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

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APPELLANTS'/CROSS-RESPONDENTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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APPELLANTS' REPLY BRIEF

INTRODUCTION

Appellants' Opening Brief (AOB) established multiple grounds for reversal. Respondents' Answering Brief (RAB) contains false and misleading statements, fails to address contentions, and provides cursory and conclusory arguments on important issues—failing to justify the district court's erroneous and prejudicial rulings.

PRELIMINARY ARGUMENTS

I. Oral rulings may be challenged.

The Jurisdictional Statement in the RAB contends this court lacks jurisdiction over challenges to oral rulings. RAB xvi. The RAB cites *Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) for the proposition that oral pronouncements are not valid, and only written orders can be challenged in appeals. *Id.* Plaintiffs fail to develop this argument any further.

Although *Rust* held oral pronouncements are not valid, *Rust* did **not** hold this court lacks jurisdiction over challenges to oral rulings, in appeals from final judgments. Nor did *Rust* hold that appellants cannot challenge prejudicial oral interlocutory rulings that result in final judgments. Plaintiffs cite no Nevada precedent for such an unrealistic position.

Rust relied on NRCP 58(c), which deals with judgments. *Rust* essentially dealt with appealability of dispositional oral judgments and minute orders, holding an oral judgment/order is not appealable. *Id.* at 689, 747 P.2d at 1382; s*ee also State, Div. Child & Fam. Servs. v. Eighth Judicial Dist. Ct.*, 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004) (applying *Rust* rule to "dispositional" orders). Cases citing *Rust* have not applied it to all interlocutory rulings a judge might render—including the variety of oral rulings judges make during trials. Such rulings are rarely followed by written orders. Plaintiffs cite no precedent for their contention that a judge's oral rulings at trial cannot be raised on appeal from a subsequent appealable judgment.

Plaintiffs' contention, if accepted, would lead to truly absurd results. Under Plaintiffs' proposed rule, every time a judge makes an oral ruling at trial—such as a ruling on an objection during witness examination—the judge would need to enter a written order. Absent a written order, the party who lost on the ruling would need to request a written order, at the risk of being unable to challenge the ruling on appeal from the final judgment. Neither *Rust* nor any other case supports such an unthinkable result.

If an oral ruling results in prejudice to a party, and if that party loses the case, the ruling can be challenged in the party's appeal from the final judgment. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co.,* 114 Nev. 1304, 1312, 971

P.2d 1251, 1256 (1998) (interlocutory order may be challenged on appeal from final judgment, even if the interlocutory order is not itself appealable). The RAB provides no reason for adopting an extreme rule requiring written orders for every ruling at trial.[1]

II. A motion for new trial was unnecessary.

Plaintiffs contend that Dr. Rives forfeited the right to ask for a new trial as an appellate remedy, because Dr. Rives did not move for a new trial. RAB 23-26. Dr. Rives is not contending that the district court erred by failing to order a new trial. Rather, Dr. Rives is seeking a new trial as an appellate remedy for prejudicial errors that resulted in the judgment. No Nevada case holds that a motion for a new trial is a prerequisite to this appellate remedy.

Plaintiffs rely primarily on *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52-53, 623 P.2d 981, 983-84 (1981), which rejected an appellate contention that had never been raised in the district court. RAB 2, 23-24. *Old Aztec* did **not** hold that a party who has preserved an issue in the district court must also take the redundant step of moving for a new trial.

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[1] After contending that this court lacks jurisdiction over oral rulings that were not embodied in written orders, Plaintiffs' cross-appeal challenges the district court's oral decision to reduce the non-economic damages. RAB 1-2, 70-71. If oral rulings cannot be challenged on appeal, as Plaintiffs contend, then Plaintiffs cannot challenge the non-economic damages reduction.

Plaintiffs rely on *Schuck v. Signature Flight Support*, 126 Nev. 434, 245 P.3d 542 (2010). *Schuck* did not require a motion for a new trial as a prerequisite to obtaining a new trial appellate remedy. The *Schuck* plaintiff raised an appellate argument he never raised below. *Schuck* declined to consider the "new theory [raised] for the first time on appeal," which was different from the theory argued in the district court. *Id.* at 437, 245 P.3d at 544.

Plaintiffs cite *Cornell v. Gobin*, 49 Nev. 101, 238 P. 344 (1925). RAB 24. Plaintiffs concede that *Cornell* merely held that an objection is waived if it was not taken "**in some appropriate way**" in the court below. RAB 24 (emphasis added). *Cornell* did not hold that an objection at trial is an inappropriate way of preserving an issue. Similarly, Plaintiffs' reliance on *Hilton v. Hymers*, 57 Nev. 391, 65 P.2d 679 (1937) is misplaced. RAB 24. The *Hilton* defendant moved for a new trial, but the motion failed to include an argument the defendant later raised on appeal. The *Hilton* court declined to consider it. *Id.* at 394, 65 P.2d at 684-85.

Plaintiffs rely on *Matter of Estate of Scheide*, 136 Nev. Adv. Op. 84, 473 P.3d 851 (2020). RAB 24. *Scheide* declined to address an issue the parties never raised in the district court, and which the district court never addressed. *Id.* at n.5.

Plaintiffs rely on a Missouri case, *Spotts v. Spotts*, 55 S.W.2d 977 (Mo. 1932). RAB 24-25. *Spotts* was based upon a specific Missouri statute, and the court applied

it to a "writ of error" procedure, which was an outdated method for obtaining appellate review. *Id.* at 980. The *Spotts* holding is not analogous to Nevada appellate jurisprudence.

Plaintiffs cite a sentence in *C.R. Bard, Inc. v. M3 Systems,* 157 F.3d 1340 (Fed. Cir. 1998). RAB 25. This conclusory sentence noted the procedural fact that no motion for new trial had been made on the ground asserted on appeal. The opinion gave no indication whether the appellant objected at trial or otherwise raised the issue below. *Id.* at 1373-74.

Plaintiffs rely on *State v. Davis*, 250 P.2d 548 (Wash. 1952). RAB 25-26. *Davis* dealt with improper comments by the judge in a jury trial. The appellant made no objection and no motion for new trial. *Davis* held that because the appellant did not object, "it was his duty to present the question by way of a motion for a new trial." *Id.* at 550. The court did not hold that a party who objects at trial must renew the same objection in a motion for a new trial.

Plaintiffs cite no Nevada case holding that a motion for a new trial is a prerequisite to obtaining the appellate remedy of a new trial, where the aggrieved party raised the issue below, and where the error was not harmless. This court's cases have not imposed such a requirement. *See, e.g., LaBarbera v. Wynn Las Vegas*, 134 Nev. 393, 422 P.3d 138 (2018) (remand for new trial based upon

erroneous exclusion of evidence; no indication of motion for new trial); *Cashman Equipment Co. v. West Edna Assocs., Ltd.*, 132 Nev. 689, 380 P.3d 844 (2016) (remand for new trial based upon judge's erroneous characterization of payment; no indication of motion for new trial); *Sanders v. Sears-Page*, 131 Nev. 500, 354 P.3d 201 (2015) (remand for new trial based upon erroneous admission of evidence; no indication of motion for new trial).[2]

III. Dr. Rives did not give false answers at trial or in interrogatory answers.

Plaintiffs contend that Dr. Rives essentially committed perjury at trial. RAB 13. Plaintiffs state that Dr. Rives "suggested that he had used an assistant who answered the interrogatories for him." RAB 13. Plaintiffs cite 4 A.App. 898-900, but those pages do not come close to supporting Plaintiffs' contention.

Plaintiffs refer to "Dr. Rives' assistant, Amy Hanegan." RAB 13. Hanegan was not Dr. Rives's assistant; she was identified at trial as an independent contractor who works with defense counsel Doyle for jury consultation and trial preparation. 17 A.App. 3692.

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[2] Plaintiffs contend that Dr. Rives is asking this court to make factual determinations relating to a new trial, although Plaintiffs do not identify what factual issues this court needs to resolve. RAB 27. Dr. Rives is requesting a new trial as an appellate remedy. The issues in this appeal are purely legal, not factual.

At trial and on appeal, Plaintiffs attempted to raise a distracting issue about whether Hanegan helped Dr. Rives prepare his testimony, and Plaintiffs suggest that Dr. Rives committed perjury on this point. RAB 13. This was much ado about nothing. During Dr. Rives's testimony, Plaintiffs' counsel Jones asked whether the woman sitting next to Dr. Rives over the last few days was a consultant. 20 A.App. 4299. Defense counsel objected, and the court held a bench conference that was not reported. *Id.* The court overruled the objection, and when examination of Dr. Rives resumed, Jones asked whether the woman assisted in preparation for Dr. Rives's testimony, and Dr. Rives answered "no." *Id.*

Two days later, Plaintiffs filed a renewed motion for sanctions, alleging perjury by Dr. Rives. 4 A.App. 892, 899-90. Jones contended that at the unreported bench conference, defense counsel Doyle indicated that the consultant helped prepare Dr. Rives to testify. 4 A.App. 894.

In opposing the motion, Doyle explained that he did not recall the discussion at the bench, but if he did state that Hanegan helped prepare Dr. Rives to testify, the statement was a mistake. 5 A.App. 1082:14-17. He explained that the **plan** was for Hanegan to meet with Dr. Rives for preparation, but the meeting never actually took place because there was no convenient time. 5 A.App. 1082:7-11. Hanegan corroborated this. 5 A.App. 1088:26.

Plaintiffs contended that Dr. Rives committed perjury when he testified that Hanegan had not helped prepare his trial testimony, and they repeat this contention on appeal. RAB 13. If there was an inconsistency between Doyle and Dr. Rives, it was simply a result of the fact that Doyle believed Hanegan and Dr. Rives were meeting for preparation, but the meeting did not take place. At worst, this was a mistake by Mr. Doyle, not perjury by Dr. Rives.

Plaintiffs argue that Dr. Rives did not tell the truth in answering interrogatories. RAB 13, 16. Again, Plaintiffs take facts out of context. Dr. Rives had signed interrogatory answers in April 2017. 5 A.App. 964:3. The hearing on which Plaintiffs rely, when Dr. Rives testified about the interrogatory answers, took place two and one-half years later, in October 2019. 5 A.App. 911, 963-64. Potentially incorrect answers to interrogatories, due to faded memory, can be considered by a jury in evaluating credibility, but they are irrelevant to any issues in this appeal.

IV. Plaintiffs' summary of trial testimony is misleading.

Plaintiffs provide a witness-by-witness summary of trial testimony. RAB 14-21. The manner in which the summary is presented suggests that it is a complete summary of trial testimony. It is not. It omits four defense medical experts.

Additionally, the witness summaries are highly selective, incomplete, and meaningless for a complete picture of the testimony at trial.

V. Cumulative error applies.

The AOB established that the district court's numerous errors resulted in an unfair trial, and that this court should apply a cumulative-error type of review. AOB 5-6. The AOB cited *Holderer v. Aetna Casualty & Surety Co.*, 114 Nev. 845, 963 P.2d 459 (1998), in which this court impliedly adopted the doctrine of cumulative error in a civil case. AOB 5.

Plaintiffs criticize the citation to *Holderer*, because that case did not mention the word "cumulative." RAB 29. Plaintiffs also argue: "There was no discussion in the [*Holderer*] opinion whether one reason [for reversal] was sufficient, or if the Court combined the two reasons to reach 'cumulative error.'" RAB 29. This is demonstrably false. *Holderer* identified improper comments by the trial judge, after which *Holderer* held: "Considered in isolation, the district court judge's comments may not have risen to the level of reversible error; however, reversal of this case is required when these errors are coupled with the other errors noted in this opinion." *Holderer* at 851, 963 P.2d at 463. The opinion concluded with: "We conclude that the district court judge's comments, **in combination with** the admission of evidence pertaining to Holderer's alleged improper acquisition of prescription medications,

constituted reversible error." *Id.* at 853, 963 P.2d 465 (emphasis added). Therefore, *Holderer* clearly supports application of a cumulative-error type of analysis in civil cases.[3]

APPEAL ARGUMENTS

I. The district court erred by allowing the reptile theory.

The AOB established that the district court erroneously allowed Plaintiffs to use an improper reptile theory, over defense counsel's repeated objections. As described in the brief, the reptile theory is a jury-influence tactic that appeals to jurors' survival instincts by persuading them that their own safety is at risk, and that a large plaintiff's verdict will make the jurors safer by making their community safer. AOB 6-7. The brief also established that the reptile theory tactic is particularly improper in a medical malpractice case, because such a case has its own standard of care for negligence, and reptile theory arguments suggest a more stringent standard of care. AOB 7-8.

Plaintiffs respond by first contending that the AOB did not identify the category of attorney misconduct covered by the reptile theory. RAB 31. Yet in the

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[3] As part of their argument, Plaintiffs discuss harmless error, arguing: "Notably, Defendants have not attempted to demonstrate that their substantial rights have been affected." RAB 30. This is completely false. The AOB demonstrated the prejudicial nature of all of the district court's numerous errors.

same breath Plaintiffs concede that an attorney commits misconduct, in the form of prohibited jury nullification, by arguing a standard of care that is different from the law, or by alluding to matters that are irrelevant given the law. RAB 34.

Plaintiffs then argue: "In fact, Defendants do not even identify whether there was an objection or an admonishment for the particular instances where the word 'safety' was uttered in the District Court and cannot raise these issues for the first time on appeal." RAB 31. This argument is false and misleading. Although defense counsel did not use the phrase "reptile theory" in objections, the AOB expressly noted that defense counsel repeatedly objected to Plaintiff's "safety" tactic on various grounds, including objections for improper indoctrination of jurors, improper references to safety rules as incorrect statements of the law, and improper reference to safety rules as being inconsistent with legal standards in medical malpractice cases. AOB 9-10. The AOB provided numerous appendix citations for defense counsel's objections and the district court's overruling of the objections throughout the trial. AOB 9-11.

Plaintiffs mention the fact that there was no admonishment involving Plaintiffs' "safety" emphasis at trial. RAB 31. There was no admonishment because the district court overruled defense objections consistently, demonstrating the court's erroneous view that Plaintiffs' attorneys were not doing anything wrong.

Plaintiffs criticize defense counsel for not filing a pretrial motion to limit Plaintiffs' trial strategy. RAB 32. No law requires a party to file a motion in limine to prevent opposing counsel from committing misconduct. For example, in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008), the plaintiffs had not filed motions in limine to prevent defense counsel from committing misconduct; and the plaintiffs had not objected during defense counsel's misconduct. This court nevertheless granted new trials, based upon defense counsel's misconduct.

Plaintiffs never really deny that their trial counsel was using a reptile strategy. Nor do they rebut the AOB's argument that "safety" is not part of the standard of care in a medical malpractice case, or that pleas regarding safety influence individual jurors' personal views and emotions. **Plaintiffs do not cite any case, from any state or federal jurisdiction, holding that a reptile tactic is acceptable, or holding that references to safety are appropriate in medical malpractice cases.**

Plaintiffs criticize the AOB's citations to two Kansas opinions. RAB 32-33. These opinions were cited to this court merely to provide information regarding the nature of the reptile tactic. AOB 6-7.

Pages 33-34 of the RAB attempt to distinguish *Bryson v. Genesys Reg'l Med. Ctr.*, 2018 WL 1611438 (Mich. App. 2018; unpublished), cited at AOB 7. Plaintiffs state that *Bryson* merely analyzed the plaintiff's closing argument, and the opinion

"did not comment on whether he utilized the reptile theory." RAB 34. Plaintiffs are wrong again. The *Bryson* court dealt with more than a closing argument, disapproving "any argument" that the doctors did not act in the safest manner possible. *Id.* at *18. Further, it is shocking that Plaintiffs would contend *Bryson* "did not comment on whether [Plaintiffs' counsel] utilized the reptile theory." RAB 34. The *Bryson* court devoted an entire section of the opinion to the reptile theory issue, under a heading: "IMPROPER USE OF 'REPTILE THEORY.'" *Id.* at *18 (capitalization in original). The court criticized the plaintiff's counsel's arguments **and** his presentation of testimonial evidence suggesting a more stringent standard of care. *Id.*

Plaintiffs criticize the AOB's citation to *Lanam v. Promise Reg'l Med. Ctr.*, 2016 WL 105046 (Kan. App. 2016; unpublished). RAB 34. The AOB correctly cited *Lanam* for the proposition that a plaintiff's use of the terms "safety requirements" and "safety rules," with reference to medical policies and procedures, will "prejudice the jury by conflating the standard of care with the safety rules." *Id.* at *9. Plaintiffs argue that the AOB overlooks *Lanam*'s holding with regard to expert testimony and the hospital's policies and procedures. RAB 34. These holdings, however, were in an entirely different part of the opinion, dealing with a different

issue. The *Lanam* court's holding, in the portion of the opinion relevant to the present appeal, is exactly what the AOB represents it to be.

Finally, Plaintiffs argue that the AOB misinterprets *Biglow v. Eidenberg*, 424 P.3d 515 (Kan. 2018). RAB 35. Plaintiffs concede that *Biglow* upheld a restriction on the plaintiff's safety argument because "broad evidence of a doctor's job is not an appropriate phrasing of the medical malpractice duty of care." RAB 35. Further, Plaintiffs argue that *Biglow* did not prohibit counsel from using words such as "safe" or "needlessly endanger" in medical malpractice cases. RAB 35. Plaintiffs are wrong again. Those were the exact words and phrases with which the *Biglow* court was dealing. 424 P.3d at 528 (noting that the appellants' argument "focuses on the admissibility of derivatives of the word 'safe' or the phrase 'needlessly endanger a patient.'"). The *Biglow* court concluded that a plaintiff's statement at trial that the defendant doctor's job is really about safety does nothing to establish whether the doctor deviated from the applicable standard of care. 424 P.3d at 529.

In summary, the comments by Plaintiffs' counsel at trial, and the evidence they presented, constituted an improper jury influence tactic. Cases cited in the AOB are persuasive. Plaintiffs cite no cases, from any jurisdiction, holding that reptile-type arguments are proper in any personal injury cases, let alone medical malpractice cases. Here, Plaintiffs used the reptile tactic throughout the trial, from beginning to

end, and the district court overruled defense counsel's objections. This clearly would have impacted the jury's huge verdict.

II. The district court erred by admitting evidence regarding the Center case.

A. The RAB's preliminary arguments are without merit.

The AOB established that the district court erred by admitting evidence of the Center case, because the evidence was irrelevant, prejudicial, and inadmissible under NRS 48.035. AOB 11-19. The RAB starts its response with the following sentence: "Defendants have waived the right to argue that the *Center* case was inadmissible because the defense intentionally concealed it from discovery to improperly gain an advantage, thereby preventing Plaintiffs from being able to fully flesh out its admissibility." RAB 36. This sentence is wrong and misleading on several levels.[4]

First, the sentence is unclear as to whether Plaintiffs are contending that Dr. Rives waived a right to make an **appellate** argument. If so, the sentence is wrong. Even if Dr. Rives somehow intentionally concealed the Center case from discovery—which he did not—this does not equate to a waiver of the right to make an appellate argument regarding inadmissibility of evidence at trial relating to the

[4] At the end of the misleading sentence, Plaintiffs cite 15 A.App. 3226. Nothing on that appendix page supports the sentence.

Center case. Plaintiffs cite no law supporting their waiver argument. Plaintiffs also cite no place in the appendix where the district judge ruled that her decision to admit evidence regarding the Center case was based upon alleged concealment during discovery. She allowed the evidence to be submitted to the jury because she thought it was admissible, not because she wanted to sanction Dr. Rives by admitting evidence that would otherwise be inadmissible.[5]

Second, the Center case was not concealed from discovery "to improperly gain an advantage," as the sentence contends. Indeed, the Center case was disclosed at Dr. Rives's deposition in October 2018, thereby gaining no advantage.

Third, Dr. Rives did not prevent Plaintiffs "from being able to fully flesh out [the Center case's] admissibility," as the sentence argues. Plaintiffs had always been represented by attorney Hand in this litigation. The Center case was disclosed to Hand at the October 2018 deposition, at which Hand could have asked any questions he desired regarding the Center case. After the deposition, Hand could have easily obtained access to all filed documents regarding the Center case, in the district court's multiple websites.[6]

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[5] The district court sanctioned Dr. Rives by giving an adverse inference instruction. This is discussed later in this brief.

[6] Even before the deposition, Hand could have easily found out about the Center case by doing a simple party-name search for Barry Rives on the district court's websites, to find other lawsuits in which Dr. Rives was a defendant.

Plaintiffs' new attorneys entered the case in July 2019, and they filed an aggressive motion for severe sanctions—including striking the answer—based upon Dr. Rives's alleged late disclosure of the Center lawsuit. 1 A.App. 87. They argued that defense counsel and Dr. Rives deviously used the name "Sinner" instead of "Center" to mislead attorney Hand, and they argued that the alleged late disclosure prevented Plaintiffs from obtaining information about the Center case.[7] 1 A.App. 92-100.

Plaintiffs' sanctions motion provided an affidavit from one of the new attorneys, but not from Hand. 1 A.App. 87-91. Of course, Hand was the only attorney for Plaintiffs with personal knowledge of what occurred before the new attorneys associated into the case, and he never suggested to the district court that he had been confused by the case name disclosed at the deposition, or that he made the same mistake as the court reporter (regarding "Sinner").

The issue regarding the Center case first arose in Plaintiffs' motion for sanctions, in which Plaintiffs claimed they had been denied an opportunity to investigate information about the case. 1 A.App. 99. Dr. Rives's opposition correctly observed that the motion did not include a declaration from Hand (who had

[7] The court reporter's mistake in using the name "Sinner" instead of "Center" is explained in more detail at AOB 21, n.6.

represented Plaintiffs from the inception of the case), and the motion provided "no information regarding what Mr. Hand was or was not aware of, his thought process, and what different discovery he would have conducted." 2 A.App. 365:12-15. This essentially challenged Plaintiffs to come up with actual evidence from Hand to support their claim that he was denied an opportunity to investigate the Center case. To the best we can determine, Hand never responded to this challenge; he never told the district court what efforts he took after the deposition to obtain information about the Center lawsuit; and he never contended that he was hampered in his ability to obtain information about the Center case.

If Hand had difficulty finding information about the Center case, all he needed to do was ask defense counsel for further information—either through discovery requests or informal communications. Yet he never did so. 2 A.App. 383:12-16. In fact, defense counsel informed the district court that Hand admitted talking to Vickie Center's attorney (Brenske) "weeks to months" before the Center trial started in April 2019. 4 A.App. 757. After defense counsel informed the district court of Hand's conversation with Center's attorney, Hand never denied it. Thus, Plaintiffs were not even slightly prevented from being able to obtain information about the Center case.

Even the district court rejected the RAB's argument that the alleged late disclosure of the Center case caused prejudice to Plaintiffs' ability to obtain information about the case. 14 A.App. 3121-22. The district court noted that Dr. Rives's deposition was in October 2018, but Plaintiffs did not look into some of the information provided at the deposition until the summer of 2019; and any prejudice could have been mitigated if Plaintiffs had looked at it earlier. 14 A.App. 3121:8-15. The court also found that "this information was available" to Plaintiffs. 14 A.App. 3121:24. The Court ruled: "However, some of this information was available to Plaintiffs in a manner that it could have been evaluated, because there was enough in that October deposition that a reasonable inquiry could have gotten you [Plaintiffs' counsel] some information and gotten some relief requested from the Court in a more timely manner that could have alleviated some of the prejudice..." 14 A.App. 3122:3-8.

Plaintiffs contend the district court characterized concealment of the Center case as "willful." RAB 36. Plaintiffs cite 19 A.App. 4229-30. On those appendix pages the district court did characterize concealment as willful, but the district court was referring to the disclosure by the associate attorney, Couchot, primarily dealing with confusion over the Sinner-Center mistake in the deposition transcript.

Plaintiffs argue that they are presumed to have suffered prejudice, and they cite *Foster v. Dingwall*, 126 Nev. 56, 227 P.3d 1042 (2010). RAB 36. As Plaintiffs concede, *Foster* dealt with continued discovery abuses **and** a failure to comply with a previous sanction order. RAB 36. In the present case, late disclosure of the Center case had nothing to do with a failure to comply with a court order.

Plaintiffs argue that Dr. Rives concealed the Center case "throughout discovery" and he "hid the *Center* case from Plaintiffs until after the discovery process had ended." RAB 36-37. Plaintiffs double down by arguing Dr. Rives disclosed the Center case "two months after the close of discovery." RAB 37. Plaintiffs triple down by arguing: "Plaintiffs found out about the [Center] case after discovery had ended." *Id.* These statements are all completely false and misleading. The Center case was disclosed at the deposition in October 2018, eight months before discovery closed in June 2019. 2 A.App. 383:10. Plaintiffs' new attorneys filed a motion for sanctions less than a month before trial, but during the 11 months prior to the motion, Hand never asked for more information, he had access to information on the court's websites, and he had spoken to Center's counsel much earlier. The information might have been unknown to Plaintiffs' new attorneys, but the information was known to Hand.

Plaintiffs next argue: "This discovery abuse precluded Plaintiffs from fully exploring and developing the evidence." RAB 37. This is another completely false statement (which is contrary to the district court's findings, discussed above), for which Plaintiffs cite 14 A.App. 3010. This appendix page is merely an argument of Plaintiffs' new counsel Jones, without any plausible explanation regarding how attorney Hand was precluded from exploring or developing evidence from the Center lawsuit.[8]

B. Evidence regarding the Vickie Center case was inadmissible and prejudicial.

The opening brief established that the district court erred by allowing the jury to consider evidence of Vickie Center's situation and her malpractice claim against Dr. Rives. AOB 11-19. In response, the RAB asserts that defense challenges to the Center evidence "were limited to relevance objections," that the AOB's arguments

[8] Plaintiffs argue that the district court found the alleged discovery abuse was prejudicial, resulting in monetary sanctions and the adverse inference instruction. RAB 37. Plaintiffs fail to explain how this is relevant to Dr. Rives's appellate contention that the Center evidence was inadmissible at trial. Plaintiffs' brief conflates the two contentions of error related to the Center case: (1) admissibility of evidence; and (2) the adverse inference instruction. Although the issues are both related to the Center case, the issues are entirely separate. The district court's finding regarding the alleged discovery abuse resulted in the sanction of an adverse inference instruction, but the finding did not result in admission of otherwise inadmissible evidence at trial.

regarding inadmissibility were not raised below, and that Dr. Rives may not have preserved the improper character evidence argument. RAB 37, 39. These assertions are false. Defense objections to Center evidence were more than sufficient to preserve the contentions.

When Plaintiffs first raised an issue regarding the Center case in Plaintiffs' motion for sanctions (1 A.App. 87), Dr. Rives's opposition asserted: "Introduction of evidence relating [to] the *Center* matter would be improper and extremely prejudicial to Defendants." 2 A.App. 359:15-16. The opposition contained an entire section entitled "Evidence Pertaining to *Center v. Rives* is Inadmissible." 2 A.App. 373:1. The opposition argued extensively that such evidence was not relevant, it was impermissible character evidence under NRS 48.045(1), and the evidence would be unfairly prejudicial and misleading to the jury under NRS 48.035(1). 2 A.App. 373-75. Thereafter, defense counsel objected numerous times on the ground that the evidence was precluded by NRS 48.035. *E.g.,* 20 A.App. 4367:8-19; 4408:8-9; 4413:13-16; 4428:17; 4432:13-17; 4464:20-24; 4465:25; 4489:19-23.

The AOB established that evidence of the Center case was irrelevant, and the AOB cited numerous cases supporting this contention. AOB 12-13. Plaintiffs' RAB completely ignores these cases. The RAB also fails to offer any argument as to why the evidence was relevant on the fundamental issue of whether Dr. Rives departed

from the applicable standard of medical care, thereby committing negligence in his treatment of Titina Farris.

The AOB drew the court's attention to counsel Jones's district court argument that the evidence was relevant to show that, from the Center situation, Dr. Rives knew of the consequences of his conduct and the potential result of sepsis. AOB 18. The AOB contended that Jones's theory of relevance was a meritless red herring. AOB 18-19. Plaintiffs' RAB ignores this contention, essentially abandoning Jones's argument and conceding our point—offering no other plausible bases for relevance.

The AOB also established that the Center evidence was inadmissible under NRS 48.035, because any probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. AOB 14-15. Plaintiffs barely mention NRS 48.035, only in passing (RAB 38), without any discussion or attempt to show the statute's inapplicability.

Plaintiffs attempt to distinguish *Hansen v. Universal Health Servs.*, 115 Nev. 24, 974 P.2d 1158 (1999), which was a medical malpractice case in which this court affirmed the exclusion of evidence involving the defendant doctor's other patients. RAB 40. Plaintiffs argue that *Hansen* is distinguishable, because *Hansen* did not discuss similar surgeries or reactions, or the same surgeon. RAB 40. This is false. The defendant surgeon in *Hansen* was the same doctor involved in the excluded

evidence regarding other patients. 115 Nev. at 27, 974 P.2d at 1160. The alleged malpractice related to spine surgery, and the excluded evidence involved the doctor's other patients "who had also had the surgery." *Id.* Further, the plaintiff in *Hansen* and the doctor's other patients all experienced medical complications from the spinal surgery. *Id.* Thus, the RAB fails in its attempt to distinguish *Hansen.*

The AOB also discussed *Mischler v. McNally*, 102 Nev. 625, 730 P.2d 432 (1986), as precedent for exclusion of prejudicial collateral evidence in medical malpractice cases. AOB 14-15. Plaintiffs' entire response is that *Mischler* is "similarly distinct from the facts of the instant case." RAB 40. This conclusory argument does not explain **any** distinction, let alone a **meaningful** distinction.

The AOB discussed several cases from other jurisdictions on this issue. AOB 15-18. Plaintiffs dismiss these cases as merely standing for the notion that evidentiary rulings on probative value versus prejudicial effect are discretionary. RAB 40. This is a grossly inaccurate characterization of the cases. As discussed in the AOB, these cases show that evidence of medical procedures on other patients is inadmissible in a medical malpractice case. **Significantly, the RAB cites no case,**

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from any jurisdiction, where a court held that a doctor's treatment of another patient was admissible in a medical malpractice case, for any purpose.[9]

The AOB argued that the Center evidence constituted inadmissible evidence of prior bad acts, with a presumption of inadmissibility. AOB 13. Plaintiffs suggest that this argument was not adequately preserved. RAB 39. Dr. Rives argued in the district court that the evidence was inadmissible character evidence under NRS 48.045(1). 2 A.App. 373-74. This preserved the issue.[10]

Plaintiffs argue that the Center case evidence falls within the *modus operandi* exception to the statute, citing *Rosky v. State*, 121 Nev. 184, 111 P.3d 690 (2005). RAB 39. *Modus operandi* helps establish the identity of a criminal perpetrator. *Id.* at 196-97, 111 P.3d at 698. Plaintiffs do not explain how this is applicable here.

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[9] Plaintiffs attempt to distinguish *Stottlemyer v. Ghramm,* 597 S.E.2d 191 (Va. 2004), on the ground that *Stottlemyer* only dealt with the doctor's falsification of medical records and licensing issues. RAB 41. This is incorrect. *Stottlemyer* dealt with "19 prior acts of improper conduct" (*Id.* at 193), going far beyond issues involving medical records and licensing, as the RAB argues. The *Stottlemyer* court held that evidence that the doctor "was negligent on a prior occasion" had no relevance on whether the doctor was negligent regarding the incident in question. *Id.* at 194.

[10] Although Dr. Rives referred to inadmissible "character evidence" (2 A.App. 373:21) instead of inadmissible "prior bad acts" evidence (AOB 13), there is no significant difference. And this court can use a plain error analysis to consider the NRS 48.045(2) "prior bad acts" challenge. *See Diomampo v. State,* 124 Nev. 414, 430-31, 185 P.3d 1031, 1041-42 (2008) (evidence of defendant's propensity to commit other bad acts considered in plain error analysis).

Moreover, *Rosky* supports Dr. Rives's contention that "improper admission of bad act evidence is common grounds for reversal," and a "presumption of inadmissibility applies to all prior bad act evidence." *Id.* at 194-95, 111 P.3d at 697.

Plaintiffs argue that "bias is a relevant inquiry into the *Center* case." RAB 39-40. Plaintiffs did not argue this in the district court, and the RAB provides no explanation as to how Center evidence somehow established bias.

In conclusion, Dr. Rives's treatment of Vickie Center was wholly irrelevant to the question of whether Dr. Rives was negligent in his treatment of Titina Farris. The RAB offers no argument supporting relevance. But even if the evidence had marginal relevance, the probative value was far outweighed by the prejudicial impact, particularly with the jury being told about Center's foot amputations and her malpractice lawsuit against Dr. Rives. As the AOB noted, the Center case was discussed by Plaintiffs at least 180 times in the presence of the jury. This would have generated the jurors' strongest emotions imaginable, and Dr. Rives did not get a fair trial. AOB 19.

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

The opening brief established that the district court erroneously gave an adverse inference instruction that related to evidence in the Center case. AOB 19-29. In response, Plaintiffs first argue that Dr. Rives waived a challenge to the

instruction. RAB 41-42. The argument is based entirely upon the district court's ruling that an objection to the instruction was waived. RAB 41. Plaintiffs point out that the AOB acknowledges the district court's waiver ruling. RAB 41. Plaintiffs omit the fact that the AOB fully explained why the district court's waiver ruling was erroneous. AOB 25-26.

There was clearly no waiver. Plaintiffs filed a motion for sanctions based upon alleged discovery violations. 1 A.App. 87. Dr. Rives filed opposition and a supplemental opposition, opposing any sanctions. 2 A.App. 358-79; 30 A.App. 6494-6503. Defense counsel opposed sanctions at every hearing on the issue. AOB 25 (listing multiple hearings).

The district court had an evidentiary hearing on Monday, October 7, 2019, for testimony by Dr. Rives regarding his discovery responses. 14 A.App. 3043. Before Dr. Rives testified, defense counsel requested permission to make closing arguments after the testimony. 14 A.App. 3069:16-17. The district court flatly refused to hear arguments by defense counsel at the hearing, because counsel had not previously requested an opportunity to argue. 14 A.App. 3069:18-19; 3118:11-18; 3119:2-4.

At the conclusion of the Monday hearing, the district court did not rule on the sanctions issue, but the court stated that the court would make a ruling on Thursday, October 10, 2019. 14 A.App. 3120:8-9; 3122:12-13. At the Thursday hearing the

district court announced the decision to give a sanction jury instruction, and the court asked Plaintiffs' counsel to prepare the instruction. 15 A.App. 3223:16-25. A few days later, the court heard arguments regarding the wording of the jury instruction. 19 A.App. 4211-45. Once again, defense counsel objected to a sanction instruction. 19 A.App. 4214:5. The district court abruptly cut off defense counsel's objection, ruling that the objection had been waived:

> Counsel, you didn't object on the 7th. Don't you think this is way too late? The Court made its ruling and you did not object on the 7th. That ruling -- the Court -- 1 will tell you on that part, the Court finds that is waived, waived, and waived. The Court made this ruling on the 7th.
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> That's so waived, counsel, because if you felt that it was objectionable, you could've told the Court on the 7th, given an opportunity to be heard then, presented the Court some authority, some opportunity.

19 A.App. 4214.

In other words, the following occurred:

(1) the district court refused to allow defense counsel to make an argument regarding sanctions at the October 7, 2019 hearing;

(2) on October 10, 2019, the district court announced the decision to give the instruction, requesting Plaintiffs' counsel to prepare it;

(3) when the attorneys and the court discussed the instruction a few days later, the district court stated that the ruling had been rendered on October 7, 2019, which was undeniably incorrect;

(4) the district court ruled that any objection was waived because defense counsel did not object at the hearing on October 7, 2019, despite the fact that the district court had flatly refused defense counsel's request to present an argument on that day; and

(5) the district court ruled that defense counsel was "given an opportunity to be heard" on October 7, 2019, despite the fact that the district court denied counsel's request for an opportunity to be heard.

Under these circumstances, the district court was clearly wrong in ruling that Dr. Rives waived the right to challenge the jury instruction. Indeed, although the RAB mentions the district court's waiver ruling, the brief makes no attempt to justify it. RAB 41.

Plaintiffs cite *Merrill v. DeMott*, 113 Nev. 1390, 951 P.2d 1040 (1997), for the proposition that waiver is a factual issue. RAB 41. This is misleading, because *Merrill* did not involve waiver of a legal argument or an objection. *Merrill* involved waiver of performance under a lease, which was a factual issue. Even then, *Merrill*

held that if a waiver question turns on legal implications of conduct, the issue is a question of law subject to *de novo* review. *Id.* at 1399, 951 P.2d at 1045-46.

On the merits of this issue, Plaintiffs argue that Dr. Rives cannot overcome his "own trial testimony admitting to providing false testimony in discovery." RAB 42. Plaintiffs cite 21 A.App. 4635-36. *Id.* The testimony on those pages is irrelevant to the jury instruction issue, because the testimony dealt with Dr. Rives's mistake in testimony regarding the use of a certain surgical device, not involving the alleged failure to disclosure the Center case.

Plaintiffs argue that the district court had discretion to give the adverse inference jury instruction as a discovery sanction, because Dr. Rives allegedly failed to supplement discovery responses. RAB 42. The argument is meritless. Under NRCP 26(e)(1), a party only has a duty to supplement discovery responses if the additional information "has not otherwise been made known" during discovery. The official Comment to the analogous federal rule, FRCP 26, states that there is no obligation to supplement information that has otherwise been made known to the parties during discovery, such as a disclosure during a deposition. Here, the Center case was disclosed at the October 2018 deposition. There was no further duty to supplement.

Plaintiffs repeatedly argue that Dr. Rives was not diligent or honest in discovery, and that this justified the adverse inference instruction. RAB 43-44. Plaintiffs also argue that the law presumes prejudice from "concealed evidence" in this case. RAB 43. These arguments lose sight of the issue in this appeal, which is whether the district court erred by instructing jurors that Dr. Rives did not disclose the Vickie Center case in interrogatories or at his deposition. 19 A.App. 4246:16-19. The instruction told jurors they could infer that evidence in the Center case "is unfavorable" to Dr. Rives, and evidence in the Center case "would be adverse to [Dr. Rives] in this lawsuit had he disclosed it." 19 A.App. 4246:21-23.

Dr. Rives and defense counsel **did disclose** the Center case at the deposition. Thereafter, Plaintiffs' attorneys were able to find out everything about the Center case. They even obtained Dr. Rives's deposition transcript from the Center case, and they used it during examination of Dr. Rives, in the presence of the jury, at the trial in the present case. 21 A.App. 4637:7-13.

Significantly, the adverse inference instruction was based upon Plaintiffs' motion for sanctions, which contended that Dr. Rives hid and deliberately obfuscated the Center case, depriving Plaintiffs of an opportunity to investigate. 1 A.App. 95, 99. The instruction dealt solely with Dr. Rives's failure to disclose the Center case "in his interrogatories or at his deposition." 19 A.App. 4246:16-24. Yet,

as explained above, the information was disclosed in September 2018; attorney Hand spoke to Center's attorney (Brenske) in early 2019; and even the district court found that Plaintiffs could have obtained information about the Center case if they had pursued it. This completely undermines the basis for the instruction. The RAB has no response.

The AOB argued that an adverse inference instruction is designed to fill an evidentiary gap created by lost or destroyed evidence. AOB 27-28. Such an instruction is not applicable where the evidence is available, even if the evidence was disclosed late. *Id.* The RAB completely ignores this important point, thereby conceding it.

Plaintiffs' argument regarding prejudice (RAB 43-44) also does not save the adverse inference instruction. As discussed extensively above, Plaintiffs were not inhibited from obtaining information about the Center case after Dr. Rives's deposition. And even the district court rejected Plaintiffs' argument that the alleged late disclosure of the Center case inhibited Plaintiffs' ability to obtain information about the case. 14 A.App. 3121-22.

The adverse inference instruction was unnecessary and inappropriate. The district court read the instruction to the jury twice—at the beginning and the end of the trial. 19 A.App. 4246; 30 A.App. 6651. Plaintiffs' counsel emphasized the

instruction during closing argument, asking the jury to consider what Dr. Rives was "hiding" in the Center case. 29 A.App. 6387, 6389. The jury probably applied the instruction, complied with Plaintiffs' counsel's request, and speculated about what Dr. Rives was hiding in the Center case. The AOB established that the instruction was erroneous and prejudicial. The RAB fails to show otherwise.

IV. This ERISA ruling was erroneous.

The AOB established that the district court erroneously applied ERISA preemption regarding the collateral source rule. AOB 29-35. As the brief observed, the United States Supreme Court has ruled that courts must presume state laws are **not** superseded by federal law, and the burden of establishing federal preemption of state law is on the party asserting preemption. AOB 34-35, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The AOB further established that Plaintiffs had not met their burden to show ERISA preemption based upon a self-funded ERISA plan. AOB 31-35. Plaintiffs' RAB ignores these Supreme Court holdings. RAB 45-48.

Plaintiffs do not contest the fact that preemption only applies, if at all, to a self-funded ERISA plan. Plaintiffs rely almost entirely on seven pages of "medical documents" in the Respondents' Appendix. RAB 45, 47 (citing 7 R.App. 944-50). These documents are blurry and largely illegible. There is a sticker indicating

"Court's Exhibit 13" on the first page, with a date "10-21-19." 7 R.App. 944. The documents were not admitted at trial on that date. In fact, the trial transcript does not mention the exhibit in the list of exhibits for that day, or anywhere else in the transcript. 21 A.App. 4536-4769. Even if the pages are enlarged enough to make them readable, there is no information indicating that the MGM's health insurance plan was self-funded.[11]

Plaintiffs rely heavily on *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 408 P.3d 149 (2017). RAB 45-46. Plaintiffs cite *McCrosky* for the proposition that federal preemption applies if a health insurance plan is funded by federal funds, and *McCrosky* eliminates a "double reduction" of a plaintiff's recovery. RAB 46. The *McCrosky* plaintiff had Medicaid, which is a government funded program that paid the plaintiff's medical bills. The United States government may recover reimbursement of Medicaid payments a plaintiff has received in a medical malpractice suit. *Id.* at 936-37, 408 P.3d at 155. A Nevada statute, NRS 42.021(1), creates an exception to the collateral source rule in medical malpractice cases, allowing a jury to deduct payments the plaintiff received for medical expenses. If the plaintiff's recovery is reduced by collateral source payments, and

[11] Plaintiffs provide no information regarding the context or origin of the pages in the exhibit. Nor do Plaintiffs disclose where they might have relied upon these documents during arguments in the district court on the preemption issue.

if the plaintiff must also reimburse the federal government for Medicaid payments, there would be a "double reduction in a plaintiff's recovery." *Id.* at 937, 408 P.3d at 155.

Under those circumstances, *McCrosky* held that "federal law preempts NRS 42.021(2) from preventing recovery of federal collateral source payments, such as Medicaid payments." *Id.* at 937, 408 P.3d at 155. *McCrosky* is therefore not applicable in the present case, because there are no federal collateral source payments here.

Nevertheless, federal preemption does apply to a self-funded ERISA plan, but not a plan funded by insurance. Plaintiffs do not dispute this distinction. RAB 46. In the district court, defense counsel pointed out the fact that MGM has multiple health plans, including separate plans for executives, and Dr. Rives provides services on some of the MGM plans but not others. 26 A.App. 5597:5-9. Plaintiffs did not dispute this fact. Defense counsel also noted that Plaintiffs' insurance card did not indicate a self-funded ERISA plan. 26 A.App. 5597:18-19. Again, Plaintiffs did not dispute this.[12]

[12] AOB 33 noted that the district judge indicated she believed she knew the answer to the self-funded question, based upon information she gained prior to taking the bench.

To support their self-funded argument, Plaintiffs rely on an unpublished New Mexico federal judge's decision in *Med Flight Air Ambulance v. MGM Resorts Int'l,* 2017 WL 5634116 (D.N.M. 2017), where the judge ruled that the particular MGM insurance plan in that case was self-funded. RAB 46-47. Unburdened by evidence, Plaintiffs assert that the "same provisions" are present in the plan in the present case. RAB 47. As noted above, MGM has multiple plans for different types of employees. The judge's decision in *Med Flight* did not provide the date of the plan, any language from the plan, or any explanation regarding why the judge believed the plan was self-funded. Also, *Med Flight* dealt with issues regarding service of process and personal jurisdiction, not preemption issues.

Further, the defendants in *Med Flight* submitted two affidavits from MGM's senior vice president and general counsel. *Id.* at *4. These affidavits may well have provided facts on which the judge relied for the self-funded comment, regarding the specific health plan involved in *Med Flight*. Plaintiffs offered no such evidence in the present case. With insufficient information in the *Med Flight* decision, this court should reject Plaintiff's bald assertion that the plan in *Med Flight* had the same provisions as the plan in this case.

As explained in the AOB, several provisions in the health plan in the present case indicate the plan is not self-funded, because the plan uses insurance for the

medical benefits. AOB 33-34. The plan calls for insurance contracts with insurance companies; benefits that are fully insured; benefits that are paid by insurance companies; and funding provided by "one or more insurance contacts." 5 A.App. 1011, 1042. The plan incorporates multiple documents, including contracts with four insurance companies. 5 A.App. 1045. These provisions demonstrate that the plan uses insurance companies, and Plaintiffs failed to meet their burden to prove the plan was self-funded.

Finally, Plaintiffs argue that the AOB's argument must fail (or the argument constitutes harmless error) because Dr. Rives did not identify evidence that would have been offered at trial regarding the collateral source payments, if the district court had not found preemption. RAB 47-48. On the first trial day, Dr. Rives filed a trial brief explaining the issue regarding the collateral source rule and federal preemption. 4 A.App. 797-802. The brief argued that federal preemption did not apply, and that Dr. Rives should be allowed to introduce evidence of collateral source payments. 4 A.App. 801-02. The district court eventually ruled that the MGM plan was self-funded, and therefore NRS 42.021 was preempted by federal law. This had the effect of denying Dr. Rives's request to introduce evidence of

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collateral source payments. This should be sufficient to satisfy NRAP 28(e)(1). Also, medical bills were admitted into evidence. 3 R.App. 187; 7 R.App. 821.[13]

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

The opening brief established that the district court erred by striking or severely limiting defense experts. Plaintiffs first contend that this issue was not preserved because Dr. Rives "never filed an opposition to Plaintiffs' motion to limit and strike Defendants' experts." RAB 48. This argument is highly misleading. Plaintiffs cite the motion at 1 A.App. 199, which was their motion filed on September 19, 2019. The day after the motion was filed, however, the district court vacated the motion. 2 A.App. 347 (court minutes stating: "Plaintiffs' Motion to Strike was VACATED per Judge Kishner."). Plaintiffs never refiled or reinstated the motion. No opposition ever came due.

Plaintiffs similarly provide a misleading argument at RAB 49, where they contend that, instead of striking the experts altogether, the district court entered a written order allowing the experts to testify on a limited basis. The RAB cites 7

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[13] Another issue in this appeal relates to the district court's order granting Plaintiffs' motion under NRCP 50. Plaintiffs argued that the past medical bills were uncontested, in the amount of $1,063,006.94. 29 A.App. 6306. The district court accepted this number, which the district court inserted into the verdict form. 12 A.App. 2475. This should inform this court as to the amount of money at stake regarding this issue. There was no evidence that any of the medical bills were paid from a source other than the MGM health insurance plan.

A.App. 1410-12. But this was an order on a different motion altogether, dealing with other discovery disclosures.

Plaintiffs next argue that Dr. Rives's discussion regarding Plaintiffs' failure to serve a mandatory computation of damages is not properly before this court, because Dr. Rives did not file a motion to strike or limit Plaintiffs' damages. RAB 49. Plaintiffs miss the AOB's point regarding the mandatory computation of damages. Dr. Rives is not contending that the district court should have stricken or limited Plaintiffs' damages, due to Plaintiffs' failure to comply with the mandatory requirement. Rather, the AOB presented this point as background information explaining why defense counsel needed rebuttal expert opinions. AOB 37-40. Because Plaintiffs provided the multi-million dollar damages computations two and one-half years late, defense counsel was blindsided by the late disclosures, justifying the need for rebuttal experts. AOB 37-40.

Plaintiffs argue that Dr. Rives cannot raise this issue regarding experts, because Dr. Rives failed to make offers of proof. RAB 50. Plaintiffs cite cases in which the appellate records did not contain information sufficient for the appellate courts to rule on the issues. RAB 50. The issue in this case deals with three experts: Dr. Adornato, Dr. Stone, and Nurse Larsen. AOB 41-45. Plaintiffs themselves placed the reports from these three experts into the district court record. 2 A.App.

226-57 (Nurse Larsen); 291-309 (Dr. Adornato); 310-23 (Dr. Stone). These reports provide this court with more than enough information with which to rule on the issue, contrary to Plaintiffs' contention.

Plaintiffs' arguments discussed above are the only arguments the RAB offers on this important issue. The RAB completely ignores Dr. Rives's discussion of legal requirements for rebuttal experts at AOB 40-41, and discussions regarding the three expert witnesses at AOB 41-45. Plaintiffs apparently can think of no rebuttal arguments on these points. *See Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (respondent's failure to address opening brief's issue treated as confession of error).

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

Dr. Rives's AOB established that there were factual issues involving past and future medical expenses, and the district court therefore erred by granting Plaintiffs' NRCP 50 motion and by filling in the verdict form with medical expenses totaling $5,726,479.94.

There are two aspects to this issue: past medical expenses in the amount of $1,063,006.94, and future expenses (*i.e.*, the life care plan) in the amount of $4,663,473.00. 12 A.App. 2475. The opening brief established that the past medical expenses were disputed, and the jury could have inferred that the full amount was

not recoverable because the claimed expenses included (1) the expense for the initial hernia surgery, which would have been incurred in the absence of any negligence, and (2) two different time frames for the alleged negligence, and the jury could have rejected expenses for the second time frame. AOB 46-47. Plaintiffs' RAB focuses only on future damages in the life care plan. RAB 51-54. The brief ignores the AOB's arguments regarding more than $1 million in past expenses. This should be deemed a confession of error.

Regarding the nearly $4.7 million in future damages in the life care plan, the AOB noted Dr. Adornato's expert medical opinion that Titina Farris's lack of mobility (which was the basis for almost all of the life care plan) should be apportioned 50/50 between surgical complications and preexisting diabetic neuropathy. AOB 48. The district court granted the Rule 50 motion, because Dr. Adornato did not use the phrase "life care plan" in his testimony. AOB 48-49.

Plaintiffs' brief contends that Dr. Rives has no response to the opinions of Plaintiffs' life care planner or economist. RAB 52. This misses the point. A medical doctor (Dr. Barchuk) determined Titina Farris's future medical needs; the life care planner (Cook) took Dr. Barchuk's opinions and determined the costs of the future medical care; and the economist (Clauretie) took Cook's numbers and determined the present value of the life care plan. RAB 51-52. Dr. Barchuk's opinions were

the foundation for everything. If weaknesses in his opinions were exposed though cross-examination or testimony by defense experts, the jury could have reasonably decided to award less than the full $4.7 million requested in the life care plan. The RAB fails to prove otherwise.[14]

Regarding Dr. Adornato's failure to use the phrase "life care plan" in his testimony, medical experts in malpractice cases are not required to use "magic words" in their reports or their testimony. *See Baty v. Futrell*, 543 S.W.3d 689, 693 (Tex. 2018); *Welsh v. Bulger*, 698 A.2d 581, 585-86 (Pa. 1997). Here, the district court seemed to acknowledge conflicting medical testimony, but the court looked for the magic words "life care plan" in defense expert evidence. AOB 47-48.

Plaintiffs argue that the district court did not intend to "elicit a magic word." RAB 52. But that is precisely what the district court did. The district court acknowledged Dr. Adornato's opinion regarding the 50/50 apportionment, but the district court stated "I don't see that he gave any testimony whatsoever to the life care plan." 29 A.App. 6312:5-7. The district court asked: "Did Dr. Adornato ever

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[14] There was a dispute between experts regarding the life care plan's calculation of present value. 29 A.App. 6306:11—6307:3. The district court gave jurors the option to reduce the future medical expense amount, based on testimony of a defense economist regarding present value. 12 A.App. 2475:24-27. This is completely different from the issue in this appeal involving the district court erroneously filling in the verdict form's answer lines for past and future expenses, totaling more than $5.7 million. 12 A.App. 2475:21-23.

mention life care plan in any of his testimony?" 29 A.App. 6313:23. The district court also specifically asked: "Did he ever state the words 'life care plan' anywhere in his testimony?" 29 A.App. 6314:12-13.

In response to these questions, defense counsel repeatedly reminded the court of the fact that Titina Farris's lack of mobility was a foundation for the life care plan, and defense experts had opined that only 50 percent could be apportioned to surgery complications. 29 A.App. 6312-15. Defense counsel also repeatedly (and correctly) argued that even if defense experts did not specifically testify regarding numbers in the life care plan, reasonable inferences from defense expert testimony would allow the jury to reduce the award for future medical expenses. *Id.*

Hypothetically, if a plaintiff's doctor and life care planner testify that the plaintiff needs two future surgeries, at $100,000 per surgery, and if the need for one surgery is seriously undermined by testimony of defense doctors, the jury can determine whether to award damages for both surgeries. If the jury rejects one of the future surgeries, the jury can award $100,000, even without a defense expert opining that $200,000 divided by two equals $100,000—and even without a defense expert using the words "life care plan." Common sense revolts at the idea that the decision should be taken from the jury in such a situation. Yet this is exactly what the district court did here.

Cross-examination of a plaintiff's witness can be sufficient to controvert a plaintiff's damages. *See Quintero v. McDonald*, 116 Nev. 1181, 1184, 14 P.3d 522, 523 (2000). Here, Cook was effectively cross-examined, and Dr. Adornato's opinions provided a solid basis with which the jury could have reduced the life care plan by 50 percent. The jury did not need an expert to do simple math. The district court typed in answers on the verdict form for medical expenses totaling more than $5.7 million, thereby requiring the jury to award these amounts. This was erroneous, highly prejudicial, and must be reversed.

VII. The district court erred regarding hospital records.

The AOB demonstrated that the district court erred by refusing to allow defense counsel to add stipulated documents to Exhibit 1, consisting of critical hospital records. Plaintiffs' first response is to criticize Dr. Rives for not specifically identifying the records or what they might show. RAB 54. This is a rather stunning argument for Plaintiffs to make under the circumstances.

Plaintiffs' pretrial memorandum identified all 8,505 pages of the St. Rose Hospital records to be used at trial. 3 A.App. 519:8. The parties agreed to present a single exhibit with the records, but 45 minutes before the calendar call hearing, Plaintiffs' counsel gave defense counsel a binder with only 613 pages. 14 A.App. 3129:2-5; 3142:14; 15 A.App. 3277; 3 R.App. 186—6 R.App. 818 (Exh. 1).

Plaintiffs' counsel had removed approximately 7,900 pages. On the record, defense counsel requested an opportunity to add additional pages back into the binder, and Plaintiffs' counsel indicated, on the record, he was "happy to add them into ours." 14 A.App. 3133:18-21. Defense counsel subsequently attempted to add approximately 400 additional pages back into the stipulated hospital records exhibit, but the district court refused. 15 A.App. 3290-3300. In other words, Plaintiffs' attorneys themselves are the ones who selectively removed pages from the stipulated hospital records, and they know exactly what they removed. Yet they now complain that, on appeal, Dr. Rives has not specifically identified the records or what they might show. RAB 54.

Defense counsel attempted to make an offer of proof and to describe the records, but the district court flatly refused. This is described in detail at AOB 55-56. Defense counsel requested to have the additional 400 pages marked as a clerk's exhibit, to preserve the record, but the district court denied the request. 15 A.App. 3282:24—3283:4. Defense counsel requested permission to submit a declaration explaining the circumstances, but the district court denied the request. 15 A.App. 3283-88. Earlier, defense counsel had requested an opportunity to make a record, but the district court responded: "Counsel, you may not." 15 A.App. 3168:9. Defense counsel did everything he could. A district judge should not be allowed to

prohibit a party from making a complete record on an issue, then avoid reversal due to an incomplete record.

The AOB explained—with accurate appendix citations (unlike the RAB)—how the district court erred by enforcing a deadline that had never actually been imposed regarding the missing pages of hospital records. AOB 56-58. Plaintiffs' RAB fails to cite any place in the October 7, 2019 transcript where the district court imposed a deadline for the missing pages. Plaintiffs argue: "Defendants fail to inform this Court that defense counsel agreed to the deadline." RAB 54. Plaintiffs cite 14 A.App. 3145, 3147, 3161 and 3162. *Id.* Those citations are misleading. Page 3145 dealt with a completely different matter (a stipulation regarding medical imaging studies). 14 A.App. 3144:20—3145:22. Page 3147 dealt with an agreement regarding photographs and videos on a jump drive. 14 A.App. 3145:23—3146:25. And pages 3161-3162 only dealt with submitting a **stipulation** regarding exhibits and an exhibit summary, with nothing to suggest that the exhibits or the missing pages themselves needed to be submitted by the end of the day. 14 A.App. 3161:6—3162:6.

Plaintiffs contend that defense counsel conceded he was aware of the "end of day Tuesday" deadline for the missing pages for Exhibit 1. RAB 54-55. Actually, at the hearing on Thursday, October 10, 2019, lead defense counsel Doyle indicated

he had no memory of a 5:00 p.m. Tuesday deadline, and he was surprised to learn of it at the Thursday hearing. 15 A.App. 3285:20-21. The district court asked associate defense counsel Couchot about the deadline, but he had not been at the calendar call. 15 A.App. 3285:22-25. The district court asked the second associate, Ms. Newberry, about the deadline, and she indicated: "That was my understanding of the Court order." 15 A.App. 3286. Ms. Newberry obviously did not recall the calendar call accurately, because the black-and-white transcript undeniably fails to show any deadline—5:00 p.m. or otherwise—for the defense attorneys to review thousands of pages removed by Plaintiffs and determine which pages should be added back into Exhibit 1.

Plaintiffs contend that there was never actually a stipulation regarding the exhibit. RAB 55. Plaintiffs rely on DCR 16, which deals with the need for written agreements and stipulations. *Id.* Despite the fact that the agreement regarding Exhibit 1 was oral, it was stated on the record, Plaintiffs acknowledged it, the district court acknowledged it, defense counsel relied on it, and Plaintiffs never contended that it was unenforceable because it was oral. Plaintiffs should be estopped from denying the agreement now. *See Pink v. Busch*, 100 Nev. 684, 689, 691 P.2d 456, 459-60 (1984) (estoppel elements).

Plaintiffs complain that defense counsel had informed the district court of a desire to add only "20 to 25 pages" to Exhibit 1, but the actual number turned out to be more. RAB 56, 58. Plaintiffs have edited the quotation by taking it out of context, thereby making it misleading. What defense counsel actually said was: "My **best guess** is **maybe** 20, 25." 14 A.App. 3142:18 (emphasis added). Defense counsel subsequently explained that when he had been given the binder with the removed pages, he did not have a fair and reasonable opportunity to review it that morning, and he did not realize the extent to which documents had been removed. 15 A.App. 3281:5-11.

Plaintiffs argue that "all parties were willing to finalize the exhibits and stipulations to the Court by the end of that day [Tuesday]." RAB 56. Plaintiffs cite 14 A.App. 3145, but that page did not deal with a deadline for the missing hospital records. The only deadline on that page related to the stipulation involving imaging studies, photographs, and videos. 14 A.App. 3144-45. Plaintiffs make the same misleading argument at RAB 56, referencing appendix page 3147, which dealt with a deadline regarding photographs and electronic exhibits on a jump drive.

Regarding the compilation of missing hospital records, Plaintiffs argue that defense counsel confirmed: "Yes, we can agree to it by end the day, Your Honor." RAB 56. The brief's citation to 14 A.App. 3147 is highly misleading. The word

"it" in the phrase "we can agree to it" was **not** referring to the removed hospital records being added back into Exhibit 1. The word "it" referenced an agreement regarding photographs and electronic exhibits on a jump drive. 14 A.App. 3147.

Plaintiffs argue that after discussing the exhibits, defense counsel "left the courthouse and did not review Exhibit 1 to see what pages should be added." RAB 57. This is a highly misleading simplification. As defense counsel Doyle explained, more than 8,000 pages of records had been identified and produced by Plaintiffs in pretrial disclosures and in Plaintiffs' pretrial memorandum, but at the meeting the day before the calendar call, Plaintiffs' attorneys did not bring the exhibit binder. 15 A.App. 3277. The next day (at the Tuesday calendar call) Plaintiffs' attorneys presented an exhibit binder that did not contain all the hospital records. 15 A.App. 3277-79. Because Plaintiffs' counsel sandbagged their alteration of the exhibit until the last minute, it was "physically impossible" at that time for Doyle to figure out what was missing and what needed to be added back in. *Id.* He spent a significant amount of time Wednesday compiling records, but the next day, when he tried to

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offer the records, the district court's reaction was: "No, no, no, no, you're not."[15] 15 A.App. 3279:16-19.

Plaintiffs' counsel engaged in flagrant litigation gamesmanship regarding the hospital records and the altered exhibit. The district court's refusal to allow the additional pages to be added back into Exhibit 1 was because defense counsel was unable to evaluate all the missing records in a very short time frame. And Plaintiffs now want to take advantage of the scenario they created.

Plaintiffs' arguments on this issue are misleading, incomplete, and unpersuasive. The district court enforced a deadline that did not exist. Even if the record is interpreted to have imposed the Tuesday deadline, the delay was minimal, without any prejudice to Plaintiffs. There was no rational reason for the district court to exclude hundreds of pages of important hospital records.

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[15] After receiving the altered exhibit at the calendar call, defense counsel would have needed to review 8,000+ pages of the original hospital records; review hundreds of pages in Plaintiffs' altered exhibit to determine which records Plaintiffs removed; review approximately 7,900 pages of the removed records, to determine which ones needed to be added back into the exhibit; then compile the additional pages in a form that could be added into Exhibit 1. It is completely unreasonable to believe defense counsel would have acquiesced in a 5 p.m. deadline for this Herculean task.

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

The AOB established that the district court abused its discretion by not allowing defense counsel to impeach Dr. Hurwitz with his deposition transcript. AOB 59-65.

In reply, Plaintiffs first argue: "Defendants have not identified what portions of the deposition they were prohibited from using in the form of an offer of proof." RAB 59. This is wrong. Defense counsel was cross-examining Hurwitz regarding his opinions on whether Dr. Rives complied with the standard of care. 23 A.App. 5039. When counsel brought up the subject of Hurwitz's deposition, Plaintiffs objected, and the district court sustained the objection, all as explained in AOB 60-62. The doctor's deposition testimony was markedly different from the trial testimony, particularly regarding Dr. Hurwitz's comments regarding the Center case, as also explained in detail at AOB 63-64.

There is also no merit to Plaintiffs' rather ironic criticism of defense counsel's failure to lodge the transcript with the district court clerk. RAB 59. After all, Plaintiffs objected to the transcript being lodged with the clerk; and the district court ruled in favor of Plaintiffs and prohibited defense counsel from lodging it. In any

event, Dr. Rives did provide a subsequent offer of proof with the transcript. 10 A.App. 2100.

Plaintiffs argue: "Defendants also have not demonstrated what these missing portions of the deposition would have shown." RAB 59. But this is exactly what Dr. Rives demonstrated at AOB 63-64.

Other than Plaintiffs' procedural comments, Plaintiffs present no argument justifying the district court's ruling, which was based upon the misperception that no transcript, or any portion, was provided to the court. 20 A.App. 4529-31. Nor have Plaintiffs provided legitimate justification for the district court's refusal to allow the transcript to be used in cross-examination of an important medical witness. The was an abuse of discretion, contributing to the unfair trial.

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

Dr. Juell is a surgeon who was called as a defense witness on the negligence issue. The opening brief established that the district court erred by allowing cross-examination dealing with prior remote instances in which Dr. Juell was sued. AOB 65-69.

In response, Plaintiffs provide a lengthy blocked quote from Dr. Juell's deposition, followed by argument that defense counsel did not object at the deposition regarding the prior lawsuits. RAB 62. This ignores the fundamental

difference between objections in depositions and objections at trial. Under NRCP 32(d), only certain limited objections are waived if not made at depositions. This case does not fall within any of the rule's waiver provisions.

Having performed thousands of surgeries in his 40 years practicing medicine (23 A.App. 4971-72, 4977), Dr. Juell was dragged into malpractice cases four times: once when he was a resident, decades before this trial; once when a nurse made a medication error, and Dr. Juell was dropped from the suit; once when he did not do anything wrong, but his insurance company settled; and once when the judge dismissed the case with prejudice. AOB 65-66. As the court aptly explained in *Heshelman v. Lombardi*, 454 N.W.2d 603 (Mich. App. 1990), a prior malpractice suit against an expert is not probative, because even highly competent physicians have been sued for malpractice. *Id.* at 609. *Heshelman* is persuasive. The prior remote lawsuits against Dr. Juell were irrelevant, and any minimal probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury. The district court erred by allowing the jury to find out that Dr. Juell had been sued in the past.[16]

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[16] The RAB argues that there was no objection to the question about Dr. Juell's malpractice history. RAB 66. Dr. Rives had filed a trial brief objecting to such questions; Dr. Rives objected again during the examination; and the district court overruled the objections. 4 A.App. 777-84; 24 A.App. 5290; 25 A.App. 5388-90, 5422-36. There was no need to renew the objections.

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

The opening brief demonstrated that there were neither factual nor legal bases for awarding $821,468.66 in attorneys' fees. AOB 69-80. The answering brief fails to establish justification for the award.[17]

A. Fees were not justified under NRCP 68.

The AOB established that the facts and case law do not justify fees based on Plaintiffs' offer of judgment. AOB 70-73. Plaintiffs' first response is that the AOB does "not earnestly challenge" the award. RAB 68. This is false. The AOB's argument regarding NRCP 68 spans four pages, discussing all relevant factors and applicable law. AOB 70-73. This is hardly a failure to "earnestly challenge" the award.

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[17] As noted in the AOB, Plaintiffs' new attorneys stated on the record that they intend to collect a 40 percent contingency fee (approximately $2.5 million) from Plaintiffs—notwithstanding the statutory fee limit, and notwithstanding the district court's award of a lower amount—because the attorneys believe they obtained a valid waiver from their clients. AOB 70. The RAB does not deny this. An identical situation was addressed in the *Nevada Lawyer*, Bar Counsel Report (January 2021), pp. 39-40. A Las Vegas medical malpractice attorney obtained a waiver and collected a fee in excess of the statutory limit. The State Bar imposed discipline, because the waiver was invalid and was an ethical violation. Bar Counsel noted that the baseline sanction for such a violation is suspension, although mitigating circumstances justified a reduction to a public reprimand. *Id.* Presumably Plaintiffs' attorneys in the present case will abandon their unethical attempt to collect a fee in excess of the statutory limit.

The AOB argued that such a fee award requires careful evaluation of factors identified in *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661 (1998), and the brief discussed all the relevant factors. Plaintiffs present a one-paragraph response, which fails to discuss and evaluate the applicable factors. RAB 67-68. The response is conclusory and wholly inadequate. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co.,* 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) (this court will not consider conclusory arguments in briefs).

Plaintiffs' conclusory one-paragraph argument seems to contend that the district court's reasons for the award must be affirmed because the district court gave reasons for the award. RAB 67-68. Besides being a circular argument, no case law supports it.

The AOB argued that a district court's award of fees on an offer of judgment should not apply a hindsight rule. Instead, the court should only consider information known to the parties at the time of the offer. The brief demonstrated that, in the present case, the district court failed to focus on information known to Dr. Rives at the time of the offer. AOB 71-72. The answering brief completely ignores this argument, thereby effectively conceding it.

Plaintiffs have provided neither factual nor legal analyses supporting the award, and the Rule 68 fees should be reversed.

B. The alternative ground for fees is unfounded.

The district court found "inappropriate" conduct as a separate basis for awarding attorneys' fees, and the AOB provided a detailed analysis of each category of alleged misconduct, rebutting each category. AOB 73-80. Once again, the RAB provides only a terse conclusory argument. RAB 68-69.

First, Plaintiffs contend that fees were justified as a sanction for willfully concealing the Center case, and causing prejudice to Plaintiffs. Circumstances involving the Center case are discussed in detail above, and will not be repeated here, except to note the district court's rejection of Plaintiffs' argument that the alleged late disclosure of the Center case caused prejudice to Plaintiffs' ability to obtain information about the case. 14 A.App. 3121-22.

Plaintiffs' other conclusory arguments do not effectively rebut the AOB's arguments regarding the additional categories for the award. Arguments relating to these categories are also discussed earlier in this brief. The award of more than $800,000 in fee sanctions was an abuse of discretion and must be reversed.

CROSS-APPEAL ARGUMENT

Plaintiffs primarily rely on *McCrosky, supra,* to argue that NRS 41A.035 is a "double reduction" on Plaintiffs' non-economic damages. RAB 70. Plaintiffs contend preemption here is similar *McCrosky*. It is not. *McCrosky* dealt with NRS

42.021, which allows a medical malpractice award to be reduced by amounts paid by collateral sources, such as a plaintiff's health insurance. The statute also prohibits the collateral source entity from recovering reimbursement of expenses from the plaintiff.

As discussed above, the *McCrosky* plaintiff's medical bills had been paid by Medicare, which is a federally funded program. The court recognized that a federal statute allows the federal government to recover from a plaintiff the Medicare expenses paid to the plaintiff; but such recovery by a collateral source entity is prohibited by NRS 42.021(2). Because of the conflict between the federal and state laws, *McCrosky* held that federal law preempted the Nevada statute, NRS 42.021, which modifies our collateral source rule. Otherwise, the plaintiff would be the victim of a "double reduction," because if both laws applied, her award would be reduced by the amount of expenses paid by Medicare (as required by the Nevada statute), **and** she would need to reimburse Medicare for the same expenses (as required by federal law). *Id.* at 937, 408 P.3d at 155.

No similar concern is present regarding NRS 41A.035, which is the target of Plaintiffs' federal preemption attack. This statute caps non-economic damages, and it does not deal with the collateral source rule. There is no federal statute that conflicts with NRS 41A.035. Nor is there a federal law requiring a plaintiff to

reimburse the federal government for non-economic damages a plaintiff receives in a malpractice case. If the Nevada damages cap applies, there is no "double reduction" of damages, as Plaintiffs contend at RAB 71. ERISA is not implicated at all.

A search of state and federal case law by Dr. Rives's counsel has revealed no case where a state statutory non-economic damages cap was found preempted by ERISA, and Plaintiffs cite to none. This court, however, can undertake the analysis set forth in *Munda v. Summerlin Life & Health Ins. Co.* to determine that NRS 41A.035 is not preempted by ERISA.

ERISA preempts state laws that "relate to" any employee benefit plan. *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 924, 267 P.3d 771, 775 (2011). A state law "relates to" a covered employee benefit plan if it has a "reference to" or "connection" with the plan. *Id.* Traditional police powers such as health and safety, however, are generally not preempted by ERISA. *Id.* at 923, 267 P.3d at 774. In fact, "medical malpractice is one traditional field of state regulation that several circuits have concluded Congress did not intend to preempt." *Bui v. Am. Tel. & Tel. Co. Inc.*, 310 F.3d 1143, 1147 (9th Cir. 2002).

When a state law "acts immediately and exclusively upon ERISA plans ... or when the existence of ERISA plans is essential to the law's operation," then the state

law has reference to an employee benefit plan. *Munda*, 127 Nev. at 924, 267 P.3d at 775 (ellipses in original, internal citations omitted). Here, NRS 41A.035 does not act immediately or exclusively on ERISA plans, and the existence of an ERISA plan is not essential to the statute's operation. *Id.* (statute was not preempted by ERISA because it applied equally to all managed care organizations regardless of their ERISA status or relationship with any ERISA plan).

A law may also be preempted by ERISA if it has a "prohibited 'connection with' an ERISA plan." *Id.* This court examines four factors:

> (1) whether the state law regulates the types of benefits of ERISA employee welfare benefits plans; (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law; (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans; and (4) whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and employee.

Id. at 924, 267 P.3d at 775. The factors above do not support the conclusion that NRS 41A.035 has a "connection with" an employee benefit plan such that it is preempted by ERISA. The statute does not regulate the types of benefits a plan may offer; it does not require an establishment of a separate plan; it does not impose

reporting, disclosure, funding, or vesting requirements; and it does not impose regulations on the relationships between ERISA participants.

The claims in this case are for medical malpractice—they are not predicated on the administration or denial of plan benefits. *See Munda*, 127 Nev. at 925, 267 P.3d at 775 (noting that claims predicated upon state statute were preempted when managed care organization was acting solely as administrator or agent of ERISA plan). Rather, NRS 41A.035 is a medical malpractice statute that applies equally to all plaintiffs regardless of their insured or uninsured status, and regardless of whether they have self-funded or insurance-funded ERISA plans. NRS 41A.035 is a law of general applicability that does not depend upon ERISA and does not affect the relationship between ERISA participants. *See Bui*, 310 F.3d at 1148 (state medical malpractice standards are not preempted because "they do not mandate employee benefit structures or their administration, do not preclude uniform administrative practices, and do not provide alternative enforcement mechanisms for employees to obtain ERISA benefits."). ERISA is simply not implicated.

Finally, even if ERISA were somehow implicated, Plaintiffs have failed to demonstrate that Titina Farris's healthcare plan was a self-funded ERISA plan such that preemption should apply. Citing to an inapplicable federal district court case from New Mexico does not establish this fact. RAB 71. Plaintiffs have failed to

show how NRS 41A.035 operates as an "impermissible 'double reduction'" in this case. RAB 71. The cross-appeal should be affirmed.[18]

CONCLUSION

This court should reverse the judgment, remand for a new trial, and affirm Plaintiffs' cross-appeal.

Additionally, Judge Kishner heard inadmissible evidence, and she had obvious strong feelings against Dr. Rives and defense counsel Doyle, as reflected in her comments and rulings throughout the trial, including her sanctions orders. To ensure a fair trial, and to avoid an appearance of impropriety, the case should be assigned to a different judge for the new trial. *See Leven v. Wheatherstone Condominium Corp.*, 106 Nev. 307, 310, 791 P.2d 450, 451 (1990) (reassignment to different judge "because the district court judge has expressed herself in the premises"); *FCH1 v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014)

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[18] Plaintiffs' cross-appeal part of their brief devotes a mere one and one-half pages to their entire preemption argument. The cross-appeal brief fails to explain how ERISA would preempt NRS 41A.035. In their reply brief on the cross-appeal, Plaintiffs should not be permitted to expand upon their arguments or to introduce new case law and points not made in their initial brief.

(reassignment to different judge where first judge heard inadmissible evidence and formed/expressed opinions).

DATED: March 26, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting, typestyle and typeface requirements of NRAP 32, because this brief is double-spaced and it has been prepared in Times New Roman in 14-point font size.

I further certify that this brief complies with the word-count limitation of NRAP 28.1(e)(2) dealing with cross-appeals [14,000 word limit for combined reply/answering brief], because it contains 13,937 words.

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume numbers, 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: March 26, 2021

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CERTIFICATE OF SERVICE

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date the foregoing ***Appellants'/Cross-Respondents' Reply Brief on Appeal and Answering Brief on Cross-Appeal*** 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
Aimee Clark Newberry
Tara Clark Newberry
Kimball Jones
Jacob Leavitt
Micah Echols
Thomas Doyle

DATED: March 26, 2021.

Yelia Geppert

Employee of LEMONS, GRUNDY & EISENBERG