IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELA DeCHAMBEAU and JEAN-PAUL DeCHAMBEAU, INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF NEIL DeCHAMBEAU,

Appellants,

vs.

STEPHEN C. BALKENBUSH, ESQ., AND THORNDAHL, ARMSTRONG, DELK, BALKENBUSH and EISINGER, A NEVADA PROFESSIONAL CORPORATION,

Respondents.
_____/

No. 72879

RESPONDENTS' ANSWERING BRIEF

Appeal From Judgment
Second Judicial District Court, County of Washoe
The Honorable Patrick Flanagan, District Judge
Case No. CV12-00571

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I. NRAP 26.1 DISCLOSURE

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

RELATED ENTITIES:

None.

LAW FIRMS APPEARING FOR RESPONDENT IN THE CASE OR EXPECTED TO APPEAR IN THIS COURT:

Robert Vohl of Molof & Vohl, and Dominique A. Pollara, of Pollara Law Group represent Respondents on Appeal.

Dominique A. Pollara, of Pollara Law Group, Kim Mandelbaum of Mandelbaum, Ellerton & McBride, and Margo Piscevich, of Piscevich & Fenner, represented Respondents in the District Court.

TABLE OF CONTENTS

Page

II. TABLE OF AUTHORITIES

CASES **Page**

STATUTES

RULES

III. STATEMENT OF THE FACTS

In 2012, the DeChambeaus sued respondents (hereafter Balkenbush) for legal malpractice. The DeChambeaus alleged that Balkenbush, who represented the DeChambeaus in a medical malpractice action against Dr. David R. Smith, breached his duty to the DeChambeaus by advising them to voluntarily dismiss their action. The trial of the DeChambeaus' action against Balkenbush was originally set to commence on November 17, 2013.

Prior to trial, Balkenbush moved for summary judgment, contending that the DeChambeaus could not establish that he breached the standard of care in handling their medical malpractice case or that they would have prevailed in the case if they had proceeded to trial. On October 17, 2013, thirty days prior to the original trial date, the district court granted summary judgment in favor of Balkenbush. The DeChambeaus appealed the summary judgment order and this Court reversed the ruling and remanded the case for further proceedings.

Following remand, the district court held a scheduling conference on January 21, 2016 and scheduled trial for January 17, 2017. On February 1, 2016, the district court issued a Scheduling Order which, among other things, set a September 3, 2016 deadline for disclosing experts.[1] 1 AA 67.

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[1] The Scheduling Order recites the fact that the court ordered that experts be disclosed by September 3, 2016 only after "counsel representing all parties have been heard and after consideration by the Court." 1 AA 67.

One of the medical expert witnesses designated by Balkenbush was Dr. Morady. Dr. Morady was initially designated as a defense expert on June 14, 2013. The designation indicated that he would opine as to "the medical care and treatment of decedent Neil DeChambeau, causation, and the standard of care as to Defendant." 1 AA 37. As of the date when summary judgment was granted in favor of Balkenbush, October 17, 2013, (just thirty days prior to the original trial date of November 17, 2013), the DeChambeaus had still not taken the oral deposition of Dr. Morady, but had only served Dr. Morady with written deposition questions pursuant to NRCP 26(a). AOB 8:20.

On September 2, 2016, Balkenbush timely designated Dr. Calkins as an additional medical expert. Dr. Calkins had the identical field of expertise (cardiac electrophysiology) as Balkenbush's previously designated expert, Dr. Morady, and was designated to opine as to the same matters as Dr. Morady, to wit, "the medical care and treatment of decedent Neil DeChambeau, causation, and the standard of care as to Defendant." 1 AA 73.

As of September 2, 2016 (the date when Dr. Calkins was disclosed), the DeChambeaus had still not sought to take Dr. Morady's oral deposition. Although the DeChambeaus had three months after the disclosure of Dr. Calkins to take his oral deposition or serve him with the same written questions that they had served upon Dr. Morady, they elected not to pursue either form of discovery from Dr. Calkins. 1 AA

67.

Rather than pursue additional discovery regarding the opinions of Dr. Morady or Dr. Calkins, the DeChambeaus filed a motion to strike "Defendents' disclosure of Hugh Calkins, M.D. as an expert witness." However, they did not file their motion to strike until November 15, 2016, some two and a half months after Balkenbush had designated Dr. Calkins as an expert and more than seven months after the Scheduling Order was issued. 1 AA 86. In that motion, the DeChambeaus argued that Balkenbush's designation was untimely because he did not seek an extension of the discovery deadline established in the August 17, 2012 NRCP 16.1 Joint Case Conference Report. 1 AA 87, 94, 95. However, the motion to strike advanced no argument that the district court lacked discretion to enter the February 1, 2016 Scheduling Order or to establish a new cut-off date. The district court entered an order denying the motion to strike on December 12, 2016.[2]

On December 29, 2016, the DeChambeaus filed a motion in limine, seeking to exclude Dr. Calkins' testimony on the ground that they were not provided with an expert report. 1 AA 123. However, the parties' Joint Case Conference Report provided that "expert reports are waived." 1 AA 34. Nothing in the record indicates that the DeChambeaus ever requested that Dr. Calkins prepare a report. Nor is there any evidence that they had ever requested such a report from Dr. Morady.

[2] The Appellant's Appendix does not include copy of the Order.

Appellant's appendix does not contain a copy of the an order denying the motion in limine or a transcript of the district court's ruling.

The case proceeded to trial on January 17, 2017. Because the Dechambeaus' claim was based on legal malpractice, they were required to prove that Balkenbush's conduct fell below the standard of care and was the proximate cause of the client's damages. *Semenza v. Nev. Med. Liab. Ins.*, 104 Nev. 666, 667, 765 P.2d 184 (1988). As this Court recognized in its Order of Reversal, in order to establish causation in the legal malpractice case, the DeChambeaus were required to prove that they would have prevailed on their medical malpractice claim against Dr. Smith if that case had been tried. 1 AA 61. This element requires the plaintiff in a legal malpractice action to prove what is commonly characterized as a "case within a case." Accordingly, the trial herein was bifurcated, with the first phase consisting of the trial of the claim against Dr. Smith for medical malpractice. 2 AA 255. Dr. Calkins testified as Balkenbush's medical expert at the trial.

Although the only portion of the trial transcript that the DeChambeaus included in their appendix was the testimony of Dr. Calkins, and therefore the majority of the trial testimony and evidence is not part of the record on appeal, it is undisputed that the medical malpractice case arose as a result of Dr. Smith's treatment of Neil DeChambeau. In treating Neil DeChambeau, Dr. Smith performed a procedure known as an "atrial fibrillation catheter ablation," in which electronic impulses are

sent to the patient's heart in order to treat an irregular heartbeat. (described in detail at 2 AA 183-188). During the course of the procedure, Neil DeChambeau suffered bleeding in the pericardial sac which resulted in cardiac arrest. AOB 3:14.

Since bleeding in the pericardial sac is one of the recognized risks of the procedure, the medical malpractice suit was not based on the fact that the bleeding or cardiac arrest occurred. Rather, the DeChambeaus claimed that Dr. Smith committed malpractice by failing to immediately perform a procedure known as "pericardiocentesis" to drain the blood from the pericardial sac in order to relieve the pressure on the patient's heart. AOB 3:15-25, 5:9; 1 AA 190. Thus, in order to establish proximate cause in the legal malpractice action, the DeChambeaus were required to prove that Dr. Smith failed to respond to the medical emergency in accordance with the applicable standard of care.

Following the phase of the bifurcated trial that was directed at the medical malpractice issue, the jury found that Dr. Smith did not commit malpractice. 2 AA 255. The jury therefore returned a verdict in favor of Balkenbush on the issue of causation. The jury's finding on the medical malpractice claim not only confirmed that the DeChambeaus were not damaged as a result of Balkenbush's conduct, but also that advice he gave to the DeChambeaus to dismiss their medical malpractice case was appropriate. As a result, the district court entered judgment in favor of Balkenbush on the DeChambeaus' legal malpractice claim. 2 AA 255.

Thereafter, the DeChambeaus filed a motion for a new trial pursuant to NRCP 59(a). The district court denied that motion on March 31, 2017 and this appeal followed.

Before proceeding with the legal argument in this answering brief, it should also be noted that the majority of the DeChambeaus' statement of the facts consists of factual assertions that are unsupported by references to the Appellant's Appendix. Instances in which the DeChambeaus have made factual assertions without any citation to the appendix include the following:

- AOB 3:2-25 (all assertions are referenced to the DeChambeaus' complaint, not to the trial transcript);
- AOB 4:1 (no references to support the assertion that "Balkenbush had no experience as a plaintiff's medical malpractice lawyer, let alone experience in handling a wrongful death claim");[3]
- AOB 4:14-21 (again referencing only the complaint);
- AOB 4:21- 5:20 (no references to support the opinions of the DeChambeaus' attorney concerning the merits of the case, factual assertions regarding expert opinions, descriptions of Balkenbush's actions, or alleged communications between individuals and Balkenbush

[3] This unsupported assertion not only violates NRAP 28(e)(1), but is also untrue, vexatious and irrelevant.

concerning the facts of the case);

- AOB 13:8 (no reference to support the assertion that "objections to the late disclosure were made to the court at the scheduling conference");
- AOB 17:10 (no reference to support assertion that the designation of Dr. Calkins was "a last ditch attempt at finding a defense expert after they dropped Morady and their summary judgment ruling was overturned.");
- AOB 21:10-15 (only referencing their complaint).

The above-referenced assertions violate NRAP 28(e)(1), which requires every factual assertion to be supported by a reference to the page of the appendix at which the factual matter appears. Accordingly, all factual assertions that are not supported by proper references to the record must be disregarded. NRAP 28(e)(1); *see Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720, 725 (1993).

IV. SUMMARY OF LEGAL ARGUMENT

The district court properly exercised its discretion by determining that Balkenbush timely designated Dr. Calkins as an expert witness because: (1) the designation was made in accordance with the deadlines established by the Scheduling Order; (2) the district court had discretion to issue the Scheduling Order following remand; (3) the DeChambeaus waived any objection to the Scheduling Order; (4) the DeChambeaus were not prejudiced by the issuance of the Scheduling Order or the designation of Dr. Calkins, and; (5) Balkenbush relied on the fact that the Scheduling

Order allowed him to designate an additional expert without having to make a motion.

The district court did not abuse its discretion in connection with the admissibility of Dr. Calkins' testimony. The DeChambeaus waived this argument by failing to interpose any objection at trial based on the reliability, competence or substance of Dr. Calkins' testimony. In addition, the DeChambeaus fail to show that any of Dr. Calkins' testimony was inadmissible.

Dr. Calkins was not required to testify to an alternative theory of causation. Although the DeChambeaus' argument regarding an alternative theory of causation is difficult to parse, it appears that they are contending that all of Dr. Calkins' testimony was inadmissible because he did not opine as to an alternative theory of causation. The DeChambeaus waived this appellate argument because they did not object at trial. In any event, the defense is never required to prove an alternative theory of causation. The only significance of the rules pertaining to an alternative theory of causation is that, when an alternative theory is presented by a medical expert, it must be stated to a reasonable medical certainty in order to be admissible.

Balkenbush was not required to produce an expert witness report as to the opinions of Dr. Calkins because: (1) the parties waived expert witness reports in their joint case conference report: (2) the DeChambeaus did not interpose any objection to the admissibility of Dr. Calkins' testimony at trial; (3) they have not included their

appendix the portions of the record that would be necessary in order for this court to review the issue, and; (4) they have shown no prejudice resulting from the lack of a report.

The district court's decision to deny the DeChambeaus' request to allow them to call a rebuttal witness should be affirmed because: (1) they have failed to include in the appendix any portion of the record where they requested the district court to allow them to introduce the subject rebuttal testimony; (2) they have failed to preserve this issue by showing that they made the requisite offer of proof at trial; (3) they have failed to include in the appendix any portion of the record where the district court ruled on their request; (4) they have failed to show that the purported rebuttal testimony was admissible, and; (5) they have failed to show that the claimed error was not harmless.

V. LEGAL DISCUSSION

A. The District Court Did Not Abuse its Discretion by Determining that Balkenbush Timely Designated Dr. Calkins as an Expert Witness.

As noted above, this Court issued an Order of Reversal and Remand in this case on November 30, 3015, reversing the order granting summary judgment in favor of Balkenbush. 1 AA 60. The Order of Reversal remanded the case to the district court for further proceedings consistent with the Order. Following remand, the district court held a scheduling conference on January 21, 2016 and set the trial for

January 17, 2017. On February 1, 2016, the district court issued a Scheduling Order setting a September 3, 2016 deadline for disclosing experts. Thereafter, on September 2, 2016, Balkenbush timely designated Dr. Calkins as an additional medical expert.

The DeChambeaus first contend that the District Court abused its discretion by issuing the February 1, 2016 Scheduling Order allowing the parties until September 3, 2016 (approximately 135 days prior to the January 17, 2017 trial date) to make expert disclosures. In particular, they argue that the Scheduling Order resulted in an improper modification of a prior scheduling order, and therefore that Balkenbush should not have been permitted to designate Dr. Calkins as an expert or call him as a witness at trial. However, there are numerous reasons, both procedural and substantive, why the DeChambeaus' argument lacks merit.

As a threshold matter, the DeChambeaus have waived this argument by failing to object to the Scheduling Order in the district court. A party's failure to object to an order of the district court results in a waiver of the objection. *See Landmark Hotel v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988); *see also MGM Grand v. District Court*, 107 Nev. 65, 70, 807 P.2d 201 (1991) (failure to press objection to discovery order waives the claim). The purpose of the requirement that a party object to the action of the trial court at the time it is taken is to allow the trial court to rule intelligently and to give the opposing party the opportunity to respond to the

objection. *Landmark*, 104 Nev. at 299.

On November 15, 2016, more than seven months after the Scheduling Order was issued, and after Balkenbush had designated Dr. Calkins as an expert, the DeChambeaus filed a motion to strike "Defendents' disclosure of Hugh Calkins, M.D. as an expert witness." 1 AA 86. In that motion, the DeChambeaus argued that Balkenbush's designation was untimely because he did not seek an extension of the discovery deadline established in the August 17, 2012 NRCP 16.1 Joint Case Conference Report. 1 AA 87, 94, 95. However, the motion to strike advanced no specific argument that the district court lacked discretion to enter the February 1, 2016 Scheduling Order or to establish a new cut-off date. As such, the DeChambeaus failed to provide the district court with any persuasive grounds for vacating its Scheduling Order or for striking Balkenbush's designation of Dr. Calkins.

In addition, the DeChambeaus waived any challenge to the Scheduling Order by waiting more than seven months to file their motion to strike. Even if the motion to strike had presented legal authority supporting an objection to the Scheduling Order, it came far to late in the proceedings to allow the trial court to alter the Order without prejudicing Balkenbush. By the time when they filed their motion, Balkenbush had already relied on the Scheduling Order in determining his course of action with respect to retaining and designating a new expert.

The district court's decision on the DeChambeaus' motion to strike is also

unreviewable on appeal because their appendix does not include copies of either Balkenbush's opposition to the motion to strike or the district court's order denying the motion to strike. *See Cuzze v. Cmty*. College Sys., 123 Nev. 598, 603, 172 P.3d 131 (2007) (appellant bears the burden of ensuring an accurate and complete record on appeal and missing portions of the record are presumed to support the district court's decision). Since the DeChambeaus have not included copies of the opposition or the district court's order in the record on appeal, there is no decision to review and the order must be presumed to be correct.

The DeChambeaus also indicate (at AOB 9:18) that on December 29, 2016, they filed a motion in limine seeking to preclude Dr. Calkins from testifying at trial. 1 AA 123. However, the motion contains no argument that the district court lacked discretion to enter the Scheduling Order. *See Richmond v. State,* 118 Nev. 924, 932, 59 P.3d 1249 (2002) (a motion in limine only preserves the evidentiary objection for appeal "where [the] objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling."); *Quiana M.B. v. State Dep't. Of Family Servs*., 128 Nev. 462, 468, 283 P.3d 842 (2012) (objections to the admissibility of evidence must be based on specific grounds). Moreover, the DeChambeaus have failed to include in the record copies of either Balkenbush's opposition to the motion in limine or the district court's order denying the motion in limine. Accordingly, the DeChambeaus

may not rely on the motion in limine as a basis for claiming that they made a proper objection to the Scheduling Order. *See Cuzze*, 123 Nev. at 603.

The DeChambeaus also assert that "objections to the late disclosure were made to the court in the scheduling conference" that was held on January 21, 2016. AOB 13:8. Once again, however, in order for the DeChambeaus to preserve such an objection for appeal, it was incumbent upon them to place their objection and the grounds for their objection on the record and to include the relevant portions of the transcript in their appendix. *See Cuzze,* 123 Nev. at 603 (missing portions of the record are presumed to support the district court's decision); *Allianz Ins.*, 109 Nev. at 997 (the appellate court need not consider the contentions of an appellant where the appellant's opening brief fails to cite the record on appeal). Accordingly, since there is nothing in the record to support the DeChambeaus' contention that they made an objection to the new discovery cut-off dates at the scheduling conference, it must be presumed that they did not do so or that their objection did not support an alternative ruling.

In any event, with respect to the merits of the DeChambeau's argument, the district court did not abuse its discretion in entering the February 1, 2016 Scheduling Order. The Dechambeaus contend that the Scheduling Order was improper because it modified an existing scheduling order without good cause. AOB 11:5, 14:24. In support of their argument, the DeChambeaus insinuate that the Pretrial Order issued

by the district court on April 30, 2012 constituted a prior scheduling order. However, a pretrial order is not a scheduling order. A pretrial order is governed by NRCP 16(e) and is simply an administrative order that the trial court may issue in order to memorialize the action taken by the court at any pretrial conference. A pretrial order may be modified by the court at any time. NRCP 16(e).

In contrast, a scheduling order is governed by NRCP 16(b) and requires the court to establish deadlines to complete discovery, among other things. Since a Pretrial Order is not a scheduling order, the February 1, 2016 Scheduling Order did not modify a prior scheduling order. Moreover, the Scheduling Order could not have operated to modify the Pretrial Order here because the Pretrial Order did not actually establish any discovery deadlines. 1 AA 20.

The DeChambeaus also attempt to argue that the Scheduling Order improperly modified the parties' August 17, 2012 Joint Case Conference Report, which stated that the final date for expert disclosures would be "One Hundred Twenty (120) days prior to trial of (sic) June 17, 2013." 1 AA 34. However, under the Nevada Rules of Civil Procedure, the cut-off dates set forth in a scheduling order always take precedence over any dates selected by the parties in a case conference report. Under the provisions of NRCP16(b), a scheduling order is entered after the filing of the case conference report and the district court is ultimately responsible for setting the final deadlines for completing discovery. *See* NRCP 16(b)(3). Thus, any cut-off dates

appearing in a case conference report are always subject to revision by the district court in a scheduling order.

Furthermore, it is not clear that the Scheduling Order was inconsistent with the case conference report. It is readily apparent that the report incorrectly referred to June 17, 2013 as the original trial date. The original trial date was actually October 14, 2013. 1 AA 27. As such, it is evident that the word "of" was a typo and the parties meant to say "or." This conclusion is underscored by the wording of the general discovery deadline, which states that the close of discovery would be "Ninety (90) days prior to trial **or** July 16, 2015." (Emphasis added). 1 AA 34. The DeChambeaus acknowledge as much in their Opening Brief. AOB 6:8. In view of the language of the Case Conference Report, the report can reasonably be construed to provide that experts should be disclosed at least 120 days prior to the date of the actual trial. The district court presumably concluded as much when it established similar deadlines in the Scheduling Order.

In any case, the district court had broad discretion to extend the discovery deadlines after the case was remanded by the Nevada Supreme Court. As a general rule, trial courts are afforded wide discretion in controlling the conduct of discovery and their decisions are reversed only where a clear abuse appears. See *Dornbach v. District Court*, 130 Nev., Adv. Op. 33, 324 P.3d 369, 373 (2014) (recognizing that district courts have "inherent" case-management authority); *Huhn v. Yackly*, 84 Nev.

49, 54, 436 P.2d 215 (1968) ("there is wide discretion in the trial court to control the conduct of pretrial discovery"); *Diversified Capital v. North Las Vegas*, 95 Nev. 15, 23, 590 P.2d 146 (1979); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 666, 262 P.3d 705 (2011) (district court has discretion to reopen discovery). An abuse of discretion only occurs "when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev., Adv. Op. 54, 330 P.3d 1, 5 (2014).

Notably, even when a party fails to comply with discovery deadlines, the district court has discretion to extend the deadlines when it determines there is "substantial justification" for the party's failure or when the failure is "harmless." *Pizarro-Ortega v. Cervantes-Lopez,* 133 Nev., Adv. Op. 37, 396 P.3d 783, 787(2017) (holding that NRCP 37(c)(1) provides the appropriate analytical framework for district courts to employ in determining the consequences of a party's failure to comply with NRCP 16.1's disclosure requirements). District courts have "considerable discretion in determining whether an untimely disclosure of expert testimony was harmless." *David v. Caterpillar*, 324 F.3d 851, 857 (7th Cir. 2008). In making that determination, court's should consider: (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial, and; (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date. *Id.; see also*

United States ex rel. Schumer v. Hughes Aircraft, 63 F.3d 1512, 1526 (9th Cir. 1995) (similar standards apply to the district court's decision to reopen discovery).

Moreover, the harmless error standard applies to all orders entered by the district court. NRCP 61 (Harmless Error). Under Rule 61, "the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." *See also Carr v. Paredes*, 2017 Nev. Unpub. Lexis 56, *3, 397 P.3d 215 (Unpublished Decision, Case, No. 61301, Nev. 2017) (harmless error rule applies to the issue of whether error in the admission or exclusion of evidence warrants a new trial). For such error to merit a new trial, the error must affect the party's substantial rights, such that "but for the alleged error, a different result might reasonably have been reached." *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765 (2010). As the foregoing authorities make clear, a discovery order is not reversible if the district court has properly exercised its discretion in determining that the complaining party would suffer no prejudice as a result of the order.

The DeChambeaus acknowledge that, in addition to showing an abuse of discretion by the district court, they are required to show prejudice resulting from the extension of the disclosure deadline and the admission of Dr. Calkins' testimony at trial. AOB 16:22, 17:17. However, nothing in the DeChambeaus' motion to strike indicated how they were or could be prejudiced by the September 2, 2016

designation. 1 AA 86-96. As such, they did not preserve this issue for appeal by bringing it to the attention of the district court.

Even on appeal, the DeChambeaus fail to show how they were prejudiced by the timing of the designation. They merely claim that the time spent in writing letters to opposing counsel concerning the matter and preparing their motion to strike "took away from trial preparation and prejudiced Plaintiff in presenting their case." AOB 13:13. However, this after-the-fact unsubstantiated assertion falls well short of establishing prejudice. The DeChambeaus have not explained how the timing of the designation affected their ability to present their case at trial. Nor have they indicated that they were unable to take Dr. Calkins' deposition during the four months that remained before trial. And they have made no showing that they were surprised by the substance of any of Dr. Calkins' testimony at trial or that his testimony varied in any material way from the opinions they had already expected to be rendered by Balkenbush's previously designated expert, Dr. Morady.[4]

It is also noteworthy that the history of the DeChambeaus' discovery efforts in this case reveals that their belated protest to the designation of Dr. Calkins was nothing more than a litigation tactic. Summary judgment was granted in favor of

[4] In addition, if they had believed that they might be disadvantaged in any respect as a result of the new deadlines set in the Scheduling Order, they could have brought their motion to strike at any time after February 1, 2016, when the district court issued its Scheduling Order (some seven months before the cut-off date and one year before the trial date).

Balkenbush on October 17, 2013, thirty days prior to the original trial date (November 17, 2013). As of that date, the DeChambeaus had not taken the oral deposition of Balkenbush's previously disclosed medical expert, Dr. Morady, who was designated to testify as to exactly the same matters as Dr. Calkins. 1 AA 37. Instead, the DeChambeaus had only served Dr. Morady with written deposition questions pursuant to NRCP 26(a).

Even as of September 2, 2016 (the date when Dr. Calkins was disclosed), the DeChambeaus had still not sought to take Dr. Morady's oral deposition. As noted, Dr. Morady was Balkenbush's original medical expert and, like Dr. Calkins, was designated to opine as to "the medical care and treatment of decedent Neil DeChambeau, causation, and the standard of care as to Defendant." 1 AA 37. Although Balkenbush continued to designate Dr. Morady as one of his medical experts in the September 2, 2016 designation (1 AA 72), there is no evidence that the DeChambeaus ever sought to take his oral deposition.

Additionally, in view of the fact that the DeChambeaus never sought to take Dr. Morady's deposition in this case, there is no reason to conclude that they might actually have desired to take Dr. Calkins' deposition. As noted above, Dr. Calkins had the identical field of expertise as Dr. Morady (cardiac electrophysiology) and was also designated to opine as to "the medical care and treatment of decedent Neil

DeChambeau, causation, and the standard of care as to Defendant."[5] 1 AA 73. And although the DeChambeaus had three months after the disclosure of Dr. Calkins to serve him with the same written deposition questions that they had previously served upon Dr. Morady, they elected not to even pursue that minimal course of discovery from Dr. Calkins. Instead, they chose to place all of their chips on the sole bet that the district court would strike his designation. 1 AA 67.

Perhaps most significantly, even after their motion to strike was denied, the DeChambeaus still did not seek to take the depositions of either Dr. Morady or Dr. Calkins. One can only assume from their inaction that the DeChambeaus continued to believe that they had no need for additional discovery. In view of their minimalistic approach to discovery throughout this case and their failure to pursue additional discovery even after they knew that Dr. Calkins would be testifying at trial, the DeChambeaus' newly minted assertion that they were prejudiced by the timing of the disclosure of Dr. Calkins rings quite hollow.

Finally, it should be noted that the record is clear that Balkenbush relied on the Scheduling Order in designating Dr. Calkins as an expert. As a result of the fact that the district court issued the Scheduling Order, there was no reason for Balkenbush to seek an order clarifying that discovery remained open or to make a motion to designate an additional expert. Further, if the DeChambeaus had made a timely

[5] For reasons not material to the issues on appeal, Dr. Morady did not testify at trial.

objection and a proper showing that the September 3, 2016 cut-off date would be prejudicial, the district court could have ordered an earlier cut-off date to accommodate any possible prejudice that the September 3, 2016 date might have posed. For all of these reasons, Balkenbush was entitled to rely on the Scheduling Order and properly did so.

The cases relied upon by the DeChambeaus are inapposite because they involve situations where parties acted unilaterally in violation of existing discovery orders. For example, in *Douglas v. Burley*, 134 So.3d 692 (Miss. 2012), the court held that the trial court abused its discretion in failing to strike plaintiff's expert designation because the designation was made after the deadline set forth in the scheduling order had passed and without a proper motion. In rendering its decision based on the "totality of the circumstances," the appellate court noted that: (1) the plaintiff's untimely designation failed to provide any meaningful information, "much less the substance of and facts and opinions to which the expert was expected to testify and a summary of grounds for each opinion;" (2) the plaintiff had "consistently ignored the rules and violated the discovery deadlines", and; (3) the trial court's attempt to mitigate prejudice by continuing the trial date for another year served only to add additional expense and even more discovery. *Id*. at 699. For the reasons indicated above, the present case has nothing in common with *Douglas* or any other cases cited by the DeChambeaus.

B. The District Court did not Abuse its Discretion in Connection with the Admissibility of Dr. Calkins' Testimony.

In their argument beginning at AOB 17:22, the DeChambeaus superficially contend that various portions of Dr. Calkins' testimony were inadmissible for various reasons. The abuse of discretion standard governs the district court's decision to allow expert testimony. *See Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646 (2008). In addition to showing an abuse of discretion, the aggrieved party must also show that the purported error in admitting expert testimony was not harmless. NRCP 61; *Hallmark*, 124 Nev. at 505; *Carr*, 2017 Nev. Unpub. Lexis 56, at *3. The DeChambeaus' argument again fails for both procedural and substantive reasons.

As a threshold matter, the DeChambeaus have waived all of their arguments concerning the admissibility of Dr. Calkin's testimony because they failed to make any objections at trial based on the competence, reliability or substance of his testimony. *See Leavitt v. Siems,* 330 P.3d 1, 7 n.6 (Nev. 2014) (objection to expert testimony is waived if not made at trial); *Aguilar v. State*, 98 Nev. 18, 22, 639 P.2d 533 (1982) (even in a criminal trial, failure to object to expert's testimony at trial waives a challenge to admissibility on appeal); *Townsend v. State*, 103 Nev. 113, 120, 734 P.2d 705 (1987). The contemporaneous objection rule, codified in NRS 47.040(1)(a), provides that error may not be predicated upon a ruling which admits evidence unless "a timely objection or motion to strike appears of record, stating the

specific ground of objection." *See Thomas v. Hardwick*, 126 Nev. 142, 155, 231 P.3d 1111 (2010) (the contemporaneous objection rule requires a party to object at trial in order to preserve its argument on appeal). The contemporaneous objection rule is also incorporated into NRCP 59(a)(7).

The DeChambeaus have also failed to adequately specify the legal grounds upon which they base their argument. They contend that Dr. Calkins testimony was improper because: (1) he "ignored" Dr. Smith's deposition testimony; (2) he based his opinions on Dr. Smith's testimony rather than on the medical records; (3) he "admitted" he had never been personally involved in the exact same type of medical emergency as the one at issue in the instant case, and; (4) in rendering his opinion that the conduct of the treating physician met the standard of care, he assumed the truth of the facts as testified to by Dr. Smith. AOB 18:12-19:11.

However, the DeChambeaus have cited no legal authority that supports any points they have raised. Nor have they explained why any of the testimony they attack violated a rule of evidence or did not meet the standards enunciated in *Hallmark*. Instead, they simply declare that Dr Calkins' testimony with regard to the targeted matters was irrelevant, speculative and unreliable. As such, they have failed to meet their appellate burden to provide this Court with cogent arguments, relevant authorities and adequate citations to the record. *See Edwards v. Emperor's Garden Rest*., 122 Nev. 317, 330 n.38, 130 P.3d 1280 (2006); *see also* NRAP 28(e)(1) ("A

party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.").

In any event, the DeChambeaus' arguments are patently incorrect on the merits. The DeChambeaus first suggest that Dr. Calkins "ignored" Dr. Smith's deposition testimony regarding his memory of the steps he took to address the emergency. AOB 18:21. However, their characterization of the record is wrong. Dr. Calkins did not testify that he did not consider the level of precision with which Dr. Smith recalled the actions he took. On the contrary, Dr. Calkins testified that he did consider the quality of Dr. Smith's recollections, but that he did not find it to be significant that Dr. Smith did not have a better memory of the exact sequence of steps he took. 2 AA 209:3-6.

Moreover, the DeChambeaus do not explain why they believe that Dr. Calkins' interpretation of Dr. Smith's testimony raises an issue of admissibility. Experts may base their opinions on the facts "perceived by or made known" to them "at or before the hearing." NRS 50.285. Further, issues regarding the reliability and sufficiency of matters relied upon by an expert in rendering his opinion go to the weight of the testimony, not admissibility. *See Nev. Power Co. v. 3 Kids, LLC*, 129 Nev., Adv. Op. 47, 302 P.3d 1155, 1159 (Nev. 2013); *Marvin Lumber & Cedar Co. v. PPG Indus*., 401 F.3d 901, 916 (8th Cir. 2005) (challenges to the factual basis of expert's analysis

go to the weight of the testimony, not its admissibility); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1352 n.5 (9th Cir. 1987) (the relative weakness or strength of the factual underpinning of the expert's opinion goes to the weight and credibility, rather than admissibility). Thus, an opposing party's disagreement with an expert's interpretation of the facts is an issue of credibility or weight of the testimony, not admissibility. *See People v. England*, 438 N.W.2d 908, 911 (Mich. App. 1989). These principles were encapsulated in Jury Instruction Number 22, which instructed the jury to consider the facts relied upon by an expert in weighing his opinion. *See* 1 AA 151. Nowhere in the DeChambeaus' brief do they even mention the distinction between admissibility of evidence and weight of the evidence.

Based on Dr. Smith's testimony concerning the events surrounding his treatment of Neil DeChambeau, Dr. Calkins concluded that Dr. Smith acted appropriately under the circumstances. The DeChambeaus obviously disagree with Dr. Calkins' interpretation of the evidence established by Dr. Smith's testimony. But, under settled rules of evidence, the fact that the DeChambeaus disagree with Dr. Calkins' view of the evidence has no bearing on the admissibility of his testimony. As is the case with any testimony that a party seeks to oppose, the proper method for challenging such testimony is by cross-examining the witness or by introducing countervailing evidence. *See Minn. Supply Co. v. Raymond Corp.*, 472 F.3d 524, 544 (8th Cir. 2006).

The DeChambeaus' next complain that "Dr. Calkins based his opinions on Dr. Smith's testimony rather than on the medical records." AOB 18:24. But their argument is again based on a myopic characterization of the record. Contrary to the Dechambeaus' assertion, Dr. Calkins testified at length concerning his interpretation and understanding of the medical records. 2 AA 239-243. In fact, when asked on cross-examination whether the basis of his opinion was the testimony of Dr. Smith, not the medical records, Dr. Calkins replied "no. That's not correct," and he went on to explain the meaning of the information contained in the medical records. 2 AA 239:23-240:15. Indeed, Dr. Calkins' opinions were obviously based on his conclusion that the medical records were consistent with Dr. Smith's testimony as to how he treated the patient. 2 AA 240. As such, it is evident that the DeChambeaus base their argument on a factual premise that does not exist.

In any event, the DeChambeaus again offer no explanation or authority for their argument that the manner in which Dr. Calkins interpreted the medical records rendered his testimony inadmissible. As noted, an expert may interpret and assess the various pieces of evidence in any way he deems fit. NRS 50.285. Thus, questions regarding the validity of the expert's evaluation of the evidence go to the weight of his testimony, not to admissibility. Accordingly, the fact that the DeChambeaus' counsel disagreed with Dr. Calkins' analysis of the medical records was not a basis for excluding the testimony.

The DeChambeaus also fail to explain why they believe Dr. Calkins could not testify to the standard of care without having been personally involved in the exact same type of medical emergency as the one at issue here. The admissibility of expert testimony is governed by NRS 50.275 and nothing in that statute requires an expert to have personally experienced the factual circumstances involved in the case in order to provide testimony that would assist the trier of fact. *Cf. Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299 (1989) (a medical expert need not even have performed the same procedure to opine as to the standard of care based on his expertise in the field). Nor is there any legal authority that has ever held that in order to qualify as an expert, a person must have had a real life encounter with a situation similar to the one at issue in the case. For all of these reasons, the DeChambeaus' contention to the contrary is absurd.

The DeChambeaus also believe it was improper for Dr. Calkins to rely on the fact that Dr. Smith testified that he started the periocardiocentesis procedure immediately after noticing the patient's condition. However, the DeChambeaus are again disinclined to favor this Court with the legal basis for their contention. As noted above, expert witnesses may properly base their opinions on the evidence presented at trial. NRS 50.285(1). Furthermore, experts routinely testify based on the evidence introduced by the party who calls them as a witness. *See Wallace v. State*, 84 Nev. 603, 606, 447 P.2d 30 (1968) (the examiner may select those facts

from the evidence which are compatible with his theory of the case).

In the instant case, the DeChambeaus claimed that Dr. Smith waited too long before initiating the emergency procedures. AOB 19:16. However, Dr. Smith disputed their claim and testified that he began to perform the proper procedures as soon as the complications arose. AOB 19:2, 19:10. Based on the evidence presented at trial by the defense, including the testimony of Dr. Smith, Dr. Calkins opined that there was no evidence indicating that Dr. Smith did not act in a manner consistent with his professional duties. 2 AA 213. Since all of Dr. Calkins' testimony regarding the actions taken by Dr. Smith was necessarily derived from his understanding of the evidence, there is no arguable basis for the DeChambeaus' challenge.

The DeChambeaus also argue that Dr. Calkins' testimony was improper because it was based on his "personal opinion that Dr. Smith was truthful" in testifying that he immediately began the periocardiocentisis, AOB 19:10, 19:25. However, these assertions are also not supported by the record. Dr. Calkins never testified that he had a personal opinion regarding the truthfulness or veracity of Dr. Smith's testimony. Rather, Dr. Calkins testified that he believed that the evidence, including Dr. Smith's testimony, indicated that Dr. Smith took immediate and appropriate action. 2 AA 228:4-18.

Moreover, the DeChambeaus fail to point out that the testimony they now attack was initially elicited by the DeChambeaus' counsel on his cross-examination

of Dr. Calkins. Indeed, the DeChambeaus' reference to the appendix (2 AA 228) is a reference to a portion of their cross-examination. Under the doctrine of invited error, a party cannot complain about the admission of testimony elicited by his counsel on cross-examination. *See United States v. De La Cruz-Feliciano*, 786 F.3d 78, 89 (1st Cir. 2015); *United States v. Walker*, 421 F.2d 1298, 1299 (3rd Cir. 1970).

Lastly, the DeChambeaus contend that Dr. Calkins' testimony did not satisfy "the requirement of *Daubert* that expert opinions be based on reliable or trustworthy scientific evidence." AOB 19:19, citing *Daubert v. Merell Dow Pharmaceuticals*, 509 U.S. 579 (1993).[6] They also assert that Dr. Calkins' testimony did not satisfy the *Hallmark* requirement that expert testimony be the product of reliable methodology. AOB 18:6. However, they fail to explain why they believe Dr. Calkins testimony did not comply with those standards. In reality, there was no aspect of Dr. Calkins' testimony that was based on the type of scientific evidence or methodology that was the subject of the standards discussed in *Hallmark* or *Daubert.* Rather, Dr. Calkins' testimony was based on his knowledge as a medical expert concerning Dr. Smith's treatment of the patient and the standard of care that Dr. Smith was required to meet under the circumstances of this case. *See Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354 (1992) ("Once a physician is qualified as an expert, he or she may

[6] Nevada courts may consider a wide variety of factors in determining whether expert testimony will assist the jury, and are not limited to those standards set forth in *Daubert. See Higgs v. State*, 125 Nev. 1, 16, 222 P.3d 648 (2010).

testify to all matters within his or her experience or training, and the expert is generally given reasonably wide latitude in the opinions and conclusions he or she can state."); *Staccato v. Valley Hosp.*, 123 Nev. 526, 532, 170 P.3d 526 (2007) (medical experts are qualified to testify within the scope of their practical knowledge in light of the particular circumstances of the case). As such, Dr. Calkins' testified to the matters within the scope of his knowledge and his opinions manifestly satisfied the requirements of NRS 50.275.

For all of the foregoing reasons, the DeChambeaus have failed to show that the district court abused its discretion in allowing Dr. Calkins' testimony. Additionally, they have failed to show that any of the errors they assign would not have been harmless. Indeed, since the record does not contain a complete transcript of the trial testimony or copies of relevant exhibits, they can make no such showing.

C. Dr. Calkins did not Testify to an Alternative Theory of Causation and was not Required to Testify to Such a Theory.

Although the DeChambeaus' argument regarding an alternative theory of causation is difficult to follow, it appears that they are contending that all of Dr. Calkins' testimony was inadmissible because he did not offer an opinion as to an alternative theory of causation.

Once again, as a threshold matter, the DeChambeaus waived this appellate argument because they did not object to the competence or substance of Dr. Calkins'

testimony at trial. If their argument is that some or all of Dr. Calkins' testimony was inadmissible because he did not proffer an alternative theory of causation, they were required to make an appropriate objection and provide the district court with pertinent legal authority to support their argument. However, they failed to do so.

Another procedural barrier to the DeChambeaus' argument stems from the fact that they failed to include the trial transcript (except for the testimony of Balkenbush's expert, Dr. Calkins) in their appendix. Without the transcript, this Court cannot determine the nature of the theory of causation posited by the DeChambeaus at trial because there is no evidence in the record from which one could reconstruct the nature of their case-in-chief.

In any event, the defense was not required to present an alternative theory of causation "to controvert the evidence of appellants," as the DeChambeaus suggest. It appears that the DeChambeaus are trying to argue that in order for Balkenbush to prevail at trial, it was somehow incumbent upon him to prove his own independent theory of causation regarding the cause of Neil DeChambeaus' death. AOB 22:7-11. If so, their argument could not be less tenable, because the defense is never required to present evidence on the issue of causation – whether as an alternative to the plaintiffs' theory or merely as rebuttal.

It is axiomatic that the plaintiff has the burden of proof as to each element of his claim. This principle was adopted as the law of this case through Jury Instruction

No. 15 (plaintiff's burden to prove elements of his claim). 1 AA 144. In this case, the DeChambeaus, as plaintiffs, had the burden to prove that the treating physician was negligent as a necessary element of their legal malpractice claim against Balkenbush. In order to prove Dr. Smith's negligence, the DeChambeaus were required to prove that his conduct fell below the standard of care and that his negligence was the proximate cause of the patient's death. 1 AA 146-151 (jury instructions, numbers 17-22). Thus, under the law established by the jury instructions (and as a fundamental tenet of civil law), Balkenbush was not required to introduce evidence negating the plaintiffs' theory of causation in order to prevail at trial.

Indeed, since the DeChambeaus had the burden of proof, the jury had the prerogative to find against them regardless of the weight of the evidence presented by the defense. In order to prove their medical malpractice case, the DeChambeaus were required to present expert testimony regarding standard of care and causation. The trier of fact has the prerogative to reject the testimony of the plaintiffs' expert, just as it has the prerogative to discount the credibility of lay witnesses. *See*, e.g., *Star Scientific v. R.J. Reynolds*, 655 F.3d 1364, 1378 (Fed. Cir. 2011) (the jury may credit or discredit the testimony of expert witnesses as it sees fit); *Moore v. Johns-Manville*, 781 F.2d 1061, 1065 (5th Cir. 1986); *Moe v. Avions Marcel*, 727 F.2d 917, 929 (10th Cir. 1984). Here, this was the law of this case, as established by the jury instructions. 1 AA 139 (jury instruction 10). Under such elementary principles of

evidence, the jury could have found in favor of the defense even in the absence of any testimony by Dr. Calkins.

The DeChambeaus' reliance on *Williams v. District Court*, 127 Nev. 518, 262 P.3d 360, 368 (2011) is woefully misplaced. An alternative causation theory is one that proposes an "independent" cause of the injury and is not merely offered to rebut the plaintiff's causation theory. When the defense expert testifies to an alternative theory of causation, the testimony must be stated to a reasonable degree of medical probability. *Id.* On the other hand, when the defense expert offers an opinion concerning causation that merely contradicts the plaintiff's expert or furnishes reasonable alternative causes to that offered by the plaintiff, the testimony is not required to meet the reasonable degree of probability standard. *Id*. "This lowered standard is necessarily predicated on whether the defense expert includes the plaintiff's causation theory in his or her analysis." *Id*.

In view of the foregoing, *Williams* only addresses the proper foundation required when the defense seeks to present expert testimony for the purpose of proving a specific alternative theory of causation, i.e., that there was a specific medical cause of an injury that is different from the cause alleged by the plaintiff. As such, the evidentiary rules governing proof of an alternative theory of causation do not require a defendant to prove an alternative theory in order to establish a defense. For the reasons discussed above, any argument to the contrary falls flat.

Moreover, in the case at bar, there was no dispute as to the cause of Neil DeChambeaus' death. The DeChambeaus' claim was based on the allegation that the treating physician's conduct fell below the standard of care with respect to the manner in which he dealt with the complications that arose during the course of the atrial fibrillation catheter ablation procedure. AOB 3:20. Indeed, it was undisputed at trial that the medical procedure caused the patient to suffer a cardiac arrest due to the accumulation of blood in the patient's pericardial sac. AOB 3:14, 21:10. There was no dispute regarding the cause of the patient's death, but only an issue as to whether the treating physician responded to the situation in accordance with the applicable standard of care. As such, Dr. Calkins' testimony was offered to contradict the DeChambeaus' allegation that Dr. Smith did not meet the standard in responding to the complications that occurred here. For all of these reasons, the DeChambeaus' argument that Dr. Calkins was required to establish an alternative theory of causation is nothing short of frivolous.

D. Balkenbush was not Required to Produce an Expert Witness Report as to the Opinions of Dr. Calkins.

The Dechambeaus next contend that the district court abused its discretion by allowing Dr. Calkins to testify despite the fact that he did not prepare an expert witness report. However, this argument is another nonstarter because the DeChambeaus did not interpose any objection to the admissibility of Dr. Calkins'

testimony at trial. Although the DeChambeaus filed a motion in limine, it consisted of nothing more than a single conclusory sentence to the effect that Dr. Calkins' testimony should be excluded because a report was not produced. 1 AA 123. As such, the DeChambeaus failed to apprise the district court of relevant facts or pertinent legal authority to support their position.

Furthermore, since the DeChambeaus failed to include the district court's order on the motion in limine in their appendix, the court's decision is not reviewable on appeal. *See Cuzze,*, 123 Nev. at 603 (appellant bears the burden of ensuring an accurate and complete record on appeal and missing portions of the record are presumed to support the district court's decision); NRAP 30(b)(2)(H) (requiring the appellant to include in the appendix all orders appealed from).

In any case, as the DeChambeaus' acknowledge, the parties expressly waived expert witness reports in their Joint Case Conference Report. 1 AA 34. They attempt to circumvent this fact by asserting that the issuance of the February 1, 2016 Scheduling Order somehow superseded the parties' waiver and reinstated the requirement that the parties produce expert reports. However, there is nothing in the Scheduling Order implies that the court intended to alter the parties' agreement regarding expert reports.

Additionally, the DeChambeaus' actions were inconsistent with their claim that they believed that the issuance of the Scheduling Order altered the parties' agreement.

Had they believed otherwise, they presumably would have notified Balkenbush that they believed the expert report requirement had been reinstated, or they would have requested Balkenbush to provide expert reports from Dr. Morady and Dr. Calkins. The DeChambeaus also presumably would have satisfied their own purported obligation by providing Balkenbush with expert reports from their own experts. Even after the district court issued its order denying the DeChambeaus' motion to strike, however, they did not mention that they had become interested in obtaining expert reports.

E. The District Court Did Not Abuse its Discretion in Denying the DeChambeaus' Request for a Rebuttal Witness.

The DeChambeaus contend that the district court abused its discretion in denying their request to call Dr. Seifert (their expert witness in their case-in-chief) as a rebuttal witness. AOB 10:10, 29:21. In *Carr v. Paredes*, 2017 Nev. Unpub. Lexis 56, 397 P.3d 215 (Unpublished Decision, Case No. 61301, January 13, 2017), this Court reviewed the standards governing expert rebuttal. This Court noted that: (1) rebuttal experts must be designated pretrial (*Id*. at *3); (2) they are proper if they contradict or rebut the subject matter of the original expert witness (*Id*. at *2); (3) harmless error does not warrant a new trial (*Id*. at *3), and; (4) to preserve excluded rebuttal testimony for appeal, the party must make a specific offer of proof to the trial court on the record (*Id*. at *4).

The DeChambeaus have satisfied none of the *Carr* standards because: (1) they did not designate Dr. Seifert as a rebuttal witness; (2) they have failed to include in the appendix any portion of the record where they requested the district court to allow them to introduce rebuttal testimony; (3) they have failed to show that they made the requisite offer of proof; (4) they have failed to include in the appendix any portion of the record where the district court ruled on their request; (5) they have failed to show that the purported rebuttal testimony was admissible, and; (6) they have failed to show that the claimed error was not harmless.

First, the DeChambeaus are precluded from raising this issue on appeal because they have not included any portions of the record pertaining to their purported oral request to introduce rebuttal testimony. *See Cuzze*, 123 Nev. at 603 (appellant's appendix must include any portion of the record that is necessary to this Court's determination of the issues raised on appeal.); *M & R Inv. v. Mandarino,* 103 Nev. 711, 718, 748 P.2d 488 (1987) (in order to preserve an error for appellate review, the appellant is required to include in the appellate record the written motion in which the issue was raised or the transcript of the hearing in which it was argued); *Ute, Inc. v. Apfel*, 90 Nev. 25, 518 P.2d 156 (1974) (appellant must provide a transcript of any hearing concerning the matter raised on appeal). When an appellant fails to include the necessary documentation in the record, this Court necessarily presumes that the missing portion of the record supports the district court's decision. *Cuzze*, 123 Nev.

at 603. Since the DeChambeaus have not provided a transcript of their oral request or the district court's order, there is no record regarding the grounds for their request and there is no evidence that they made the requisite offer of proof concerning the substance of the rebuttal testimony.

Second, the DeChambeaus have not addressed the reasons why the district court denied their request. In the post-trial order denying their motion for a new trial, the district court indicated that one of the reasons why it had denied the DeChambeaus' request to call Dr. Seifert as a rebuttal witness at trial was that by the time when they made their request, Dr. Seifert had left Nevada. As a result, his testimony could not have occurred without delaying the completion of the jury trial. 2 AA 280. There is nothing in the record to explain why the DeChambeaus failed to make appropriate arrangements for their expert to be available to testify on rebuttal.

Third, the DeChambeaus have still advanced no persuasive reason why the rebuttal testimony was necessary. They simply assert that Dr. Seifert would have testified that Dr. Calkins' testimony was "unsupported speculation." AOB 29:21. However, an opinion that the other party's expert testimony was "speculative" does not serve to materially rebut the subject matter of the opposing expert's testimony. Rather, such a contention should have been raised either as an objection to the testimony of Balkenbush's expert (which it was not) or as part of the closing argument to the jury.

Finally, the DeChambeaus have not shown that, "but for the alleged error, a different result might reasonably have been reached." *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765 (2010). The DeChambeaus' have not indicated that Dr. Seifert's rebuttal testimony would have differed in any respect from the testimony he gave in their case-in-chief. They simply proclaim that, "had Calkins' testimony not gone unchallenged, the jury may have found Dr. Smith to have been negligent in the underlying action." AOB 29:22. Accordingly, their assertion is purely conclusory and thus provides no basis for determining that the excluded rebuttal testimony would have had a material impact on the outcome of the case.[7]

F. The District Court did not Abuse its Discretion in Denying the DeChambeaus' Motion for a New Trial.

Although the DeChambeaus do not explicitly challenge the district court's order denying their motion for a new trial (or even list the propriety of the court's post-trial order as an issue on appeal) , they allude to the district court's denial of their new trial motion and to the new trial standards at several points in their opening brief. For example, at AOB 16:18, they cite NRCP 59(a)(1) and (2) in connection with their argument that Dr. Calkins was not properly disclosed as an expert. They also refer to NRCP 59(a) on pages 17 and 20 of their brief. The DeChambeaus'

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[7] Indeed, since the record of the trial contains nothing other than the transcript of Dr. Calkins (Balkenbush's expert), it is impossible to determine how any excluded evidence may have affected the outcome of the case.

references to the denial of their motion should be disregarded for several reasons.

In the first place, the DeChambeaus are precluded from raising any issue concerning their motion for a new trial because they have not included a copy of the motion or opposition in their appendix. In the absence of the motion, the district court's order is unreviewable because there is nothing in the record to indicate the nature of the DeChambeaus' arguments to the district court.[8] Accordingly, any references to the standards under NRCP 59(a) are misplaced.

In any event, the DeChambeaus' reliance on Rule 59(a) adds nothing to their arguments on appeal. The standard of review with respect to an order denying a motion for a new trial, like the standard applicable to all of their other arguments, is abuse of discretion. *See Gunderson v. D.R. Horton, Inc.* 130 Nev. 67, 74, 319 P.3d 606 (2014). And even if one of NRCP 59(a)'s new-trial grounds had been established, they would also have been required to show that such ground materially affected their substantial rights and was more than harmless error. *Id*. For all of the reasons discussed above, they have failed to make such a showing.

G. The Record on Appeal is Inadequate to Permit Review of Any of the Issues Raised on Appeal.

Since all of the appellate issues raised by the DeChambeaus involve an analysis

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[8] The DeChambeaus were required to include their motion for a new trial in their appendix regardless of whether they intended to appeal the district court's ruling. *See* NRAP 30(b)(2)(iii).

of harmless error or prejudice, they were required to provide this Court with a sufficient record to adequately review their prejudice claim. *See* NRAP 30(b)(1) (stating that the appendix filed on appeal shall include copies "of all transcripts that are necessary" to permit review of the issues raised on appeal); *Cuzze,* 123 Nev. at 603 (appellant bears the burden of ensuring an accurate and complete record on appeal and missing portions of the record are presumed to support the district court's decision); *M & R Inv.,* 103 Nev. at 718 ("when evidence upon which the lower court's judgment rests is not included in the record, it is assumed that the record supports the district court's decision."). In the absence of a complete transcript of the trial, it is not possible to evaluate the DeChambeaus' claim that any different evidentiary ruling by the district court might have lead to a different outcome. And in view of the fact that they filed a Request For Transcript of Proceedings in which they stated that they were requesting the "entire 4-day trial transcript," their failure to include the complete transcript in their appendix is inexplicable. *See* Request for Transcript of Proceedings, filed herein on May 10,2107.

VI. CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment entered by the district court be affirmed.

VII. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in proportionally spaced typeface using WordPerfect 9 in 14-point Times New Roman.

2. The brief consists of 10,648 words.

3. I hereby certify that I have read this brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of November, 2017.

/s/ Robert C. Vohl, Esq.

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CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed the foregoing Brief, thereby serving notice of the filing to:

Charles R. Kozak, Esq.

DATED this 7th day of November, 2017.

/s/ **Robert C. Vohl**