

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
2

3
4 ANGELA DeCHAMBEAU, and)
5 JEAN-PAUL DeCHAMBEAU)
6 BOTH INDIVIDUALLY AND AS)
7 SPECIAL ADMINISTRATORS)
8 OF THE ESTATE OF NEIL)
9 DeCHAMBEAU)

10 Appellant,
11

12 vs.
13

14 STEPHEN C. BALKENBUSH, ESQ.,)
15 AND THORNDAL, ARMSTRONG,)
16 DELK, BALKENBUSH and)
17 EISINGER, A NEVADA)
18 PROFESSIONAL CORPORATION,)
19

20 Respondent.
21

22
23 An Appeal from the Second Judicial District
24 Court, Judge Patrick Flanagan, Case
25 Number CV12-00571
26
27
28

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Case No. 72879

APPELLANT'S APPENDIX

Volume 1

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Transaction # 2805996

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

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

9 ANGELA DECHAMBEAU and

10 JEAN-PAUL DECHAMBEAU, both

Case No.

11 Individually and as SPECIAL

12 ADMINISTRATORS of the ESTATE

Dept. No.

of NEIL DECHAMBEAU,

13 Plaintiff,

14 Vs.

15 STEPHEN C. BALKENBUSH, ESQ.,

16 THORNDAL, ARMSTRONG, DELK,

17 BALKENBUSH and EISINGER,

18 A Nevada Professional Corporation,

& DOES I through X, inclusive,

19 Defendants.

20
21 **COMPLAINT**

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

23 DECHAMBEAU both individually and as SPECIAL ADMINISTRATORS of the ESTATE of

24 NEIL DECHAMBEAU, by and through their attorney, CHARLES R. KOZAK, ESQ., and for

25 their COMPLAINT against the Defendants, STEPHEN C. BALKENBUSH, ESQ.,

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

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

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

24 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

- 1 20. On September 7, 2006, Neil DeChambeau was [sic] 57 year old male in good
2 physical health who was admitted to Washoe Medical Center to undergo an atrial
3 fibrillation ablation procedure to address a previously diagnosed paroxysmal atrial
4 fibrillation.
- 5 21. On the morning of September 7, 2006, Neil DeChambeau was brought to the
6 cath lab at Washoe Medical Center where David Kang, M.D. Induced anesthesia.
7 Neil DeChambeau was intubated and anesthesia was maintained throughout the
8 atrial fibrillation ablation procedure.
- 9 22. At or about 12:39 p.m., Neil DeChambeau suddenly developed cardiac
10 arrest. In response to the cardiac arrest cardio pulmonary resuscitation was
11 instituted on Neil DeChambeau and multiple doses of vasoactive drugs were
12 administered as chest compressions were performed.
- 13 23. At or about 1:00 p.m., an echo-cardiogram of the heart showed a cardiac
14 tamponade.
- 15 24. At or about 1:00 p.m., a pericardiocentesis was performed and approximately
16 300 ccs of blood were removed from Neil DeChambeau's pericardial sac.
- 17 25. David Smith, M.D. failed to timely diagnose that Neil DeChambeau
18 experienced a cardiac tamponade.
- 19 26. David Smith, M.D. failed to timely perform a pericardiocentesis procedure
20 on Neil DeChambeau.
- 21 27. David Kang, M.D. failed to timely diagnose that Neil DeChambeau
22 experienced a cardiac tamponade.
- 23 28. David Kang, M.D. failed to timely recommend to David Smith, M.D. that he
24 perform a pericardiocentesis [sic] on Neil DeChambeau.
- 25 29. David Kang, M.D. failed to timely perform a pericardiocentesis [sic] on Neil
26 DeChambeau.
- 27 30. The conduct of David Smith, M.D. set forth in paragraphs 25 and 26 fell
28 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

9 14. BALKENBUSH'S stated reason for dismissing Plaintiffs' case was that as a result of a
10 review of an EPS tape recorded during the operation, DR. MORADY, one of Plaintiffs' experts,
11 had reversed his opinion as to the negligence of DR. DAVID SMITH. BALKENBUSH never
12 provided Plaintiffs with any written communication from DR. MORADY to him in which DR.
13 MORADY explained his alleged reversal of his original opinion of DR. SMITH'S malpractice.
14 In fact no such opinion exists in any written form.
15

16 15. No reason was given to Plaintiffs by BALKENBUSH for the dismissal of the case
17 against DR. KANG. They were simply told that the case against DR. KANG had been dismissed
18 with prejudice as well a month or so after BALKENBUSH had done so without Plaintiffs'
19 knowledge or permission.
20

21 16. At no time did BALKENBUSH conduct any written discovery of any Defendants in the
22 case, other than to request production of the medical records of the various Defendants.

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

21 20. The Defendants provided an EPS tape allegedly recorded during the operation to
22 BALKENBUSH. Defendants claimed this tape contradicted the written medical records and
23 proved that DR. SMITH had acted in accordance with the acceptable standards of practice when
24 responding to the cardiac arrest of NEIL DeCHAMBEAU. Other than DR. SMITH'S Counsel's
25 representations as to the authenticity of the EPS tape, BALKENBUSH made no attempt to verify
26 its authenticity or even explore the spoliation of evidence issues attendant with the isolated
27 appearance of the EPS tape long after the other medical records had been produced by the
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
9 21. DR. SMITH'S own records of the events leading up to and causing the premature death
10 of NEIL DeCHAMBEAU, transcribed on September 8, 2006 specifically state:

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
17 22. A simple reading of the records in DR. SMITH'S own words immediately after the
18 operation confirms the opinions of DR. MORADY and DR. MESSEI, Plaintiffs' experts, that
19 DR. SMITH and DR. KANG, in delaying the pericardiocentesis until after futile CPR was
20 performed and then the echocardiogram ordered and performed instead of immediately doing the
21 pericardiocentesis, caused the needless death of NEIL DeCHAMBEAU on September 8, 2007.

22
23 23. This delay was medical malpractice and BALKENBUSH dismissed the case with no
24 sworn evidence to the contrary, without taking any Depositions, asking any Interrogatories,
25 making any Requests for Admissions and without giving Plaintiffs the chance to pursue their
26 Causes of Action with other counsel competent to handle a medical malpractice case as he,
27 **without their permission, dismissed their case with prejudice.**
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

5 A. Defendants failed to keep the Plaintiffs informed of the status of their case.

6 B. Defendants dismissed Plaintiffs case without consulting with Plaintiffs and obtaining
7 their consent before entering into an agreement with opposing counsel and dismissing Plaintiffs
8 case with prejudice.
9

10 C. Defendants failed to provide legal services reasonably required to investigate the
11 merits of Plaintiffs' case. In a wrongful death case involving medical malpractice, failure to
12 take depositions of the treating physicians and other physicians who were present in the
13 operating room where the fatal injury occurred violates the acceptable legal standard of care for
14 attorneys handling such cases. Furthermore, Defendants were negligent in not asking
15 Interrogatories, failing to make any Requests for Admissions or using any or the normal
16 discovery tools expected of litigation attorneys handling a medical malpractice case.
17

18 D. Defendants failed to provide Plaintiffs with the opportunity to obtain new counsel
19 who could have substituted in on the case and verified the reasonableness of DR. MORADY'S
20 claimed change of opinion approximately five (5) months prior to Trial or obtained another
21 expert cardiologist.
22

23 E. Defendants failed to properly investigate the authenticity of the EPS tape and to
24 allow the Plaintiffs to obtain a second opinion from qualified technical and/or medical experts
25 as to the significance of the EPS tape to the ultimate issues in the case. Defendants also failed
26 to investigate the spoliation of evidence issues attendant with a tape which had not been
27 produced with the other medical records, including whether the tape was even from the
28

1 operation on NEIL DeCHAMBEAU on September 7, 2006 or whether the tape had been
2 tampered with or altered in any manner.

3
4 F. Defendants' actions and omissions were so egregious, wanton, willful, reckless and in
5 such complete disregard of Plaintiffs' rights that they are thereby liable for punitive or
6 exemplary damages.

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 3. Punitive or exemplary damages.

15 4. All costs and expenses of this action, prejudgment interest and attorneys fees.

16 5. Such other and further relief as the Court deems equitable in the premises.

17
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

3 Pursuant to NRS 239B.030 the undersigned certifies no Social Security numbers are contained in this document.
4

5 Dated this 5th day of March, 2012.
6

7 /s/ Charles R. Kozak
8 CHARLES R. KOZAK, ESQ.
9 Nevada State Bar No. 11179
10 1225 Tarleton Way
11 Reno, NV 89523
12 (775) 622-0711
13 Kozak131@charter.net
14 Attorney for the Plaintiff
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VERIFICATION

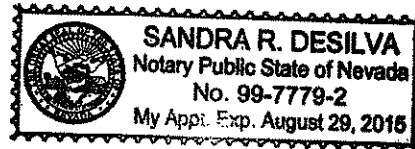
STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

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

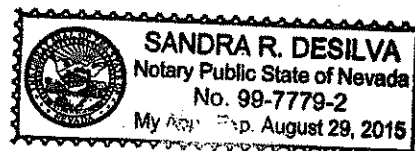


ACKNOWLEDGMENT

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



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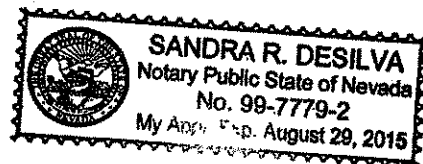
STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

JEAN-PAUL DeCHAMBEAU, under penalties of perjury being first duly sworn,
deposes and says: That he is a Plaintiff in the above-entitled action, and has read the Complaint
and Jury Demand, that the same is true of his own knowledge, except for those matters therein
contained stated upon information and belief, and as to those matters he believes it to be true.

SUBSCRIBED and SWORN to before me
this 2nd day of March, 2012.


JEAN-PAUL DeCHAMBEAU


NOTARY PUBLIC

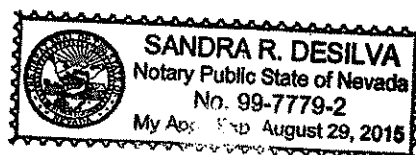


ACKNOWLEDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

On this 2nd day of March, 2012, personally appeared before me, JEAN-PAUL
DeCHAMBEAU, proven to me to be the person whose name is subscribed to the above
instrument, and who acknowledged to me that he executed the foregoing Complaint and Jury
Demand.


NOTARY PUBLIC



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BY [Signature]
DEPUTY

1130
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ANGLEA DECHAMBEAU and
JEAN-PAUL DECHAMBEAU, both
Individually and as SPECIAL
ADMINISTRATORS of the ESTATE
Of NEIL DECHAMBEAU,

Case No. CV12-00571

Dept. No. 7

Plaintiffs,

vs.

STEPHEN C. BALKENBUSH, ESQ.,
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH and EISINGER,
A Nevada Professional Corporation,
And DOES I through X, inclusive,

Defendants.

DEFENDANTS' ANSWER TO COMPLAINT

Defendants STEPHEN C. BALKENBUSH and THORNDAL, ARMSTRONG, DELK,
BALKENBUSH and EISINGER, a Nevada Professional Corporation, by and through their
counsel, PISCEVICH & FENNER, and in answer to Plaintiffs' Complaint, admit, deny and
allege as follows:

PARTIES

1. Upon information and belief, Defendants admit the allegations contained in paragraph 1 of Plaintiffs' Complaint.

2. Upon information and belief, Defendants admit the allegations contained in paragraph 2 of Plaintiffs' Complaint.

3. Upon information and belief, Defendants admit the allegations contained in paragraph 3 of Plaintiffs' Complaint.

4. These answering Defendants are without information sufficient to form a belief form as to the allegations contained in paragraph 4 of Plaintiffs' Complaint and therefore deny the same.

5. Defendants admit that Stephen Balkenbush is a resident of Reno, Nevada, and licensed to practice law in the State of Nevada.

6. Defendants admit that Thorndal, Armstrong, Delk, Balkenbush and Eisinger is a law firm with offices located at 6590 S. McCarran Boulevard in Reno, Nevada.

7. It appears that no answer is required of these answering Defendants as to the allegations contained in paragraph 7; however, if it is determined that an answer is required, these answering Defendants hereby deny said allegations.

FIRST CAUSE OF ACTION

(Legal Malpractice)

8. Defendants admit a medical malpractice lawsuit was filed arising out of the alleged wrongful death of Neil DeChambeau; however, denies the remaining allegations of paragraph 8 of Plaintiffs' Complaint.

9. Defendants admit that medical experts were retained; however, denies the remaining allegations of paragraph 9 of Plaintiffs' Complaint.

1 10. Defendants admit a medical malpractice was filed; however, the allegations could
2 not be proven as set forth in paragraph 10 of Plaintiffs' Complaint.

3 11. These answering Defendants are without information sufficient to form a belief
4 form as to the allegations contained in paragraph 11 of Plaintiffs' Complaint and therefore deny
5 the same.
6

7 12. These answering Defendants deny the allegations contained in paragraph 12 of
8 Plaintiffs' Complaint.

9 13. These answering Defendants deny the allegations contained in paragraph 13 of
10 Plaintiffs' Complaint.

11 14. Defendants admit that Dr. Morady reversed his opinion; however, deny the
12 remaining allegations contained in paragraph 14 of Plaintiffs' Complaint.
13

14 15. These answering Defendants deny the allegations contained in paragraph 15 of
15 Plaintiffs' Complaint.

16 16. These answering Defendants deny the allegations contained in paragraph 16 of
17 Plaintiffs' Complaint.

18 17. These answering Defendants deny the allegations contained in paragraph 17 of
19 Plaintiffs' Complaint.
20

21 18. These answering Defendants deny the allegations contained in paragraph 18 of
22 Plaintiffs' Complaint.

23 19. These answering Defendants are without information sufficient to form a belief
24 form as to the allegations contained in paragraph 19 of Plaintiffs' Complaint and therefore deny
25 the same.

26 20. These answering Defendant deny the allegations contained in paragraph 20 of
27 Plaintiffs' Complaint.
28

22. These answering Defendants are without information sufficient to form a belief form as to the allegations contained in paragraph 22 of Plaintiffs' Complaint and therefore deny the same.

23. These answering Defendant deny the allegations contained in paragraph 23 of Plaintiffs' Complaint.

24. These answering Defendant deny the allegations contained in paragraph 24 of Plaintiffs' Complaint.

AFFIRMATIVE DEFENSES

As separate and affirmative defenses to Plaintiffs' Complaint and each cause of action, claim and allegation contained therein, these answering Defendants allege as follows:

FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim against these answering Defendants.

SECOND AFFIRMATIVE DEFENSE

There is no causal relationship between the alleged malpractice as set forth in Complaint and the damages being claimed.

THIRD AFFIRMATIVE DEFENSE

Pursuant to Chapter 41A of Nevada Revised Statutes, Plaintiffs have failed to state a claim for exemplary or punitive damages.

FOURTH AFFIRMATIVE DEFENSE

Punitive damages are unconstitutional in that they are in violation of the equal protection clause, due process clause and undue burden on interstate commerce in violation of contract clause and the Eighth Amendment prescription of excessive fines.

FIFTH AFFIRMATIVE DEFENSE

With respect to punitive damages, NRS 42.025 does not provide for adequate standards for the application for punitive damages, the statute is inherently vague, and said statute violates the rights and safeguards of the Eighth and Fourteenth Amendments of the United States Constitution and the Constitution of the State of Nevada.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs were placed on notice of the problems in the underlying case, including that the Plaintiffs could not prevail on the malpractice claims, met with Defendants, and specifically agreed to dismiss the malpractice case.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' conduct constitutes a known waiver or abandonment of the underlying medical malpractice case and Plaintiffs consented to the dismissal of the underlying case.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrine of equitable estoppel.

NINTH AFFIRMATIVE DEFENSE

The Plaintiffs' claims are barred as they agreed to a compromise of the underlying case, consisting of a dismissal with each side to bear their own costs and fees.

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:

ANSWER TO COMPLAINT

Person(s) Served:

Charles R. Kozak
1225 Tarleton Way
Reno, NV 89523

<input type="checkbox"/>	Hand Deliver
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile (775)
<input type="checkbox"/>	Electronic Filing

DATED this 28th day of March, 2012.


Beverly Chambers

FILED

Electronically

04-30-2012:11:28:05 AM

Joey Orduna Hastings

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.,

Case No.: CV12-00571

Plaintiffs,

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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Charles Kozak, Esq. for Estate of Neil Dechambeau, et al;
Margo Piscevich, Esq. and Mark Lenz, Esq. for Thorndal, Armstrong, et al.
I deposited in the Washoe County mailing system for postage and mailing v


Judicial Assistant

**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

Plaintiffs,

Dept. No.: 7

vs.

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

Defendants.

APPLICATION FOR SETTING

TYPE OF ACTION: Legal Malpractice

MATTER TO BE HEARD: Trial

Date of Application: 05.29.12 Made by: Plaintiffs

COUNSEL FOR PLAINTIFF: Charles Kozak, Esq. - 622.0711

COUNSEL FOR DEFENDANT: Margo Piscevich, Esq. - 329.0958

Instructions: Check the appropriate box. Indicate who is requesting the jury.

☒ Jury Demanded by (Name): Defendants

Estimated Duration of Trial: 8 full days

[Appeared in Person - No Appl. provided]
Attorneys for Plaintiff

[Appeared in Person - No Appl. provided]
Attorneys for Defendant

MPTC - 1:15 p.m. on the 14th day of August, 2012.

PTC - 1:15 p.m. on the 26th day of September, 2013.

Trial - No. #1 Setting at 9:30 a.m. on the 14th day October, 2013.

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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 29 day of May, 2012, 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. for Angela Dechambeau, et al.; and

Margo Piscevich, Esq. for Stephen C. Balkenbush, Esq., et al.

I deposited in the 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:


Judicial Assistant

FILED

Electronically

08-17-2012:11:47:09 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3155672

1 1835

2 CHARLES R. KOZAK, ESQ.

3 Nevada State Bar No. 11179

4 1225 Tarleton Way

5 Reno, Nevada 89523

6 (775) 622-0711

7 Kozak131@charter.net

8 Attorney for the Plaintiffs

9

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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IN AND FOR THE COUNTY OF WASHOE

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ANGLEA DECHAMBEAU and
JEAN-PAUL DECHAMBEAU, both
Individually and as SPECIAL
ADMINISTRATORS of the ESTATE
Of NEIL DECHAMBEAU,

Plaintiffs,

vs.

STEPHEN C. BALKENBUSH, ESQ.,
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH and EISINGER,
A Nevada Professional Corporation,
And DOES I through X, inclusive,

Defendants.

Case No. CV12-00571

Dept. No. 7

NRCP 16.1 JOINT CASE CONFERENCE REPORT

DISCOVERY PLANNING/DISPUTE
CONFERENCE REQUESTED:

Yes _____ No XX

1 The parties, by and through their undersigned counsel, hereby submit this Joint
2 Case Conference Report, pursuant to NRCPC 16.1.

3 I.

4 PROCEEDINGS PRIOR TO CASE CONFERENCE REPORT

5 A. Date of filing of Complaint: March 6, 2012

6 B. Date of filing of Answer of each Defendant: March 28, 2012

7 C. Date of Early Case Conference and who attended: May 9, 2012 attended by
8 CHARLES R. KOZAK, ESQ., Counsel for Plaintiffs and MARGO PISCEVICH, ESQ.,
9 Counsel for Defendants.
10

11 II.

12 BRIEF DESCRIPTION OF THE NATURE OF THE ACTION AND EACH CLAIM
13 FOR RELIEF OR DEFENSE [16.1(c)(1)]

14 A. Description of the action: This is an action to obtain damages for legal
15 Malpractice.

16 Plaintiff's Contention: Attorney STEVEN BALKENBUSH, ESQ. committed
17 malpractice.
18

19 B. Claims for Relief: Damages as a result of mishandling the wrongful death of
20 Defendants' husband and father.

21 Defendants; Contention: Defendant BALKENBUSH did not commit legal
22 malpractice and handled the case appropriately. Also, please refer to the affirmative
23 defenses contained Defendants' Answer on file herein.
24

25 III.

26 LIST OF ALL DOCUMENTS, DATA, COMPILATIONS AND TANGIBLE
27 THINGS IN THE POSSESSION, CUSTODY OR CONTROL OF EACH PARTY
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- 4. Jean-Paul DeChambeau
c/o Charles R. Kozak
- 5. David Smith, MD
343 Elm Street, Suite 400
Reno, Nevada 89503
- 6. David Kang, MD
c/o Sierra Anesthesia
520 Hammill Lane
Reno, Nevada 8950
- 7. Fred Morady, M.D.
Professor of Internal Medicine
McKay Professor of Cardiovascular Disease
University Michigan
TC B1 140
1500 East Medical Center Drive
Ann Arbor, MI 48106-0311
- 8. William James Mazzei, M.D.
UCSD Medical Center
200 West Arbor Drive
San Diego, CA 92103-8770
- 9. Ronald Pearl, MD
Department of Anesthesia
Stanford, California
- 10. Rahul Doshi, MD
25262 Rockridge Road
Laguna Hills, CA 92653
- 11. Hugh G. Calkins, MD
The Johns Hopkins Hospital
Carnegie Building, Room 530
600 North Wolfe Street
Baltimore, Maryland 21287-0409
- 12. Anil K. Bhandari, MD
Los Angeles Cardiology Associates
1245 Wilshire Boulevard, Suite 703
Los Angeles, California 90017
- 13. Edward J. Lemons, Esq.
Lemons, Grundy & Eisenberg

6005 Plumas Street, Suite 300
Reno, Nevada 89519-6069

14. John H. Cotton, Esq.
Michael D. Navratil, Esq.
John H. Cotton & Associates, Ltd.
200 West Sahara Avenue, Suite 420
Las Vegas, Nevada 89102

15. Casey Blitt, MD
Old Pueblo Anesthesia
5700 East Pima, Suite E
Tucson, Arizona 85712

16. Douglas H. McConnell, MD
2650 Elm Avenue, Suite 318
Long Beach, California 90806

17. Thomas Vallas
Renown Health
1155 Mill Street
Reno, Nevada 89502-1474

V.

DISCOVERY PLAN [16.1(b)(2) and 16.1(c)(2)]

A. What changes, if any, should be made in the timing, form or requirements for

Disclosures under 16.1(a):

1. Plaintiffs' view: None.
2. Defendants' view: None at this time.

When disclosures under 16.1(a)(1) were made or will be made:

1. Plaintiffs' disclosures: All records provided STEVEN BALKENBUSH
2. Defendants' Disclosures: Same as above.

B. Subjects on which discovery may be needed:

1. Plaintiffs' view: Complete medical records from Renown Regional
Medical Center, Reno Heart Physicians, Sierra Anesthesiology and possibly others.

1 2. Defendants' view: Defendants have provided all documents from the
2 Defendants' law firm.

3 C. Should discovery be conducted in phases or limited to, or focused upon,
4 particular issues? None

5 The parties have agreed to the following discovery phases and dates: N/A

6 D. What changes, if any, should be made in limitations on discovery imposed
7 under these rules and what, if any, other limitations should be imposed? N/A

8 E. What, if any, other orders should be entered by Court under Rule 26(c) or Rule
9 16(b) and (c):

10 1. Plaintiffs' view: None at this time.

11 2. Defendants' view: None of this time.

12 F. Estimated time for Trial: Ten (10) days

13 **VI.**

14 **DISCOVERY AND MOTION DATES [16.1(c)(5)-(8)]**

15 A. Dates agreed by the parties:

16 1. Close of Discovery: Ninety (90) days prior to Trial or July 16, 2013

17 2. Final date to file motions to amend pleadings or add parties without a
18 further Court Order: One Hundred Twenty (120) days prior to trial of June 17, 2013

19 3. Final dates for expert disclosures: One Hundred Twenty (120) days
20 prior
21 to trial of June 17, 2013

22 4. Expert reports are waived

1 5. Rebuttal expert witnesses: Ninety (90) days prior to trial or July 16,
2 2013

3 6. Final date to file dispositive motions: Sixty (60) days prior to trial or
4 August 15, 2013

5 **VII.**

6 **JURY DEMAND [16.1(c)(10)]**

7 A jury demand has been filed by Defendants.

8 **VIII.**

9 **INITIAL DISCLOSURES/OBJECTIONS [16.1(a)(1)]**

10 If a party objects during the Early Case Conference that initial disclosures are not
11 appropriate I the circumstances of this case, those objections must be stated herein. The
12 Court shall determine what disclosures, if any, are to be made and shall set the time for
13 such disclosure.
14

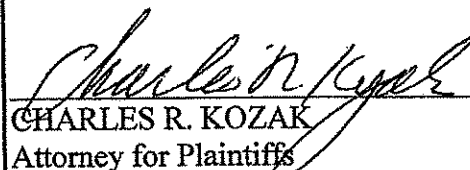
15 This report is signed in accordance with Rule 26(g)(1) of the Nevada Rules of Civil
16 Procedure. Each signature constitutes a certification that, to the best of the signers'
17 knowledge, information and belief, formed after a reasonable inquiry, the disclosures made
18 by the signers are complete and correct as of this time.
19

20 **AFFIRMATION**

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

23 DATED: August 17, 2012

24 DATED: August 16, 2012
PISCEVICH & FENNER

25 
26 CHARLES R. KOZAK
Attorney for Plaintiffs

27 By 
28 MARGO PISCEVICH
Attorneys for Defendants

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**
29 **POTENTIAL EXPERT WITNESSES**

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

- 32 1. Fred Morady, MD, FACC
33 University of Michigan Cardiovascular Center
34 1500 East Medical Center Drive, SPC 5853
35 Ann Arbor, MI 48109-5853
36 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
23 **PISCEVICH & FENNER**

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

Placevich & 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:

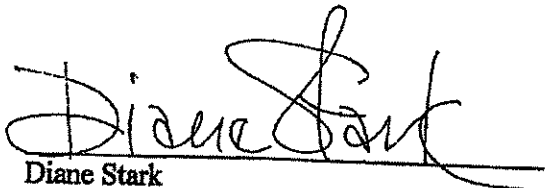
Defendants Stephen C. Balkenbush, Esq., and
Thorndal, Armstrong, Delk, Balkenbush &
Eisenger's Disclosure of Potential Expert
Witnesses

Person(s) Served:

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

<input type="checkbox"/>	Electronic Filing
<input type="checkbox"/>	Hand Deliver
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile (775)

DATED this 14th day of June, 2013.


Diane Stark

ORIGINAL

FILED

Electronically

07-11-2013:11:49:46 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3847834

1 3980
2 MARGO PISCEVICH
3 Nevada State Bar No. 000917
4 MARK J. LENZ
5 Nevada State Bar No. 004672
6 PISCEVICH & FENNER
7 499 West Plumb Lane, Suite 201
8 Reno, Nevada 89509
9 775-329-0958
10 Attorneys for Defendants

11
12
13 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

14
15 IN AND FOR THE COUNTY OF WASHOE

16 ANGLEA DECHAMBEAU and
17 JEAN-PAUL DECHAMBEAU, both
18 Individually and as SPECIAL
19 ADMINISTRATORS of the ESTATE
20 Of NEIL DECHAMBEAU,

Case No. CV12-00571

Dept. No. 7

21
22 Plaintiffs,

23 vs.

24 STEPHEN C. BALKENBUSH, ESQ.,
25 THORNDAL, ARMSTRONG, DELK,
26 BALKENBUSH and EISINGER,
27 A Nevada Professional Corporation,
28 And DOES I through X, inclusive,

Defendants.

STIPULATION AND ORDER TO AMEND JOINT CASE CONFERENCE

REPORT

The parties hereto, by and through their respective counsel, hereby stipulate to amend the Joint Case Conference Report that was filed on August 17, 2012.

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

1 Pursuant to the Joint Case Conference Report, the close of discovery is July 16,
2 2013.

3 There still remains approximately four (4) or five (5) depositions to be taken and it
4 is anticipated that the depositions can be completed before August 30, 2013.
5

6 Presently the following depositions have been scheduled:

7 July 23, 2013 - Deposition of Richard M. Teichner, one of plaintiffs' experts

8 July 31, 2013 - Deposition of Gerald Gillock, one of plaintiffs' experts
9

10 August 7, 2013 - Deposition of Peter Durney, one of defendants' experts

11 There appears to be remaining two lay witnesses disclosed by plaintiffs, namely,
12 Doris Stewart and Pastor Dave Smith and dates are being obtained by plaintiffs' counsel
13 for these depositions.
14

15 The parties hereby agree and stipulate that the above depositions may go forward
16 and that the remaining two depositions shall be scheduled before August 30, 2013.

17 **AFFIRMATION**

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

2 DATED this 9 day of July, 2013.


3
4
5 
6 CHARLES KOZAK, ESQ.
7 Attorney for Plaintiffs

8 PISCEVICH & FENNER
9 By: 
10 MARGO PISCEVICH
11 Attorneys for Defendants

12
13 ORDER

14 IT IS HEREBY SO ORDERED.

15 Dated this 11th day of July, 2013.

16
17 
18 DISTRICT JUDGE
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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

A0043

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. CV12-00571

Dept. No. 7

Plaintiffs,

vs.

STEPHEN C. BALKENBUSH, ESQ.,
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH and EISINGER,
A Nevada Professional Corporation,
And DOES I through X, inclusive,

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendants Stephen C. Balkenbush, Esq., and Thorndal, Armstrong, Delk, Balkenbush and Eisinger, having moved the Court pursuant to NRCP 56 for an Order granting summary judgment in Defendants' favor, the Court being familiar with the briefing on file, and having heard the arguments of counsel, being fully advised in the premises, finds, concludes and orders as follows:

1 **Findings of Fact.**

2 The Court finds that the material facts in this case are as follows:

3 In this legal malpractice action, Plaintiffs allege that Mr. Balkenbush failed to exercise
4 the legal skills necessary to their purported medical malpractice claim against Dr. David Smith
5 and others. Plaintiffs' claim for medical malpractice against Dr. Smith arose out of a heart
6 procedure known as cardiac ablation. During the procedure, (an atrial fibrillation ablation), there
7 was a complication involving a pericardial tamponade. During Dr. Smith's efforts to deal with
8 the complication, Plaintiffs' decedent "coded," i.e. went into cardiac arrest, suffered an anoxic
9 brain injury and died.

11 On September 5, 2007, Plaintiffs' then-counsel, Mr. Balkenbush, filed a medical
12 malpractice lawsuit against Dr. Smith and others. Attached to the underlying Complaint was the
13 Affidavit of Dr. Fred Morady dated August 29, 2007. Plaintiffs had agreed that Mr. Balkenbush
14 would seek to retain the most preeminent expert in the country on cardiac ablation, and that the
15 case would "rise or fall" on the expert's opinion. Plaintiffs and Mr. Balkenbush hired Dr.
16 Morady to fill that role.

18 Dr. Morady reviewed the medical records provided to him, and based on that review,
19 initially opined that Dr. Smith's conduct fell below the standard of care. Dr. Morady advised
20 Mr. Balkenbush that he needed to review the "Prucka" recording, also called the "EPS data"
21 noting "there [had] to be one." Mr. Balkenbush was unable to obtain the EPS tape until March,
22 2010, but upon receipt, Mr. Balkenbush provided it to Dr. Morady for review. After Dr. Morady
23 reviewed it, he told Mr. Balkenbush that he had "changed his opinion," and that he no longer
24 believed that there was any malpractice in the action by Dr. Smith.

26 Mr. Balkenbush advised Plaintiffs of Dr. Morady's change of opinion, and offered to
27 have them speak directly and confidentially to Dr. Morady, which they declined. Plaintiffs
28

1 agreed to dismiss their case, and Mr. Balkenbush filed the appropriate dismissal. Subsequently,
2 Plaintiffs brought this action alleging legal malpractice against Mr. Balkenbush.

3 At the close of discovery, Defendants moved for summary judgment on the ground there
4 was no genuine dispute as to any material issue of fact, and Defendants were entitled to
5 judgment as a matter of law. Specifically, Defendants challenged the existence of any evidence
6 that would support a conclusion that had Mr. Balkenbush done something different it would have
7 resulted in a different outcome. Defendants also challenged Plaintiffs' ability to prove by a
8 preponderance of evidence that they would have prevailed in their underlying medical
9 malpractice action.
10

11 **Standard of Review**

12

13 Summary judgment may be granted where there are no genuine issues of material fact
14 and the movant is entitled to judgment as a matter of law. NRCP 56. This Court must view the
15 evidence and any reasonable inferences drawn from it in a light most favorable to the non-
16 moving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). In *Wood*, however,
17 the Nevada Supreme Court made it clear that the "slightest doubt" standard ... is an incorrect
18 statement of the law and should no longer be used when analyzing motions for summary
19 judgment." *Id.* The nonmoving party must "do more than simply show that there is some
20 metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered
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22 gossamer threads of whimsy, speculation or conjecture." *Pegasus v. Reno Newspapers, Inc.*, 118
23 Nev. 706, 713-14, 57 P.3d 82 (2002). In addition, the mere existence of some alleged factual
24 dispute between the parties will not defeat an otherwise properly supported motion for summary
25 judgment – there must be some genuine issue of material fact. The showing of such a genuine
26 issue for trial is predicated upon the existence of a legal theory which remains viable under the
27 asserted version of the facts and which would entitle the party opposing the motion, assuming
28 that version to be true, to a judgment as a matter of law. *Wood, supra.*

1 **Conclusions of Law**

2 Based upon the briefs, evidence and argument presented to the Court, and on the
3 arguments and presentments of counsel at hearing on September 24, 2013, the Court makes the
4 following conclusions of law and/or application of the facts thereto:

5 Turning first to the underlying medical malpractice claim, the parties agreed that the
6 pivotal issue of fact, or rather, the pivotal set of facts at issue revolved around the administration
7 of pericardiocentesis by Dr. Smith sometime between 12:36 pm and 12:54 pm. Plaintiffs'
8 medical expert concedes that the procedure was properly performed, but disputes the timing.
9 However, while there may have been a dispute in the medical malpractice action, that factual
10 dispute is both speculative and immaterial in light of the failure of Plaintiffs to demonstrate
11 causation in the legal malpractice case.
12

13 In order to prevail in a legal malpractice action, Plaintiffs must allege and prove (1) an
14 attorney-client relationship; (2) the duty to use the skill, prudence and diligence ordinary lawyers
15 possess in exercising and performing similar tasks; (3) a breach of that duty; (4) proximate
16 cause; and (5) damages. *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308 (2004).
17

18 The Court finds that the first two elements are not disputed. Mr. Balkenbush was
19 Plaintiffs' former counsel, and there was no evidence that Mr. Balkenbush lacked any necessary
20 skill, prudence or diligence. In addition, as noted above, Mr. Balkenbush communicated
21 appropriately and timely with his clients. However, Plaintiffs failed to establish the fourth
22 element, proximate cause.
23

24 Plaintiffs' expert, Gerald Gillock, could not point to any action or inaction on the part of
25 Mr. Balkenbush which caused damages to Plaintiffs. While Mr. Gillock was critical of Mr.
26 Balkenbush' discovery, including not obtaining the EPS data sooner, he was unable to suggest
27 how a different course of conduct by Mr. Balkenbush would have changed the outcome. The
28

1 Court notes that even if Mr. Balkenbush had obtained the EPS data sooner, that would only have
2 allowed Dr. Morady to retract his earlier opinion sooner; and the suggestion that Mr. Balkenbush
3 would have had time to hire a different expert does not make the outcome any less speculative.
4 Mr. Balkenbush would have been left with a turncoat witness who would have gutted his case
5 like a trout if he were called as a witness by the defense. Mr. Balkenbush would then have
6 occupied the unenviable position of struggling to rehabilitate his former expert. The likelihood
7 of a favorable outcome under that scenario is ephemeral at best; and no Plaintiffs' expert testified
8 that the outcome would have been any different. Mr. Gillock nowhere asserted that the alleged
9 failure to engage in formal written discovery caused anything.

11 Finally, although Plaintiffs included in their Complaint a claim for punitive damages,
12 Plaintiffs appear to have abandoned that claim. In response to Defendants' Motion for
13 Summary Judgment, Plaintiffs' offered no evidence or argument supporting such claim,
14 and the Court therefore finds it must be dismissed.

16 ORDER

17 The Court having found and concluded as set forth above, therefore orders Defendants'
18 Motion for Summary Judgment shall be, and hereby is **GRANTED**; and Plaintiffs' claims as set
19 forth in their Complaint are **DISMISSED**, with prejudice.

20 Dated this 17 day of OCTOBER, 2013

21
22
23 Patrick Flanagan
DISTRICT JUDGE
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1 2540
MARGO PISCEVICH
2 Nevada State Bar No. 0917
MARK J. LENZ
3 Nevada State Bar No. 4672
PISCEVICH & FENNER
4 499 West Plumb Lane, Suite 201
Reno, Nevada 89509
5 775-329-0958
6 Attorneys for Defendants
7
8

9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR THE COUNTY OF WASHOE**
11

12 ANGELA DECHAMBEAU and
13 JEAN-PAUL DECHAMBEAU, both
Individually and as SPECIAL
14 ADMINISTRATORS of the ESTATE
Of NEIL DECHAMBEAU,
15

Case No. CV12-00571

Dept. No. 7

16 Plaintiffs,
17

17 vs.

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

21 Defendants.
22 _____/

23 **NOTICE OF ENTRY OF ORDER**
24

24 TO: All parties and their counsel of record:
25
26
27
28

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

1 YOU WILL PLEASE TAKE NOTICE that on the 17th day of October, 2013, the
2 above-entitled Court entered its Order Granting Motion for Summary Judgment, a true
3 and correct copy of which is attached hereto.
4

5 **AFFIRMATION**

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

8 DATED this 18th day of October, 2013.
9

10 PISCEVICH & FENNER

11 By: 

12 MARGO PISCEVICH

13 Attorneys for Defendants
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

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JEAN-PAUL DECHAMBEAU, both
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ADMINISTRATORS of the ESTATE
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13 Summary Judgment, Plaintiffs' offered no evidence or argument supporting such claim,
14 and the Court therefore finds it must be dismissed.
15

16 ORDER

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18 Motion for Summary Judgment shall be, and hereby is **GRANTED**; and Plaintiffs' claims as set
19 forth in their Complaint are **DISMISSED**, with prejudice.

20 Dated this 17 day of OCTOBER, 2013

21
22
23 Patrick F. Tavan
DISTRICT JUDGE
24
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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, addressed to the following:

Document Served:


NOTICE OF ENTRY OF ORDER

Person(s) Served:

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

<input type="checkbox"/>	Hand Deliver
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile (775)
<input type="checkbox"/>	Electronic Filing

DATED this 18th day of October, 2013.


Beverly Chambers

CV12-00571
DC-990051050-043
R. DeCHAMBEAU ETAL. VS. STEPH 3 Pages
District Court 11/14/2013 04:08 PM
Washoe County \$2615
n 1000MT

ORIGINAL

FILED

2013 NOV 14 PM 4:09

JOEY DUNCAN HASTINGS
CLERK OF THE COURT

BY 
DEPUTY

1 CODE \$2515
2 CHARLES R. KOZAK, ESQ.
3 Nevada State Bar No. 11179
4 3100 Mill Street, Suite 115
5 Reno, Nevada 89502
6 (775) 322-1239
7 chuck@kozaklawfirm.com
8 Attorney for the Plaintiffs

9
10 **IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**

12 ANGELA DeCHAMBEAU and
13 JEAN-PAUL DeCHAMBEAU, both
14 Individually and as SPECIAL
15 ADMINISTRATORS of the ESTATE
16 of NEIL DECHAMBEAU,

Case No. CV12-00571

Dept. No. 7

17 Plaintiff,

18 vs.

NOTICE OF APPEAL

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

24 Defendants.

25 **COME NOW** Plaintiffs, ANGELA DeCHAMBEAU and JEAN-PAUL
26 DeCHAMBEAU, by and through their Attorney of Record, CHARLES R. KOZAK, ESQ., and
27 hereby Appeal to the SUPREME COURT OF NEVADA, from the final Judgment entered in
28 its entirety, entered October 18, 2013 dismissing Plaintiffs' Complaint with prejudice and
entering Judgment in favor of Defendants and each of them.

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Pursuant to NRS 1239B.030 the undersigned certifies no Social Security numbers are contained in this document.

Dated this 14th day of November 2013.



CHARLES R. KOZAK, ESQ.

Nevada State Bar No. 11179

3100 Mill Street, Suite 115

Reno, Nevada 89502

(775) 322-1239

chuck@kozaklawfirm.com

Attorney for the Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I, Nan V. Adams, certify that on the 14th day of November, 2013, I caused to be
3 delivered by:

4 _____ MESSENGER SERVICE

5 _____ FASCIMILE to the following number: _____

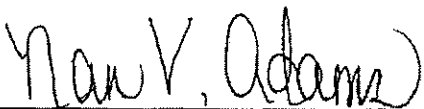
6 XXX U.S. MAIL

7 _____ CERTIFIED MAIL, RETURN RECEIPT REQUESTED

8 _____ FEDERAL EXPRESS or other overnight delivery

9
10 A true and correct copy of the within document: **NOTICE OF APPEAL**, Case No.
11
12 CV12-00571, addressed as follows:

13
14 Margo Piscevich, Esq.
15 Mark J. Lenz, Esq.
16 PISCEVICH & FENNER
17 499 West Plumb Lane, Suite 201
18 Reno, Nevada 89509

19
20 

21 Nan V. Adams
22 3100 Mill Street, Suite 115
23 Reno, Nevada 89502

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.

CV12-00571
No. 64463 D7

FILED

NOV 24 2015

THORNDAL ARMSTRONG
CLERK OF THE DISTRICT 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.

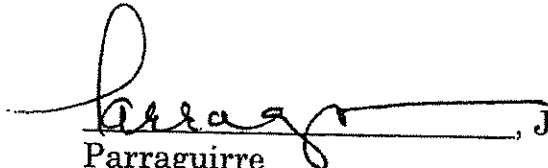
Although respondents also contend that the DeChambeaus' expert legal witness did not testify that Balkenbush's conduct was a proximate cause of any damages, their expert testified that there was a breach of the standard of care with regard to Balkenbush actively pursuing the case. In particular, the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

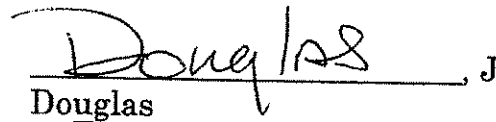
medical records indicating that Dr. Smith did not immediately perform the procedure necessary to restore Neil's pulse, Balkenbush breached his duty to the DeChambeaus in handling discovery, failing to take depositions of fact witnesses and defendants, failing to obtain a certain medical record for close 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.

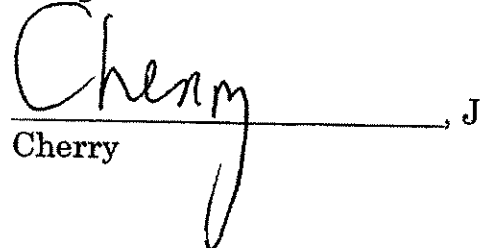
The DeChambeaus supported their arguments against summary judgment with admissible evidence, including transcripts of deposition testimony and medical records. Viewing the evidence in the light most favorable to the DeChambeaus, and drawing reasonable inferences in their favor, summary judgment should 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.


Parraguirre, J.


Douglas, J.


Cherry, J.

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

9 ANGELA DECHAMBEAU, et al.,

10 Plaintiffs,

11 vs.

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

14 Respondents.
15

Case No.: CV12-00571

Dept. No.: 7

16 **ORDER**

17 The Court having reviewed this matter and pursuant to the November 24,
18 2015, Nevada Supreme Court *Order of Reversal and Remand*, and in the interest of
19 justice.

20 The parties to this matter are hereby **ORDERED** to contact the Judicial
21 Assistant in Department 7 within ten (10) days of this *Order* to set a status hearing
22 in this matter.

23 DATED this 23 day of December, 2015.

24 
25 PATRICK FLANAGAN
26 District Judge
27
28

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 23 day of December, 2015, 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, et al.

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

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.

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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.
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7 DISTRICT JUDGE
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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:

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

Joseph A. Lino
Judicial Assistant

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:

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

Fred Morady, M.D., is a cardiologist in clinical practice in the State of Michigan, board-certified in cardiology, clinical cardiac electrophysiology and in internal medicine. Dr. Morady is McKay Professor of Cardiovascular Disease at the University of Michigan School of Medicine, and was an expert for the Plaintiffs in the underlying medical malpractice case, Case Number CV07-02028, *Angela DeChambeau, Jean-Paul DeChambeau v. David, M.D., David Kang, M.D., et al.* Dr. Morady will 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. Dr. Morady's expert information was previously provided in the underlying case.

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

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

\\

\\

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

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

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

8 **AFFIRMATION**

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

12 Dated: September 1, 2016

13 **POLLARA LAW GROUP**

14 By 
15

16 DOMINIQUE A. POLLARA

17 Nevada Bar No. 5742

18 3600 American River Drive, Suite 160

19 Sacramento, CA 95864

20 Phone: (916) 550-5880

21 Attorneys for Defendant STEPHEN C.
22 BALKENBUSH, ESQ. and THORNDAL,
23 ARMSTRONG, DELK, BALKENBUSH and
24 EISINGER, a Nevada Professional
25 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

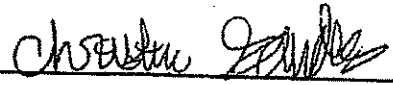
Pursuant to NRCP 5(b), I hereby certify I am an employee of Reno Carson Messenger and that on the 2nd day of September, 2016, I caused DEFENDANTS'

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

1 [DISC]

2 DOMINIQUE A. POLLARA, Nevada SBN 5742
3 POLLARA LAW GROUP
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6 (916) 550-5880 - telephone
7 (916) 550-5066 - fax

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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

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 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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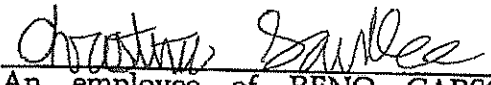
CERTIFICATE OF SERVICE BY SERVICE

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).
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- ☐ 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



KOZAK LUSIANI LAW, LLC

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Reno, NV 89502
P: 775.322.1239
F: 775.300.1767
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

A0082

Dominique A. Pollara, Esq.*
Jesse S. Burns, Esq.*
Vancean N. Hunter, Esq.
Jacqueline C. Zee, Esq.

Pollara
LAW GROUP

3600 American River Dr.
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*Also admitted in Nevada

October 18, 2016

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

Charles R. Kozak, Esq.
Kozak Lusiani 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 Disclosures. 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.

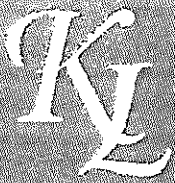
Very truly yours,

POLLARA LAW GROUP

DOMINIQUE A. POLLARA
Dominique A. Pollara
DAP:bf

00076291.WPE

A0083



KOZAK LUSIANI LAW, LLC

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KozakLusianiLaw.com

October 27, 2016

Dominique Pollara

Pollara Law Group

3600 American River Dr., Suite 160

Sacramento, CA 95864

Re: DeChambeau v. Balkenbush

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

Attorneys:

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

R. Craig Lusiani
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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.

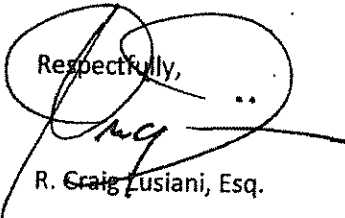
There has been no agreement to extend any discovery since that date and, in fact, you will recall at the Settlement Conference that we attended last month that our position was, and continues to be, that there was no further disclosure of experts possible.

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).

A0084

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

Code 2475
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Attorneys for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ANGELA DECHAMBEAU, et al.,

Plaintiff

Case No.: CV12-00571

vs.

Dept. No.: 7

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

Defendants

PLAINTIFFS' MOTION TO STRIKE

Plaintiffs hereby move to strike Defendants' disclosure of Hugh Calkins, M.D. as an expert witness. Plaintiffs' Motion is brought pursuant to the following Points and Authorities along with the record on file herein.¹

POINTS AND AUTHORITIES

On March 6, 2012, Plaintiffs filed their Complaint and Demand for Jury. On March 28, 2012, Defendants filed their Answer.

¹ Plaintiffs' counsel certifies that he attempted to resolve the issue with Defendants' counsel but was unable to do so.

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

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

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
5 further disclosure of experts possible.

6 There is no reason why a further expert could not have been named
7 previously up to and including as this matter moved towards the October,
8 2013 trial date.

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

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

16 (See Exhibit 6).

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

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

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

9 Burley would withdraw Shivers as an expert and trial was reset for December 3, 2007.
10

11 YVEPA moved for Summary Judgment and on November 7, 2007, the trial court
12 granted the Motion. Burley appealed. On November 5, 2009, the Supreme Court reversed and
13 remanded the case to the trial court "for further proceedings consistent with [its] opinion."
14

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

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

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

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

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

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

15
16
17
18 Considering that Dr. Caulkin resides in Baltimore, the costs and fees Plaintiffs will come
19 to bear will be significantly magnified.

20
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.

25
26
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. Ticor 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

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

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

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

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

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

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

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

DATED: November 15th, 2016.

/s/ R. Craig Lusiani, Esq.
R. CRAIG LUSIANI, ESQ.
Kozak Lusiani Law Firm

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Sacramento, CA 95864

Dedra Sonne
Employee of Kozak Lusiani Law, LLC

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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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Jacqueline Bryant
Clerk of the Court
Transaction # 5807912 : pmsewell

EXHIBIT 1

EXHIBIT 1

A0099

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**
29 **POTENTIAL EXPERT WITNESSES**

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

- 32 1. Fred Morady, MD, FACC
33 University of Michigan Cardiovascular Center
34 1500 East Medical Center Drive, SPC 5853
35 Ann Arbor, MI 48109-5853
36 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
23 PISCEVICH & FENNER

24
25 By: 

26 Margo Piscevich
27 Attorneys for Defendants
28

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:

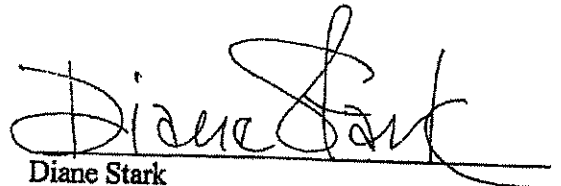
Defendants Stephen C. Balkenbush, Esq., and
Thorndal, Armstrong, Delk, Balkenbush &
Eisenger's Disclosure of Potential Expert
Witnesses

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

A0104

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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Electronically
CV12-00571
2016-11-15 04:29:38 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5807912 : pmsewell

EXHIBIT 3

EXHIBIT 3

A0106

Dominique A. Pollara, Esq.*
Jason S. Barnat, Esq.*
Vanessa N. Hunter, Esq.
Jacqueline C. Zee, Esq.

Pollara
LAW GROUP

3681 American River Dr.
Suite 160
Sacramento, CA 95864
(916) 551-5880
(916) 551-5866

*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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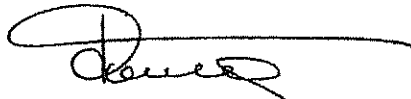
A0107

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
3600 American River Drive, Suite 160
4 Sacramento, California 95864
(916) 550-5880 - telephone
(916) 550-5066 - fax

5 KIM MANDELBAUM
6 Nevada Bar No. 318
MANDELBAUM ELLERTON & MCBRIDE
7 2012 Hamilton Lane
Las Vegas, Nevada 89106
(702) 367-1234
8 Email: filing@memlaw.net

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

11
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
and as Special Administrator of the Estate
17 of NEIL DeCHAMBEAU,

18 Plaintiffs,

19 vs.

20 STEPHEN C. BALKENBUSH, ESQ.; and
THORDAHL ARMSTRONG DELK
21 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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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

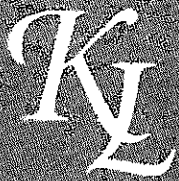

An employee of RENO CARSON
MESSENGER

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

EXHIBIT 4

EXHIBIT 4

A0113



KOZAK LUSIANI LAW, LLC

3100 Mill Street
Suite 115
Reno, NV 89502
P: 775.322.1239
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

A0114

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

EXHIBIT 5

EXHIBIT 5

A0115

Pollara

LAW GROUP

Dominique A. Pollara, Esq.*
Jason S. Barnes, Esq.*
Vance N. Hunter, Esq.
Jacqueline C. Zee, Esq.

3600 American River Dr.
Suite 160
Sacramento, CA 95866
(916) 550-5880 office
(916) 550-5886 fax

*Also admitted in Nevada

October 18, 2016

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

Charles R. Kozak, Esq.
Kozak Lusiani 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

00076291.WPI

A0116

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CV12-00571
2016-11-15 04:29:38 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5807912 : pmsewell

EXHIBIT 6

EXHIBIT 6

A0117



KOZAK LUSIANI LAW, LLC

8100 Mill Street
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Reno, NV 89502
P: 775.322.1239
T: 775.800.4767
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.

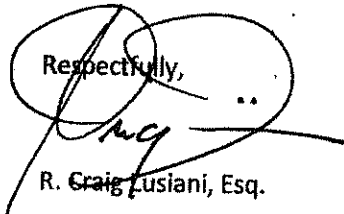
There has been no agreement to extend any discovery since that date and, in fact, you will recall at the Settlement Conference that we attended last month that our position was, and continues to be, that there was no further disclosure of experts possible.

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).

A0118

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/rcl

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Jacqueline Bryant
Clerk of the Court
Transaction # 5807912 : pmsewell

EXHIBIT 7

EXHIBIT 7

A0120

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

Pollara
LAW GROUP

3601 American River Dr.
Suite 160
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(916) 530-5860 office
(916) 530-5066 fax

*Also admitted in Nevada

October 10, 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.

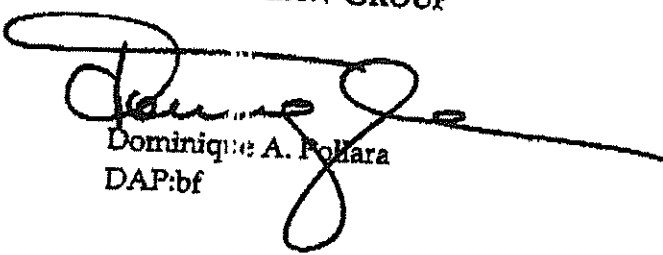
Charles R. Kozak, Esq.
R. Craig Lusiani, Esq.
Re: DeChambeau v. Balkenbush
October 31, 2016
Page 2

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

Code 2475
CHARLES R. KOZAK, ESQ. (SBN 11179)
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3100 Mill Street, Suite 115
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(775) 322-1239; Fax (775) 800-1767
Attorneys for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ANGELA DECHAMBEAU, et al.,

Plaintiff

Case No.: CV12-00571

vs.

Dept. No.: 7

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

Defendants

MOTION IN LIMINE TO EXCLUDE THE TESTIMONY
OF DR. HUGH G. CALKINS

Plaintiffs bring this Motion to Exclude the Testimony of Dr. Hugh G. Calkins as an additional medical expert on the basis that Defendants have failed to produce Dr. Calkin's Expert Witness Report pursuant to NRCP 16.1 (2) (A)(B) and (C). Defendants disclosed an expert pursuant to the court's Feb 1, 2016 Scheduling Order. It should be noted that Plaintiffs have filed an Emergency Petition for a Writ of Mandamus wherein they seek to strike Dr. Calkin's expert testimony and to vacate the Scheduling Order. This petition remains pending.

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

DATED: December 29th, 2016.

/s/ Charles R. Kozak, Esq.
CHARLES R. KOZAK, ESQ.
Kozak Lusiani Law Firm

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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
Dedra Sonne
Employee of Kozak Lusiani Law, LLC

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

ANGELA DECHAMBEAU AND JEAN-PAUL
DECHAMBEAU, BOTH INDIVIDUALLY AND
AS SPECIAL ADMINISTRATOR OF THE
ESTATE OF NEIL DECHAMBEAU,
Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF WASHOE; AND THE
HONORABLE PATRICK FLANAGAN,
DISTRICT JUDGE,

Respondents,

and

STEPHEN C. BALKENBUSH, ESQ.; AND
THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER, A NEVADA
PROFESSIONAL CORPORATION,
Real Parties in Interest.

Supreme Court No. 72004
District Court Case No. CV1200571

07

NOTICE OF TRANSFER TO COURT OF APPEALS

TO: Hon. Patrick Flanagan, District Judge
Kozak Lusiani Law \ Charles R. Kozak
Pollara Law Group \ Dominique A. Pollara
Mandelbaum, Ellerton & Associates \ Kim Irene Mandelbaum
Jacqueline Bryant, Washoe District Court Clerk ✓

Pursuant to NRAP 17(b), the Supreme Court has decided to transfer this matter to the Court of Appeals. Accordingly, any filings in this matter from this date forward shall be entitled "In the Court of Appeals of the State of Nevada." NRAP 17(e).

DATE: December 28, 2016

Elizabeth A. Brown, Clerk of Court

By: Amanda Ingersoll
Chief Deputy Clerk

Notification List

Electronic

Kozak Lusiani Law \ Charles R. Kozak

Pollara Law Group \ Dominique A. Pollara

Mandelbaum, Ellerton & Associates \ Kim Irene Mandelbaum

Paper

Hon. Patrick Flanagan, District Judge

Jacqueline Bryant, Washoe District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CV12-00571
No. 72004 07

ANGELA DECHAMBEAU AND JEAN-
PAUL DECHAMBEAU, BOTH
INDIVIDUALLY AND AS SPECIAL
ADMINISTRATOR OF THE ESTATE
OF NEIL DECHAMBEAU,
Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
WASHOE; AND THE HONORABLE
PATRICK FLANAGAN, DISTRICT
JUDGE,

Respondents,

and

STEPHEN C. BALKENBUSH, ESQ.;
AND THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER, A
NEVADA PROFESSIONAL
CORPORATION,
Real Parties in Interest.

FILED

JAN 05 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS


This is an original petition for a writ of mandamus challenging a district court order denying a motion to strike an expert witness.

Having considered the petition and supporting documents, we conclude that petitioners have failed to meet their burden of demonstrating that extraordinary writ relief is warranted. See NRS 34.160 (providing that a writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station); NRS 34.170 (explaining that writ relief is generally not available when the petitioner has a plain, speedy, and

adequate remedy at law); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) ("Petitioners carry the burden of demonstrating that extraordinary relief is warranted."). In this case, petitioners have an adequate remedy in the form of an appeal from the final judgment in the underlying matter. *See Pan*, 120 Nev. at 224, 88 P.3d at 841 (holding that an appeal is generally an adequate remedy precluding writ relief). Accordingly, we deny the petition. *See* NRAP 21(b); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (providing that whether to consider a writ petition is discretionary).

It is so ORDERED.¹


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Kozak Lusiani Law
Pollara Law Group
Mandelbaum, Ellerton & Associates
Washoe District Court Clerk

¹In light of this order, we deny as moot petitioners' request, contained in the writ petition, for a stay of the underlying proceedings.

ORIGINAL

1 [1885]

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

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

15 Plaintiffs,

16 vs.

17 STEPHEN C. BALKENBUSH,
18 ESQ.; and THORNDAL
19 ARMSTRONG DELK
20 BALKENBUSH & EISINGER, a
21 Nevada Professional Corporation,

22 Defendants.

Case No. CV 12-00571
Dept. 7

Trial Date: January 17, 2017

23 LADIES AND GENTLEMEN OF THE JURY:

24 It is my duty to instruct you in the law that applies to this case. It is
25 your duty as jurors to follow these instructions and to apply the rules of
26 law to the facts as you find them from the evidence.

27 You must not be concerned with the wisdom of any rule of law stated
28 in these instructions. Regardless of any opinion you may have as to what
the law ought to be, it would be a violation of your oath to base a verdict
upon any other view of the law than that given in the instructions of the
court.

INSTRUCTION NO. 1

1 If, in these instructions, any rule, direction or idea is repeated or
2 stated in different ways, no emphasis thereon is intended by me and none
3 may be inferred by you. For that reason, you are not to single out any
4 certain sentence or any individual point or instruction and ignore the
5 others, but you are to consider all the instructions as a whole and regard
6 each in the light of all the others.

7 The order in which the instructions are given has no significance as
8 to their relative importance.

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27 INSTRUCTION NO. 2
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1 The masculine form as used in these instructions, if applicable as
2 shown by the text of the instruction and the evidence, applies to a female
3 person or a corporation.
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INSTRUCTION NO. 3

1 The evidence which you are to consider in this case consists of
2 testimony of the witnesses, the exhibits, and any facts admitted or agreed
3 to by counsel.

4 Statements, arguments and opinions of counsel are not evidence in
5 the case. However, if the attorneys stipulate as to the existence of a fact,
6 you must accept the stipulation as evidence and regard that fact as proved.

7 You must not speculate to be true any insinuations suggested by a
8 question asked a witness. A question is not evidence and may be
9 considered only as it supplies meaning to the answer.

10 You must disregard any evidence to which an objection was
11 sustained by the court and any evidence ordered stricken by the court.

12 Anything you may have seen or heard outside the courtroom is not
13 evidence and must also be disregarded.

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28 INSTRUCTION NO. 4

1 You must decide all questions of fact in this case from the evidence
2 received in this trial and not from any other source. You must not make
3 any independent investigation of the facts or the law or consider or discuss
4 facts as to which there is no evidence. This means, for example, that you
5 must not on your own visit the scene, conduct experiments or consult
6 reference works for additional information.

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28 INSTRUCTION NO. 5

1 Although you are to consider only the evidence in the case in
2 reaching a verdict, you must bring to the consideration of the evidence
3 your everyday common sense and judgment as reasonable men and
4 women. Thus, you are not limited solely to what you see and hear as the
5 witnesses testify. You may draw reasonable inferences from the evidence
6 which you feel are justified in the light of common experience, keeping in
7 mind that such inferences should not be based on speculations or guess.

8 A verdict may never be influenced by sympathy, prejudice or public
9 opinion. Your decision should be the product of sincere judgment and
10 sound discretion in accordance with these rules of law.

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28 INSTRUCTION NO. 6

1 If, during this trial, I have said or done anything which has
2 suggested to you that I am inclined to favor the claims or position of any
3 party, you will not be influenced by any such suggestion.

4 I have not expressed, nor intended to express, nor have I intended to
5 intimate, any opinion as to which witnesses are or are not worthy of belief,
6 what facts are or are not established, or what inference should be drawn
7 from the evidence. If any expression of mine has seemed to indicate an
8 opinion related to any of these matters, I instruct you to disregard it.

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27 INSTRUCTION NO. 7
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1 There are two kinds of evidence, direct and circumstantial. Direct
2 evidence is direct proof of a fact, such as testimony of an eyewitness.
3 Circumstantial evidence is indirect evidence, that is, proof of a chain of
4 facts from which you could find that another fact exists, even though it has
5 not been proved directly. You are entitled to consider both kinds of
6 evidence. The law permits you to give equal weight to both, but it is for
7 you to decide how much weight to give to any evidence. It is for you to
8 decide whether a fact has been proved by circumstantial evidence.

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28 INSTRUCTION NO. 8

1 In determining whether any proposition has been proved, you should
2 consider all of the evidence bearing on the question without regard to
3 which party produced it.
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27 INSTRUCTION NO. 9
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1 The credibility or "believability" of a witness should be determined by
2 his or her manner upon the stand, his or her relationship to the parties,
3 his or her fears, motives, interests or feelings, his or her opportunity to
4 have observed the matter to which he or she testified, the reasonableness
5 of his or her statements and the strength or weakness of his or her
6 recollections.

7 If you believe that a witness has lied about any material fact in the
8 case, you may disregard the entire testimony of that witness or any
9 portion of this testimony which is not proved by other evidence.

1 Discrepancies in a witness's testimony or between his testimony and
2 that of others, if there were any discrepancies, do not necessarily mean
3 that the witness should be discredited. Failure of recollection is a common
4 experience, and innocent misrecollection is not uncommon. It is a fact,
5 also, that two persons witnessing an incident or transaction often will see
6 or hear it differently. Whether a discrepancy pertains to a fact of
7 importance or only to a trivial detail should be considered in weighing its
8 significance.

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28 INSTRUCTION NO. 11

1 A question has been asked in which an expert witness was told to
2 assume that certain facts were true and to give an opinion based upon that
3 assumption. This is called a hypothetical question. If any fact assumed in
4 the question has not been established by the evidence, you should
5 determine the effect of that omission upon the value of the opinion.
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INSTRUCTION NO. 12

1 Whenever in these instructions I state that the burden, or the
2 burden of proof, rests upon a certain party to prove a certain allegation
3 made by him, the meaning of such an instruction is this: That unless the
4 truth of the allegation is proved by a preponderance of the evidence, you
5 shall find the same to be not true.

6 The term "preponderance of the evidence" means such evidence as,
7 when weighed with that opposed to it, has more convincing force, and from
8 which it appears that the greater probability of truth lies therein.

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27 INSTRUCTION NO. 13
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1 The preponderance, or weight of evidence, is not necessarily with the
2 greater number of witnesses.

3 The testimony of one witness worthy of belief is sufficient for the
4 proof of any fact and would justify a verdict in accordance with such
5 testimony, even if a number of witnesses have testified to the contrary. If,
6 from the whole case, considering the credibility of witnesses, and after
7 weighing the various factors of evidence, you believe that there is a
8 balance of probability pointing to the accuracy and honesty of the one
9 witness, you should accept his testimony.

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28 INSTRUCTION NO. 14

1 The plaintiff has the burden to prove that the plaintiff sustained
2 damage, that the defendant was negligent, and that such negligence was a
3 proximate cause of the damage sustained by the plaintiff.
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INSTRUCTION NO. 15

1 The plaintiff seeks to establish a claim of negligence. I will now
2 instruct you on the law relating to this claim.
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INSTRUCTION NO. 16

1 A proximate cause of injury, damage, loss or harm is a cause which,
2 in natural and continuous sequence, produces the injury, damage, loss, or
3 harm and without which the injury, damage, loss, or harm, would not have
4 occurred.

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27 INSTRUCTION NO. 17
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A0146

1 In this case, liability for personal injury or death is not imposed upon
2 any provider of medical care based on alleged negligence in the
3 performance of that care unless evidence consisting of expert medical
4 testimony or material from recognized medical texts or treatises is
5 presented to demonstrate the alleged deviation from the accepted standard
6 of care in similar circumstances to this case.

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27 INSTRUCTION NO. 1A
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A0147

1 It is the duty of a physician or surgeon who is a Board Certified
2 Specialist to have the knowledge and skill ordinarily possessed, and to use
3 the care and skill ordinarily used, by reputable specialists practicing in the
4 same field.

5 A failure to perform such duty is negligence.
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INSTRUCTION NO. 19

1 A physician is not necessarily negligent because his efforts prove
2 unsuccessful. He is negligent if his lack of success is due to a failure to
3 perform any of his duties as defined in these instructions.
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INSTRUCTION NO. 20

1 The mere fact that there was an accident or other event and someone
2 was injured is not of itself sufficient to predicate liability. Negligence is
3 never presumed but must be established by substantial evidence.
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INSTRUCTION NO. 21

1 In this case you have heard medical experts express opinions as to
2 the standard of professional learning, skill and care required of David
3 Smith, M.D.

4 To evaluate each opinion, you should consider the qualifications and
5 credibility of the witness and the reasons given for his opinion. Give each
6 opinion the weight to which you deem it entitled.

7 You must resolve any conflict in the testimony of the witnesses by
8 weighing each of the opinions expressed against the others taking into
9 consideration the reasons given for the opinion, the facts relied upon by
10 the witness, his relative credibility, and his special knowledge, skill,
11 experience, training and education.

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27 INSTRUCTION NO. 22
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1 Plaintiffs, Angela DeChambeau and Jean-Paul DeChambeau, are the
2 heirs of Neil DeChambeau, deceased.

3 In determining the amount of losses, if any, suffered by one or more
4 of the heir(s) as a proximate result of the death of Neil DeChambeau, you
5 will decide upon a sum of money sufficient to reasonably and fairly
6 compensate each such heir for the following items:

7 The heir's loss of probable support, companionship, society, comfort
8 and consortium. In determining that loss, you may consider the financial
9 support, if any, which the heir would have received from the deceased
10 except for his death, and the right to receive support, if any, which the heir
11 has lost by reason of his death.

12 The right of one person to receive support from another is not
13 destroyed by the fact that the former does not need the support, nor by the
14 fact that the latter has provided it.

15 You may also consider:

- 16 1. The age of the deceased and of the heir;
- 17 2. The health of the deceased and of the heir;
- 18 3. The respective life expectancies of the deceased and of the heir;
- 19 4. Whether the deceased was kindly, affectionate or otherwise;
- 20 5. The disposition of the deceased to contribute financially to support
21 the heir;
- 22 6. The earning capacity of the deceased;
- 23 7. His habits of industry and thrift; and
- 24 8. Any other facts shown by the evidence indicating what benefits the
25 heir might reasonably have been expected to receive from the deceased
26 had he lived.

27 With respect to life expectancies, you will only be concerned with the
28 shorter of the two, that of the heir whose damages you are evaluating or

1 that of the decedent, as one can derive a benefit from the life of another
2 only so long as both are alive.

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27 INSTRUCTION NO. 23
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1 No definite standard or method of calculation is prescribed by law by
2 which to fix reasonable compensation for grief or sorrow or pain and
3 suffering. Nor is the opinion of any witness required as to the amount of
4 such reasonable compensation. Furthermore, the argument of counsel as
5 to the amount of damages is not evidence of reasonable compensation. In
6 making an award for grief or sorrow and pain and suffering, you shall
7 exercise your authority with calm and reasonable judgment and the
8 damages you fix shall be just and reasonable in light of such evidence.

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28 INSTRUCTION NO. 24

1 Whether any of these elements of damage have been proved by the
2 evidence is for you to determine. Neither sympathy nor speculation is a
3 proper basis for determining damages. However, absolute certainty as to
4 the damages is not required. It is only required that plaintiff prove each
5 item of damage by a preponderance of the evidence.

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27 INSTRUCTION NO. 25
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1 The court has given you instructions embodying various rules of law
2 to help guide you to a just and lawful verdict. Whether some of these
3 instructions will apply will depend upon what you find to be the facts. The
4 fact that I have instructed you on various subjects in this case, including
5 that of damages, must not be taken as indicating an opinion of the court as
6 to what you should find to be the facts or as to which party is entitled to
7 your verdict.

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27 INSTRUCTION NO. 26
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1 It is your duty as jurors to consult with one another and to deliberate
2 with a view toward reaching an agreement, if you can do so without
3 violence to your individual judgment. Each of you must decide the case for
4 yourself, but should do so only after a consideration of the case with your
5 fellow jurors, and you should not hesitate to change an opinion when
6 convinced that it is erroneous. However, you should not be influenced to
7 vote in any way on any question submitted to you by the single fact that a
8 majority of the jurors, or any of them, favor such a decision. In other
9 words, you should not surrender your honest convictions concerning the
10 effect or weight of evidence for the mere purpose of returning a verdict or
11 solely because of the opinion of the other jurors. Whatever your verdict is,
12 it must be the product of a careful and impartial consideration of all the
13 evidence in the case under the rules of law as given by the court.
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INSTRUCTION NO. 27

1 If, during your deliberation, you should desire to be further informed
2 on any point of law or hear again portions of the testimony, you must
3 reduce your request to writing signed by the foreperson. The officer will
4 then return you to court where the information sought will be given to you
5 in the presence of the parties and their attorneys.

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27 INSTRUCTION NO. ~~28~~
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1 Now you will listen to the arguments of counsel who will endeavor to
2 aid you to reach a proper verdict by refreshing in your minds the evidence
3 and by showing the application thereof to the law; but, whatever counsel
4 may say, you will bear in mind that it is your duty to be governed in your
5 deliberation by the evidence, as you understand it and remember it to be,
6 and by the law as given you in these instructions, and return a verdict
7 which, according to your reason and candid judgment, is just and proper.
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INSTRUCTION NO. 29

1 When you retire to consider your verdict, you must select one of your
2 number to act as a foreperson, who will preside over your deliberation and
3 will be your spokesperson here in the court.

4 During your deliberation, you will have all the exhibits which were
5 admitted into evidence, these written instructions and forms of verdict
6 which have been prepared for your convenience.

7 In civil actions, three-fourths of the total number of jurors may find
8 and return a verdict. This is a civil action. As soon as six or more of you
9 have agreed on a verdict, you must have it signed and dated by your
10 foreperson, and then return with it to this room.

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13 Patrick Flanagan
14 DISTRICT JUDGE
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ORIGINAL

1 [3950]

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
7 NEVADA
8 IN AND FOR THE COUNTY OF WASHOE
9

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

13 Plaintiffs,

14 vs.

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

18 Defendants.
19

Case No. CV 12-00571
Dept. 7

Trial Date: January 17, 2017

20 SPECIAL VERDICT FORM
21

22 We, the jury in the above-entitled action, find the following special
23 verdict on the Questions submitted to us:

24 Question No. 1: Was David Smith, M.D. negligent in his care and
25 treatment of the decedent, Neil DeChambeau?
26

27 ANSWER: Yes _____

No X

28
A0161

1 If you answered Question No. 1 "no," stop here, answer no further
2 questions, and have the foreperson sign and date and return this verdict.

3
4 If you answered Question No. 1 "yes," please proceed to Question No. 2.

5 Question No. 2:

6
7 Was David Smith, M.D.'s negligence a cause of the death of Neil
8 DeChambeau?

9
10 ANSWER: Yes _____ No _____

11 If you answered Question No. 2 "no," stop here, answer no further
12 questions, and have the foreperson sign and date and return this verdict.

13
14 If you answered Question No. 2 "yes," please proceed to Question No. 3.

15 Question No. 3:

16
17 What amount of damage, if any, do you find was sustained by the
18 decedent, Neil DeChambeau, for pain, suffering and disfigurement?

19 Answer: \$ _____

20
21 Question No. 4:

22 What amount of damage, if any, do you find plaintiffs are reasonably
23 likely to sustain for their grief or sorrow, companionship, society, comfort
24 and consortium as the result of the wrongful conduct of the Defendant?

25
26 Angela DeChambeau \$ _____

27
28 Jean-Paul DeChambeau \$ _____

1 Question No. 5:

2 What amount of damage, if any, do you find plaintiffs have sustained
3
4 for loss of earnings caused by such negligence?

5 Answer: \$ _____

6
7 DATED this 20 day of January, 2017,

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11 Matthew Gomez
12 FOREPERSON

13 Matthew Gomez
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Return Of NEF

Recipients

DOMINIQUE - Notification received on 2017-01-24 10:05:35.389.
POLLARA, ESQ.

R. LUSIANI, ESQ - Notification received on 2017-01-24 10:05:35.327.

CHARLES KOZAK, - Notification received on 2017-01-24 10:05:35.467.
ESQ.

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A filing has been submitted to the court RE: CV12-00571

Judge:

HONORABLE PATRICK FLANAGAN

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01-24-2017:10:04:27

Clerk Accepted:

01-24-2017:10:05:02

Court:

Second Judicial District Court - State of Nevada
Civil

Case Title:

A.DECHAMBEAU ETAL. VS. STEPHEN
BALKENBUSH ETAL.(D7

Document(s) Submitted:

Special Verdict

Filed By:

Court Clerk KOates

You may review this filing by clicking on the following link to take you to your cases.

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If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

CHARLES R. KOZAK, ESQ. for JEAN-PAUL
DECHAMBEAU et al

DOMINIQUE A. POLLARA, ESQ. for STEPHEN
C BALKENBUSH

R. CRAIG LUSIANI, ESQ for JEAN-PAUL
DECHAMBEAU et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

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