IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D.; and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants/Cross-Respondents, vs. TITINA FARRIS and PATRICK FARRIS, Respondents/Cross-Appellants.	Case No. 80271
BARRY JAMES RIVES, M.D.; and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants, vs. TITINA FARRIS and PATRICK FARRIS, Respondents.	Case No. 81052

APPEAL FROM JUDGMENT

EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JOANNA S. KISHNER, DISTRICT JUDGE

*****

APPELLANTS' OPENING BRIEF

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
775-786-9716 fax
rle@lge.net

ATTORNEYS FOR APPELLANTS

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

BARRY RIVES, M.D.; and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants/Cross-Respondents, vs. TITINA FARRIS and PATRICK FARRIS, Respondents/Cross-Appellants.	**Case No. 80271**
BARRY RIVES, M.D.; and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants, vs. TITINA FARRIS and PATRICK FARRIS, Respondents.	**Case No. 81052**

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 justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None; appellant is an individual.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an

administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg
Schuering Zimmerman & Doyle, LLP
Mandelbaum Ellerton & Associates

3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED: Oct. 13, 2020

Robert L. Eisenberg

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
(775) 786-6868
(775) 786-9716 fax
rle@lge.net

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (Continued)

Cases **Page(s)**

TABLE OF AUTHORITIES (Continued)

Cases **Page(s)**

TABLE OF AUTHORITIES (Continued)

Cases **Page(s)**

TABLE OF AUTHORITIES (Continued)

Cases **Page(s)**

TABLE OF AUTHORITIES (Continued)

Cases **Page(s)**

TABLE OF AUTHORITIES (Continued)

JURISDICTIONAL STATEMENT

I. Substantive appealability.

This is an appeal from a final judgment and a post-judgment order awarding attorneys' fees and costs. 12 A.App. 2479; 31 A.App. 6802. Both are appealable. NRAP 3A(b)(1) [final judgment] and (8) [special order after final judgment].

II. Timeliness.

Notice of entry of the judgment was served electronically on November 19, 2019. 12 A.App. 2483. A notice of appeal was filed on December 18, 2019 (30 A.App. 6665). Notice of entry of the post-judgment order was served electronically on March 31, 2020. 31 A.App. 6816. An amended notice of appeal was filed on April 13, 2020. 31 A.App. 6835.

ROUTING STATEMENT

This case should be retained by the Supreme Court, because it involves a tort judgment of more than $6 million. NRAP 17(b)(5).

STATEMENT OF ISSUES

1. Whether the district court erred by allowing Plaintiffs to use the reptile theory.
2. Whether the district court erred by allowing evidence of the Vickie Center case.
3. Whether the district court erred by giving an adverse inference instruction.
4. Whether the district court erred regarding ERISA preemption.

5. Whether the district court erred by limiting and excluding defense experts.

6. Whether the district court erred by granting JMOL.

7. Whether the district court erred regarding hospital records.

8. Whether the district court erred regarding the Hurwitz deposition.

9. Whether the district erred regarding cross-examination of Dr. Juell.

10. Whether the district court erred by awarding attorneys' fees.

STATEMENT OF CASE

Plaintiffs filed their complaint on July 1, 2016. 1 A.App. 1. The trial was held in October 2019, with a verdict for Plaintiffs; judgment was entered on November 14, 2019. 12 A.App. 2475, 2479. The district court granted attorneys' fees and costs to Plaintiffs. 31 A.App. 6802. Appellants appealed from the judgment and the post-judgment order. 30 A.App. 6665; 31 A.App. 6835.

STATEMENT OF FACTS

Plaintiff Titina Farris was a patient of Dr. Naomi Chaney, who was treating Farris for diabetes (among other things). 27 A.App. 6001. Farris was having back pain, with pain and burning in her feet; and her diabetes was uncontrolled, despite her use of medications. 27 A.App. 6000-06. Dr. Chaney diagnosed Farris as having uncontrolled diabetes, causing neuropathy (consistent with pain/burning in her feet and lower legs). 27 A.App. 6004-6, 6012.

In 2014, Dr. Chaney referred Farris to Dr. Rives for swelling in her upper abdomen. 27 A.App. 6039. He found a hernia, which he repaired surgically. 27 A.App. 6039-41. Farris returned to Dr. Rives in 2015 with another hernia, which he surgically repaired on July 3, 2015. 27 A.App. 6041-43—28 A.App. 6046. Dr. Rives found part of the colon had become stuck to mesh from the prior surgery, and in freeing the colon from the mesh, he inadvertently caused two small holes in the colon, which he repaired using a stapling device. 28 A.App. 6055-59.

Farris developed problems after the surgery, including sepsis (an infection). 23 A.App. 5023. She had a CT scan on July 5, 2015, showing no evidence of a leak anywhere in her colon. 23 A.App. 5021.

On July 12, there was a plain film of the abdomen, again showing no evidence of a leak. 24 A.App. 5203. But another CT scan on July 15 did show evidence of a leak in the colon. 24 A.App. 5203-06. Farris underwent surgery to repair the leak (with another surgeon). 28 A.App. 6207. Her sepsis continued, and she eventually developed foot-drop in both feet. 30 A.App. 6531:4. The extent to which the foot-drop was caused by the sepsis was a disputed issue at trial, with defense expert testimony establishing that the foot-drop was largely caused by the preexisting diabetic neuropathy.

Farris sued Dr. Rives for malpractice, contending that Dr. Rives caused a hole in the colon during surgery, and that fecal material leaked from the hole into Farris's

abdomen, causing the sepsis and the subsequent foot-drop. The jury found for Farris. This appeal followed.

Additional facts will be provided below.

ARUMENTS

SUMMARY OF ARGUMENTS

The district court committed multiple errors, which combined to create an unfair trial. First, the district court allowed Plaintiffs to use a "reptile" strategy, which improperly inflates verdicts by appealing to jurors' primal instincts. The district court then allowed Plaintiffs to introduce significant evidence regarding another patient who suffered complications from surgery by Dr. Rives, including amputation of both feet. This evidence was not only irrelevant, it was highly inflammatory and prejudicial. The other case—including the fact that there was a pending lawsuit—was mentioned at least 180 times in the presence of the jury.

The district court also erroneously gave an adverse inference jury instruction, based upon a faulty analysis of facts and law.

Next, the district court committed multiple evidentiary errors, including exclusion of defense expert witnesses, exclusion of a key deposition transcript, and exclusion of hundreds of pages of relevant medical records. These rulings failed to comply with evidence law, resulting in prejudice to the defense.

The district court also granted judgment as a matter of law regarding two elements of damages. This ruling ignored the correct standard of review for a JMOL motion. As a result of the ruling, the district court filled in two lines on the jury verdict form, thereby awarding nearly $6 million on these items, instead of allowing the jury to make the decision.

The district court also failed to apply federal preemption correctly regarding important statutory protections for doctors in medical malpractice cases. Finally, the district court erroneously awarded more than $800,000.00 in attorneys' fees, without any proper legal basis.

CUMULATIVE ERROR

Any one of the errors in this case can justify reversal. But when the combined errors are considered together, reversal is even more compelling. Cumulative error applies when there are numerous errors found to be prejudicial, even if a single error alone might not be sufficient for a reversal. Although the doctrine has been recognized in criminal cases, the case of *Holderer v. Aetna Casualty & Surety Co.*, 114 Nev. 845, 853, 963 P.2d 459, 465 (1998) seems to have impliedly adopted the doctrine. *Holderer* was a civil case, where this court held that although certain errors did not rise to the level of reversible error, reversal was required when those errors were coupled with other errors at trial.

In the present case, the district court's erroneous rulings permeated the trial, from beginning to end. Any objective reading of the trial transcript leads to the conclusion that the cumulative errors resulted in an unfair trial, and a new trial should be ordered.

I. The district court erred by allowing Plaintiffs to use the reptile theory.

Whether an attorney's comments at trial constitute misconduct is a question of law, reviewed *de novo*. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

A. The reptile theory is improper.

The reptile theory is a "jury influence tactic" used by plaintiffs' attorneys to motivate juries to award larger verdicts. *Perez v. Ramos*, 2018 WL 5305614, *9 (Kan. App. 2018; unpublished) (affirming defense verdict where trial court granted anti-reptile order in limine). The tactic appeals to jurors' basic survival instincts (their "reptilian brains") by persuading them that their own safety is at risk and that a larger plaintiff's verdict will make them safer by making their community safer. *Id.* To use the tactic, a plaintiff's attorney tries to establish generic "safety rules," which may or may not have anything to do with specific facts and duties in the case. *Id.* "Reliance on these safety rules then activates the survival instinct of the jurors and prompts the jury to return a higher verdict." *Id.* The reptile theory encourages a jury decision based upon fear, generated by plaintiff's counsel, that a verdict for the defendant will harm the safety of the community, and thus, the jury's own safety.

See Randolph v. QuikTrip Corp., 2017 WL 2214932, *4 (D. Kan. 2017; unpublished).

In a medical malpractice case, the plaintiff's attorney uses the reptile theory in an effort to activate a jury's reptilian survival mode by suggesting that, regardless of legal standards of care, doctors may not take unnecessary risks and must make safe choices, or the safest choices, for patients. *Bryson v. Genesys Regional Medical Center*, 2018 WL 1611438, *18 (Mich. App. 2018; unpublished). Such arguments are improper because they suggest "a more stringent standard of care" than the correct legal duty in a malpractice case, i.e., a duty to comply with the standard of care in the medical community.[1] *Id.*

Nevada doctors commit negligence (malpractice) by failing to use "the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015. This standard of care is established through expert testimony at trial. *See Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 642, 403 P.3d 1280, 1284-85 (2017). A defendant in a negligence case is not required to act in "the safest possible

[1] *Bryson* found that the plaintiff's "limited and fleeting" improper references were harmless in that case. *Id.* Here, Plaintiffs' references to safety as a substitute for the actual legal standard of care permeated the trial, starting with voir dire, continuing throughout witness testimony, and finally ending with closing arguments.

way," but is only required to act reasonably under the circumstances. *See Johnson v. National Sea Products, Ltd.*, 35 F.3d 626, 632 (1st Cir. 1994).

A plaintiff's use of the reptile theory tactic in a medical malpractice case runs contrary to these standards. The plaintiff's use of the terms "safety requirements" and "safety rules," with reference to the medical defendant's policies and procedures, will "prejudice the jury by conflating the standard of care with the safety rules." *See Lanam v. Promise Regional Medical Center*, 2016 WL 105046, *9 (Kan. App. 2016; unpublished) (holding that trial court did not abuse its discretion by finding that plaintiff's counsel violated an order in limine prohibiting reference to "safety" rules and requirements).

Arguments and evidence based on "broad and abstract" concepts of patient safety or needlessly endangering patients—or arguments that a doctor's job is to "take care of people and help people, but really the safety" of patients—are improper. *See Biglow v. Eidenberg*, 424 P.3d 515, 528-29 (Kan. 2018). Such concepts inappropriately rephrase the legal duty of care for doctors, and the concepts do nothing to establish whether a doctor breached the actual legal standard of care. *Id.* Thus, in addition to prohibiting plaintiff's counsel from referring to "safety rules," a trial court appropriately prohibits the plaintiff's use of the word "safe" or the phrase "needlessly endanger" in a medical malpractice case. *Id.*

B. The district court improperly allowed the tactic.

In the present case, Plaintiffs' reptile tactic permeated the entire trial, starting with voir dire and continuing throughout the trial until closing argument. A trial transcript search shows that Plaintiffs' counsel used the phrase "safety rules" at least 30 times while talking to prospective jurors during jury selection. He talked to jurors about their own personal compliance with safety rules while driving, working, and at home. 18 A.App. 3828-32. He talked to jurors about what happens if people do not follow safety rules, and injuries that can ensue. *Id.* Counsel discussed the distinction between regular "rules" and "safety rules," with emphasis on consequences of "breaking the safety rules," and whether somebody who breaks a safety rule and causes an accident should get "a complete pass" for what happened. 18 A.App. 3838-41.

Plaintiffs' counsel then repeatedly talked to jurors about whether doctors and surgeons must follow "safety rules," and what safety rules jurors thought surgeons should follow. 18 A.App. 3832-33, 3841-51. Counsel asked jurors about what can happen if a doctor violates a safety rule; and, as expected, jurors indicated possible death, loss of function of a person's body, or infection. 18 A.App. 3846.

Defense counsel repeatedly objected on various grounds, including the ground that Plaintiffs' counsel was improperly indoctrinating jurors, reference to safety rules was an incorrect statement of law, and reference to "safety rules" for doctors

was inconsistent with the applicable legal standard in medical malpractice cases. 18 A.App. 3832, 3841, 3846-47, 3851-59. The district court consistently overruled these objections. 18 A.App. 3833-34, 3841, 3853-58. When defense counsel mentioned that Nevada appellate courts had not yet addressed the objectionable reptile theory, the district court disagreed and stated that the Nevada Supreme Court **has** addressed the issue.[2] 18 A.App. 3855-56.

After voir dire, Plaintiffs' counsel continued his reptile tactic during opening statement, where virtually the first thing he told the jury was: "What brings us to the court today, to the courthouse, this court of law, are safety rules; safety rules that surgeons must follow." 19 A.App. 4247. The district court overruled defense counsel's objection. *Id.* Plaintiffs' counsel mentioned "safety rules" eight times in the first page of the opening statement transcript. *Id.* During cross-examination of Dr. Rives, Plaintiffs' counsel discussed "safety" or "safety rules" at least 15 times; and defense counsel's objection was overruled. 20 A.App. 4300-09; 28 A.App. 6218, 6271. Plaintiffs' counsel continued using the reptile "safety" tactic during

---

[2] The district court failed to identify any Nevada cases about which she was referring on the reptile tactic issue. A Westlaw search for this brief revealed no published or unpublished Nevada decision dealing with legitimacy of the reptile theory. The closest thing is *Boyack v. Dist. Ct.*, 2019 WL 1877402 (Nev. 2019; No. 75522; unpublished), where the court dealt with procedural requirements for mistrial sanctions relating to the reptile theory. But the *Boyack* court expressly declined to decide whether the reptile theory is a legitimate trial technique. *Id.* at n.1.

examination of defense witnesses Dr. Juell and Dr. Ardanato.[3] 24 A.App. 5267-68; 26 A.App. 5728. And in closing arguments, Plaintiffs' counsel argued about safety rules, including arguments (two times) that a doctor must choose "the safest tool." 29 A.App. 6385.

In other words, Plaintiffs' counsel hammered at his reptile tactic repeatedly and pervasively—dozens of times—from the beginning of trial until the very end, over defense counsel's overruled objections. No amount of debating skill can establish that this would not have impacted the jury's multi-million dollar verdict.

II. The district court erred by allowing evidence of the Vickie Center case.

Admission or exclusion of evidence is generally reviewed for abuse of discretion, but where an evidentiary ruling includes a legal interpretation of the

---

[3] In addition to discussing "safety" during examination of defense medical witnesses, Plaintiffs' counsel used another scare tactic consistent with the reptile theory. On cross-examination of Dr. Juell, counsel asked about estimates of the number of deaths in the United States caused by medical errors on an annual basis. 25 A.App. 5348. A defense objection was overruled, and Dr. Juell noted some literature indicating as many as 400,000 deaths per year. *Id.* Plaintiffs' counsel then emphasized that there have been scientific studies indicating "over 400,000 deaths a year from medical error," which meant that "on a daily basis it's an indication of more than a 1,000 Americans because of medical error that die per day if those estimates were correct." 25 A.App. 5348-49. Counsel then asked whether the high number of deaths caused by medical error is "an okay scenario," and whether "one of the ways that we reduce the error frequency is by holding those who commit errors accountable for their errors." 25 A.App. 5349. Of course, Dr. Juell had to agree. *Id.* These questions were obviously designed to fortify the reptile theory tactic by hammering on broad concepts of patient safety, needlessly endangering patients resulting in numerous deaths, and activating the jury's survival instinct to protect the safety of the community, and the jury's own safety, by rendering a large verdict.

evidence law, the ruling is reviewed *de novo*. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012). A district court necessarily abuses its discretion if it makes an erroneous ruling of law or an erroneous assessment of evidence. *BMW v. Roth,* 127 Nev. 122, 133, 252 P.3d 649, 657 (2011).

A. Evidence of the Center case was irrelevant and prejudicial.

Vicki Center was an unrelated patient who had another unrelated surgery by Dr. Rives; she developed sepsis, eventually leading to amputation of her feet, and she sued Dr. Rives for malpractice. Over defense objections on multiple grounds, the district court admitted evidence regarding the Center case into the Farris trial, allowing Plaintiffs' counsel to bombard the jury with evidence regarding Center throughout the trial. A trial transcript search reveals that **the Center case was mentioned in the Farris trial at least 180 times in the presence of the jury, and the fact of Vickie Center's amputations was also made known to the jury.** *E.g.,* 21 A.App. 4647 (including overruled objection). This trial should have been a Farris trial. Instead, the district court allowed it to become a Farris-Center trial.

The evidence was irrelevant to the fundamental question of whether Dr. Rives's conduct departed from the accepted standard of medical care. *Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. 163, 174, 359 P.3d 1096, 1103 (2015) (discussing requirements for malpractice suits). Inflammatory and speculative evidence involving prior incidents other than the incident at issue serves little

purpose except to inflame the jury, and such evidence should not be admitted. *See Roever v. State*, 114 Nev. 867, 872, 963 P.2d 503, 506 (1998). Evidence of prior incidents can result in a verdict against a defendant because the jury believes the defendant is a bad person, rather than because of the merits of the case. *See e.g., Braunstein v. State*, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002).

With certain exceptions not applicable here, evidence of prior bad acts is not admissible to prove the defendant's character or to show that he acted in conformity therewith. NRS 48.045(2). **"A presumption of inadmissibility attaches to all prior bad act evidence."** *Hubbard v. State*, 134 Nev. 450, 454, 422 P.3d 1260, 1264 (2018) (emphasis added). Evidence of prior bad acts can have minimal probative value and can cause unfair prejudice to the defendant. *Id.* at 457, 422 P.3d at 1266.

Evidence of other claims against a doctor is irrelevant in a medical malpractice action. *See Wood v. McCullough*, 45 F.R.D. 41 (S.D.N.Y. 1968). Evidence concerning other lawsuits against a party is irrelevant unless there is a "clear nexus" and no significant differences between the cases. *McCleod v. Parsons Corp.*, 2003 WL 22097841, *7 (6th Cir. 2003; unpublished) (employment litigation). A potential for prejudice accompanies such evidence, outweighing its probative value and misleading the jury. *Id.*

B. NRS 48.035 precluded the Center evidence.

Even if evidence is relevant, it is "not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

In *Hansen v. Universal Health Servs.*, 115 Nev. 24, 974 P.2d 1158 (1999), a patient suffered a severe debilitating infection after spine surgery. He sued the doctor and the hospital, contending that the incision became severely infected due to contamination with fecal material. The jury returned a defense verdict. On appeal, the plaintiff contended that the district court erroneously excluded a Nevada state agency's survey of medical complications experienced by the doctor's other patients who also had the same surgery. The *Hansen* court affirmed exclusion of the evidence under NRS 48.035(1), because the probative value was substantially outweighed by the danger of confusing the issues and misleading the jury. *Id.* at 27, 974 P.2d at 1160. Injecting evidence of other cases into the trial at hand would prolong trial, confuse the issues, and divert the jury from the case at hand to collateral matters. *Id.* The evidence was properly excluded. *Id.*

In *Mischler v. McNally*, 102 Nev. 625, 730 P.2d 432 (1986), a surgeon was sued for malpractice. At trial, the district court admitted a memorandum contained in a hospital personnel file for the surgeon, in which another doctor said "I wouldn't let him treat my dog." *Id.* at 628, n.1, 730 P.2d at 434, n.1. Admissibility of the

memorandum was the only issue addressed in *Mischler*. This court reversed and remanded for a new trial. In addition to hearsay and foundational problems, the *Mischler* court held that the memorandum was irrelevant and inadmissible. *Id.* at 628-29, 730 P.2d at 435. The memorandum "was an emotional statement of opinion as to the doctor's capabilities and character," and the comment "had a high potential for prejudicially arousing the jury's hostility against Dr. Mischler." *Id.* at 629, 730 P.2d at 435. The court also held that the memorandum "distracted the jury from the issue of the reasonableness of Dr. Mischler's conduct during the [surgery], and interjected a strong potential, if not probability, of jury confusion based upon the highly deprecatory characterization of Dr. Mischler's professional history." *Id.*

The plaintiff in *Mischler* had suffered severe complications and injuries resulting from the alleged malpractice, and the jury awarded more than $1.1 million. Nevertheless, this court reversed and remanded for a new trial, all based upon a seven-word sentence stated in another doctor's memorandum. The prejudicial impact—and the likelihood of unfairly inflaming the jury's emotions—called for a new trial.

C. Other cases support exclusion of the evidence.

Exclusion of similar evidence was required in *Kunnanz v. Edge,* 515 N.W. 2d 167 (N.D. 1994), where a surgeon performed a ureteroscopy, causing damage to the ureter, requiring removal of a kidney. Only one week earlier, the same surgeon had

performed a ureter procedure on another patient, injuring her ureter and leading to a kidney loss. The trial court refused to allow the plaintiff to introduce evidence of the failed surgery that occurred one week before the surgery at issue, as well as the doctor's deposition (offered to establish his complication rate).

On appeal, the plaintiff argued that the excluded evidence was offered to show the doctor's complication rate for ureteroscopy procedures, and the evidence was highly probative of his lack of skill. The *Kunnanz* court upheld the exclusionary rulings. The court first held that negligence cannot be proven by showing the commission of similar prior acts by the same person. *Id.* at 171. Evidence of the surgery one week earlier was not admissible to show the doctor's negligence, and in any event, its introduction "would have injected a collateral matter into this trial and confused the jury." *Id.*

In *Buford v. Howe*, 10 F.3d 1184 (5th Cir. 1994), the plaintiff had a hysterectomy, and her lawsuit contended that the surgery was unnecessary and fraudulently induced. The trial court excluded evidence of other hysterectomies the doctor performed on other patients. This evidence was offered to prove that the doctor fraudulently induced women to submit to unnecessary surgeries for financial gain. The *Buford* court upheld the exclusion of this evidence, in light of the marginal relevance and the fact that the probative value was outweighed by the prejudicial effect. *Id.* at 1188-89. *See also Lund v. McEnerney,* 495 N.W. 2d 730, 734 (Iowa

1993) (affirming refusal to admit evidence of injuries caused to other patients in other surgeries by same doctor).

Another court dealt with this issue in *Cerniglia v. French*, 816 So. 2d 319 (La. App. 2002), where the plaintiff suffered severe complications from sinus surgery. After a plaintiff's verdict, the doctor contended on appeal that the trial court erred by admitting testimony from two other patients who suffered similar injuries in similar surgeries by the doctor. The appellate court reversed, holding that the evidence was not admissible. In addition to being irrelevant, any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury.[4] *Id.* at 323-24.

A persuasive opinion was issued in *Stottlemyer v. Ghramm*, 597 S.E. 2d 191 (Va. 2004), which was a medical malpractice case arising out of botched surgery. The plaintiff appealed from a defense judgement, contending that the trial court erred by denying cross-examination of the doctor regarding prior acts of misconduct and negligence relating to former patients. The *Stottlemyer* court found no error in the exclusion of this evidence. The testimony was collateral, and it "would have certainly injected non-probative prejudicial evidence before the jury." *Id.* at 194.

---

[4] The *Cerniglia* court rejected the idea that evidence of the doctor's treatment of other patients was admissible to prove the doctor's knowledge or lack of knowledge regarding proper surgical procedures obtained through training. *Id.* at 324-25. This was Plaintiffs' primary argument in the present case.

The collateral evidence "would have distracted the jurors from the issues of Dr. Ghramm's alleged negligence, and such evidence would have excited prejudice and misled the jurors." *Id.*

The *Stotttlemyer* court also held that prior malpractice is not relevant or admissible to show that a defendant was negligent. *Id.* at 194. "Evidence that a defendant was negligent on a prior occasion simply has no relevance or bearing upon whether the defendant was negligent during the occasion that is the subject of the litigation." *Id.* The primary issue before the jury was whether the defendant doctor performed the surgery in accordance with applicable standards of care, and "alleged prior bad acts and his alleged prior acts of negligence related to other patients simply had no relevance to the issues that were before the jury for its consideration." *Id.*

In the present case, Plaintiffs' counsel Jones argued that the fact of Center having her feet amputated as a result of sepsis before Farris's surgery was relevant to establish foreseeability, i.e., to show that, from the Center situation, Dr. Rives knew the consequences of his conduct. 14 A.App. 2986-89. The theory was, in essence, that Dr. Rives should have learned a lesson from his experience with sepsis after Center's surgery. As defense counsel aptly observed, however, Plaintiffs' argument was a red herring. 14 A.App. 2995. There was no question that an experienced surgeon is aware of dangers associated with sepsis. *Id.* There was no legitimacy to Plaintiffs' contention that Dr. Rives may have been unaware of risks

involved with sepsis when he operated on Farris, and that he should have learned a lesson from the Center surgery complications a few months earlier.[5] 14 A.App. 2995-97.

Dr. Rives was essentially forced to defend both cases in the same trial, with jurors being constantly bombarded with information from the Center case—including the overwhelmingly sympathetic fact that Mrs. Center had both feet amputated as a result of her sepsis. Evidence and arguments involving the Center case would have evoked the jurors' strongest emotions imaginable. Plaintiffs cannot in good conscience assert otherwise. Common sense revolts at the idea that this was a fair trial.

III. The district court erred by giving an adverse inference instruction.

A trial court's decision on whether to impose sanctions, including an adverse inference instruction, is reviewed for abuse of discretion. *Bass-Davis v. Davis,* 122 Nev. 442, 447, 134 P.3d 103, 106 (2006). Affirmance is only appropriate if a district court examines relevant facts, applies a proper standard of law, and utilizes a demonstrably rational process. *Id.* at 447-48, 134 P.3d at 106. This court conducts

---

[5] As noted, Jones had argued that Center's surgery complications were relevant to show Dr. Rives's knowledge of the consequences of sepsis before he operated on Farris. Yet at trial, when Dr. Rives attempted to tell the jury about his prior knowledge of sepsis and what he has known about sepsis since medical school, Jones objected on the ground that Dr. Rives was improperly testifying as an expert. 27 A.App. 5879-80. The district court sustained the objections. *Id.*

de novo review of whether a jury instruction was an accurate statement of law. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009).

A. Background regarding discovery sanction.

This issue is related to the Center lawsuit in Clark County, in which Dr. Rives was a defendant. The same defense firm represented Dr. Rives in both cases. 2 A.App. 382. One of the attorneys in the firm was Chad Couchot, who prepared responses to interrogatories for Dr. Rives in the Center case. *Id.* An interrogatory asked about other malpractice suits against Dr. Rives. 2 A.App. 388-89. The response prepared by counsel Couchot in the Center case provided information concerning other suits, including the Farris case. 2 A.App. 389.

About one month later, Couchot prepared interrogatory responses for Dr. Rives in the Farris case, and just like the interrogatories in the Center case, one of the interrogatories asked about other lawsuits. 2 A.App. 394. Couchot knew he had recently answered a similar interrogatory in the Center case, and he therefore transferred information from the Center responses to responses in the Farris case. 2 A.App. 382. Unfortunately, when transferring the information from the Center responses to the Farris responses, Couchot neglected to add the Center case to the list of prior suits. *Id.* This was simply an oversight. *Id.*

In October 2018, Plaintiffs' counsel in the Farris case, George Hand, took Dr. Rives's deposition. 2 A.App. 399. During the deposition, Hand drew Dr. Rives's

attention to Interrogatory 3, involving other suits. Hand asked questions regarding each of the cases disclosed in the response. 2 A.App. 401-02. Hand then asked about an interrogatory response dealing with Dr. Rives's prior depositions, "such as an expert for patient or for defendant doctor." 2 A.App. 402:22-24. When Dr. Rives responded, referring to information in his response to Interrogatory 5, he did not mention the Center case, because he had not been deposed in that case when the answers to interrogatories were prepared in the Farris case. 2 A.App. 403-04. At that point defense counsel Couchot informed Hand about the Center case. *Id.* Hand asked all the questions he wanted to ask regarding the Center case, and Dr. Rives answered his questions.[6] *Id.*

---

[6] Unfortunately, the transcript has the name "Sinner" instead of "Center." 2 A.App. 403-04. This was obviously a mistake by the court reporter. Nearly a year later, Plaintiffs' new attorneys suggested that Couchot and Dr. Rives provided the incorrect name "Sinner," essentially contending that this was somehow part of a devious scheme to prevent Hand from finding out about the Center case. 1 A.App. 93. This was ridiculous. If Couchot and Dr. Rives did not want the Center case to be disclosed, they would not have mentioned it at all. The case was in the public record; Hand could have asked for other information at the deposition; and he could have made follow-up discovery requests after the deposition if he had difficulty obtaining information about the case. Plaintiffs' new attorneys eventually conceded that Couchot "likely was intending to say Center but that wasn't picked up [by the court reporter] because of the—it came up [as] Sinner." 14 A.App. 2981:18-25.

Plaintiffs' new attorneys also accused Couchot of "improperly coaching the witness" regarding the Center case. 1 A.App. 92:23-24. Hand did not object to alleged improper coaching at the deposition. Regardless, Couchot absolutely did the right thing by providing additional information when he realized there was an omission.

Information regarding the Center case was always available to Hand on the district court's Odyssey website, and Plaintiffs' new attorneys eventually conceded this. 1 A.App. 90:25-26; 2 A.App. 383. Hand took Dr. Rives's deposition in October 2018; discovery closed in June 2019; and Plaintiffs associated their new attorneys into the case in July 2019. 2 A.App. 382-83. Then, the attorneys from both sides attended a meeting in September 2019, pursuant to EDCR 2.67. *Id.* Plaintiffs' counsel did not notify defense counsel of any alleged concealment regarding the Center case at that time. *Id.* In fact, during the entire time from Dr. Rives's deposition until Plaintiffs filed their motion for sanctions nearly a year later, none of Plaintiffs' attorneys asked for additional information regarding the Center case. *Id.* As it turned out, Hand had contacted Center's counsel, attorney Brenske, "weeks to months" before the trial in the Center case started on April 1, 2019. 4 A.App. 757.

Nearly a year after the deposition, and months after Hand discussed the Center case with Center's counsel, Plaintiffs filed a motion for sanctions against Dr. Rives, alleging intentional concealment of the Center case. 1 App. 87. Plaintiffs contended that Dr. Rives and his attorneys "sought to hide" the Center case and committed "deliberate obfuscation." 1 A.App. 95:14, 28. Plaintiffs' new attorneys contended that Plaintiffs "only found out about the Center case by a search through Odyssey." 1 A.App. 96:10. This was false, because the Center case had been disclosed in

October 2018 at Dr. Rives's deposition, and Hand had discussed the Center case with Center's counsel "weeks to months" before the April 2019 trial in the Center case.

Unburdened by evidence, Plaintiffs' attorneys asserted that they "had no reasonable opportunity to further investigate this critical and admissible information." 1 A.App. 99:15-16. With Rambo-style bravado, Plaintiffs' new attorneys requested the court to order a "case terminating sanction" by striking Dr. Rives's answer. 1 A.App. 98:24-25.

Dr. Rives filed an opposition. 2 A.App. 358. Couchot provided uncontroverted explanations about preparing the interrogatory responses in the Center case; preparing the responses in the Farris case a month later; using information from the Center responses for the nearly identical interrogatory in the Farris case; inadvertently failing to add the Center case to the Farris responses; and subsequently disclosing the Center case (not Sinner) at Dr. Rives's deposition. 2 A.App. 361-71, 382-83.

The opposition also established that the mistake caused no prejudice to Plaintiffs, because they were not prevented from inquiring as to Dr. Rives's knowledge of the dangers of organ perforation, sepsis, and the need for urgent surgery. 2 A.App. 372:1-2. Plaintiffs were wrong in their contention that they were unable to investigate these issues due to their alleged lack of knowledge regarding

the Center case. 2 A.App. 372. The opposition also established that any evidence pertaining to the Center case was inadmissible anyway, for a variety of reasons. 2 A.App. 373-75.

The district court held a hearing on the motion, including an evidentiary hearing with testimony by Dr. Rives regarding the process for responding to interrogatories. He explained that he relied on defense counsel to prepare the interrogatory responses and to provide the information contained in their responses. 14 A.App. 3075. He conceded that he did not read the responses before he signed them, because the responses looked like legalese, and he assumed the information was the same as his earlier responses. 14 A.App. 3075:8-18. He did not believe the questions by attorney Hand at his deposition included questions for which the answer would have needed discussion of the Center case.[7] 14 A.App. 3081, 3103-05.

The district court failed to enter a written order, but the court issued an oral ruling indicating the court was "inclined to" give a jury instruction and impose a monetary sanction. 15 A.App. 3223:18-20, 3226:16-17. The court found that Dr. Rives had not given appropriate responses in discovery. 15 A.App. 3219-30. Later,

---

[7] Near the beginning of the evidentiary hearing on October 7, 2019, defense counsel Doyle requested permission to make a closing argument after Dr. Rives's testimony at the hearing. 14 A.App. 3069:16-17. The district court refused the request, because defense counsel had not made the request before the hearing. 14 A.App. 3069:18-23. Thus, the district court rendered her ruling without the benefit of argument by counsel regarding Dr. Rives's testimony.

during the trial, the court stated that Dr. Rives's conduct was intentional. 19 A.App. 4218-19. The court noted that Dr. Rives had "relied on counsel," and he had an "intent not to read the interrogatories," which the court found was "intentional conduct." 19 A.App. 4218-19. The court decided to give an instruction allowing the jury to draw an adverse inference against Dr. Rives. 19 A.App. 4220-25.

Of course, defense counsel had consistently opposed the imposition of any sanctions, because no sanctionable conduct had occurred. 2 A.App. 358-84, 30 A.App. 6494-6505. Defense counsel opposed sanctions at every hearing on the issue. 14 A.App. 2971 (September 26, 2019), 14 A.App. 3043 (October 7, 2019), 15 A.App. 3163 (October 10, 2019), 19 A.App. 4212 (trial, October 16, 2019). When the district court announced the decision to give a sanction jury instruction, the court told Plaintiffs' counsel to prepare the instruction, with defense counsel having an opportunity to review it. 15 A.App. 3223:16-25. Defense counsel received Plaintiffs' instruction three days later, on a Sunday afternoon. 19 A.App. 4215:7-13. He sent his own proposed instruction to Plaintiffs' counsel Monday morning. 19 A.App. 4215:14-19.

The wording of the jury instruction was argued on the third trial day. 19 A.App. 4211-45. Defense counsel indicated he objected to "any sort of instruction along these lines," i.e., a sanctions instruction. 19 A.App. 4214:5. The district court ruled that the objection was waived, because defense counsel did not make an

objection at an earlier hearing on October 7, 2019. 19 A.App. 4214:7-11. There was no basis for this ruling. As noted above, Dr. Rives's attorneys had consistently opposed any sanctions. Additionally, the hearing on October 7, 2019, to which the district court referred, was the evidentiary hearing. The district court did not make a ruling at that time, and in fact, the court did not rule until October 10, 2019. 15 A.App. 3223:16-23 (announcing the court's inclination to give jury instruction). That was the hearing at which the district court instructed Plaintiffs' counsel to draft the proposed instruction.

Regardless of all this procedural wrangling, the district court ultimately read an instruction to the jury before opening statements. The instruction read as follows:

> Members of the jury, Dr. Barry Rives was sued in a medical malpractice case in the case *Vickie Center v. Barry James Rives, M.D., et al.* Dr. Barry Rives was asked about the Vickie Center case under oath and he did not disclose the case in his interrogatories or at his deposition. You may infer that the failure to timely disclose evidence of a prior medical malpractice lawsuit against Dr. Barry Rives is unfavorable to him. You may infer that the evidence of the other medical malpractice lawsuit would be adverse to him in this lawsuit had he disclosed it. This instruction is given pursuant to a prior Court ruling.

19 A.App. 4246:16-24. The district court gave essentially the same instruction at the end of the trial. 30 A.App. 6651.

B. Argument regarding sanctions instruction.

A district court may give an adverse inference instruction where evidence has been lost or destroyed. *See Bass-Davis v. Davis*, 122 Nev. at 447, 134 P.3d at 106. An adverse inference is essentially a gap-filler that serves the remedial function of restoring parties to the same position they would have been in absent the loss or destruction of the evidence. *Id.* at 449, 134 P.3d at 107. It allows the jury to infer that the lost or destroyed evidence would have been unfavorable to the party who lost or destroyed it, and favorable to the other party. *Id.* at 449-50, 134 P.3d at 107-08. The inference is not imposed because of any moral culpability, but rather, because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss. *Id.*

Nevada cases applying adverse inferences have primarily dealt with evidence that was actually lost or destroyed, without the ability to retrieve it. *E.g., Banks v. Sunrise Hosp.*, 120 Nev. 822, 102 P.3d 52 (2004) (equipment sold); *Bass-Davis, supra* (videotape lost); *Franchise Tax Board v. Hyatt*, 133 Nev. 826, 407 P.3d 717 (2017) (computer tapes destroyed), reversed on other grounds by *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019). On the other hand, where evidence has not actually been lost or destroyed, it makes no sense to impose an adverse inference. The inference allows a jury to fill an evidentiary gap by inferring (or speculating) about what the lost or destroyed evidence would have been. Where the party

asserting the inference has gained possession of the evidence, even if somewhat late, the evidence is known, and there is no evidentiary gap. There is simply no need for a jury to draw an adverse inference, one way or the other, regarding the evidence, and it makes no sense to give an instruction allowing the jury to draw an inference regarding what the evidence would have been. *Cf. D'Onofrio v. SFX Sports Group, Inc.,* 2010 WL 3324964, *10 (D.C.D.C. 2010) (where lost computer evidence was partially recovered, adverse inference instruction would have been "half true").

In the present case, the adverse inference instruction informed the jury that Dr. Rives did not disclose the Center case in his interrogatories or his deposition; that the jury could infer that the failure to disclose evidence "is unfavorable to him"; and the jury may infer that the evidence of the Center lawsuit would be adverse to Dr. Rives. But Plaintiffs' attorneys had already obtained all the evidence they wanted regarding the Center case, and they discussed the Center case more than 180 times in the presence of the jury. There was no evidentiary gap to fill with the adverse inference instruction. The instruction—which was given at the beginning of the trial and a second time at the end of the trial—allowed the jury to speculate that there might have been more evidence regarding the Center case, and allowed the jury to fill gaps that simply did not exist.

Equally egregious, however, was the district court's decision to give an adverse inference instruction for evidence that should not even have been admitted

in the first place. Evidence of Center's case was irrelevant, inflammatory, and unduly prejudicial. The adverse inference instruction was error because the Center evidence had no relation to Plaintiffs' malpractice claim. *See Stanojev v. Ebasco Servs., Inc.*, 643 F.2d 914, 924 (2d Cir. 1981) (adverse inference instruction error where the inference "could not serve to supply the missing element of a prima facie case.").

Plaintiffs' counsel emphasized the adverse inference instruction during his closing argument, essentially asking the jury to speculate about what Dr. Rives was "hiding" in the Center case. 29 A.App. 6387, 6389. The adverse inference instruction was clear error, resulting in an unfair trial that requires reversal.

IV. The district court erred regarding ERISA preemption.

Issues involving ERISA preemption in medical malpractice cases are reviewed *de novo*. *E.g., McCrosky v. Carson Tahoe Regional Medical Center*, 133 Nev. 930, 936-37, 408 P.3d 149, 154-55 (2017).

A. Background.

In a typical personal injury case, the default rule is that collateral source evidence (payment of bills by insurance or a third-party) is inadmissible. *McCrosky*, 133 Nev. at 936, 408 P.3d at 154-55. In a medical malpractice case, however, the default rule is that collateral source evidence **is admissible** under NRS 42.021(1). This statute was adopted in 2004, when voters approved the Keep Our Doctors in

Nevada (KODIN) ballot initiative, which changed Nevada law for medical malpractice litigation, including changes in the collateral source rule. 13 A.App. 2793-94, 2799; *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1005, 363 P.3d 1168, 1169 (2015); *McCrosky*, 133 Nev. at 936-37, 408 P.3d at 154-55.

NRS 42.021 created an exception to the collateral source rule, allowing medical malpractice defendants to introduce evidence of collateral payments that the plaintiffs received from third parties. *Id.* Application of the statute can be preempted by federal law in limited circumstances. For example, medical bills in *McCrosky* were paid by Medicaid. A federal statute gives the United States a right to reimbursement from a third-party tortfeasor. *McCrosky* held that federal law preempted NRS 42.021 in this regard. *Id.* at 937, 408 P.3d at 155. *McCrosky* noted, however, that NRS 42.021 remains intact regarding private collateral source payments. *Id.* at n.2.

Because the present case does not involve direct federal collateral source payments, *McCrosky* does not apply. Nonetheless, preemption can apply under the Employee Retirement Income Security Act (ERISA), which governs employee benefit plans. *FMC Corp. v. Holliday*, 498 U.S. 52, 54 (1990). There are two types of ERISA plans. Some plans are self-funded, where the employer pays medical benefits directly, without an insurance company. If the plan is not self-funded, the employer purchases a health insurance policy, and the insurance company pays

medical expenses. *Id.* at 54, 61-62. If a plan is self-funded, federal preemption applies, and the plan is exempt from state regulations relating to the plan. *Id.* If the plan is not self-funded—and an insurance company pays benefits—federal preemption does not apply, and state laws such as NRS 42.021 apply. *Id.*

B. The ERISA plan in this case.

Titina Farris's medical bills were paid through her husband's coverage as an MGM employee. 21 A.App. 4720-22. Plaintiffs never filed a motion in limine to preclude evidence of medical insurance payments, or to preclude anyone from mentioning insurance at trial. On the first trial day, Dr. Rives filed a trial brief explaining the ERISA issue, and pointing out that Plaintiffs had not shown evidence that Farris's bills were paid by a self-funded ERISA plan. 4 A.App. 798-801. Dr. Rives argued that he was therefore permitted to introduce evidence of the medical benefits paid. 4 A.App. 802:15-16.

On the sixth trial day, during cross-examination of Dr. Rives, Plaintiffs' counsel Jones asked about Dr. Rives's surgery billings: "Doctor, did you give the money back in this case or did you choose to keep that?" 21 A.App. 4716:15-4717:1. This was obviously designed to make Dr. Rives look greedy, with no relevance whatsoever to the question of whether Dr. Rives committed malpractice. Yet the district court overruled a relevance objection. 21 A.App. 4717:2-3.

Dr. Rives responded: "I don't think legally we can give the money back." 21 A.App. 4717:4-5. Instead of dropping the matter, Jones persisted by asking a follow-up question: "Did you try?" 21 A.App. 4717:7. In attempting to answer the question, Dr. Rives explained: "Well, the insurance company is the one who pays me so--" 21 A.App. 4717:8. The district court interrupted the answer and had a discussion outside the jury's presence. 21 A.App. 4717:9-18. Jones argued that "insurance is prohibited," and insurance was "not to be discussed in this case." 21 A.App. 4720:1-2. Actually, the district court had never issued an order prohibiting mention of insurance or ruling that NRS 42.021 was inapplicable. Thus, defense counsel argued that Dr. Rives's answer to Jones's question was not improper. 21 A.App. 4720-46.

The parties made arguments regarding whether the plan was a self-funded ERISA plan, and whether federal preemption applied. 21 A.App. 4719-46. The next day, Dr. Rives filed another trial brief on the ERISA issue, and he provided a copy of the MGM plan. 5 A.App. 995-1002, 1006-44.

Plaintiffs filed a document asserting that Dr. Rives was guilty of "violating the Court's strict prohibition against referencing insurance payments in this matter." 7 A.App. 1345:20-21. Plaintiffs did not identify when the court ordered such a prohibition, and in fact, no such prohibition had been ordered. Plaintiffs also argued that NRS 42.021 was preempted by ERISA. 7 A.App. 1346-50.

At another hearing, when the parties were arguing about whether the plan was self-funded, the district court indicated that "the Court actually knows the answer to the question," based upon independent knowledge that the court "gained prior to being on the bench." 22 A.App. 4931:18-20. The court subsequently repeated the fact that she had "independent knowledge of whether MGM is or is not self-funded," and that she "did know the answer independently."[8] 26 A.App. 5594:2-5. Doyle observed that MGM has multiple health plans, including separate plans for executives, and the insurance card does not say it is a self-funded plan. 26 A.App. 5597.

The district court ruled that the MGM was self-funded. 26 A.App. 5594:10-12. Therefore, the court ruled that "there will be no collateral source, okay." 26 A.App. 5598:13. The impact of this ruling was twofold. First, the defense was prohibited from offering evidence showing that Farris's bills were paid by insurance, as allowed by NRS 42.021; and second, Dr. Rives's use of the word "insurance" was deemed improper.

C. The district court's ERISA ruling was erroneous.

The MGM plan is located at 5 A.App. 1006. Several provisions indicate that the plan is **not self-funded**, because the plan uses insurance for the medical benefits.

---

[8] Despite indicating twice that she had independent knowledge, the court indicated that she would not utilize this information. 22 A.App. 4931:19; 26 A.App. 5594:2-6. In other words, she would ignore what she knew.

For example, the plan discusses benefits "provided under a group **insurance** contract," in which "the **insurance company** shall be the Claims Administrator" for the group insurance benefits. 5 A.App. 1011 (emphasis added). A provision dealing with the source of benefits discusses benefits "that are fully **insured**," and such benefits will be paid "solely by **the insurance company** or other entity contractually responsible to pay for or to provide such benefits." 5 A.App. 1042 (¶ 20.17 (a))(emphasis added). A "funding" provision allows benefits to be provided by "one or more **insurance contracts**." 5 A.App. 1042 (¶ 2014)(emphasis added). The plan recites multiple "incorporated documents," including contracts with insurance companies such as Blue Cross Blue Shield, CIGNA, Harmony Healthcare, and Health Plan of Nevada, Inc. 5 A.App. 1045.

These provisions show that the plan uses insurance companies, and the plan is not self-funded. Plaintiffs offered no testimony establishing that Farris's bills were paid by the MGM rather than by an insurance company.

In determining whether state statutes are preempted, the United States Supreme Court ruled that **courts must presume state police powers are not superseded by federal law**. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). The Supreme Court has also mandated that **the burden**

of establishing federal preemption of a state law is on the party asserting preemption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (emphasis added).

Nevada's important medical malpractice statute should have been given full dignity and effect, absent a clear factual showing by Plaintiffs that preemption applied. Plaintiffs made no such showing. Consequently, the district court erred by deeming the plan self-funded and ruling that the statute was preempted, by excluding evidence of collateral source medical payments, and by determining that Dr. Rives improperly used the word "insurance."

V. The district court erred by limiting and excluding defense experts.

Admissibility of expert testimony is reviewed for abuse of discretion, but *de novo* review is implicated on whether the district court applied a correct legal standard. *See Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 505-06 (2007).

A. Background information.

Expert disclosures with reports were made on November 15, 2018. 26 A.App. 5622:20-22. Plaintiffs disclosed Dr. Alex Barchuk, who is a physical medicine and rehabilitation doctor, and who prepared a life care plan evaluation. 4 A.App. 719. His 31-page evaluation was undated, but Dr. Barchuk had evaluated Titina Farris in March 2018, eight months before the disclosure. 26 A.App. 5622:15-16. His life

care evaluation included opinions regarding Farris's need for extensive future care, which had not been previously disclosed in a life care plan. 4 A.App. 719-50. When Plaintiffs made their expert disclosures in November 2018, they also disclosed Dr. Willer, a neurologist. 26 A.App. 5622-23. When the disclosures were made in November 2018, Plaintiffs had not complied with NRCP 16.1's mandatory requirement for disclosure of medical expenses. That disclosure was not made until April 2019. 26 A.App. 5623.

With Plaintiffs' expert disclosures in November 2018, defense counsel learned for the first time that Dr. Willer and Dr. Barchuk were opining that all of Farris's current and ongoing complaints, problems, and disabilities were caused by the critical illness neuropathy/polyneuropathy (complications from surgery), with no attribution to Farris's longstanding preexisting diabetic neuropathy. 26 A.App. 5622-24.

Defense counsel Doyle was surprised by the opinions that essentially ignored the long-term preexisting diabetic problems, and Doyle therefore retained Dr. Adornato to rebut Dr. Willer; Dr. Stone to rebut Dr. Barchuk; Ms. Larsen to rebut Ms. Cook (Plaintiffs' life care cost analyst); and Eric Volk to rebut Mr. Clauretie (Plaintiffs' economist). 26 A.App. 5623-24. Despite the amount of work involved, Doyle was able to disclose rebuttal reports from these experts approximately one month after receiving Plaintiffs' disclosures. 26 A.App. 5623:7-8 (rebuttal

disclosures on December 19, 2018). Plaintiffs did not object at that time. 26 A.App. 5623:7-11.

Plaintiffs did not file motions in limine challenging the defense experts. Plaintiffs did, however, file a motion to strike alleged improper rebuttal opinions less than a month before trial, and they filed a trial brief regarding rebuttal experts on the ninth trial day. 1 A.App. 199; 27 A.App. 1420. The district court struck or severely limited the defense experts, as described below.

B. Plaintiffs failed to make mandatory disclosures of damages.

Under NRCP 16.1(a)(1), a plaintiff's initial disclosures (due 14 days after the Rule 16.1 conference) "must" provide a computation of each category of damages claimed, including future medical expenses. *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 264-65, 396 P.3d 783, 786-87 (2017).

In the present case, the Rule 16.1 conference was in October 2016. 26 A.App. 5627:7-8. Plaintiffs failed to provide the medical expense computations, and even when the parties disclosed experts two years later in November 2018, Plaintiffs still did not provide the computations. 26 A.App. 5623:12-22. Plaintiffs finally provided the mandatory computations two and one-half years late in April 2019. 26 A.App. 5623. Plaintiffs disclosed $4.2 million on April 5 (7 A.App. 1366:9), then $5.2 million a few weeks later. 3 A.App. 637. Counsel Doyle argued this late-disclosure

point in explaining why he needed rebuttal expert opinions after Plaintiffs disclosed their experts in November 2018, and why he did not anticipate the need for such rebuttal experts earlier. 26 A.App. 5623-25.

Throughout the trial, the district court ardently held defense counsel to strict compliance with virtually every obscure procedural requirement. Yet when it came to Plaintiffs' failure to comply with the mandatory disclosure rule for damages, the district court gave Plaintiffs' attorneys a free pass. The court seemed to believe that prior to *Pizarro-Ortega*, Clark County attorneys could ignore the rule, due to a general practice in that county. 26 A.App. 5629, 5641.[9] The court failed to enforce the rule against Plaintiffs, because Plaintiffs' attorneys did not have a "crystal ball," and Plaintiffs' attorneys did not have notice in October 2016 that *Pizarro-Ortega* would be issued in June 2017. 26 A.App. 5641:12-16.

Although *Pizarro-Ortega* acknowledged an understanding among some Clark County attorneys to ignore the rule, this was "not a valid basis for disregarding" the rule. *Pizarro-Ortega*, 133 Nev. at 265, 396 P.3d at 787. The 2017 *Pizarro-Ortega* opinion put every attorney in Clark County—including Farris's attorneys—on notice that plaintiffs "are not free to disregard" the disclosure requirement. *Id.* at 264 n.6,

---

[9] Page 5629 from the trial transcript contains a lengthy paragraph attributed to Doyle. 26 A.App. 5629:10-24. From the contents of the paragraph, attribution to Doyle was obviously another typographical error by the court reporter/recorder. The paragraph was clearly spoken by the judge.

396 P.3d at 787 n.6. In allowing Plaintiffs' attorneys to get away with violating the mandatory rule—because they did not have a crystal ball regarding the June 2017 *Pizarro-Ortega* opinion—the district court completely ignored the fact that Plaintiffs never provided the mandatory damages disclosure until April 2019, **nearly two years after this court published *Pizarro-Ortega*.**

Thus, Plaintiffs were guilty of two serious rule violations. First, they failed to comply with Rule 16.1's mandatory requirement for a damages disclosure. Second, they failed to comply with the mandatory requirement for timely supplementing discovery responses (for two years after this court gave notice to Clark County attorneys in *Pizarro-Ortega*). *See Capanna v. Orth*, 134 Nev. 888, 894, 432 P.3d 726, 733 (2018) (supplement disclosures are required upon learning that information previously disclosed is incomplete). Plaintiffs' attorneys did not need a crystal ball to know of their supplemental disclosure obligation during this time frame.

The prejudice to Dr. Rives was manifest. Doyle explained that, as a practical matter, he was blindsided by Plaintiffs' late damages disclosure, and by other surprising opinions by Plaintiffs' experts; thus, Doyle's supplemental expert disclosures were fair responses to Plaintiffs' new information. Yet the district court excluded defense experts, including experts who would have rebutted Plaintiffs' life care plan (with its $4.6 million in future damages). Plaintiffs then seized on the exclusion of defense experts and moved for JMOL, asserting an alleged lack of

defense evidence, as explained in great detail below. The district court granted the motion and inserted the number $4,663,473 into the verdict form before giving it to the jury. 12 A.App. 2475. This was grossly unfair and an abuse of discretion.

C. Legal requirements for rebuttal experts.

A party may disclose a rebuttal expert to contradict or rebut evidence on the same subject matter identified by the opposing party. NRCP 16.1(a)(2)(E)(i)(b). Rebuttal testimony contradicts the opposing party's expert or furnishes a reasonable alternative to the other expert. *Mathews v. State*, 134 Nev. 512, 515, 424 P.3d 634, 638 (2018). Expert rebuttal witnesses are proper if they contradict or rebut the subject matter of the original expert witness. *Carr v. Paredes*, 2017 WL 176591, *1 (Nev. 2017; No. 60318; unpublished).

Plaintiffs argued that rebuttal expert testimony is not appropriate to contradict an expected and anticipated disclosure by the opposing party. 1 A.App. 206-07. The district court seemed to agree, noting that the "idea of diabetes was known before the initial expert deadline." 26 A.App. 5697:8.

As noted above, the district court previously ruled that Plaintiffs' attorneys were not expected to have a crystal ball, to anticipate future developments. Similarly, defense counsel should not have been expected to have a crystal ball, to predict opinions that Plaintiffs' experts would render in their initial expert

disclosures. *See System Fuels, Inc. v. United States*, 117 Fed. Cl. 362, 365 (2014) (a party cannot be charged with being clairvoyant regarding anticipation of opponent's expert report).

(1) Dr. Adornato.

One of Plaintiffs' experts was Dr. Justin Willer, a neurologist. 7 A.App. 1488. He opined, in essence, that virtually all of Titina Farris's problems were a result of critical illness polyneuropathy (surgery complications). 7 A.App. 1489-95. When defense counsel Doyle received the report, he was surprised, because Dr. Willer had received reports from Farris's doctors regarding serious preexisting diabetic problems, yet Dr. Willer attributed 100 percent of Farris's problems to the surgery complications. 26 A.App. 5622:22-25, 5623:1-4, 5676-77, 5680.

Because this was the first time Plaintiffs' expert had failed to attribute any percentage whatsoever to the preexisting diabetic neuropathy, Doyle retained Dr. Bruce Adornato, a board-certified neurologist. 2 A.App. 292-308. He prepared a report which he stated was intended "to rebut the opinions of Dr. Justin Willer and to comment on the cause of Titina Farris' injuries." 2 A.App. 292. He noted his review of extensive medical records, including records showing that Farris had longstanding diabetes, which was poorly controlled, and that Farris had a history of diabetic neuropathy and nerve pain so severe she was treated with "substantial amounts of oral narcotics." 2 A.App. 293. Dr. Adornato further rebutted Dr.

Willer's report by indicating that Dr. Willer failed to acknowledge the preexisting diabetic neuropathy as a significant factor in her current disability; Dr. Willer's report acknowledged the history of diabetic neuropathy, but did not comment on the severity of the problem; and Dr. Willer's report did not mention relevant information. *Id.* Dr. Adornato opined that Farris would continue to have painful diabetic neuropathy, worsening with time in terms of disability, pain, weakness, impaired sensation and gait imbalance, and: "None of these facts were considered by Dr. Willer in his report." 2 A.App. 294.

As defense counsel Doyle explained, there had been no foreseen need to disclose someone like Dr. Adornato until the defense received Dr. Willer's report. 26 A.App. 5697:24-25. The district court ruled, however, that Dr. Adornato was barred from offering any opinions regarding Farris's loss of sensation caused by diabetic neuropathy, and Dr. Adornato could not opine regarding the cause of Farris's injury. 26 A.App. 5698-99. His testimony was limited to explaining his disagreement with Dr. Willer's percentage allocations. 26 A.App. 5698:22-24.

This ruling was clearly wrong. With Farris's extensive history of diabetic neuropathy, with pain and physical disabilities, Dr. Willer's report came as a complete surprise to counsel Doyle. The district court's hyper-technical and extremely limited view of the scope of rebuttal testimony was an abuse of discretion.

(2) Dr. Stone.

Dr. Lance Stone is a board-certified physical medicine and rehabilitation doctor. 2 A.App. 311. He was retained to review the life care plan authored by Plaintiffs' expert Dr. Barchuk, and to "attest to any separate and divergent opinions" regarding Dr. Barchuk's plan. 2 A.App. 311. Dr. Stone reviewed extensive records for Farris, and he specifically provided opinions regarding the list of diagnoses that Dr. Barchuk had documented. 2 A.App. 312. Dr. Stone expressed agreement, in general, with some of Dr. Barchuk's diagnoses, with different conclusions regarding Farris's preexisting conditions or problems unrelated to surgery. 2 A.App. 313-14. Additionally, Dr. Stone reported that he "formed conclusions that both share and differ from Dr. Barchuk's future recommendations." 2 A.App. 314. He identified 19 such opinions. 2 A.App. 315-16.

Dawn Cook is a registered nurse, who came up with the monetary numbers for the life care plan expenses, based upon Dr. Barchuk's medical recommendations. 22 A.App. 4849, 4854. Dr. Barchuk and Ms. Cook had created the life care plan in March and June of 2018, but it was not disclosed by Plaintiffs' attorneys until November 15, 2018. 26 A.App. 5622:15-22. This was the first disclosure of a life care plan. And because Plaintiffs had not complied with the damages disclosure requirement of NRCP 16.1, this was the first disclosure of more than $4 million in claimed future damages in the life care plan. 22 A.App. 4891; 26 A.App. 5622-24.

When Doyle reviewed the newly-disclosed life care plan and its economic analysis, he observed that the plan was "very extensive, very expensive, and very unexpected, and unanticipated, given the fact that we had no prior computation of damages." 26 A.App. 5624:7-10. Consequently, Dr. Stone was retained to rebut Dr. Barchuk's life care plan recommendations, and a nurse, Ms. Larsen, was retained to rebut nurse Cook's part of Plaintiffs' life care plan. 26 A.App. 5624:10-11. Doyle explained that these experts "were properly disclosed as rebuttal expert witnesses, given the fact that the opinions expressed by Plaintiffs' damages experts was [sic] unexpected and unanticipated." 26 A.App. 5625:19-21.

The district court conceded that some aspects of Stone's report "could be considered proper rebuttal." 26 A.App. 5642:24. Yet the district court excluded Stone, primarily on the ground that his rebuttal report was "really an initial expert's opinion and should have been designated" as such.[10] 26 A.App. 5642:14-16. This ruling was erroneous and should be reversed.

---

[10] The district court gave two other reasons for excluding Stone. First, he had not disclosed his involvement as an expert in the Center case. 26 A.App. 5637. But he had never been deposed in that case, and his testimony at the Center trial was **after** disclosure of Farris defense experts, and he would not have appeared on a case list for trial testimony. 26 A.App. 5634:14-19. The other reason was that he failed to satisfy *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). 26 A.App. 5636, 5644. The court said Dr. Stone had no "data," and no "peer reviewed" opinions (26 A.App. 5644:8-11), but Plaintiffs' *Hallmark* argument was raised for the very first time on trial day 11. 26 A.App. 5575, 5643:24-25. In any event, Dr. Stone's report gave his extensive qualifications, with detailed explanations about the records he studied and medical bases for his opinions. 2 A.App. 311-23.

(3) Sarah Larsen, RN.

Plaintiffs had disclosed Dawn Cook, a life care planner, who used Dr. Barchuk's medical recommendations and then came up with a $4.6 million life care plan for future expenses (present value). 3 A.App. 637:17; 7 A.App. 1557. Defense counsel retained Sarah Larsen, a registered nurse, who prepared a life care plan to rebut Cook's plan. 2 A.App. 227-250 (report). Her plan was based upon recommendations of Dr. Stone. *Id.* Unlike Dawn Cook's $4.6 million life care plan, Larsen's life care plan was only $507,000.00 to $549,000.00 (present value). 8 A.App. 1824-25. When the district court refused to allow Dr. Stone to testify, Larsen's life care plan pricing (which was derivative from Dr. Stone) became moot, and she was therefore not called as a trial witness. 16 A.App. 3413:8-14; 26 A.App. 5572:18-19. As such, exclusion of Stone's opinion had a $4 million impact (the difference between the two life care plan values).[11]

****

In conclusion on this issue, the district court erred by excluding key defense expert testimony. The error resulted in an unfair trial, with a potentially huge impact on the verdict. A new trial should be ordered.

---

[11] Larsen's name is sometimes misspelled in the trial transcript as "Larson." Indeed, hearing transcripts have Dr. Rives's name misspelled as "Reeves" a few times. 5 A.App. 976:22; 16 A.App. 3513:3, 6. These are additional examples of court reporter errors, similar to the "Sinner" mistake.

VI. The district court erred by granting Plaintiffs' NRCP 50(a) motion.

In ruling on a motion for judgment as a matter of law under NRCP 50(a), the district court must view the evidence and all inferences in favor of the non-moving party. *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008). This court applies that same standard on appeal, performing *de novo* review of the district court's ruling. *Id.*

A. Factual background.

When the defense rested, Plaintiffs moved for a "directed verdict" under NRCP 50(a) [motion for judgment as a matter of law]. 29 A.App. 6305. Plaintiffs contended that past medical bills were undisputed in the amount of $1,063,006.94 (29 A.App. 6305-06), and that the life care plan was undisputed in the amount of $4,663,473.00. 29 A.App. 6306-08.

In opposition, defense counsel pointed out that there was evidence from which the jury could infer that the full amount of the hospital bill was not reasonable, given expert testimony. 29 A.App. 6310:20-23. For example, the hospital bill included care on July 3, 2015, which was the date of Farris's hernia surgery. 29 A.App. 6310:23-24. Expenses for that surgery were not caused by any alleged negligence, and the jury could have drawn an inference that the expense for the hernia surgery would have been incurred even in the absence of any negligence.

Defense counsel also noted that Plaintiffs had two theories of negligence in two time frames: negligence during the hernia surgery, and negligence after the surgery (not returning Farris to a second surgery on July 9). 29 A.App. 6311. If the jury were to find that Dr. Rives was not negligent in the hernia surgery, but that he was negligent by not returning Farris to surgery on July 9, then a substantial amount of medical expenses would have been incurred anyway, even if the surgery had been done before July 9, and these expenses were not recoverable. 29 A.App. 6311.

The district court seemed to acknowledge this medical testimony, but she questioned whether the medical experts testified that the hospital bill could be broken down and reduced by a certain amount. 29 A.App. 6314:17-25. Defense counsel informed the court that there was testimony that some percentage of medical bills would have been incurred anyway (i.e., in the absence of malpractice), depending on how the jury decided the standard of care issue. 29 A.App. 6315:2-4. The district court again wanted to know whether the medical experts said they could "parse out" portions of the hospital bill. 29 A.App. 6315:8-10. Defense counsel observed that although no experts explicitly parsed out the bill, this was a reasonable inference that could be drawn from testimony of Dr. Hurwitz and Dr. Juell. 29 A.App. 6315:11-13.

In rebuttal, Plaintiffs' counsel conceded that his medical billing expert, Dawn Cook, did not break out the hospital bill, and counsel argued that this was the **defendant's** burden.[12] 29 A.App. 6316:6-10.

Regarding the life care plan, the district court seemed to acknowledge defense expert Dr. Adornato's opinion that Farris's lack of mobility could be apportioned 50/50 between neuropathy caused by surgery complications and the preexisting diabetic neuropathy. 29 A.App. 6311-13. Thus, the jury could infer that only 50 percent of the life care plan was due to the surgery. 29 A.App. 6313:4-7.

The district court seemed to focus on the absence of magic words, asking whether Dr. Adornato ever mentioned the phrase "life care plan" in his testimony, and defense counsel answered that the doctor "did not use those words." 29 A.App. 6313:21-24. Counsel pointed out that Dr. Adornato testified "about her [Farris's] mobility which is part of the life care plan," and that "a reasonable inference can be drawn from his testimony that half the life care plan is attributable to the preexisting diabetic neuropathy." 29 A.App. 6314:1-11. But again, the district court argued: "But he never tied it to the life care plan." 29 A.App. 6314:5. The district court

[12] Plaintiffs' counsel argued that this was the defendant's burden, despite the fact that the dispute involved a Rule 50(a) motion, where the evidence and all inferences must be drawn in favor of the non-moving party.

asked: "Did he ever state the words 'life care plan' anywhere in his testimony?" 29 A.App. 6314:12-13. Defense counsel responded that the doctor "did not use those words." 29 A.App. 6314:14.

The district court granted the Rule 50 motion, determining as a matter of law that the recoverable amount of the life care plan was $4,663,473.00, because there was no "alternative testimony that that amount is incorrect." 29 A.App. 6318:13-17.

As a result of these rulings, the district court gave the jury a verdict form with two answers already typed in and provided by the court. 12 A.App. 2475.

3.	**What are Titina Farris' economic damages:**	
	a. Past medical and related expenses:	**$1,063,006.94**
	b. Present Value of Life Care Plan:	**$4,663,473.00**

Thus, the jury was given a verdict form with damages answers totaling $5,726,479.94 already provided by the court.[13]

[13] The verdict form's two lines mandating more than $5.7 million for damages were directly below the form's two yes-or-no questions regarding liability. 12 A.App. 2475. As such, the form would have strongly suggested to the jury that the judge already decided Plaintiffs should receive at least $5.7 million. This would almost certainly have influenced the jury's answers to the liability questions.

B. The Rule 50 motion should have been denied.

Applying the correct standard for a JMOL motion, the evidence justified an inference that would have allowed the jury to reduce the amount of recoverable medical bills and the life care plan. Dawn Cook was extensively cross-examined. The life care plan she prepared—and the future expenses in the plan—were based primarily, if not entirely, upon Farris's foot drop in both feet, which affected her mobility. 22 A.App. 4855; 4861-81; 4908. Cook conceded it is important to consider whether a patient has preexisting medical conditions when preparing a life care plan. 22 A.App. 4898:24-4899:2. She was provided with no medical records regarding Farris's preexisting medical conditions during the time prior to the surgery in question. 22 A.App. 4899:3-10. When Farris was interviewed by Cook, Farris did not share her history of diabetes and the fact that it was uncontrolled, or the fact that there were complications associated with diabetes prior to the surgery. 22 A.App. 4902:1-16. Cross-examination brought out other weaknesses in Cook's testimony. 22 A.App. 4901-06.

Defense witness Dr. Adornato, a board-certified neurologist, has treated thousands of patients diagnosed with diabetic peripheral neuropathy. 26 A.App. 5705-5707. He reviewed medical records and opined that half of Farris's mobility problem was due to the critical care (i.e., surgery-related) neuropathy, and the other half due to her other (preexisting) neuropathies. 26 A.App. 5716:25-5717:1.

Cook's $4.6 million life care plan was based on Farris's loss of mobility caused by the foot drop; and Dr. Adornato attributed only half to the surgical complications. Although he did not utter the phrase "life care plan" in his testimony—and although he did not do the math (50 percent of $4.6 million)—his opinions supported a strong inference that Cook's life care plan should be reduced by half. His testimony undermined the life care plan, and it was for the jury, not the judge, to determine whether the $4.6 million life care plan should be reduced. The district court erred by looking for magic words or talismanic phrases in Dr. Adornato's testimony. *See Welsh v. Bulger*, 698 A.2d. 581, 585-86 (Pa. 1997) (experts are not required to use magic words when expressing their opinions; instead, courts look at the substance of the testimony).

Although the defense was precluded from presenting its own separate witnesses to testify about the dollar amounts for which recovery of Plaintiffs' medical bills and life care expenses could be reduced, the district court still should not have resolved those factual issues in Plaintiffs' favor. Plaintiffs' expert witnesses were cross-examined, and cross-examination of a plaintiff's witnesses can be sufficient to controvert the extent of a plaintiff's damages. *See Quintero v. McDonald,* 116 Nev. 1181, 1184, 14 P.3d 522, 523 (2000).

Further, Dr. Adornato's testimony provided an evidentiary basis for reducing the life care plan by at least half. But even if there had been no defense witness

controverting plaintiff's damages evidence, the jury was still not bound to assign any particular probative value to Cook's testimony. *Id.* A jury may decide to disbelieve a plaintiff's witness, even if the witness's testimony is uncontradicted. *See Grant v. Cruz,* 406 S.W.3d 358, 364 (Tex. App. 2013); *Cook v. Wadlington,* 821 S.W.2d 864, 865 (Mo. App. 1991) (a jury is free to disbelieve plaintiff's expert testimony); *Gittings v. Hartz,* 116 Nev. 386, 392, 996 P.2d 898, 902 (2000) (effective cross-examination may be sufficient to point out discrepancies in an injury claim, without defense expert testimony and without countervailing medical evidence).

Here, Cook was effectively cross-examined, and Dr. Adornato's opinions undermined the life care plan. This was sufficient for the defense to survive a Rule 50 motion. Instead of using the very narrow legal standard for granting JMOL, the district court assumed the role of a fact-finder, weighed the evidence, and rejected inferences favoring the non-moving defendants. This was error. The district court provided answers on the verdict form's questions—more than $5.7 million. Requiring the jury to award this amount as part of the special damages award was erroneous and highly prejudicial. A new trial must be ordered.

VII. The district court erred regarding hospital records.

Evidence rulings are generally reviewed for abuse of discretion. *See Hansen,* 115 Nev. at 27, 974 P.2d at 1160.

The surgery in question was performed at St. Rose Dominican Hospital. Plaintiffs' pretrial memorandum identified 8,505 pages of St. Rose medical records Plaintiffs would use at trial. 3 A.App. 519:8. Defense counsel's pretrial memorandum also disclosed that St. Rose records would be used at trial. 3 A.App. 499:18-19. The parties agreed to present a single exhibit with St. Rose records, but at a meeting with all attorneys the day before the calendar call hearing, Plaintiffs' attorneys did not provide an exhibit binder with the records; they said they would bring the binder to court the next day. 15 A.App. 3277.

Plaintiffs provided the binder to defense counsel 45 minutes before the calendar call hearing; but Exhibit 1 (St. Rose records) did not include all the pages, and it only had 613 pages of the 8,505 pages of St. Rose records. 14 A.App. 3129:2-5; 3142:14; 15 A.App. 3277. Defense counsel Aimee Clark Newberry informed the court she had anticipated that the complete exhibit would be ready to present to the court that morning, but she was "just made aware" of Plaintiffs' changes in the stipulated exhibit. 14 A.App. 3135:11-16. She observed that Plaintiffs had eliminated "essential records" the defense was requesting. 14 A.App. 3133:5-14. She requested an opportunity to add additional pages into the Exhibit 1 binder. 14 A.App. 3133:5-14; 3142:18. In response, Plaintiffs' counsel indicated he was "happy to add them into ours." 14 A.App. 3133:18-21. Plaintiffs agreed that the

exhibit, with the defense's additional pages, would be stipulated "in all regards" as admissible into evidence.[14] 14 A.App. 3134:1-18.

At a hearing two days later, defense counsel Doyle attempted to add the additional documents to Exhibit 1. 15 A.App. 3275. Doyle explained that when he received Exhibit 1 from Plaintiffs' counsel the morning of the Tuesday calendar call hearing, he realized it did not contain all the records. 15 A.App. 3277. With approximately 7,900 pages of missing records, it was impossible at that time for him to figure out what additional records needed to be added back. 15 A.App. 3279. He explained that he spent significant time the next day (Wednesday) compiling the additional records, and he presented them to the court the next day (Thursday), to be added at the end of Exhibit 1—as the parties had agreed at the calendar call. *Id.*

When Doyle attempted to present the additional pages, the district court said: "No, no, no, no, you're not." 15 A.App. 3279:19. The judge *sua sponte* ruled that the documents should have been provided by the end of the business day on Tuesday. 15 A.App. 3279:19-23. The judge ruled: "It was Tuesday, end of day. You are out of luck." 15 A.App. 3280:12; *see also*, 15 A.App. 3164:23-3165:1-15. The judge

---

[14] The additional pages only needed redactions for insurance references. 14 A.App. 3135-36. Issues regarding the exhibit were resolved during a recess, after which the parties informed the court that the pages would be combined into Exhibit 1 for a "fully stipulated" exhibit. 14 A.App. 3138:6-10; 3141:3-7.

repeated that she had imposed a Tuesday deadline, and: "If you choose not to comply, then you lose out." 15 A.App. 3282:20.

Counsel Doyle then asked to have his additional pages marked as a clerk's exhibit, to preserve the record on appeal. 15 A.App. 3282:24-3283:3. The court denied the request, saying "there's no record on appeal." 15 A.App. 3283:4. Doyle then requested permission to submit a declaration explaining the circumstances, "for purposes of the record on appeal." 15 A.App. 3283:6-9. He wanted to explain in more detail his reliance on Plaintiffs' counsel's representations regarding the records; his reasons for not providing the additional pages earlier; and "a lot more detail" regarding the circumstances. 15 A.App. 3283-88. The district court ruled that there was no reason for the declaration. 15 A.App. 3288-90.

Doyle again attempted to explain the circumstances, noting that he had approximately 400 additional pages [out of the nearly 7,900 pages removed by Plaintiffs]. 15 A.App. 3290-93. He argued that there was no prejudice to Plaintiffs by including the additional records; the court responded, not by identifying any prejudice to Plaintiffs, but instead by noting that the court clerk would need to deal with the records. 15 A.App. 3297:22-3298:3. When Doyle again attempted to argue about prejudice to the parties, the court abruptly ended the hearing. 15 A.App. 3300 ("We're done.").

The district court's refusal to give Doyle a full opportunity to make a record was consistent with a similar refusal earlier in the hearing, when the judge would not hear Doyle's argument regarding the exclusion, at which time he could have described the St. Rose records and explained the importance of the additional records.

MR. DOYLE:	If I -- if I may be heard at least --
THE COURT:	No, you may not.
MR. DOYLE:	-- to make a --
THE COURT:	This is done.
MR. DOYLE:	-- at least to make a --
THE COURT:	This is done. No.
MR. DOYLE:	-- record.
THE COURT:	Counsel, you may not. The record is done.

15 A.App. 3168:2-9.

Therefore, the district court excluded the additional medical records that Doyle attempted to provide on Thursday, all based on the district court's belief that she had imposed a clear Tuesday deadline (two days earlier) for the documents. In fact, the calendar call transcript does not contain a close-of-business deadline for defense counsel to add back missing pages of St. Rose records Plaintiffs' counsel

had removed.[15] 14 A.App. 3125. There was no basis for the district court's conclusion that the perceived two-day delay violated some type of binding deadline and therefore foreclosed defense counsel from being able to admit additional stipulated pages into evidence. *Cf. Rish v. Simao*, 132 Nev. 189, 198-200, 368 P.3d 1203, 1210-11 (2016) (for sanctions, order allegedly violated must have been clear and specific); *Boyack, supra,* 2019 WL 1877402 at *3 (admonition to counsel not specific enough to justify sanctions); *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (district court's oral pronouncement from the bench is "ineffective for any purpose").

Moreover, even if the hearing transcript can be interpreted to impose an end-of-day deadline for the additional St. Rose records, there was no prejudice to Plaintiffs from the short delay. *Cf. Rish*, 132 Nev. at 198, 201, 368 P.3d at 1211-12 (for violation of order in limine to justify sanction, prejudice must be shown). After all, Plaintiffs' own pretrial memorandum identified the 8,505 pages of St. Rose medical records Plaintiffs planned to use at trial. 3 A.App. 519:8. Further, Plaintiffs had **stipulated** to the St. Rose records, and when defense counsel requested an opportunity to add the missing records to Plaintiffs' drastically shortened exhibit,

---

[15] The district court requested two things **unrelated** to Exhibit 1 to be provided by the end of the day. 14 A.App. 3145:9-19; 3147:8-25 (submissions regarding imaging studies and photographs).

Plaintiffs' counsel indicated that he would be "happy to add them into ours." 14 A.App. 3133:18-21.

As a result of the district court's draconian ruling, only about seven percent of the 8,505 pages of St. Rose records were admitted into evidence. Defendants' 400 additional pages would have presumably included various time frames of treatment as well as physician progress notes, medical orders, lab reports, nursing notes, and myriad other records relevant to the case.

A district court's decision must have appropriate reasons. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007). Abuse of discretion occurs if a decision is arbitrary or capricious, or exceeds the bounds of reason. *Skender v. Brunsonbuilt Const.,* 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006).

Here, the district court refused to allow defense counsel to add essential records back into an exhibit from which Plaintiffs' counsel had removed the pages. The refusal was based upon the court's perception that there was a time deadline imposed two days earlier. But the deadline had never actually been imposed, and there was not even a molecule of prejudice to Plaintiffs. Then, the court exacerbated the error by not allowing defense counsel to make a complete record, to argue fully, to describe the records and explain their importance, to mark the records as an exhibit, or to submit a declaration with additional information for the record. The district court's ruling lacked appropriate reason; it was arbitrary; it was overly

severe; and it exceeded the bounds of reason. Accordingly, the district court erred by excluding relevant stipulated medical records, and a new trial should be ordered.

VIII. The district court erred regarding Dr. Hurwitz's deposition transcript.

Evidentiary rulings are reviewed for abuse of discretion. *See Hansen,* 115 Nev. at 27, 974 P.2d at 1160.

Dr. Hurwitz is a general surgeon, who was called by Plaintiffs as a key medical expert. 20 A.App. 4440. He opined that Dr. Rives's treatment was below the standard of care. 20 A.App. 4443-55. His deposition was taken in September 2019, and it was disclosed to the court in various motions. 4 A.App. 774:5-6, 15-16. Before trial, Dr. Rives filed a Pretrial Memorandum disclosing: "Deposition transcript of Dr. Michael Hurwitz, including exhibits." 3 A.App. 500:14. At a calendar call on October 8, 2019, the trial attorneys lodged deposition transcripts. 14 A.App. 3152-53. Defense counsel did not lodge the transcript for Dr. Hurwitz's recent deposition, because the transcript was not yet available. 18 A.App. 3864-65. The next week, on the first trial day, defense counsel indicated that he had the original deposition transcript, which had not been available at the calendar call. 18 A.App. 3864:16-22. Plaintiffs' counsel objected because the transcript had not been lodged earlier. 18 A.App. 3865. The district court did not rule at that time regarding the transcript. 18 A.App. 3865.

Dr. Hurwitz's testified at trial a few days later. On direct examination, Plaintiffs' counsel Leavitt asked a question disclosing to the jury that Dr. Hurwitz was "deposed by Mr. Doyle." 20 A.App. 4443:20. Shortly thereafter, Leavitt again (in the presence of the jury) referred to "your deposition in this case." 20 A.App. 4465:8.

Later, defense counsel objected because some of Dr. Hurwitz's opinions had not been previously disclosed. 20 A.App. 4490-91. The district court held proceedings outside the jury's presence. 20 A.App. 4497-98. The district court acknowledged that she "asked the parties to also provide the [court with the] deposition of Dr. Hurwitz." 20 A.App. 4498:20-21. The judge also acknowledged that she "asked to look at the deposition," and that "**I was provided with the deposition of Dr. Hurwitz.**" 20 A.App. 4499:4-5, 16 (emphasis added). The judge then read into the record extensive portions of Dr. Hurwitz's deposition transcript, even providing page and line numbers. 20 A.App. 4499-4501.

Dr. Hurwitz's trial testimony resumed. During cross-examination, defense counsel attempted to impeach Dr. Hurwitz with his inconsistent deposition testimony. 20 A.App. 4522. Plaintiffs' counsel objected, because defense counsel was not using the deposition transcript during the impeaching cross-examination. 20 A.App. 4522. Defense counsel offered to lodge the original deposition, indicating he had copies available. *Id.* The district court sustained Plaintiffs' objection,

because the transcript had not been lodged with the court a few days earlier at the calendar call. *Id.* When defense counsel again referred to the deposition, Plaintiffs' counsel objected on the ground that a deposition transcript "doesn't exist," and the district court sustained the objection. 20 A.App. 4523:8-11. The district court's ruling ignored the fact that everyone was aware of the transcript, and in fact, the judge herself read from the transcript, on the record, when ruling on whether Dr. Hurwitz's opinions had been previously disclosed.

Shortly thereafter, without specifically referring to the deposition transcript, defense counsel attempted to cross-examine the doctor regarding deposition testimony that contradicted his trial testimony. 20 A.App. 4525:3-4. Although there was no objection, the district court interrupted and held proceedings outside the presence of the jury. 20 A.App. 4525, 4527. The district court admonished defense counsel for cross-examining the doctor using phrases from the doctor's deposition testimony. 20 A.App. 4528-29. The court ruled that the transcript could not be used in any manner, because it had not been lodged with the court at the calendar call. 20 A.App. 4529-30. Amazingly, the district court stated, on the record: "**As of today, there was no transcript, or any portion provided to the Court.**" 20 A.App. 4531:20-21 (emphasis added). The court made this statement despite the fact that barely one hour earlier she had been handed the transcript (at her own request) and she read the transcript into the record. 20 A.App. 4498-4501.

Dr. Hurwitz's cross-examination resumed later in the trial. 23 A.App. 5036. Without mentioning a "deposition" or "transcript," defense counsel asked about the doctor's testimony "when we were together on September 18, 2019" (which was the date of the deposition). 23 A.App. 5037:19-22. Plaintiffs did not object, and the doctor answered the questions. 23 A.App. 5037-38. Defense counsel then asked whether the doctor recalled "telling me on September 18, 2019" about the standard of care. 23 A.App. 5038:13-15. Again, defense counsel did not indicate anything about the doctor's "deposition" or the "transcript," and again, Plaintiffs did not object. *Id.* The doctor answered defense counsel's questions. 23 A.App. 5038-39.

With no objections to defense counsel's two references to what the doctor told counsel on September 18, 2019 (the deposition date), defense counsel asked a third question about whether the doctor recalled telling counsel on September 18, 2019, about the standard of care, but this time Plaintiffs objected. 23 A.App. 5039:18-22. The district court held proceedings outside the presence of the jury. Plaintiffs' counsel argued two times: "There is no deposition." 23 A.App. 5043:14, 25. Plaintiffs' counsel argued that, without a properly lodged deposition transcript, the witness could not be impeached. 23 A.App. 5046:3-5, 17-19. And Plaintiff's counsel ignored the fact that he had referred to the doctor's deposition **twice** during his direct examination of the doctor, as noted above.

Defense counsel informed the district court that if the witness gave trial testimony that was materially different from his deposition testimony, defense counsel would renew the request to lodge the transcript, to demonstrate to the jury that the witness changed his testimony and perhaps committed perjury. 23 A.App. 5048:23-5049:3. The district court refused to allow cross-examination based upon deposition testimony, without a properly lodged transcript. 23 A.App. 5051:11-14, 5052:22-24.

The refusal to allow this cross-examination was highly prejudicial. At his deposition, Dr. Hurwitz testified that he reviewed Dr. Rives's deposition transcript from the Center case, and he found no important similarities between the cases. 10 A.App. 2106:4-5 (gray highlighting on this page is on original); 20 A.App. 4500. At trial, however, Dr. Hurwitz essentially testified that the Center case showed Dr. Rives should have known about potential problems for the Farris surgery, based on Dr. Rives's experience in the Center case. 20 A.App. 4465:10-20. Dr. Hurwitz's opinions at trial specifically referenced "[t]he fact that a very similar circumstance occurred just five months—" 20 A.App. 4491:15-16 (referring to the Center case). He then extensively referred to what he perceived as important similarities between the Center and Farris cases. *E.g.* 20 A.App. 4492:12—4493:7. Thus, Dr. Hurwitz's deposition testimony (there were no significant similarities) and his trial testimony

(there were important very similar circumstances) were drastically contradictory—and the jury had the right to consider this fact in evaluating Dr. Hurwitz's credibility.

In short, defense counsel was prohibited from presenting the jury with the fact that a key medical expert for the Plaintiffs had given testimony at his deposition that was contrary to his trial testimony; and this prohibition was a result of the fact that the transcript was not available at the calendar call and was offered to the court just a few days later when the trial started.

Although judges may enforce local procedural rules, enforcement should not be so onerous that it results in an unfair trial. Even if a district court has discretion on a matter, the court must reach its conclusions for an appropriate reason. *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42. Abuse of discretion occurs if a decision is arbitrary or capricious or exceeds the bounds of reason. *Skender,* 122 Nev. at 1435, 148 P.3d at 714.

A trial is a search for the truth. *Cardinal v. Zonneveld*, 89 Nev. 403, 407, 514 P.2d 204, 206 (1973). Allowing an expert witness to get away with contradictory sworn testimony (perhaps amounting to perjury)—all in the name of enforcing an obscure rule governing when deposition transcripts must be lodged with the court—is the epitome of extreme and unfair enforcement of a procedural rule. This is particularly true in the present case—where Plaintiffs' attorneys attended the deposition, mentioned the deposition twice during direct examination, possessed the

transcript in court, and never articulated prejudice resulting from the short delay in lodging the transcript—and where the judge herself even read parts of the transcript into the record. The district court's ruling was an abuse of discretion, resulting in an unfair trial.

IX. The district court erred regarding cross-examination of Dr. Juell.

The scope of cross-examination is generally reviewed for abuse of discretion. *See Capanna,* 134 Nev. at 892, 432 P.3d at 732. A district court necessarily abuses its discretion if a ruling is based upon an erroneous view of the law or a clearly erroneous assessment of evidence. *BMW,* 127 Nev. at 133, 252 P.3d at 657.

A. Dr. Juell's testimony.

Defense witness Dr. Juell is a surgeon who has performed several thousand hernia repairs in 40 years of practice. 23 A.App. 4971-72, 4979. He opined that Dr. Rives's care for Farris in 2015 complied with the standard of care. 23 A.App. 5020-22.

At Dr. Juell's deposition, Plaintiffs' counsel asked whether the doctor had ever been a defendant in a malpractice case. 4 A.App. 793. Dr. Juell answered that he had been sued four times. *Id.* Once, when he was a resident, the attending physician made the medical decision in question, and the university settled. 4 A.App. 793-94. He was also sued in a case where a nurse made a medication error; he was dropped from the lawsuit. 4 A.App. 794. He was sued in another case in

which he did not do anything wrong, but his insurance company settled the case. 4 A.App. 794-95. Finally, he was sued in a case that the judge dismissed with prejudice. 4 A.App. 795.

Before Dr. Juell testified at trial, defense counsel filed a trial brief objecting to anticipated cross-examination regarding the prior medical malpractice cases. 4 A.App. 777-84. At trial, defense counsel objected when Plaintiffs' counsel cross-examined Dr. Juell regarding his malpractice history, and the district court immediately overruled the objection. 24 A.App. 5290. The issue was discussed again, and the district court repeatedly relied upon "the general practice" and "general conceptual framework" in the Eighth Judicial District. 25 A.App. 5388-90, 5422-36. Thus, the court allowed the cross-examination.

B. The district court erred by allowing the cross-examination.

Defense counsel's objections included relevance, improper character evidence, and NRS 48.035(1) (probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury). 4 A.App. 779-82. All these grounds were correct.

Evidence that Dr. Juell had been sued was irrelevant because it did not tend to prove or disprove any disputed material fact. NRS 48.015. Even on his qualification or credibility, the fact that he had been sued in the past did not prove

anything. Some lawsuits have merit, while others are frivolous. The fact that a doctor has been sued, without more, is irrelevant.

In *Heshelman v. Lombardi*, 454 N.W. 2d 603 (Mich. App. 1990), the court found error when the Plaintiff's expert was cross-examined regarding an unrelated medical malpractice suit brought against him. The malpractice suit was "in no way probative of his truthfulness." *Id.* at 609. "Highly competent and knowledgeable physicians have been sued for malpractice." *Id.* Unproven accusations of malpractice cannot be a basis for attacking an expert physician's knowledge and credibility. *Id.* "Similarly, the mere fact that someone has been named as a defendant in a malpractice lawsuit may not be used to impeach his credibility as an expert witness." *Id.*

Evidence about prior litigation history of expert witnesses should be excluded. *See Ferris v. Tennessee Log Homes, Inc.*, 2010 WL 1049852, *1 (W.D. Ken., 2010; unpublished). In *Locke v. Vanderark,* 843 P.2d 27 (Colo. App. 1992), the trial court permitted cross-examination of an expert medical witness concerning six prior suits for malpractice. The court held that inquiry into such unrelated litigation is irrelevant to the expert's credibility, diverts a jury's attention from dispositive issues in the case, and the "sideshow would take over the circus." *Id.* at 31.

In *United States v. Ahmed*, 2016 WL 3647686 (E.D.N.Y. 2016; unpublished), the court excluded evidence that a medical expert had been named in malpractice

lawsuits, because the allegations in the other suits were not probative of the witness' truthfulness, and the suits were too remote in time to have any significance. *Id.* at *3. Further, any probative value of the lawsuits was substantially outweighed by the potential for unfair prejudice. *Id; see also Manhardt v. Tamton*, 832 So. 2d 129, 131-32 (Fla. App. 2002) (questions dealing with expert's prior lawsuit were irrelevant to his expertise and constituted improper attack on credibility).

Dr. Juell has been practicing medicine for 40 years, and the first malpractice suit against him, when he was a resident at the beginning of his career, involved a medical decision by another doctor; and the case settled. Thus, the old lawsuit was irrelevant. 25 A.App. 5423. The second lawsuit was more than ten years old, and his insurance company settled the case against his wishes. 25 A.App. 5424-25. The other two cases were either dismissed or dropped. 25 A.App. 5426.

Yet the district court allowed inquiry into suits against Dr. Juell, based upon the district court's perception of a "general practice" in Clark County. Legal authority for the "general practice" was never identified. The mere fact that some judges in a district have a general practice on an issue does not give legitimacy to the practice.

Plaintiffs' counsel made sure the jury was fully aware Dr. Juell had been sued for malpractice. Late in counsel's cross-examination, he told Dr. Juell he wanted to "chat a little bit about your malpractice history." 24 A.App. 5290. Defense counsel

objected, and the district court overruled the objection. *Id.* But the district court declared an evening recess before cross-examination resumed after the objection. Thus, the last thing the jury heard at the end of the trial day was counsel's statement about Dr. Juell's "malpractice history."

The next day Plaintiffs' counsel resumed the cross-examination, asking: "Doctor, do you have any bitterness about or bias towards patients that bring medical malpractice lawsuits, **because of the fact that you've been sued in the past."** 25 A.App. 5443 (emphasis added). Although Dr. Juell answered in the negative, the damage was done, because Plaintiffs' counsel had informed the jury, for a second time, that Dr. Juell had been sued for malpractice.

Accordingly, the district court erred by allowing the jury to know that Dr. Juell had a "malpractice history" and had been "sued in the past," considering the remote and irrelevant nature of the doctor's malpractice litigation history.

X. The district court erred by awarding attorneys' fees.

Although attorneys' fee decisions are generally reviewed for abuse of discretion, review is *de novo* when the matter implicates questions of law. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006).

On June 5, 2019, Plaintiffs served an offer of judgment in the amount of $1 million. 12 A.App. 2513-14. After trial, Plaintiffs moved for attorneys' fees, pursuant to NRCP 68. 12 A.App. 2489. Under NRS 7.095, there is a strict limit on

contingency fee agreements in medical malpractice cases. This statute, which protects medical malpractice plaintiffs **and** defendants, states that an attorney "shall not contract for or collect a fee" in a contingency fee agreement beyond percentage limits in the statute.

Plaintiffs' motion acknowledged this statute, but Plaintiffs' attorneys contended that their clients (Plaintiffs) waived the statutory protection and agreed to pay 40 percent. 12 A.App. 2500. Plaintiffs' attorneys calculated the statutory allowable fees as approximately $1 million, but the attorneys were claiming approximately $2.5 million as a result of the alleged waiver.[16] 12 A.App. 2502.

Dr. Rives opposed the motion, and Plaintiffs filed a reply. 12 A.App. 2551; 13 A.App. 2878. At a hearing on the motion, the district court awarded $821,468.66, using the statutory formula. 31 A.App. 6739, 6809.

A. The fee award was not justified under NRCP 68.

An award of fees to a plaintiff based on an offer of judgment requires careful evaluation of four factors. *Yamaha Motor Co., USA v. Arnoult*, 114 Nev. 233, 251-52, 955 P.2d 661, 672-73 (1998). These factors are: (1) whether the defense was

[16] At the hearing on the motion, attorney Jones indicated that, regardless of the district court's decision, "our client is going to pay the contingency fee that she's going to pay based on the contract that we have in this case." 31 A.App. 6720:12-14. In other words, Plaintiffs' attorneys plan to collect 40 percent from Plaintiffs, despite the statutory limit or the judge's decision. *Cf. APCO v. Zitting Bros.*, 136 Nev. Adv. Op. 64 (October 8, 2020) (contract provisions that violate public policy statutory protections are void and unenforceable).

litigated in good faith; (2) whether the offer of judgment was reasonable and in good faith in its timing and amount; (3) whether the defendant's decision to reject the offer was grossly unreasonable or in bad faith; and (4) whether the fees sought are reasonable and justified in amount. *Id.* Even if a plaintiff's injuries are severe, and even if the verdict exceeds the offer by a significant amount, the court must consider whether liability issues were intricate. *Id.* at 252, 955 P.2d at 673 (verdict was $1.1 million more than offer, and liability issues were quite intricate; fee award reversed and remanded).

In evaluating a defendant's decision to reject an offer of judgment, the court should not apply a hindsight rule. The court should consider information known to the defendant at the time the offer was made. *See Taylor v. Kilroy*, 2019 WL 3195458, *3 (Nev. 2019; No. 75131: unpublished) (consideration of defendant's rejection of offer was "based on the information known to the parties at the time the offer was made"); *Cripps v. DiGregorio*, 824 A.2d 1104, 1108 (N.J. Super. 2003) (court cannot evaluate offer of judgment "through the eyes of 20/20 hindsight"). Rule 68 should not have the effect of unfairly forcing defendants to forego legitimate defenses. *See Yamaha*, 114 Nev. at 252, 955 P.2d at 673.

In the present case, Plaintiffs made no showing that Dr. Rives lacked a legitimate defense, or that Dr. Rives knew there was no legitimate defense at the time of the offer. The defendants had obtained opinions from highly-qualified

medical experts on liability and damages, including two general surgeons, an infectious disease specialist, a neurologist, an economist, and a life care planner. 12 A.App. 2579-13 A.App. 2766. Additionally, the jury's verdict was not unanimous. 29 A.App. 6485.

There was also no showing that the decision to reject the $1 million offer of judgment was grossly unreasonable or in bad faith. At the time of the offer—not in hindsight—Dr. Rives had strong expert witnesses supporting his case. There had been no motions for summary judgment or motions in limine attacking the defense case. Also, at that time "there was not even an inkling the Center case would become part of this case." 12 A.App. 2565:21-22. At the time of the offer of judgment, Plaintiffs' counsel had never asserted any impropriety regarding disclosure of the Center case; Plaintiffs had not requested any sanctions relating to Dr. Rives's discovery disclosures; and the defense team had no reason to imagine that, months later at the start of trial, the district court would decide to instruct the jury regarding an adverse inference relating to discovery disclosures involving the Center case.

Accordingly, there were legitimate defenses, and the decision to reject the offer was not grossly unreasonable or in bad faith **at that time**. The award of attorneys' fees had the effect of retroactively requiring Dr. Rives to forego legitimate

defenses, contrary to the public policy articulated in *Yamaha* and *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983). Rule 68 fees were not supportable and should be reversed.

B. The alternative ground for the fee award is unfounded.

The district court awarded attorneys' fees under NRCP 68, but the written order found "there was significant inappropriate conducted [sic] by Defendants and Defense Counsel," which was an independent basis for awarding attorneys' fees. 31 A.App. 6810:3-4, 18-20. The district court's so-called independent grounds for fees cannot be upheld.

The district court's order does not contain a sufficient analysis justifying an award of more than $800,000 as a sanction. The order contains only a conclusory list of "sanctionable conduct," consisting of eight lines in the order, with six vague and broad categories of alleged misconduct. 31 A.App. 6810:8-15. The order should be deemed legally insufficient to support the $800,000 sanction award. *Cf. Foster v. Dingwall*, 126 Nev. 56, 65-66, 227 P.3d 1042, 1048-49 (2010) (careful written analysis required for sanction of dismissal). For sanctions to be awarded based on attorney misconduct, the order allegedly violated "must be specific, the violation must be clear, and unfair prejudice must be shown." *Rish*, 132 Nev. at 200, 368 P.3d at 1211.

Fairness and due process require that discovery sanctions be just and related to the specific conduct at issue. *GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 870, 900 P.2d 323, 325 (1995). An award of attorney's fees under NRCP 37(b)(3) requires the district court to determine the amount of fees "**caused by the failure**" to comply with a court order (emphasis added). Here, the attorneys' fee order did not identify specific orders that were allegedly violated, and the fee order gave no explanation regarding how more than $800,000 in attorneys' fees—the same amount awarded under NRCP 68—might have been "caused by" any sanctionable conduct.

The six categories of alleged misconduct [31 A.App. 6810] are as follows.

(1) and (2) Discovery violations.

The first two categories indicate withholding evidence and omitting evidence during discovery. The grounds appear to be referring to the interrogatory answers and deposition testimony relating to the Center case. These circumstances are thoroughly discussed earlier in this brief. In short, the Center case **was** disclosed; Plaintiffs never raised any question about it until months after the deposition; Plaintiffs never articulated prejudice regarding the discovery mistake; and the district court gave an adverse inference instruction. Sanctions in the form of attorneys' fees were neither justified nor appropriate.

(3) The word "insurance."

The third category of alleged misconduct was Dr. Rives "blurting out that Plaintiff's bills were paid through medical insurance." 31 A.App. 6810:10-11. The circumstances involving this matter are discussed in detail above. Dr. Rives gave a fair response to Jones's cross-examination question. There was no order prohibiting the mention of insurance, and there had been no prior ruling that NRS 42.021 was inapplicable. 21 A.App. 4720:23-4721:14. Dr. Rives's answer was not improper.[17]

The district court erroneously determined that the statute was not applicable. Even if the ruling was correct, neither defense counsel nor Dr. Rives had been given any prior notice that the statute was inapplicable and that the word "insurance" was forbidden. The jury was instructed not to consider whether "Plaintiff was carrying insurance to cover medical bills" [30 A.App. 6655:3], and the one word "insurance" in Dr. Rives's testimony, during the 14-day trial, obviously caused no prejudice, because Plaintiffs obtained a $13 million verdict. That one word did not support an $800,000 attorneys' fee sanction.

---

[17] The court was highly critical of Doyle for failing to advise Dr. Rives not to use the word "insurance" at trial. 21 A.App. 4732-33. The court referred to this as "Law School 101" and a "general witness practice." 21 A.App. 4732:23, 4733:3. The court was wrong. No law authorizes sanctions for violating a "general practice." *Cf. Rish*, 132 Nev. at 198-200, 368 P.3d at 1210-11 (as prerequisite to sanctions, order allegedly violated must be clear and specific). And "Law School 101" **in a Nevada medical malpractice case** includes NRS 42.021(1), which expressly provides that "the defendant may introduce evidence" of medical insurance payments.

(4) Affidavits.

The fee order next criticizes defense counsel's "signing affidavits" containing false information prior to trial. 31 A.App. 6810:11-13. The order contains no information about the affidavits to which the court was referring. Presumably the court was referring to information provided regarding the Center discovery issue discussed above, which was not a basis for additional sanctions.

(5) Offers of proof.

The order next attempts to justify $800,000 in sanctions based upon alleged improper filing of offers of proof without leave of court. 31 A.App. 6810:13-14. Defense counsel Doyle filed seven offers of proof on the last day of trial. 9 A.App. 1840, 1974; 10 A.App. 2089; 11 A.App. 2262, 2315, 2347, 2437.

The district court seemed to become incensed by the fact that Doyle filed offers of proof without first obtaining permission. The court issued an order requiring Doyle to show cause why he filed the documents. 12 A.App. 2477. The order did not identify any alleged legal violation by Doyle. *Id.*

At the show-cause hearing, the district court demanded to know the identity of every other attorney who participated regarding the offers of proof. 16 A.App. 3368:22-24, 3371:12-14. Doyle identified Robert Eisenberg. 16 A.App. 3371:17-18. Doyle explained that he kept notes during trial about potential offers of proof, for an adequate record for appeal; and he made the decision to file the offers of proof

after court on Thursday, October 31, 2019. 16 A.App. 3372:17-3373:14. He did not give the court advance notice because he did not believe it was necessary. 16 A.App. 3374:7-11.

The court was also critical of the fact that Doyle filed the offers of proof after the court had indicated "there were no further outstanding issues to be addressed" near the end of the trial. 12 A.App. 2477:19-20. Doyle explained that the offers of proof did not deal with "outstanding issues" to be addressed, and they did not ask the court to take any action. 16 A.App. 3376:20-25, 3377:1. Doyle explained that he had not found authority discussing when offers of proof could be filed, and he relied on Eisenberg's advice.[18] 16 A.App. 3379:5-7; 3381:11-14.

The district court criticized the individual offers of proof, eventually stating that they were NRCP 11 violations, because they were filed without giving the court any advance notice. 16 A.App. 3410:25-3411:1. Rule 11 contains no such requirement. The district court's severe criticisms and berating Doyle continued throughout almost the entire hearing. 16 A.App. 3365-3432.

As noted above, Doyle had relied on advice from Robert Eisenberg, who was appellate counsel working with Doyle during the trial. Eisenberg submitted a declaration describing his appellate experience, including work at the Nevada

[18] The hearing transcript refers to Doyle saying "offers of judgment" instead of "offers of proof." 16 A.App. 3381:21-24. This is obviously a mistake.

Supreme Court. 12 A.App. 2558. He explained that he had never seen or heard any criticism of attorneys who filed offers of proof to preserve the record. 12 A.App. 2560:13-19.

Eisenberg also described a trial in which he was the defendant's appellate consultant. The defense team filed approximately 15 offers of proof shortly before the end of trial, without seeking prior permission. 12 A.App. 2559:8-19. The offers of proof were included in the appeal appendix and cited in briefs. 12 A.App. 2560:1-4. Neither the district judge, opposing counsel, nor the Nevada Supreme Court itself ever suggested it was improper to file the offers of proof without first obtaining permission. 12 A.App. 2559:20-26, 2560:1-12.

Eisenberg's declaration also indicated that he discussed potential offers of proof with Doyle; and he informed Doyle of his experience with offers of proof in the case mentioned above, his 40 years of appellate experience, and his opinion that there was nothing improper about filing the offers of proof. 12 A.App. 2560: 20-26, 2561:1-7. Doyle relied on Eisenberg's advice. 16 A.App. 3381:21-24.

As part of her scathing criticism of the offers of proof, which the district court referred to as egregious and rogue [16 A.App. 3557:13-17], the district court attempted to distinguish the Farris case from the prior case Eisenberg's declaration had described, on the ground that offers of proof were filed one or two days before the end of trial in that case, but the offers of proof were filed on the last day of trial

in the Farris case. 31 A.App. 6745:22-25, 6746:1-13. But the district court missed the entire point of Eisenberg's reference to the prior case. Regardless of whether the prior case was distinguishable, or whether Eisenberg should have relied upon his experience in that case, the important point was that **Doyle** relied upon the advice of an experienced appellate attorney, and this provided a legitimate good faith basis for Doyle filing the offers of proof. Whether Eisenberg's advice was right or wrong, Doyle was not in bad faith by relying on it. Filing the offers of proof—which did not cause even an iota of prejudice to anyone—cannot be considered a legitimate ground for awarding more than $800,000 in attorneys' fees sanctions.

(6) Miscellaneous violations.

The final conclusory ground for the award of attorneys' fees as a sanction was "violating Court orders during the course of trial on numerous occasions, including during the cross-examination of Dr. Michael Hurwitz." 31 A.App. 6810:14-15. The order fails to identify any of the prior orders to which the district court was referring. Such a vague, conclusory and non-specific order does not satisfy *Rish* and precludes this court's meaningful review. *Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011) ("without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because

we are left to mere speculation"). This ground simply cannot provide a basis for awarding more than $800,000 in attorneys' fees sanctions.[19]

In conclusion on this point, the huge award of attorneys' fees cannot be sustained as a sanction alternative basis for the fee award.

CONCLUSION

The district court committed multiple errors, any one of which justifies reversal. The cumulative impact of the errors also justifies reversal. The judgment should be reversed, and a new trial should be ordered.

DATED: Oct. 13, 2020.

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
rle@lge.net
ATTORNEYS FOR APPELLANTS

[19] The issue regarding cross-examination of Dr. Hurwitz is discussed earlier in this brief.

CERTIFICATE OF COMPLIANCE [NRAP 32(a)(7)(D)(ii)]

This certificate of compliance is being submitted with appellants' motion requesting enlargement of the word-count limit for the opening brief, as required by NRAP 32(a)(7)(D)(ii). The certificate is also attached to the proposed brief being submitted with the motion.

1. I hereby certify that this 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 a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that **I have filed a motion for permission to exceed the word-count limit for this brief.** If the motion is granted, this brief will comply with Rule 32 because the brief will contain the number of words allowed by the court (18,619), using the computation guidelines in NRAP 32(a)(7)(C).

3. Finally, I hereby certify that I have read this appellate 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 appropriate references to page and volume number, if any, 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: Oct. 13, 2020.

Robert L. Eisenberg
ROBERT L. EISENBERG

CERTIFICATE OF SERVICE

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date the foregoing **Appellant's Opening Brief** and **Appendix** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

George Hand
Tara Clark Newberry
Kimball Jones
Jacob Leavitt
Micah Echols
Thomas Doyle

I further certify that on this date I served a copy of the foregoing by depositing a true and correct copy, postage prepaid via U.S. mail to:

Aimee Clark Newberry
810 Durango Drive, Suite 102
Las Vegas, NV 8145
(702) 608-4232
al@szs.com

Dated this 13 day of October, 2020.

LEMONS, GRUNDY & EISENBERG

Julia Jeppert

An employee of Lemons, Grundy & Eisenberg