IN THE SUPREME COURT OF THE STATE OF NEVADA

DARELL L. MOORE; AND CHARLENE A. MOORE, INDIVIDUALLY AND AS HUSBAND AND WIFE, Appellant, vs. JASON LARSY, M.D., INDIVIDUAL; AND TERRY BARTMUS, RN, APRN Respondents	)	Electronically Filed Jul 21 2021 04:51 p.m. Elizabeth A. Brown Clerk of Supreme Court Case No. 81659 District Court Reference: A766426

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable Kathleen E. Delaney, District Judge
District Court Case No.: A-17-766426-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

In accordance with Nevada Rule of Appellate Procedure 26.1, the undersigned counsel of record for Appellant Darell Moore and Charlene Moore certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

In addition, the following is a list of the names of all law firms whose partners or associates have appeared for the party in the case, including proceedings in District Court:

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(2). The District Court denied the request from Darell L. Moore and Charlene A. Moore for a new trial. The Order was filed on 7/15/2020 with the Notice of Entry of Order filed and served the next day on 7/16/2020. The Notice of Appeal was filed on 8/14/2020.

APPELLANT'S STATEMENT REGARDING ROUTING

Pursuant to NRAP 28(a)(5), Appellants Darell Moore and Charlene Moore state that this matter is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(5). This matter is on appeal from a judgment of less than $250,000.00 in a medical malpractice case which is a form of tort case. Appellants further believe that this appeal will be resolved by well settled precedent.

However, if a new trial is granted, Appellants respectfully reserve the right to seek a judgment greater than $250,000.00.

ISSUES PRESENTED

1. Whether the District Court erred in deny a motion for a new trial when the District Court committed evidentiary errors which prejudiced the Plaintiff.

STATEMENT OF THE CASE

This is a medical malpractice case. Plaintiffs-Appellants the Moores brought suit alleging that Defendants-Respondents failed to treat Mr. Moore's ischemic leg appropriately. Days after Mr. Moore was seen by the Defendants at the emergency room, he was forced to return to the emergency room as his symptoms grew worse. Ultimately, due to the delay, other doctors were forced to amputate Mr. Moore's leg above the knee.

During the jury trial, the District Court allowed counsel for Defendant Bartmus to extensively question the Moores' expert witness on liability based upon an article which was not disclosed or provided at trial despite objections. This article and this line of questioning were used for impeachment of the expert witness. The District Court also declined to allow the treating physician to testify for the Plaintiffs.

The jury found for the Defendants. The Moores moved for a new trial on the basis of improper evidentiary decisions by the District Court which prejudiced the Plaintiffs. The District Court denied the motion, acknowledging that one of the evidentiary decisions may have been improper but finding the error was not sufficient to justify a new trial. This appeal followed.

STATEMENT OF FACTS

I. Factual Background

This case centers on medical malpractice. Plaintiff Darell Moore came to St. Rose Dominican Hospital's Emergency department on Christmas, December 25, 2016. **Vol. I, AA00146.** He was complaining of intense pain in his left calf. *Id.* There, he was seen by Dr. Jason Lasry and Nurse Practitioner Terry Bartmus. *Id.* The fact that Mr. Moore had previously had a femoral or popliteal artery bypass was documented. *Id.*

Dr. Lasry and Ms. Bartmus ordered a venous duplex ultrasound to determine if deep vein thrombosis (DVT) could be the cause of the problems. *See id.* While the ultrasound demonstrated no venous occlusion, it did show occlusion of the left femoral-popliteal arterial bypass graph. *Id.* Despite the ultrasound and despite Mr. Moore's known history of having had an artery bypass in 2014, the differential diagnosis did not include arterial occlusion. *Id.* Mr. Moore was discharged without further immediate treatment or diagnostic with aftercare instructions on pain and hypertension. *Id.*

Shortly thereafter, on December 28, 2016, Mr. Moore returned to the Emergency Department at St. Rose Dominican. *Id.* He again complained of persistent and increasing pain in his left leg. *Id.* The treating physician had an arterial duplex ultrasound performed. *Id.* The ultrasound again showed occlusion of the left

leg graft vasculature. *Id.* Based on this it was determined that he had an ischemic lower extremity. *Id.*[1] This time the treating physicians took immediate action to provide care including admitting him into the ICU. *Id.* However, his leg was too ischemic and it was determined that he required an above the knee amputation of the leg. *Id.*

II. Relevant Procedural Background

This case began on December 18, 2017 when the Moores filed their complaint. **Vol. I, AA00001.** The Moores filed an amended complaint shortly thereafter on December 20, 2017. **Vol. I, AA000025.** The Moores filed a second amended complaint on October 29, 2019. **Vol. I, AA00134.** The complaint enumerated six causes of action, but the gravamen of the case centered on the medical malpractice of Dr. Lasry and Ms. Bartmus. *See* **Vol. I, AA00134 – 143.** The Moores, as Plaintiffs, presented evidence that Dr. Lasry and Ms. Bartmus failed to diagnose and property treat Mr. Moore's ischemic leg. *See e.g* **Vol. I, AA000145 – 149.** The Moores further presented evidence that had Dr. Lasry or Ms. Bartmus properly diagnosed and treated Mr. Moore's ischemic leg, Mr. Moore almost certainly would not have needed an above the knee amputation. *See e.g. id.* The matter was brought to a jury trial which began on January 27, 2020. **Vol. VII, AA00842.**

[1] Ischemic means that there is a deficient supply of blood. *Ischemia*, Merriam Webster (Online Edition, 2021)

A. Plaintiffs' expert was questioned about an article that had not been produced.

At trial, the Moores as Plaintiffs presented Dr. Alexander Marmureanu as their expert witness as to liability. *See e.g.* **Vol. IV, AA00461.** Counsel for Nurse Practitioner Terri Bartmus attempted to discredit Dr. Marmureanu by questioning him about a magazine article dealing with deaths after certain cardiovascular procedures. **Vol. IV, AA00487 – AA00497.**[2] Counsel for Plaintiffs promptly objected to this line of questioning, noting in open court the failure to lay a proper foundation. **Vol. IV, A00489.**

The Court held a bench conference and the details of the bench conference do not appear in the trial transcript. ***Id.*** During the bench conference, Plaintiffs' Counsel elaborated on the objection **Vol. VI, AA00795 – AA00796.** Plaintiffs' Counsel objected based on the fact that the article in question was not produced during discovery. *Id.* at ¶4. Plaintiffs' Counsel also objected that a proper foundation had not been laid. *Id.* A further objection was lodged that the evidence was not appropriate because it designed to impeach the reputation of the witness. *Id.* Finally, Plaintiffs' Counsel objected on relevance. *Id.* The objections were overruled and questioning about the article was allowed to continue. **Vol. IV, AA00489.** The Court

[2] The citation to the record in Vol. V is to exhibits to the Plaintiff's Motion for New Trial. This motion is at the heart of the appeal. The trial transcript for that day is located at Vol. XI, AA01379.

very briefly made a record regarding the bench conference out of the hearing of the jury. **Vol. IV, AA00522 – AA00524.** The Court found that despite the objections the line of questioning was allowable so long as the counsel had a "good faith belief to ask the question". **Vol. IV, AA00523.**

There were multiple requests for the report in question to be produced or at least shown to Dr. Marmureanu, but Defense counsel was unable to provide it during the questioning. *See e.g.* **Vol. VI, AA00796** (trial counsel's declaration regarding events); **Vol. IV, AA00487 – AA00489** (multiple requests to show the article, without the article being produced). When the article was made available, it became clear that counsel for Ms. Bartmus had not accurately stated the contents of the articles. In particular, Ms. Bartmus' counsel repeatedly stated or suggested that Dr. Marmureanu was one of the "worst" cardiovascular surgeons in California. **Vol. IV, AA00490.** The article in question never used the word "worst" and Ms. Bartmus' counsel has never identified any other authority suggesting that Dr. Marmureanu was among the "worst". *See* **Vol. IV, AA0045.**[3]

[3] The article does note that Dr. Marmureanu had a higher than average mortality rate along with a statement from Dr. Marmureanu that he takes some of the most complicated cases in town. *Id.* In other words, no reasonable reading of the article could even be used to imply that he was among the "worst".

B. Plaintiffs were not permitted to produce the primary care physician as a witness.

During the trial, the Plaintiffs wished to call Dr. Wiencek as a witness. *See* **Vol. V, AA00655.**[4] The District Court declined to allow Dr. Wiencek to testify citing claims that he had been noticed as a witness too late during the trial. **Vol. V, AA00654 – 655.** However, at the same time, the Court also accepted representations that Dr. Wiencek had been listed as a possible witness on the pretrial disclosures and that the Court had been copied on emails noting Dr. Wiencek was available and that the Plaintiffs intended to call him on the day in question. *Id.* (discussing the emails); *see also* **Vol. V, AA00647** (discussing pretrial disclosures).[5] Dr. Wiencek was Mr. Moore's physician and had been discussed in great detail at the trial prior to this decision. *See* **Vol. V, AA00652 – AA00653** (noting that Dr. Wiencek was discussed prior to the decision on whether or not he could testify.)

C. The jury found in favor of the Defendants and Plaintiff filed a motion for a new trial.

At the conclusion of the trial, the jury returned a verdict in favor of Defendants Dr. Jason Lasry and Terry Bartmus. **Vol. III, AA0430.** The Plaintiffs promptly filed

[4] The citation to the record is to documents produced as part of Defendant's Opposition to the Motion for New Trial. The trial transcripts for that day are in the appendix starting at **Vol. XVII, AA02609.**

[5] *See also* **Vol. VI, AA00806** (discovery disclosure attached as exhibit showing that Dr. Wiencek was listed); **Vol. III, AA00242, ¶ 20** (listing Dr. Wiencek as a potential witness in the pretrial disclosures).

a motion for a new trial. **Vol. IV, AA00436.** The motion focused on the questioning of Dr. Marmureanu and the decision not to allow Dr. Wiencek to testify. **Vol. IV, AA00437 – 438.** The District Court concluded that it did not error in precluding Dr. Wiencek from testifying. **Vol. VI, AA00836.** The District Court noted that it may have erred in allowing the use of the article for the purposes of impeaching Dr. Marmureanu. *Id.* However, the District Court concluded that any such error did "not substantially prejudice Plaintiffs in their right to a fair trial." *Id.* The District Court therefore denied the request for a new trial.

SUMMARY OF ARGUMENT

It is proper to order a new trial when there are errors regarding the admission of evidence which substantially affect the right of one of the parties. *Hallmark v. Eldridge,* 124 Nev. 492, 505, 189 P.3d 646, 654 (2008). Here, the District Court made two errors in its decisions regarding the admission of evidence which substantially affected the rights of the Moores.

Most significantly, the District Court allowed the counsel for Ms. Bartmus to extensively question the Moores' expert witness regarding an article that went only to the expert witness' reputation. **Vol. IV, AA00487 – AA00497.** This questioning was based on an article which was neither disclosed during discovery nor presented during trial. **Vol. VI, AA00795 – AA00796.** The questioning also implied factual allegations which were not supported by the article. Allowing this line of

questioning essentially introduced a version of the article, filtered through Defense Counsel, to the jury. The use of the undisclosed article this way surprised the Moores and prejudiced them by not allowing them a proper opportunity to respond. *Sanders v. Sears-Page*, 131 Nev. 500, 517, 354 P.3d 201, 212 (Nev. Ct. App. 2015). This attack on the reputation of the Moores' most important witness prejudiced the jury and can best be cured through an order for a new trial.

Additionally, the District Court declined to allow the Moores to call Dr. Wiencek as a witness. **Vol. V, AA00654 – 655.** The District Court's reasoning centered on a finding that the Moores had not adequately disclosed their intention to call Dr. Wiencek. *Id.* However, the Moores had disclosed Dr. Wiencek as a possible witness during discovery and in their pretrial disclosures. **Vol. VI, AA00806**; **Vol. III, AA00242, ¶ 20**. Moreover, any perceived failure to disclose the exact time he would be called was both harmless and substantially justified since all parties were aware of the significance of Dr. Wiencek and the Moores provided as much notice as they reasonably could under the circumstances. **Vol. V, AA00654 – 655.** Thus, it was reversible error to prevent the Moores from calling a significant witness. Moreover, under these circumstances, declining to allow the treating physician to testify compounded the error of improperly allowing impeachment evidence against the Plaintiffs' expert.

Under these circumstances, the law and policy require that this matter be remanded for a new trial on the merits untainted by significant and prejudicial evidentiary errors.

ARGUMENT

I. Standard of Review

Appellate Courts review requests for a motion for a new trial under an abuse of discretion standard. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009). A new trial may be granted for several reasons, including "irregularity in the proceedings of the court…by which either party was prevented from having a fair trial." NRCP 59(a)(1)(A). A new trial may also be granted whenever there is "accident or surprise that ordinary prudence could not have guarded against". NRCP 59(a)(1)(C). Appellate Courts review claims of prejudice regarding errors in the admission of evidence based upon whether the error substantially affect the rights of the party. *Hallmark v. Eldridge,* 124 Nev. 492, 505, 189 P.3d 646, 654 (2008). A new trial should be ordered when a decision regarding evidence was made incorrectly in a way that prejudices a party's right to a fair trial which can only be cured by a new trial. *Hallmark,* 124 Nev. at 506; *Bass-Davis v. Davis*, 122 Nev. 442, 454, 134 P.3d 103, 110-11 (2006).[6]

[6] *See also Proctor v. Castelletti,* 112 Nev. 88, 91, 911 P.2d 853, 854 (1996)

II. A new trial should have been granted because Plaintiffs were improperly prejudiced by the questioning of the expert witness with an article that was not produced during discovery.

In a case dealing with medical malpractice, the testimony and reputation of a party's expert witness is of paramount importance. NRS 41A.100(1) (requiring expert medical testimony to establish liability for negligence against a provider of health care with narrow exceptions not relevant here); *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992) ("This court has recognized the general rule that expert testimony must be used to establish medical malpractice,…"). In this case, Dr. Marmureanu was the Plaintiffs' sole expert witness on liability in a medical malpractice claim. *See* **Vol. IV, AA00445.**

During cross examination, the counsel for one of the Defendants spent an extended period of time attempting to discredit this vital witness by questioning Dr. Marmureanu about the contents of an article that was not in evidence and in fact had not even been disclosed during discovery. *See e.g.* **Vol. IV, AA00487 – AA00497** (the questioning on the topic)**. Vol. VI, AA00795 – AA00796** (declaration of counsel discussing objections made). This line of questioning was an attempt to impeach the Plaintiffs' expert witness whose testimony formed the linchpin of the case. *See* **Vol. VI, AA00836** (noting that the Court says the questioning was for impeachment). Plaintiffs' counsel objected to the line of questioning at the time but was overruled. **Vol. IV, AA00489.**

Significantly, in this line of questioning, Counsel for Ms. Bartmus repeatedly suggested that the article made statements that the article did not, in fact, make. Ms. Bartmus' Counsel asked "In 2017, the State of California declared that you are one of the seven worst cardiovascular surgeons in the entire state out of hundreds; correct?" **Vol. IV, AA00487, 1 – 5.** The article does not support that claim. *See* **Vol. IV, AA00451 – AA00456.** While the article does state that Dr. Marmureanu was a surgeon with an above average death rate after certain procedures, it never uses the word "worst" and it provides significant context for that statement *Id.* Specifically, it notes that public reporting of the kind the article was discussing may convince doctors to turn away difficult cases. *Id.* at AA00455. The article notes that Dr. Marmureanu self identifies as a surgeon that takes some of the most complicated cases in town. *Id.* at AA00456.

Counsel for Ms. Bartmus also asked "And I would also be wrong if you told a reporter for Kaiser News that, in effect, hospital patients don't care if they're, in your case, nine times more likely to die under your care?" **Vol. IV, A00488.** Again, the article does not state that. The article does note that Dr. Marmureanu said that hospital patients do not care about the report, but that in no way implies that patients were more likely to die under his care than that of other doctors or that patients do not care about the odds of their own survival. **Vol. IV, AA00456.**

As discussed below, allowing this line of questioning constituted an error by the District Court in several independent ways, but most significantly it was trial by ambush. The article in question was never produced in discovery. **Vol. VI, AA00795 – 796.** Nor was it produced in the courtroom despite the fact Dr. Marmureanu asked to see the referenced documents. *See e.g.* **Vol. IV, AA00761.**

This left Defense Counsel free to provide insinuations about the contents of the referenced articles without providing either Dr. Marmureanu or Plaintiffs' counsel a fair and reasonable opportunity to respond. Had the article been available, Plaintiffs could have easily shown that the insinuations of Mr. Barmus' counsel were false and preserved the expert witness' reputation before the jury. Since that was not possible, the jury was almost certainly prejudiced by the insinuations of defense counsel. When a jury is prejudiced by an evidentiary error such that a different result might reasonably have been expected but for the error, a new trial is appropriate. *Bass-Davis v. Davis,* 122 Nev. 442, 454, 134 P.3d 103, 110-11 (2006).[7]

A. The evidence should not have been admitted because it was not properly disclosed.

The article in question was not disclosed prior to trial. **Vol. VI, AA00795 – 796.** The Rules of Civil Procedure requires a party to produce, without waiting for a

[7] *Las Vegas Paving Corp. v. Coleman*, No. 66242, *7, 2016 Nev. App. Unpub. LEXIS 9, *7 (Nev. 2016) (unpublished disposition)

discovery request "copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, including for impeachment or rebuttal." NRCP 16.1(a)(1)(A)(ii). The policy behind this requirement is to "place all parties on an even playing field and to prevent trial by ambush or unfair surprise." *Sanders v. Sears-Page*, 131 Nev. 500, 517, 354 P.3d 201, 212 (Nev. Ct. App. 2015).[8]

When a document is not properly disclosed, a court should not permit the document to be introduced at trial "unless the failure was substantially justified or is harmless." NRCP 37(c)(1). Here, there was no justification for the failure. The Defense Counsel could easily have disclosed the document but did not do so. The Defense Counsel did not even bring the document to trial. Nor did anything hinder Defense Counsel from locating the document until the last minute. In fact, Defense counsel made a point of stating before the jury that the report was "all online for the world to see…". **Vol. IV, AA00494, ll. 15 – 21.**

Nor was the lack of disclosure harmless. Had the referenced article been disclosed during discovery, Plaintiffs' counsel could have prepared a proper rehabilitation or even considered whether additional experts were necessary. Since

[8] *Sanders* discusses NRCP 16.1(a)(2), but the policy basis is the same.

there are additional reasons to exclude the article, as discussed below, Plaintiff's counsel could have sought to have it excluded through a motion in limine based on the contents of the article. Instead, Plaintiffs' counsel was forced to respond to an attack on a key witness with no way of anticipating it ahead of time.

Ms. Bartmus' counsel did not even bring the document to court which would have allowed Plaintiffs' counsel to at least show the jury that many of the insinuations made by Ms. Bartmus' counsel were not supported by the document. This compounded the harm done by failing to disclose the document.

The Plaintiffs' expert was a necessary witness and arguably the most important witness in this medical malpractice case. *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992). Here, Ms. Bartmus' counsel was allowed to impugn the Plaintiffs' expert based on an undisclosed document. This is clear prejudice to the Plaintiffs and thus justifies a new trial. *Las Vegas Paving Corp. v. Coleman*, No. 66242, *7, 2016 Nev. App. Unpub. LEXIS 9, *7 (Nev. 2016) (unpublished disposition) (upholding an order for new trial when testimony was improperly admitted).

Respondents may attempt to argue, as they did before the District Court, that disclosure was not required. They may attempt to argue that only documents "concerning the incident that gives rise to the lawsuit…" are required for disclosure. **Vol. V, AA00556.** However, that is not supported by the plain language of the rule

or by policy. Under the plain language of the rule, the quoted section "concerning the incident that gives rise to the lawsuit" modifies and applies to the portion requiring disclosure of "any record, report, or witness statement, in any form…" NRCP 16.1(a)(1)(A)(ii). The words "concerning the incident that gives rise to the lawsuit" do not apply to the disclosure of documents that would be used for impeachment which are addressed earlier. *Id.* The only way to read the rule that limits the disclosure to documents "concerning the incident that gives rise to the lawsuit" is to cut out a large and important part of the quote as Ms. Bartmus' counsel did in their Opposition. **Vol. V, AA00556, ll. 15 – 17.** Furthermore, the reading of the rule that Ms. Bartmus' counsel wishes to propose would be contrary to policy since it would allow surprise impeachment and allow trial by ambush. *Sanders,* 131 Nev. at 517, 354 P.3d at 212.

Because it was plain error to allow this line of testimony based upon an undisclosed document and the plain error prejudiced the Plaintiffs, a new trial should be granted.

B. The evidence should have been precluded by NRS 50.085.

Nevada law does not allow evidence of reputation to be used to show truthfulness or untruthfulness. NRS 50.085(1) – (2). The statute says directly, "Evidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible.". *Id.* at (2) Here, the District Court acknowledged that the discussion

of the article was an attempt to impeach the witness. **Vol. VI, AA00830, ll. 7 – 12** ("…the Court finds that it may have erred in allowing the impeachment of Dr. Marmureanu using the article…")**.** Since the discussion of the article was an improper attempt to impeach a witness using collateral matters, it constitutes error. *McKee v. State*, 112 Nev. 642, 646, 917 P.2d 940, 943 (1996) ("It is error to allow the State to impeach a defendant's credibility with extrinsic evidence relating to a collateral matter.").[9]

Here, this error prejudiced the Plaintiff by improperly impugning the reputation of a key witness. Therefore, a new trial is appropriate.

C. Ms. Bartmus' counsel failed to lay a proper foundation.

By allowing the line of questioning the way it did, the District Court essentially allowed Ms. Bartmus' counsel to present to the jury a skewed version of an article. *See* **Vol. IV, AA00487 – AA00497** (the questioning on the topic)**.** However, evidence should not be admitted unless it is relevant and authenticated. NRS 52.015 (discussing authentication); NRS 48.025 (discussing relevance).

Here, Ms. Bartmus' counsel never provided a foundation to show authenticity. *See* **Vol. IV, AA00487 – AA00497.** He never provided anything to show that the referenced article actually existed, much less that it was from a reliable source. *Id.*

[9] *McKee* deals with a criminal matter, but it centers on interpretation of NRS 50.085 which is a generally applicable law regarding evidence and witnesses.

He failed to even provide a full title for the article until after the cross examination was complete. *Id.* He failed to lay this foundation and show authenticity even though Plaintiffs' counsel's first objection on the record dealt with foundation and even though the witness directly asked, more than once, to see the article. *Id.*

Since Ms. Bartmus' counsel was not able to lay a foundation, he should not have been allowed to introduce the contents of the article to the jury, much less to do so in a skewed fashion and without providing the whole article. This prejudiced Plaintiffs because they were forced to try to respond to claims in an article with little knowledge of the article's origin or accuracy.

Thus, since Plaintiff was prejudiced by a clear error in the improper admission of evidence, a new trial should be granted. *Las Vegas Paving Corp. v. Coleman*, No. 66242, *7, 2016 Nev. App. Unpub. LEXIS 9, *7 (Nev. 2016) (unpublished disposition)

III. A new trial should have been granted because Plaintiffs were denied the opportunity to question a significant witness.

The District Court declined to allow Dr. Wiencek to testify. **Vol. V, AA00654 – 655.** The District Court based this reasoning on a failure to fully disclose that Dr. Wiencek would testify. *Id.*

However, Plaintiffs listed Dr. Wiencek as a potential witness during discovery and as part of the pretrial disclosures. **Vol. VI, AA00806** (discovery disclosure

attached as exhibit showing that Dr. Wiencek was listed); **Vol. III, AA00242, ¶ 20** (listing Dr. Wiencek as a potential witness in the pretrial disclosures). There was therefore adequate notice before the trial that Dr. Wiencek was a potential witness.

Respondents may point out that the listing states "Custodian of Records and/or Person Most Knowledgeable" for Dr. Wiencek. **Vol. III, AA00242, ¶ 20.** However, this was still actual notice in the pre-trial disclosures that Dr. Wiencek was a possible witness.

Respondents may also allege that they were entitled to notice as to when in the trial Dr. Wiencek would appear. Even assuming that they were entitled to such notice, Plaintiffs' counsel sent notice of the intention to call Dr. Wiencek as soon as it was confirmed that Dr. Wiencek would be available to testify. **Vol. V, AA00654 – 655.** This was both as soon as Plaintiffs' counsel was able to send the notice and reasonably adequate since the notice was provided nearly a full day before Dr. Wiencek was to be called. *See id.*

Furthermore, even assuming purely for the sake of argument, that The Moores' counsel failed to provide adequate notice, such failure was harmless and substantially justified. NRCP 37(c)(1) (noting that undisclosed witnesses may be allowed if the failure to disclose was substantially justified or harmless). The Defendants were aware of the significance for Dr. Wiencek to the case. *See* **Vol. V, AA00653** (discussing the significance of Dr. Wiencek to the events of the case).

They could not reasonably have been surprised that he might have been a witness if he were available and thus any technical failure was harmless. Any hypothetical failure to inform early enough was also substantially justified since it was caused by questions about Dr. Wiencek's availability. **Vol. V, AA00643.**

It was therefore clear error and prejudicial to Plaintiffs to deny an opportunity for Dr. Wiencek to testify. This is particularly true in light of the attack on the expert witness' testimony. In particular, Dr. Wiencek was in the best position to testify as to the status of Mr. Moores and pulses and whether they were palpable, which was a significant issue in the malpractice case. Testimony from the treating physician could have addressed some of the harm done by the improper assault on the expert witness' reputation. Thus, this error justifies a new trial, especially when combined with the error in allowing the improper discussion of the article. Accordingly, this Court should remand with instructions to hold a new trial.

IV. Conclusion

The District Court committed reversible error by prejudicing the Plaintiffs during the trial through two separate errors regarding evidentiary matters. The District Court erred in allowing improper questioning of the Plaintiffs' expert witness. This improper questioning should not have been allowed at all and it was made worse by the fact that the Defense Counsel improperly stated the contents of the article that Defense Counsel was referencing before the jury. In a medical

malpractice case such as this one, the expert witness and the weight given to the expert by the jury is paramount. There is a significant likelihood that a jury would have found differently had this line of questioning not improperly tainted their perception of the expert witness. Therefore, even without anything more, this matter should be remanded to allow for a new trial without prejudicial errors.

However, the District Court erred again by excluding the testimony of Mr. Moore's primary treating physician without justification. The testimony of the treating physician almost certainly would have leant weight to the conclusions of the expert. Had the treating physician been able to testify, the jury almost certainly would have come to a different outcome. Again, this error by itself would have justified a new trial.

Thus, justice requires that this matter be remanded for a new trial.

Dated this 21st day of July, 2021.

E. BREEN ARNTZ, CHTD.

By: */s/ E. Breen Arntz*
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CERTIFICATE OF COMPLIANCE WITH RULE 28.2

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 of style requirements of NRAP 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

2. I further certify that this Brief complies with the page or type-volume limitations of NRAP 32(a)(7), excluding the parts of the Brief exempted by NRAP 32(a)(7)(C), as it contains 4688 words.

. . .

. . .

. . .

3. Finally, I hereby certify that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page 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 sanction in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of July, 2021.

E. BREEN ARNTZ, CHTD.

By: */s/ E. Breen Arntz*
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I certify that I am an employee of E. Breen Arntz, Chtd. and that on this 21st day of July, 2021, I served a true and correct copy of the foregoing Appellant's Opening Brief as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be sent via facsimile (as a courtesy only); and/or
- ☐ to be hand-delivered to the attorneys at the address listed below:
- x to be submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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