the foregoing Complaint and Jury Demand.

Sandra R. Desilva
NOTARY PUBLIC




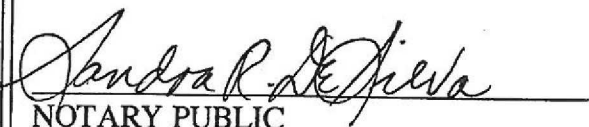
1
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3 VERIFICATION

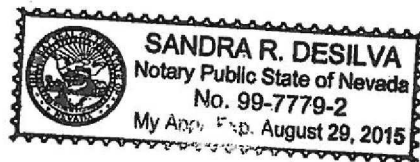
4 STATE OF NEVADA)
5) ss.
6 COUNTY OF WASHOE)

7 JEAN-PAUL DeCHAMBEAU, under penalties of perjury being first duly sworn,
8 deposes and says: That he is a Plaintiff in the above-entitled action, and has read the Complaint
9 and Jury Demand, that the same is true of his own knowledge, except for those matters therein
10 contained stated upon information and belief, and as to those matters he believes it to be true.
11

12
13
14 SUBSCRIBED and SWORN to before me
15 this 2nd day of March, 2012.


JEAN-PAUL DeCHAMBEAU

16
17 
18 NOTARY PUBLIC

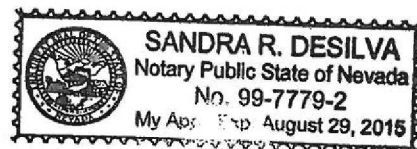


19 ACKNOWLEDGMENT

20 STATE OF NEVADA)
21) ss
22 COUNTY OF WASHOE)

23 On this 2nd day of March, 2012, personally appeared before me, JEAN-PAUL
24 DeCHAMBEAU, proven to me to be the person whose name is subscribed to the above
25 instrument, and who acknowledged to me that he executed the foregoing Complaint and Jury
26 Demand.

27 
28 NOTARY PUBLIC



IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELA DECHAMBEAU; AND
JEAN-PAUL DECHAMBEAU, BOTH
INDIVIDUALLY AND AS SPECIAL
ADMINISTRATORS OF THE
ESTATE OF NEIL DECHAMBEAU,

Appellant,

vs.

STEPHEN C. BALKENBUSH, ESQ.;
AND THORNDAL, ARMSTRONG,
DELK, BALKENBUSH &
EISNIGER, A NEVADA
PROFESSIONAL CORPORATION,

Respondent.

No. 72879

District Court Case Electronically Filed
May 12 2017 04:13 p.m.

DOCKETING STATEMENT
CIVIL APPEALS
Elizabeth A. Brown
Clerk of Supreme Court

1. Judicial District 2nd Department 7
County Washoe Judge Honorable Patrick Flanagan
District Ct. Case No. CV12-00571

2. Attorney filing this docketing statement:

Attorney Charles R. Kozak Telephone 775-322-1239
Firm Kozak Lusiani Law, LLC.
Address 3100 Mill Street, Suite 115, Reno, Nevada 89502

Client(s) Angela DeChambeau and Jean-Paul DeChambeau

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Dominique A. Pollara Telephone 916-550-5880
Firm Pollara Law Group
Address 3600 American River Drive, Suite 160, Sacramento, California 95864

Client(s) Stephen C. Balkenbush and Thorndal Armstrong Delk Balkenbush & Eisinger

Attorney Kim Mandelbaum Telephone 702-367-1234
Firm Mandelbaum Ellerton & McBride
Address 2012 Hamilton Lane, Las Vegas, Nevada 89106

Client(s) Stephen C. Balkenbush and Thorndal Armstrong Delk Balkenbush & Eisinger

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|-----------------------------------------------------------------|-------------------------------------------------------------------------|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input checked="" type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

DeChambeau et al vs. Balkenbush et al Supreme Court No. 64463
DeChambeau et al vs. Balkenbush et al Supreme Court No. 72004

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

DeChambeau et al vs. Balkenbush et al Washoe 2nd Judicial CV12-00571. 3/31/2017

8. Nature of the action. Briefly describe the nature of the action and the result below:

On September 8, 2006, Neil DeChambeau died while undergoing a heart procedure at Washoe Medical Center in Reno, Nevada. On or about September 5, 2007, Respondents filed a medical malpractice lawsuit on behalf of Appellants. Trial for the Medical Malpractice lawsuit was set for July 12, 2010. In June 2010, Appellants were informed by Respondents that their case had been dismissed against all of the Defendants. In actuality, Respondents had stipulated to a dismissal with prejudice of their Complaint on May 5, 2010 without ever informing Appellants they were doing this and without ever obtaining their permission or authority. The deadline for expert disclosures was set for February 17, 2013. Appellants objected to the late disclosure of Dr. Hugh Calkins as an expert witness on Sept. 2, 2016. The Court's of issuance of February 2, 2016 Scheduling Order and abuse of discretion in reopening discovery, as well as its permission for Calkins to testify as to a new theory of the case, prevented Appellants from having a fair trial under NRCP 59. Calkins testimony was based on his personal opinion and not substantiated by the medical record. His testimony was admitted and left unchallenged because Appellants' were denied a rebuttal witness.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Irregularities in discovery proceedings materially affected Appellants' Rights and prevented them from having a fair trial.
2. Dr. Calkins's testimony was not proper expert testimony.
3. Dr. Calkins submitted not expert witness report pursuant to NRS 16.1(A), (B), and (C).
4. Dr. Calkins did not base his opinions on the medical records.
5. Dr. Calkins testimony against Morady's affidavit raised a new theory of liability.
6. Abuse of discretion in denying Appellants a rebuttal expert witness.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

There are none known.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ N/A

☐ Yes

☒ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: When a case is remanded from the Nevada Supreme Court in a reversal of Summary Judgment, 22 days before the trial, does the trial judge abuse his discretion by allowing Respondents to re-open discovery when they represented, on the record at the time Summary Judgment was granted, that discovery was complete. Further, Respondents filed no motions to re-open discovery after Remand.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case should be retained by the Supreme Court pursuant to NRAP 17(a)(14) which states " Matters raising as a principal issue a question of statewide public importance..."

14. Trial. If this action proceeded to trial, how many days did the trial last? 4

Was it a bench or jury trial? Jury

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 1/25/2017

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served 1/27/2017

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☒ NRCP 50(b) Date of filing 2/8/2017

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion 3/31/2017

(c) Date written notice of entry of order resolving tolling motion was served 3/31/2017

Was service by:

☐ Delivery

☒ Mail

19. Date notice of appeal filed 4/17/2017

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1) 30 days after written notice of entry.

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---------------------------------------------------|---------------------------------------|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input checked="" type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order: A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial. An appeal may be taken from a judgment and order of a district court when there is an order denying a motion for a new trial. NRAP 3A(b)(2).

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Angela DeChambeau

Jean-Paul DeChambeau

Stephen Balkenbush

Thorndal, Armstrong, Delk, Balkenbush & Eisinger, a Nevada Professional Corporation

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

n/a

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Angela DeChambeau- Medical and Legal Malpractice.

Jean-Paul DeChambeau- Medical and Legal Malpractice.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Angela DeChambeau Jean DeChambeau
Name of appellant

Charles R. Kozak
Name of counsel of record

May 12, 2017
Date

/s/ Charles R. Kozak
Signature of counsel of record

Nevada Washoe County
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 12th day of May, 2017, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Dominique Pollara, 3600 American River Dr., Sacramento, California 95864;
Kim Mandelbaum, 2012 Hamilton Ln., Las Vegas, Nevada 89106;
Robert Vohl, 301 Flint St., Reno, Nevada 89501.

Dated this 12th day of May, 2017

/s/ Dedra L. Sonne
Signature

EXHIBIT LIST

EXHIBIT NO.	DOCUMENT	NO. PAGES
1	Complaint	13
2	Plaintiffs' Motion for a New Trial	159
3	Order dated 1/25/2017	3
4	Notice of Entry of Order	4
5	Amended Judgment on Jury Verdict	3
6	Notice of Entry of Order	7
7	Order dated 3/31/2017	8
8	Notice of Entry of Order	4