IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 72879

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 and EISINGER, A NEVADA PROFESSIONAL CORPORATION,

Respondent.

An Appeal from the Second Judicial District Court, Judge Patrick Flanagan, Case Number CV12-00571

APPELLANT'S OPENING BRIEF

CHARLES R. KOZAK, ESQ.
KOZAK LUSIANI LAW, LLC
Nevada State Bar #11179
3100 Mill Street, Suite 115
Reno, Nevada 89502
Telephone (775) 322-1239
Fax (755) 800-1767
chuck@kozaklusianilaw.com
ATTORNEYS FOR ANGELA DeCHAMBEAU and JEAN-PAUL DeCHAMBEAU

NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

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

Attorney of record for Appellants Angela DeChambeau and Jean-Paul DeChambeau is Charles R. Kozak, Esq. Kozak Lusiani Law, LLC.

Appellants Angela DeChambeau and Jean-Paul DeChambeau were represented in the underlying District Court case by Charles R. Kozak, Esq.

There exists no publicly held company nor corporation affiliated with Kozak Lusiani Law, LLC.

Dated this 8th day of September 2017.

/s/ Charles R. Kozak
Charles R. Kozak, Esq.
Attorney for Appellants

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JURISDICTIONAL STATEMENT

This Appeal concerns a Judgment after a Jury Verdict on a Legal Malpractice case with an underlying Medical Malpractice case brought pursuant to Article 6 §4 of the Nevada Constitution. Notice of Entry of the District Court's Order was filed and served on February 14, 2017. A0268-A0273 @Vol. 2. Notice of Appeal was filed and served on April 17, 2017. A0286-A0288 @Vol. 2.

ROUTING STATEMENT

There is no subparagraph under NRAP 17 pertaining to an appeal from a Judgment after a Jury Verdict. This matter was previously heard by the Supreme Court in #64463 due to the appeal of an Order granting an NRCP 56 Summary Judgment Motion, prior to the requirement for a routing statement, but it would appear that this matter should be assigned to the Court of Appeals.

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STATEMENT OF ISSUES

1)Whether the Trial Court Exceeded its Discretion by Issuing a Scheduling Order Modifying Time for Expert Disclosures Without Motion.

2)Whether the Trial Court Exceeded its Discretion by Issuing a Scheduling Order Modifying Time for Expert Disclosures Without Good Cause.

3)Whether the Court Erred in Admitting Expert Testimony not Based on Medical Records Pursuant to Hallmark Factors.

4)Whether Calkins Expert Testimony Falls Below Expert Standards because it Fails to Present an Alternative Theory.

5)Whether the Court Erred in Admitting Calkins' Testimony Without an Expert Report.

6)Whether it was an Abuse of Discretion for the Court to Deny Plaintiffs a Rebuttal Expert Witness

STATEMENT OF CASE

This Court's Pretrial Order, entered April 30, 2012, states that "A continuance of trial does not extend the deadline for completing discovery. A request for an extension of the discovery deadline, if needed, must be included as part of any motion for continuance." A 0023:1-3 @Vol. 1. Defendants did not request a discovery extension or move for continuance. Plaintiffs' counsel sent defense counsel a letter, dated September 4, 2013, stating that they "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." A 0043 @Vol. 1. The trial court granted Defendants' summary judgment motion on September 24, 2013, which Plaintiffs appealed. A 0057-59 @Vol. 1. On November 24, 2015, the Supreme Court reversed and remanded the matter because a triable issue of fact existed. The order remanded the case "for proceedings consistent" with that order. The order did not remand the case to reopen discovery or to procedurally alter the case from the point when Summary Judgment had been granted. A 0060-64 @Vol. 1. A 0060-64 @Vol. 1. It had been only twenty (20) days until trial when the summary judgment motion was granted; yet, the trial court issued a new Scheduling Order on February 2, 2016, nearly two and a half years after summary judgment in 2013. A 0067-70 @Vol. 1.

Defendants had already made their expert disclosures on June 14, 2013. A 0036-39 @Vol. 1. In the Joint Case Conference Report, the parties "agreed" that the final date for "expert disclosures" would be 120 days prior to trial or June 17, 2013 and discovery would close 90 days prior to trial or July 16, 2013. A 0034:22-24 @Vol. 1. Therefore, *discovery had closed two years and four months prior* to the Supreme Court Remand on November 24, 2015. No further discovery or disclosure should have been allowed. The case only should have been set and proceeded to trial.

Yet, the District Court made a Scheduling Order to the contrary, without motion from either party and without good cause, stating that initial expert disclosures be made "on or before September 3, 2016" and that all discovery was to be completed by "December 2, 2016." A 0067:26-0068:3 @Vol. 1.

The Scheduling Order was entered Over Plaintiffs' objections and their Motion to Strike, filed November 15, 2016, and despite inconsistencies with its own Pretrial Order, the trial court permitted Defendants to name Calkins as their expert and allowed him to testify at trial. A 0086-0122 @ Vol. 1.The Judgment on Jury Verdict, dated January 25, 2017, states that the jury found no negligence by Dr. Smith in the underlying medical malpractice matter, which was found to negate an element required under Plaintiff's legal malpractice claim. A 0247-48 @ Vol. 2.

STATEMENT OF FACTS

Plaintiffs Angela DeChambeau and Jean-Paul DeChambeau brought this suit regarding the death of their husband and father, due to legal malpractice in their underlying medical malpractice suit. Neil DeChambeau, a 57-year-old accountant went into Renown hospital for a coronary ablation procedure to be performed by a cardiologist named Dr. David R. Smith. In this procedure, a wire is inserted in the groin and then electronic impulses are sent to the heart to deaden certain nerves causing an irregular heartbeat. A 0001-12 @Vol. 1. During the process Dr. Smith burned a hole in the pericardial sac surrounding the heart. This caused bleeding into the sack which resulted in cardiac arrest. When this happens, the accepted procedure is for the physician to immediately open the chest and place his thumb on the hole blocking further hemorrhage and at the same time insert a needle into the sack to evacuate the blood from the pericardial sac. (periocardiocentesis). However, Dr. Smith froze and did not do this procedure. Instead he ordered an electrocardiogram (the machine was not in the operating room) to observe the heart to see where the perforation had occurred. By the time it was hooked up, at least ten (10) minutes lapsed and Mr. DeChambeau was brain dead. A 0001-12 @Vol. 1.

Mrs. DeChambeau retained Attorney Stephen Balkenbush to represent her in the wrongful death case against Dr. Smith. A 0001-12 @Vol. 1. However, Mr.

Balkenbush had no experience as a plaintiff's medical malpractice lawyer, let alone experience in handling a wrongful death claim. He did hire a competent expert, Dr. Morady, one of the foremost authorities and pioneers in the electrophysiology field. A 0001-12 @Vol. 1. Dr. Morady practices and teaches at the University of Michigan hospital. Dr. Morady submitted an affidavit stating that Dr. Smith was negligent and suit was filed. A 0001-12 @Vol. 1. Dr. Smith was represented by Ed Lemons, probably the most experienced medical malpractice attorneys in Northern Nevada. Virtually no discovery was done by Mr. Balkenbush and trial date was set for July 2010. A 0001-12 @Vol. 1.

When Mr. Balkenbush contacted his expert, Dr. Morady, he had changed his opinions and no longer wished to testify on behalf of Mrs. DeChambeau. Dr. Morady gave no reason for his change in opinion. Mr. Balkenbush summoned Mrs. DeChambeau and her son and advised they dismiss the case. Mrs. DeChambeau and her son followed Mr. Balkenbush's advice and dismissed the case with prejudice on May 5, 2010. A 0001-12 @Vol. 1. Mrs. DeChambeau then obtained an opinion from the Kozak Law Firm that Mr. Balkenbush had committed malpractice for many reasons including:

1. Failure to ascertain why Dr. Morady was withdrawing as an expert before advising the client to dismiss the case.

2. Failure to obtain another expert and move for a continuance due to the first expert withdrawing.

3. Lack of competence in prosecuting the case to a conclusion.

4. Failure to keep Dr. Morady informed of developing facts in the case.

Kozak retained Dr. Richard Seifert, head of the electrophysiological department at a Phoenix Hospital. Dr. Seifert opined that Dr. Smith was negligent in not performing a periocardiocentesis immediately after "code blue" in the operating room. Kozak discovered that the anesthesiologist, Dr. Kang's, counsel, Mr. Navrotil, had contacted Mr. Balkenbush on the day before he called Dr. Morady to determine why he was withdrawing as an expert. Mr. Navrotil, informed Balkenbush that Kang observed that Dr. Smith had not commenced the periocardiocentesis immediately, but had waited for the electrocardiogram to be hooked up. Thus, the ten (10) minute delay. Mr. Balkenbush failed to communicate this critical information to Dr. Morady.

Upon learning all this information, Kozak filed suit on behalf of the Plaintiffs on March 12, 2012. A 0001-12 @Vol. 1. On March 28, 2012, Defendants filed their Answer. A 00013-19 @Vol. 1. On April 30, 2012, this Court entered its Pretrial Order. A 00020-26 @Vol. 1. Regarding discovery, the Order states: "A continuance of trial does not extend the deadline for completing discovery. A request for an extension of the discovery deadline, if

needed, must be included as part of any motion for continuance." A 0023:1-3 @Vol. 1. Case conference occurred on May 9, 2012. On May 29, 2012, an Application for Setting established the trial date of October 14, 2013. A 0027-28 @Vol. 1. August 17, 2012, the parties filed a Joint Case Conference Report. A 0029-35 @Vol. 1. The parties "agreed" that the final date for "expert disclosures" was 120 days prior to trial or June 17, 2013 and discovery would close ninety (90) days prior to trial or July 16, 2013. A 0034:22-24 @Vol. 1.

Then the strangest thing happened. June 14, 2013, Defendants counsel, Piscevich, designated Dr. Morady as her own expert, with four other experts. A 0036-38 @Vol. 1. On July 11, 2013, a Stipulation and Order to Amend Joint Case Conference Report allowed a few depositions of lay witnesses, but there were no other changes to the dates set forth in the Joint Case Conference Report. A 0040-42 @Vol. 1. On August 14, 2013, Defendants filed their Motion for Summary Judgment. A 0044@Vol. 1.

In a letter to Defendants' counsel dated September 4, 2013, Plaintiffs' counsel confirmed: "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... The discovery cut off has long passed for any discovery depositions of any other medical experts." A 0043 @Vol. 1.

On September 3, 2013, Plaintiffs filed their Opposition to Motion for Summary Judgment and on September 6, 2013, Defendants filed their Reply. Following oral argument on September 24, 2013, this Court granted Defendants' Motion for Summary Judgment. A 0044@Vol. 1. The Court's Order came 20 days before the date set for trial. A 0027-28 @Vol. 1.

Plaintiffs appealed. A 0057-59 @Vol. 1. Ms. Piscevich retired during the appeal process and the Dominic law firm took over the case. Prior to the hearing on the motion for Summary Judgement, Plaintiffs' counsel learned Dr. Morady would not be coming to trial. On November 24, 2015, the Supreme Court entered its Order of Reversal and Remand. A 0060-64 @Vol. 1. The Supreme Court returned the matter "to the district court for proceedings consistent with this order." As noted above, at the time the Summary Judgement motion was granted, the case was 100% ready for trial, including Motions in Limine. No further discovery or motions should have been allowed. A 0027-28 @Vol. 1.

Nowhere in the Order for Reversal and Remand did it state that discovery was re-opened, nor did the Supreme Court's decision altered discovery deadlines. A 0060-64 @Vol. 1. The trial court's April 30, 2012 Pretrial Order specifically stated that a "continuance of trial does not extend the deadline for completing discovery" and a request for such extension must be made by Motion. A 00020-26 @Vol. 1.

Although no such Motion was made, the trial court entered a Scheduling Order on February 2, 2016 that "initial expert disclosures" be made "on or before September 3, 2016" and that all discovery be completed by "December 2, 2016". A 00067:26-68:3 @Vol. 1. The court's Scheduling Order clearly contradicts its Pretrial Order. A 00067:26-68:3 @Vol. 1; A 00020-26 @Vol. 1. Expert disclosures were completed by Defendants on June 14, 2013, thirty-two months prior to the Scheduling Order. A 0036-38 @Vol. 1.

Nonetheless, on September 2, 2016, Defendants submitted a Disclosure identified Fred Morady, M.D., David Smith, M.D., Edward Lemons, Esq., Michael Navratil, Esq., Peter Durney, Esq. and, for the first time, Hugh Calkins, M.D. A 0071-77 @Vol. 1. In a letter dated September 28, 2016, Plaintiffs' counsel addressed the Disclosure: "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. Calkin, Bhandari and Doshi disclosed as experts in this case?" A 0082 @Vol. 1.

In her letter dated October 18, 2016, Dominique Pollara responded that neither Bhandari nor Doshi have been disclosed as experts but Dr. Calkin is being disclosed as an expert pursuant to the September 2, 2016 Disclosure. A 0083 @Vol. 1.

In his letter dated October 27, 2016, Plaintiffs' counsel Craig Lusiani informed Pollara expert disclosures cut off one hundred (120) days prior to trial on October 14, 2013 pursuant to the Joint Case Conference Report of August 17, 2012. He stated that there was no agreement to extend any discovery since that date and, noted that at a recent Settlement Conference Plaintiffs' position was, and continues to be, that there was no further disclosure of experts possible. A 0084-85 @Vol. 1.

Expert disclosure of Calkin came fifty-four (54) months after filing the Complaint, thirty-nine (39) months after the agreed upon deadline for expert disclosures, thirty-eight (38) months after the deadline for discovery, and ten (10) months after the Supreme Court's Order of Reversal. A 0060-64 @Vol. 1.

The matter proceeded to trial on January 17, 2017. Despite Plaintiffs' Motions in Limine to exclude Dr. Calkins testimony, and despite his failure to submit an expert witness report pursuant to NRS 16.1(A), (B), and (C), Calkins was allowed to testify. A 0086-122 @Vol. 1. Moreover, Calkins presented trial testimony in violation of the requirement in *Daubert* that expert opinions be based on reliable or trustworthy scientific evidence. *Daubert v. Merell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-594 (1993).

In response, Plaintiffs called their expert Dr. Siefert in rebuttal to Calkins's testimony. A 0262-0265 @Vol. 2. Plaintiffs anticipate the argument that a rebuttal

witness to Calkins was not designated by the deadline stated in the 2016 Scheduling Order. However, Plaintiffs have challenged and continue to object to the Scheduling Order as an irregularity in the proceedings and an abuse of discretion that prejudiced Plaintiffs and materially affected the outcome of trial.

Dr. Siefert has reviewed Calkins's trial testimony. A 0262-0265 @Vol. 2. Had this Court allowed Plaintiffs to call Dr. Siefert as a rebuttal witness, Dr. Seifert would have testified that Dr. Calkin's testimony was unsupported speculation. A 0262-0265 @Vol. 2. Had Calkins' testimony not gone unchallenged, the jury may have found Dr. Smith to have been negligent in the underlying action, such that the remaining elements of legal malpractice in the instant case could have been tried.

SUMMARY OF ARGUMENT

The District Court decision to permit Defendants' late and improper disclosure of Dr. Hugh Calkins as an expert prevented Plaintiffs from having a fair trial. This Court's issuance of a February 2, 2016 Scheduling Order and reopening discovery, and allowing Calkins to testify, was an abuse of discretion. Calkins' testimony was based on his personal opinion and not substantiated by the medical record. Calkins testimony denied Plaintiffs theory of causation, but provided no alternative theory. His testimony was admitted and left unchallenged because Plaintiffs were denied a rebuttal witness.

ARGUMENT

I. The Trial Court Exceeded its Discretion by Issuing a Scheduling Order Modifying Time for Expert Disclosures Without Motion or Good Cause.

A. Modification of the Scheduling Order Without Motion Unfairly Rewarded Defendants and Prejudiced Plaintiffs

Nevada courts are required to issue a scheduling order that limits the time to complete discovery. Nev. R. Civ. P. 16(b)(3) "The scheduling order may include: Any other matters appropriate in the circumstances of the case. The order shall issue as soon as practicable but within 60 days after the filing of a case conference report pursuant to Rule 16.1 or an order by the discovery commissioner or the court waiving requirement of a case conference report pursuant to Rule 16.1(f). A schedule shall not be modified except by leave of the judge or a discovery commissioner upon a showing of good cause." Nev. R. Civ. P. 16(b)(5). The Drafter's Note to the 2004 Amendment to Nev. R. Civ. P. 16 notes that the rule follows the federal rules with a few notable exceptions which limit modifications by the trial court as follows:

> "Nevada has not adopted paragraph (4) of the federal rule, added in 1993, which provides that the scheduling order may also include "modifications of the times for disclosures under Rules 26(a) [cf. NRCP 16.1(a)] and 26(e)(1) and of the extent of discovery to be permitted." . . .The amended rule conforms to the 1993 amendments, with two exceptions. Omitted federal provisions are paragraph (6), which allows the court to take appropriate action with respect to "the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26. . . Nev. R. Civ. P. 16 (Drafter's Note to the 2004 Amendment) (Emphasis added.)

In Nutton v. Sunset Station, Inc., 131 Nev. Adv. Op. 34, 357 P.3d 966 (Nev. App. 2015) the court noted where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority in Nevada Rules. *See also* Exec. Mgmt., Ltd. v. Ticor Title Ins., *Co.*,118 Nev. 46, 53, 38 P.3d 872, 876 (2002). Nutton at 970 (Nev. App. 2015). The Nutton court, cited Federal cases to address when modification of a scheduling order for disclosures is within the court's discretion. The Nutton court noted the purpose of NRCP 16(b) is "to offer a measure of certainty in pretrial proceedings, ensuring that at some point both the parties and the pleadings will be fixed." Parker v. Columbia Pictures Indus., 204 F.3d 326, 339–40 (2d Cir.2000) (internal quotation marks omitted). "Disregard of the [scheduling] order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 610 (9th Cir.1992). NRCP 16 was drafted precisely to prevent this from occurring. Id.

Here, when the trial court modified discovery with the scheduling order it removed the measure of certainty in the pretrial proceedings which had been fixed for over two years and four months prior to the Supreme Court Remand on November 24, 2015. Defendants had already made their expert disclosures on June 14, 2013 based on the Joint Case Conference Report. A

0036-38 @Vol. 1. This disclosure was based on the parties' agreements. A 0034:22-24 @Vol. 1. The district court's action resulted in a reward to the Defendants by allowing them the opportunity to name a new expert, who was not properly disclosed pursuant to the prior rulings in this matter. A 00020-26 @Vol. 1. Plaintiffs had already deposed the Defendant's previously disclosed expert and were moving forward to trial. Objections to the late disclosure were made to the court in the scheduling conference, letters to opposing counsel and in a Motion to Strike, to no avail. A 0082 @Vol. 1, A 0084-85 @Vol. 1 and A 0086-122 @Vol. 1. These efforts took away from trial preparation and prejudiced Plaintiff in presenting their case.

B. Absence of Good Cause Defeats Modification of the Scheduling Order

If Defendants had motioned the court to modify the Scheduling Order, the court would have had to consider whether good cause existed to make the modification. The court's scheduling order 'shall not be modified except upon a showing of good cause.'" Grochowski v. Phoenix Constr., 318 F.3d 80, 86 (2d Cir.2003) (quoting prior version of FRCP 15(a) and 16(b)). Instead, the Scheduling Order was entered without motion from either party and without good cause.". A 00067:26-68:3 @Vol. 1. The absence of a motion does not remove the standard for the trial court to have good cause to made such a modification in its discretion. The Nevada Supreme Court has never defined what constitutes "good

cause" under NRCP 16(b), but NRCP 16(b) is based in relevant part upon Rule 16(b) of the Federal Rules of Civil Procedure. Federal Courts have determined that "properly construed, 'good cause' means that scheduling deadlines cannot be met despite a party's diligent efforts." Street v. Curry Bd. of Cnty. Comm'rs, No. CIV 06–0776 JB/KBM, 2008 WL 2397671, at *6 (D.N.M. Jan. 30, 2008) (Browning, J.).

In this matter, absolutely no issues were raised as to difficulty meeting deadlines. In fact, at the time the Summary Judgement motion was granted, the case was 100% ready for trial, including Motions in Limine. A 0027-28 @Vol. 1. No further discovery or motions should have been allowed, nor was there good cause for any. The Order for Reversal and Remand did not alter discovery deadlines. A 0060-64 @Vol. 1. In fact, the trial court's April 30, 2012 Pretrial Order specifically stated that a "continuance of trial does not extend the deadline for completing discovery" and a request for such extension must be made by Motion. A 00020-26 @Vol. 1. To allow amendment discovery by issuing the new scheduling order without motion or good cause nullifies the purpose of NRCP 16.1 because the case was timely moving forward to trial with fixed deadlines agreed to and set by the court. Nutton v. Sunset Station, Inc. (Nev. App. 2015) 131 Nev. Adv. Op. 34 [357 P.3d 966, 971].

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C. Modification of the Scheduling Order Necessitates Remand.

Based on the foregoing sections A and B, modification of the Scheduling Order by the District Court was made pursuant to incorrect standards, which is a per se abuse of discretion, and necessitates remand. *See* In re Grand Jury Subpoena, 138 F.3d 442, 444, 445–46 (1st Cir.1998). Even though there is a narrow exception for instances in which application of the correct legal standard can lead to only one result, (*see id.* at 446) where uncertainty lurks, remand is the appropriate course. *See* United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 733–34 (1st Cir.2007). Here, there is manifest uncertainty as to the result that could have occurred if Defendants had to rely on Dr. Morady as the only disclosed expert. First, if Dr. Morady had already changed his position once, if questioned at trial, his testimony and contradicting affidavit may have been sufficient to bring a different result with the jury. Accordingly, the application of inappropriate standards by the trial court and uncertain alternate result is cause for remand.

In response, the Defendants may argue the trial court has considerable discretion in allowing expert designations, and that it had authority to allow the designation under Rule 4.04, which is correct, but judicial discretion is not boundless. Judicial discretion "is defined as a 'sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable in circumstances and law, and which is directed by the reasoning conscience of the

trial judge to just result.'" Douglas v. Burley 134 So.3d 692, 696 (Miss. 2012). An abuse of discretion means "'clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing.'" Id. "[U]pon remand, prior orders governing discovery remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court." Id. The policy behind this is to "prevent confusion and potential conflict." Laws v. Louisville Ladder, Inc., 146 So. 3d 380, 387 (Miss. Ct. App. 2014) Here, Defendants never filed a motion to extend the deadline for expert disclosures and were bound by the deadlines set forth in the Joint Case Conference Report. For the trial court to change the deadlines, which were complete and agreed to by the parties, is abuse of discretion because it is against logic and unreasonable. A 0029-35 @Vol. 1.

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

59(a)(7). Plaintiffs pointed out the errors in the discovery proceedings and conflict between this Court's Pretrial Order and subsequent Scheduling Order, in their correspondence with defense counsel, and in their Motion to Strike. A 0082 @Vol. 1, A 0084-85 @Vol. 1 and A 0086-122 @Vol. 1.

NRCP 26(e) sets forth the parties' duty to timely supplement their witness disclosures. Defendants' September 2, 2016 disclosure of Calkins was not made in the spirit of the statute, as it was a last-ditch attempt at finding a defense expert after they dropped Morady and their summary judgment ruling was overturned. A 0060-64 @Vol. 1. Defendants could have, for instance, offered Calkins for deposition prior to their motion for summary judgment hearing; but, they did not. Defendants' undue delay and failure to provide complete information earlier in the proceedings substantially affected Plaintiff's case and provide grounds for a new trial under NRCP 59(a)(1).

II. The Court Abused its Discretion by Allowing Dr. Calkins' Testimony, Not Based on Reliable Standards and Without an Expert Report

A. The Court Erred in Admitting Calkins's Testimony as not Based on Medical Records Pursuant to Hallmark Factors.

The district court failed to address the Nevada Supreme Court's established standard for evaluating expert testimony. *See* Hallmark v. Eldridge, 124 v. 492, 189 P.3d 646 (2008). To testify as an expert witness, the witness must be qualified

in an area of specialized knowledge, the testimony must assist the trier of fact, and the testimony must be limited to the scope of the expert's knowledge. Id. at 498, 189 P.3d at 650. Only Hallmark's second factor is at issue. Expert testimony assists "the trier of fact only when it is relevant and the product of reliable methodology." An expert's opinion is based upon reliable methodology, if it is based more on particularized facts rather than assumption, conjecture, or generalization." *Id.* at 500–01, 189 P.3d at 651–52 (footnotes omitted). Pickett v. McCarran Mansion, LLC, (Nev. App., Aug. 8, 2017, No. 70127) 2017 WL 3526269, at *3

Calkins testified as to his personal opinion based on assumption, conjecture, and generalization, and which was not substantiated by anything in the medical record. He admitted he hasn't been in the exact situation Smith faced in this case; yet, he outlined the "necessary" steps and opined that Smith met the standard of care. A 0202:11-13, 0208:1-19 @Vol. 2. Despite having outlined the steps Smith should have followed to meet the standard of care, Calkins ignored Smith's 2013 deposition testimony in which Smith was unable to remember the sequence of steps taken. A 0208:20-209:6 @Vol. 2. It is clear from the trial testimony that Calkins based his opinions on Dr. Smith's testimony rather than on the medical records. Though he denied this at trial, Calkins repeatedly took Smith's word over the gaps documented in the medical records. A 0228:4-18, 239:23-240:15 @Vol. 2.

Notably, Calkins agreed there was nothing in the medical record to substantiate Smith's testimony that he immediately started the periocardiocentesis. A 0228:10-18 @Vol. 2. He also agreed that it was not documented in the records that there was a periocardiocentesis initiated at 12:41. A 0243:5-8 @Vol. 2. He hadn't seen anything showing Smith had not waited to perform the periocardiocentesis until the echo machine was present. A 0212-213:8 @Vol. 2.

It was therefore Calkins's personal opinion that Smith was truthful when he said he started the periocardiocentesis almost immediately after the code sounded at 12:39. His personal opinion was based on his belief that no reasonable electrophysiologist would stand around for ten minutes waiting for the stat echo to arrive. A 0228:4-18 @Vol. 2. But this is what Plaintiffs claimed happened, based on the evidence and medical record, and what led to Mr. DeChambeau's untimely death. Calkins's personal and conclusory opinions, are not an acceptable basis for expert opinion and should not have passed the *Daubert* (or *Frye*) gatekeeping standards. The extent to which Calkins was permitted to testify far exceeded the scope for which he had been disclosed. A 0078-81 @Vol. 2 Calkins's report in the underlying complaint is deficient under NRCP 16.1 because it fails to provide the basis for his opinion; namely, that he believes Dr. Smith. A 0228:4-18 @Vol. 2. Defendants' Pretrial Disclosures dated September 1, 2016 provided only Calkins's

name, employer, and address, and proposed his curriculum vitae as an exhibit. A 0078-0081@Vol. 1.

Neither was Calkins properly disclosed as per the Scheduling Order. As outlined above, discovery was not reopened after the Supreme Court remanded, and it was in error for discovery to have reopened without a properly made request for an extension or a motion for a continuance. Regardless, Defendants' September 2, 2016 disclosures vaguely stated that "Calkins is anticipated to testify regarding the underlying case as to the medical care and treatment of decedent Neil DeChambeau, causation, and the standard of care as to defendant David Smith, M.D." A 0078-0081@Vol. 1.

Calkins submitted no expert witness report pursuant to NRS 16.1(A), (B), and (C), he presented trial testimony in violation of the requirement in *Daubert* that expert opinions be based on reliable or trustworthy scientific evidence. Daubert v. Merell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-594 (1993). To go forward with Calkins's testimony, based on his personal opinions, was an error in law and in discretion and should result in new trial under NRCP 59(a)(7).

B. Calkins Testimony as to Dr. Smith's Truthfulness Rather than Medical Records Falls Below Expert Standards because it Fails to Present an Alternative Theory.

If the defense expert does not consider the plaintiff's theory of causation at all, then the defense expert must state any independent alternative causes to a

reasonable degree of medical probability because he or she then bears the burden of establishing the causative fact for the trier of fact. Otherwise, the testimony would be incompetent not only because it lacks the degree of probability necessary for admissibility but also because it does nothing to controvert the evidence of appellants. Williams v. Eight Judicial Dist. Court of State, ex rel. County of Clark 127 Nev. 518, 531, 262 P.3d 360, 368 (2011).

Plaintiffs underlying medical malpractice case is based squarely on the fact that Dr. Smith did not commence the periocardiocentesis immediately, but instead had waited ten (10) minutes for the electrocardiogram to be delivered and hooked up, which resulted in Mr. DeChambeau brain death. A 0007:16-23 @Vol. 1. Plaintiffs' case is that the delay was the cause of death. A 0007:16-23 @Vol. 1. Calkins testified directly contrary to this. Although he also agreed that it was not documented in the records that there was a periocardiocentesis initiated at 12:41. A 0243:5-8 @Vol. 2. He hadn't seen anything showing Smith had not waited to perform the pericardiocentesis until the echo machine was present. A 0212:22-213:8 @ol. 2. Based on no medical record, Calkins simply stated he believed Smith was truthful when he said he'd started the periocardiocentesis almost immediately after the code sounded at 12:39. It was only his personal opinion was based on his belief that no reasonable electrophysiologist would stand around for ten minutes waiting for the stat echo to arrive. A 0228:4-18 @Vol. 2. Calkins

testimony was there was no delay, in his opinion and therefore, the delay was *not* the cause of death. Therefore, Calkins as the defense expert did not consider the plaintiff's theory of causation at all. Accordingly, Calkins was required to state other independent alternative causes to a reasonable degree of medical probability to establish the causative fact for the trier of fact. Calkin presented no alternate theory so his testimony is incompetent because it lacks the degree of probability necessary for admissibility but also because it does nothing to controvert the evidence of appellants. Id.

C. The Court Erred in Admitting Calkins' Testimony Without an Expert Report.

A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Under Nev. R. Civ. P. 16.1(a)(2)(B) expert testimony must be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten (10) years; the compensation to

be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Nev. R. Civ. P. 16.2(B), If a report from the expert is required under Rule 16.1(a)(2)(B) or 16.2(a)(3), the deposition shall not be conducted until after the report is provided. Nev. R. Civ. P. 26.

Under the federal rules, paralleled by the Nevada rules, if a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. Sage-Allison v. Novartis Pharmaceuticals Corporation (D.N.M., Nov. 25, 2013, No. CV 07-25 KG/ACT) 2013 WL 12157868, at *7–8, report and recommendation adopted (D.N.M., Mar. 11, 2014, No. CV 07-25 KG/GBW) 2014 WL 12625095.

Under the original joint conference report, expert witness reports were waived. A 0029-35 @Vol. 1. However, at page 2 of the February 2, 2016 Scheduling Order, there was no mentioning of when expert reports were to be submitted, and the item number 4 inquiry as to whether rebuttal witness reports were to be submitted was left blank. A 00067:26-68:3 @Vol. 1. The Court's December 2016 ruling on Plaintiffs' Motion to Strike, affirmed its Scheduling Order as appropriate for discovery deadlines in this matter." Expert reports are part of the expert discovery deadlines. Reliance by the court on the new Scheduling

Order, by its own ruling states that the parties are not bound by the August 17, 2012 *Joint Case Conference Report* in which expert reports were waived. The court did not relieve the parties of the duty to prepare a written report. A 00067:26-68:3 @Vol. 1.

Therefore, it follows that when Defendants disclosed Calkins as an expert, the disclosure should have been accompanied by a written report prepared and signed by the expert. The report shall have contained a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness. In violation of these standards, nothing accompanied Defendants' disclosure of Calkins except his CV. Defendants' September 2, 2016 disclosures vaguely stated that "Calkins is anticipated to testify regarding the underlying case as to the medical care and treatment of decedent Neil DeChambeau, causation, and the standard of care as to defendant David Smith, M.D.," and attached his curriculum vitae. A 0078-0081@Vol. 1.

Plaintiffs were prejudiced by this late and improper disclosure because pursuant to Nev. R. Civ. P. 26., a deposition should not be conducted until after the report is provided. Defendants' failure to provide information about a witness as required by Rule 26(a) or (e), is without justification and should have prevented Calkins testimony at trial. Id.

While the court, upon good cause shown, may relieve a party of the duty to prepare a written report in an appropriate case, as noted above, no motion was made regarding disclosure of Calkins and no showing of good cause was made. A 0078-0081@Vol. 1. The federal courts have noted that any litigation tactic or strategy, such as waiting on an appellate decision, should be made within the bounds of court-established rules. In Harvey v. Novartis Pharmaceutical Corp., (N.D. Ala., Jan. 12, 2012, No. 2:06-CV-1140-VEH) 2012 WL 113317, at *5, the court found no good cause as to why a party waited to designate "a case-specific expert" until *after* the deadline for designation of experts expired, *after* discovery closed, *after* the other party filed summary judgment motions, and *after* the case was remanded. The Harvey court stated it discerned no evidence of Plaintiff's diligence in designating her case-specific expert. To the contrary, the Court recognized that based on the specific circumstances of the case, counsel had every reason to be diligent in securing a viable expert on this issue earlier. The court found no persuasive reason as to why such an expert could not have been designated before the original deadline set by the court and therefore no good cause existed upon which to grant an extension. Id.

Here, no new experts should have been named twenty (20) days from the original trial, when discovery had closed, except for Morady's trial deposition. A 0027-28 @Vol. 1. Defendants made no motion for extension, so no showing good

cause was made as to why Defendants waited to designate "a case-specific expert" with no expert report until *after* the deadline for designation of experts expired, *after* discovery closed, *after* they lost a summary judgment motion on appeal, and *after* the case was remanded. A 0071-77 @Vol. 1.

Defendants used conflicting pretrial agreements orders, to their benefit, to disclose their case-specific expert without a report. A 0071-77 @Vol. 1. The trial court denied the Plaintiffs motion in limine to exclude Calkins testimony, but this Court should have recognized that based on the specific circumstances of the case, a manifest unfairness has resulted. The Defendants' previously disclosed expert, Dr. Morady had given an Affidavit in the underlying medical malpractice action stating an opinion contrary to the Defendant's position. While Dr. Morady changed his opinion and switched sides, if he were to testify at trial, his Affidavit would have come into evidence and his changed opinion would have been under strict scrutiny by the jury. There is no persuasive reason as to why another expert could not have been designated before the original deadline set by the court. Nonetheless, Defendants benefitted from the conflicting pretrial agreements orders which have caused a lasting detrimental and prejudicial impact to the Plaintiffs in this matter. A 0071-77 @Vol. 1.

Defendants' may assert that Plaintiffs' counsel should have somehow predicted or foreseen these, among other, consequences of the expert discovery

discrepancy that has happened, and objected at the time the February 2016 scheduling order was made. Plaintiffs are hard-pressed as to how objections to the February 2016 scheduling order at that time, or at the January 21 pretrial conference, would have helped. Defendants acknowledged in their opposition at page 3 that there was no discussion about the status of discovery at the January 21 pretrial conference, and a scheduling order covers many deadlines, beyond discovery, that are needed to prepare for and try a case. Defendants had also stated in their motion for summary judgment that discovery had closed. Any argument by Defendants' that Plaintiffs failed to raise objections on these issues would be disingenuous. Plaintiffs took action by meeting and conferring regarding expert discovery with Defendants' counsel by letter, and also by filing their motion to strike. A 0082 @Vol. 1, A 0084-85 @Vol. 1 and A 0086-122 @Vol. 1.

Additionally, the trial court's ruling on the Defendants summary judgment indicate the motion against Plaintiffs was filed on grounds that Plaintiffs could not meet the elements of legal malpractice, which they argued required proof of medical malpractice in the underlying action. A 0051-56 @Vol. 1. The ruling only referenced the opinion of Morady because nowhere in their motion did Defendants present the opinions of Calkins in support of their defense. A 0051-56

@Vol. 1. Defendants defended Morady as a reliable expert and championed the medical record as the key evidence.

A motion for summary judgment is essentially a "trial on paper" where a party puts its best case and facts forward to avoid going to trial. If Defendants' main argument was Smith's truthfulness as to whether he promptly performed the periocardiocentesis, then why spend so much time on Dr. Morady, and why defend the legal malpractice claim by saying further discovery didn't need to be done because everyone had the medical records? Prior to the Supreme Court's reversal and remand of the summary judgment, the crux of defendants' defense against plaintiffs' claims was all about Morady, not Calkins' belief in Smith's truthfulness not based on medical records or supported by an expert report.

Allowing Calkins' testimony in this matter is reversible error because it was not based on reliable Hallmark factors, but was simply personal opinion. Additionally, Calkins' failed to provide any alternate theory to a reasonable degree of medical probability to establish the causative fact to assist the trier of fact in making a determination in this matter and therefore the judgment should be reversed.

III. Abuse of Discretion in Denying Plaintiffs a Rebuttal Expert Witness

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

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

Here, Plaintiffs were denied the opportunity to call Dr. Siefert in rebuttal to Calkins's testimony. Plaintiffs anticipate the argument that a rebuttal witness to Calkins was not designated by the deadline stated in the 2016 Scheduling Order. A 0262-0265 @Vol. 2. However, as outlined above, Plaintiffs have challenged and continue to object to the Scheduling Order as an irregularity in the proceedings and an abuse of discretion that prejudiced Plaintiffs and materially affected the outcome of trial. Defendants were permitted to offer the trial testimony of a new expert who presented on new theories in the case.

Dr. Siefert has since reviewed Calkins's trial testimony. A 0262-0265 @Vol. 2. Had this Court allowed Plaintiffs to move forward with Dr. Siefert as a rebuttal witness, Dr. Seifert would have testified that Dr. Calkin's testimony was unsupported speculation. A 0262-0265 @Vol. 2.

Had Calkins's testimony not gone unchallenged, the jury may have found Dr. Smith to have been negligent in the underlying action, such that the remaining elements of legal malpractice in the instant case could have been tried. No new experts should have been named 20 days from trial, and discovery had closed, except for Morady's trial deposition. As per the February 1, 2016 Scheduling

Order, naming a new expert under the second scheduling order required defendants to file a report by Calkins. Until Defendants filed their initial report, Plaintiffs had no duty to file a rebuttal report. But if the joint case conference report still stands, Plaintiffs had the right to call a rebuttal expert without having first filed a report because expert reports were waived. These events and the resulting confusion raised by conflicting pretrial agreements orders have caused a prejudice to the Plaintiffs.

CONCLUSION

Plaintiffs Angela DeChambeau and Jean-Paul DeChambeau have not only suffered the death of their husband and father, due to medical malpractice of Dr. Smith; but subsequent legal malpractice. Now due to the abuse of discretion and error of the trial court, described above, they have again suffered by not receiving a fair trial in this matter. Accordingly, Plaintiffs respectfully request this Court overturn the turn the judgment in this matter.

CERTIFICATE OF COMPLIANCE

I certify that I have read this Opening Brief and that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the Appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6) and the type-volume limitation set forth in NRAP 32(a)(7). This Brief uses a proportional typeface, 14-point font and contains 7,116 words.

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

Dated this 8th day of September 2017.

Respectfully Submitted by:

/s/ Charles R. Kozak
Charles R. Kozak, Esq.
Attorney for Appellants
Angela DeChambeau and
Jean-Paul DeChambeau

CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify I am an employee of Kozak Lusiani Law, LLC and that on September 8, 2017, I electronically filed a true correct copy of the **APPELANT'S OPENING BRIEF**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

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

Kim Mandelbaum, Esq.
Mandelbaum Ellerton & McBride
2012 Hamilton Lane
Las Vegas, Nevada 89106

/s/ Dedra Sonne
Employee of Kozak Law Firm
3100 Mill Street, Suite 115
Reno, Nevada 89502