IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELA DeCHAMBEAU, and JEAN-PAUL DeCHAMBEAU BOTH INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF NEIL DeCHAMBEAU Appellant, vs. STEPHEN C. BALKENBUSH, ESQ., AND THORNDAL, ARMSTRONG, DELK, BALKENBUSH and EISINGER, A NEVADA PROFESSIONAL CORPORATION, Respondent.	Case No. 72879

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

APPELLANTS' REPLY BRIEF

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

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

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

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

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

Dated this 4th day of December 2017.

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

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I. After Objection, and Contrary to NRCP, The Trial Court Abused its Discretion by Modification of the Scheduling Order.

A. Appellants Objected Numerous Times to Modification of the Scheduling Order to Preserve the Issue for Appeal

Respondents claim Appellants waived the issue in regard to modification of the Scheduling Order; however, Appellants objected to the modification, a number of times and by several methods, including by objection in the scheduling conference, by letters to opposing counsel, prior to and after the conference, with a Motion to Strike, a Motion in Limine and a Writ of Mandamus. A 0043 @Vol. 1; A 0082 @Vol. 1; A 0084 @Vol. 1; A 0086-A0122 @Vol. 1; A 0023-A0125 @Vol. 1; and A 0028-A0129 @Vol. 1.

The Pretrial Order filed April 30, 2012, page 4 stated "[a] a continuance of trial does not extend the deadline for completing discovery." A 0023 @Vol. 1. The first objection by Appellants to any additional disclosures of expert witnesses came after this 2012 Pretrial Order, but well before any modification to the Scheduling Order in February 2016. On September 4, 2013 in a letter from Appellant's attorney to Respondent's then attorney, stated "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" and further stating "[t]he discovery cut off has long passed for any

discovery depositions of any other medical expert. . .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." A 0043 @Vol. 1. It is interesting to note that the "late date" referenced was September 4, 2013, two and a half years before the scheduling conference after remand on appeal. A 0043 @Vol. 1.

Respondents were aware and on notice that Appellant's objected to any additional expert disclosures as early as September 2013. A 0043 @Vol. 1. While there is not a court transcript of the scheduling conference, for Respondents to now claim there was no objection is disingenuous. Objections had long been made. For this reason, when on September 1, 2016, Respondent's disclosed Dr. Calkin, Appellant's were surprised and questioned the designation in a September 28, 2016 letter to Pollara, stating "were Dr. Calkin, Bhandari and Doshi disclosed as experts in this case?" A 0082 @Vol. 1. After Respondent's counsel confirmed the disclosure of Calkin (A 0083 @Vol. 1) Appellant's counsel again objected and notes that "[y]ou have confirmed to us the intent on disclosing a further expert witness for the very first time in this letter." A 0084 @Vol. 1. Appellant's counsel goes on to note the discovery deadline of 120 days before the original October 14, 2013 Trial date and notices counsel of intent to file a Motion to Strike. A 0084 @Vol. 1. Appellants' Motion to Strike was filed on November 15,

2016 and fully briefed the issues, therein. A 0086-A0122 @Vol. 1. While the Court's Order is not in Appellants' Appendix, the court ruled against Appellants and, as a result they filed a Motion in Limine to exclude Dr. Calkins (A 0023-A0125 @Vol. 1) and a Writ of Mandamus which was denied by this Court on January 6, 2017. A 0028-A0129 @Vol. 1. While Appellants inadvertently left some of the briefing of these motions out of the Appendix, the record sufficiently reflects objection to the modification of the Scheduling Order, the reasoning thereon, and the fact that the court ruled against the motions, as evidenced by the record that Dr. Calkins testified in this matter. A 00166-A0246 @Vol. 1. This should not prevent this Court from considering the issue because "[t]he rules of procedure were intended to expedite and simplify the practice and procedure. Ample provision is made in the rules to relieve against hardship and excusable neglect." Doolittle v. Doolittle 70 Nev. 163, 165–66, 262 P.2d 955, 956 (1953).

B. Modification of the Scheduling Order Violated NRCP and Prejudiced Appellants which is not Harmless Error

"Disregard of a [scheduling] order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 610 (9th Cir.1992). NRCP 16 was drafted precisely to prevent this from occurring. Id. Please see the Drafter's Note to the 2004 Amendment to Nev. R.

Civ. P. 16, which states "Nevada has not adopted paragraph (4) of the federal rule, allowing for modification of disclosures.

By the trial court ignoring the NRCP on this issue, it has rewarded the cavalier by allowing Respondent's to disclose an expert thirty-eight (38) months after the deadline for discovery. By the time Appellant's counsel confirmed the disclosure and their Motion to Strike and a Motion in Limine were denied, the time had passed for deposition of Dr. Calkin or designation of rebuttal experts prior to trial.

The prejudice to Appellants of the trial court allowing the disclosure and testimony of Dr. Calkin can be best understood in the history of this matter. In the underlying medical malpractice case, Appellants retained Attorney Stephen Balkenbush to represent them against Dr. Smith. A 0001-12 @Vol. 1. Mr. Balkenbush hired a competent expert, Dr. Morady, one of the foremost authorities and pioneers in the electrophysiology field. A 0001-12 @Vol. 1. Dr. Morady submitted an affidavit stating that Dr. Smith was negligent, and suit was filed. A 0001-12 @Vol. 1. However, in the course of the initial case, Dr. Morady, changed his opinions and no longer wished to testify on behalf of Mrs. DeChambeau. Dr. Morady gave no reason for his change in opinion. Mr. Balkenbush advised and Appellants did dismiss the case on May 5, 2010. A 0001-12 @Vol. 1.

Thereafter, Appellants commenced this action for legal malpractice against Mr. Balkenbush, which required proving the medical malpractice in the underlying case. Oddly, on June 14, 2013, Respondent's then counsel, Piscevich, designated a Dr. Morady as her own expert, with four other experts which did not include Calkin. A 0036-38 @Vol. 1. Appellants made no other expert disclosures before discovery closed on July 16, 2013. After the Supreme Court Remand on November 24, 2015, no further discovery or disclosure should have been allowed. The case only should have been set and proceeded to trial and Respondents would and should have been required to use the experts already designated, including Dr. Morady. If Respondents had to rely on Dr. Morady, it would have been revealed that he had already changed his position once, and if questioned at trial, his testimony and contradicting affidavit may have been sufficient to bring a different result with the jury. This uncertain alternate result is cause for remand because where uncertainty lurks, remand is the appropriate course. *See* United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 733–34 (1st Cir.2007). This abuse of discretion caused an irregularity in the proceedings which materially affected the substantial rights of Appellants and is therefore more than harmless error. Therefore, under NRCP, Rule 59, a "new trial may be granted to all or any of the parties and on all or part of the issues for...causes or grounds materially affecting the substantial rights of an aggrieved party."

II. The Court Abused its Discretion by Allowing Dr. Calkins' Testimony, Based Assumed Facts not the Evidence of the Medical Record

A. Calkins's Testimony Fails under Standards for Reliable Methodology.

Respondents contend that no legal grounds were stated to support that Calkin's testimony was inadmissible, yet immediately cite to the same case Appellants' cite for the Nevada standard for evaluating expert testimony. *See* Hallmark v. Eldridge, 124 v. 492, 189 P.3d 646 (2008). Appellants' specifically pointed to the second factor that expert testimony assists "the trier of fact only when it is relevant and the product of reliable methodology, " and noted that an expert's opinion is based upon reliable methodology, if it is based more on particularized facts rather than assumption, conjecture, or generalization." *Id.* at 500–01, 189 P.3d at 651–52 (footnotes omitted). Pickett v. McCarran Mansion, LLC, (Nev. App., Aug. 8, 2017, No. 70127) 2017 WL 3526269, at *3 (emphasis added).

Appellants' underlying medical malpractice case is based squarely on the fact that Dr. Smith did not commence the periocardiocentesis immediately, but instead had waited ten (10) minutes for the electrocardiogram to be delivered and hooked up, which resulted in Mr. DeChambeau's brain death. A 0007:16-23 @Vol. 1. Calkins testified directly to the contrary, that Dr. Smith had not waited to perform the periocardiocentesis, yet Calkins agreed there was **nothing** in the

medical record to substantiate Smith's testimony. A 0228:10-18 @Vol. 2. In other words, there were no particularized facts upon which Dr. Calkin based his testimony. Calkins admitted this was his assumption, as much under oath and it should be excluded as evidence as follows:

> Q. That's just his testimony. There is nothing in the medical record to substantiate that, is there?
>
> A. No. But it's also, I mean, it would be –any physician would absolutely – you know, he knew it was a tamponade. He knew how to treat tamponade . . .And that's what I believe occurred. . .
>
> A 0228:10-18 @Vol. 2.

A court must to rule out "subjective belief or unsupported speculation" such as this. Clark v. Takata Corp., 192 F.3d 750, 757 (7th Cir. 1999). In Clark, the crux of Clark's tort claim was that a lap belt buckle failed during the accident and thus was defective. The court determined that the liability expert had not proven the allegation that the belt failed; but rather, he has *assumed* it to be true. The court held that a district court is required to rule out "subjective belief or unsupported speculation" by considering "whether the testimony has been subjected to the scientific method." An expert must "'substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless.'" Huey v. United Parcel Serv., Inc., 165 F.3d 1084, 1087 (7th Cir.1999) (citing Minasian v. Standard

Chartered Bank, *PLC,* 109 F.3d 1212, 1216 (7th Cir.1997)). Simply put, an expert does not assist the trier of fact in determining whether a product failed if he starts his analysis based upon the assumption that the product failed (the very question that he was called upon to resolve), and thus, the court's refusal to accept and give credence to the expert's opinion was proper. If an expert assumes the very fact that he has been hired to prove, his testimony is not helpful to the trier of fact in determining that same fact in issue. Clark v. Takata Corp., at 757 (7th Cir. 1999).

Although this reasoning comes from a federal case, Nevada courts have also ruled consistently that opinion testimony should not be received if shown to rest upon assumptions rather than facts. Levine v. Remolif, 80 Nev. 168, 172, 390 P.2d 718 (1964)., Choat v. McDorman, 86 Nev. 332, 335, 468 P.2d 354 (1970). And, such expert opinion may not be the result of guesswork or conjecture. Beasley v. State, 81 Nev. 431, 436, 404 P.2d 911 (1965).

In Wrenn v. State, 89 Nev. 71, 73, 506 P.2d 418, 419 (1973), the validity of the engineering calculations of the expert witnesses rested upon several assumed facts which were not established to have been the actual facts of the homicide. Since the probative value of their engineering calculations and resulting conclusions necessarily depended upon the accuracy of the facts they had assumed to be true, the trial judge properly precluded their opinion testimony. Id.

Just because a witness may be qualified as an expert does not automatically qualify him to give an opinion necessarily based on facts beyond his knowledge even though the opinion may be within the range of his expertise. Choat v. McDorman, 86 Nev. 332, 335–36, 468 P.2d 354, 356 (1970). Likewise, in Levine v. Remolif, 80 Nev. 168, 390 P.2d 718 (1964), the court held that the testimony of an expert who had never examined the wrecked vehicles, as to their speed at the time of the accident, was properly stricken when based entirely on photographs of vehicles and certain diagrams made after the accident because the photographs could not disclose damage to the frames of the cars. Id. Even in the Hallmark case, used to cite the factors to consider admissibility of expert testimony, the expert's testimony was not admitted because the expert concluded that the forces involved in the collision did not cause Hallmark's back injuries by either assuming or failing to consider critical pieces of information Hallmark v. Eldridge 124 Nev. 492, 504, 189 P.3d 646, 654 (2008).

If it is not enough that Dr. Calkins admits his opinion is not supported by the medical record (A 0228:10-18 @Vol. 2.) his own testimony shows numerous inconsistencies, errors and is wrought with opinion and determination to ignore the medical record. Testimony about the timeline shows this clearly as follows:

First, Dr. Calkins describes that in the operating room there is a team member called a "recorder" who is responsible for documenting everything that

happens in a "code blue" situation in the code blue book. That team member is not involved in caring for the patient, but the person's only responsibility is to record what happens and the time it occurs. In this instance it was a nurse named Newton. A 0203:16-0204:1-15 @Vol. 2.

Based on this code blue book, Dr. Calkin testifies the code blue occurred at 12:39 and CPR started at the same time. A 0205:4-5 @Vol. 2. He further testifies that the "cath lab log" records the same time of these events. A 0205:6-7 @Vol. 2.

On cross examination, Dr. Calkin notes that the code sheet does not state anything about a periocardiocentesis being started immediately at 12:41. A 0220:8-14 @Vol. 2. Then Dr. Calkin immediately refers to Dr. Smith's deposition for the basis of his opinion instead of the Medical Record. A 0220:14-17 @Vol. 2.

When again pressed that the periocardiocentesis was not documented, he again avoids the question and refuses to base the answer on the Medical Record. Yet, he does admit the times and other events listed in the record are accurate. A 0220:18-0221:1-11@Vol. 2.

It is important to note that every time, Dr. Calkin is asked to consider whether Dr. Smith immediately performed the periocardiocentesis he refers to Dr. Smith or his attorney's statement of what happened, rather than the Medical Record. A 0213:14-21@Vol. 2; A 0228:4-18@Vol. 2, 239:23-240:15 @Vol. 2.

Yet, he also ignored Smith's 2013 deposition testimony in which Smith was unable to remember the sequence of steps taken. A 0208:20-209:6 @Vol. 2.

Next, Dr. Calkin does admit that the Medical Record shows at 12:44 the stat echo machine was called for and at 12:49 it was hooked up. A 0223:13-20@Vol. 2. This occurred a full ten (10) minutes after the code blue. A 0205:4-5 @Vol. 2. By Dr. Calkin's own admission, nothing in the Medical Record indicates that Dr. Smith performed the periocardiocentesis in this time. A 0228:10-18 @Vol. 2. Appellants have maintained from the beginning of this matter that this ten (10) delay caused Mr. DeChambeau's death. A 0007:16-23 @Vol. 1. Dr. Calkin's testimony was only his opinion of what occurred during this time based on assumption and not on the facts of the Medical Record. A 0228:10-18 @Vol. 2.

Further, after the echo stat machine was hooked up at 12:49 or 12:50, a large pericardial effusion was observed which was then drawn off and by 12:54 pulse was restored. A 0224:15-0225:1-17 @Vol. 2. But, by then it was too late for Mr. DeChambeau. A 0007:16-23 @Vol. 1. Dr. Calkin agrees with the timeline that when the fluid was gone, and the pulse was restored was a time frame of approximately three (3) minutes. A 0225:18-24 @Vol. 2.

Calkins's personal and conclusory opinions, are not an acceptable basis for expert opinion and should not have passed the *Daubert* (or *Frye*) gatekeeping standards reliable or trustworthy scientific evidence. Daubert v. Merell Dow

Pharmaceuticals, Inc., 509 U.S. 579, 593-594 (1993). To go forward with Calkins's testimony, based on his personal opinions, was an error in law and in discretion and should result in new trial under NRCP 59(a)(7).

B. Review of Admission of Calkin's Testimony is Appropriate Due to Appellants' Motion to Strike or Alternatively under the Plain Error Rule

Respondent's claim that Appellants' Appeal of Calkin's testimony is barred, however, Appellant's did object by their motion to strike. A 0086-A0122 @Vol. 1. NRS 47.040(1)(a) requires a party who objects to the admission of evidence to make "a timely objection or *motion to strike* ..., stating the specific ground of objection." Thomas v. Hardwick, 126 Nev. 142, 156, 231 P.3d 1111, 1120 (2010). Appellants additionally filed a Motion in Limine to exclude Dr. Calkin's testimony (A 0023-A0125 @Vol. 1) and a Writ of Mandamus. A 0028-A0129 @Vol. 1.

Moreover, failure to object to a trial court's evidentiary ruling precludes appellate review of the matter *unless* it rises to the level of plain error. Mclellan v. State, 124 Nev. 263, 182 P.3d 106 (2008). To secure reversal under the "plain error" standard, defendant must prove that: (1) there was "error"; (2) the error was "plain"; and (3) that the error affected "substantial rights." People v. Cleveland, 87 Cal.App.4th 263, 104 Cal.Rptr.2d 641 (2001).

As described in detail in the foregoing section, by Dr. Calkin's own admission, nothing in the Medical Record indicates that Dr. Smith performed the periocardiocentesis immediately upon the code blue. A 0228:10-18 @Vol. 2. Appellants have maintained from the beginning of this matter a ten (10) delay caused Mr. DeChambeau's death. A 0007:16-23 @Vol. 1. Dr. Calkin's testimony of what occurred during this time based on assumption and not on the facts of the Medical Record. A 0228:10-18 @Vol. 2, A 0213:14-21@Vol. 2; A 0228:4-18@Vol. 2, 239:23-240:15 @Vol. 2, A 0208:20-209:6 @Vol. 2. Allowing this testimony based on assumption and conjecture is error. Hallmark v. Eldridge, 124 v. 492, 189 P.3d 646 (2008). Admission of this evidence in error affected Appellants substantive right to receive a fair trial. People v. Cleveland, 87 Cal.App.4th 263, 104 Cal.Rptr.2d 641 (2001).

CONCLUSION

Based on the foregoing, Appellants Angela DeChambeau and Jean-Paul DeChambeau respectfully request this Court overturn the turn the judgment in this matter.

CERTIFICATE OF COMPLIANCE

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

I certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6) and the type-volume limitation set forth in NRAP 32(a)(7). This Brief uses a proportional typeface, 14-point font and contains 3,365 words.

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

Dated this 4th day of December 2017.

Respectfully Submitted by:

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

CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify I am an employee of Kozak Lusiani Law, LLC and that on December 4, 2017, I electronically filed a true correct copy of the **APPELANT'S REPLY BRIEF**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

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