IN THE SUPREME COURT OF THE STATE OF NEVADA

DARELL L. MOORE; AND CHARLENE A. MOORE, INDIVIDUALLY AND AS HUSBAND AND WIFE, Appellants, vs. JASON LARSY, M.D., AN INDIVIDUAL; AND TERRY BARTMUS, RN, APRN, Respondents.	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

APPELLANTS' REPLY BRIEF

E. Breen Arntz, Esq.
Nevada Bar No. 3853
Breen@breen.com
Phone: 702-494-4800
Fax: 702-446-8164
Attorneys for Appellants

NRAP 26.1 DISCLOSURE STATEMENT

In accordance with Nevada Rule of Appellate Procedure 26.1, the undersigned counsel of record for Appellants Darrell 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:

Atkinson Watkins & Hoffmann LLP

E. Breen Arntz, Chtd.

Morris Law Center

By: */s/: E. Breen Arntz*
E. Breen Arntz, Esq.
Nevada Bar No. 3853
Breen@breen.com
Attorneys for Appellants

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I. The District Court erred because it allowed cross-examination based on evidence that had not been properly disclosed prior to trial, was precluded by statute, and was not supported by proper foundation at trial.

A. The Moores did not waive any objections.

The Respondents correctly note that an Appellant may waive an argument, including arguments relating to objections, by failing to timely raise the argument before the Trial Court. *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 137, 252 P.3d 649, 659 (2011); *See* **Ans. Br. at p. 13.** However, this general rule is inapposite when the objections were timely raised, and here the record clearly shows that the objections were raised. *See e.g.* **Vol. IV, AA00795 – AA00796.** Moreover, the general rule that an argument must be preserved before the Trial Court is based on policy, and here policy supports considering these arguments on appeal even if, *arguendo,* they were not adequately raised before the Trial Court. *United States v. Brunner*, 726 F.3d 299, 304 (2d Cir. 2013).

1. All objections raised on appeal were raised before the Trial Court.

The Respondents urge that the record does not reflect the objections to cross examination based on the magazine article on the grounds that it was not properly disclosed or that it was improper reputational evidence. But the record often does not include all of the details of discussion of a bench conference held during a Jury

Trial, and here a Declaration from a licensed attorney shows that all relevant objections were raised during the bench conference. **Vol. IV, AA00795 – AA00796.** A trial attorney is obligated to raise the objections, but the trial attorney is not obligated to try to force objections raised during a bench conference to appear on the transcript.

Accordingly, all relevant arguments were preserved for consideration on appeal and the Respondents claim that arguments were waived should be disregarded.

2. Even if, hypothetically, the objections regarding the failure to disclose and the fact that the article constituted improper reputational evidence were not properly preserved, policy supports their consideration here.

The general rule that a matter not properly urged before the District Court is waived on appeal is based on policy and is discretionary. *United States v. Brunner*, 726 F.3d 299, 304 (2d Cir. 2013).[1] As discussed above, the Appellants preserved all

[1] "Even assuming that the government failed to raise the argument below, the rule against considering arguments raised for the first time on appeal "is prudential, not jurisdictional," and we are free to exercise our "discretion to consider waived arguments." *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004). Exercise of that discretion is particularly appropriate where an argument presents a question of law and does not require additional fact finding. *Id*."

arguments raised on appeal before the Trial Court, but even if hypothetically they did not, policy in this instance supports considering the arguments here nonetheless.

The policy purpose behind the rule requiring an objection to be made contemporaneously is twofold. *Bayerische Motoren Werke Aktiengesellschaft,* 127 Nev. at 136 – 137. First and primarily, it is meant to conserve judicial resources by providing the Trial Court an opportunity to either avoid or cure error. *Id.* Second, it prevents trial counsel from sitting silently and hoping to use the error to force a new trial if they were to lose. *Id.* Here, even if it were assumed for the sake of argument that the Appellants did not raise objections regarding the fact the magazine article was not disclosed and that it was improper reputational evidence, the Appellants did raise an objection in open Court regarding the failure to lay a foundation. **Vol. IV, A00489.** Accordingly, even under this hypothetical, the policy objectives of requiring an argument to be preserved before the District Court has been met since the District Court had an opportunity to correct the error, and the Appellants did not sit silently as it occurred. Furthermore, these arguments are purely questions of law and do not turn on fact finding, and it is particularly appropriate for an Appellate Court to use their discretion to consider arguments like that even if they might otherwise have been waived. *Brunner,* 726 F.3d at 304. Therefore, policy weighs in favor of considering these arguments even if they might hypothetically have otherwise been waived.

Separately, a Court will consider an argument that might otherwise have been waived if it highlights plain error. *Turner v. State*, 473 P.3d 438, 446 (Nev. 2020); *Lioce v. Cohen*, 124 Nev. 1, 16-17, 174 P.3d 970, 980 (2008). As discussed further below, allowing the use of an article not disclosed during discovery for purposes of impeaching the reputation of an expert witness goes beyond a mere abuse of discretion and constitutes Plain Error.[2] Accordingly, even if hypothetically, that argument had not been adequately raised before the District Court, it would still be appropriate to consider now whether it merited reversal under a plain error standard.

B. There is an explicit requirement to disclose impeachment evidence, and the failure in this case prejudiced Appellants.

The Respondents argue that there is no requirement to disclose impeachment evidence prior to trial. They rest this on an unusual reading of NRCP 16.1(a)(1)(A)(ii). The operative text of that rule is **"In General"**. Except as exempted by Rule 16.1(a)(1)(B), or as otherwise stipulated or ordered by the Court, a party must, without awaiting a discovery request, provide to the other parties: "(ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in

[2] The fact that this error by the District Court constituted Plain Error and was not merely an abuse of discretion was raised in the Opening Brief on page 15 towards the end of section II(A). However, since the argument was properly preserved as discussed above, it should be decided on the lower abuse of discretion standard.

its possession, custody, or control and may use to support its claims or defenses, including for impeachment or rebuttal, and, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, concerning the incident that gives rise to the lawsuit;".

The Respondents trim the text from the rule in an attempt to obscure its meaning and support the reading they wish this Court to use in considering their argument. **Ans. Br. p. 14.** However, when the entire rule is read, it is clear that, with some exceptions not applicable here, a party is required to provide to the other parties a copy of all documents that the party has in its possession which may be used to support its claims or defenses including for impeachment or rebuttal. NRCP 16.1(a)(1)(A)(ii). The Respondents attempt to limit the rule to documents "concerning the incident that give rise to the lawsuit". **Ans. Br. p. 14.** However, when the entire rule is read rather than being overly trimmed, it is clear that the clause "concerning the incidents that give rise to the lawsuit" is meant to modify and limit the requirement to provide "any record, report or witness statement" and does not limit the requirement to produce a copy of documents, electronically stored information, and things that are related to a claim or defense including for impeachment purposes.

Since the language of the rule is clear so long as the entire Rule is read together, there is no need to inquire further. *Beazer Homes Nev., Inc. v. Eighth*

Judicial Dist. Court, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004).[3] Nonetheless, to the extent this Court may nonetheless wish to consider outside materials, the outside materials support a broad reading of what is required in a disclosure rather than the very specific and narrow reading the respondents urge. The Respondents attempt to rely on the Advisory Committee Notes to the 2019 amendments. P. 15. However, the Advisory Committee notes actually say:

> Rule 16.1(a)(1)(A)(ii) incorporates language from the federal rule requiring that a party disclose materials that it may use to support its claims or defenses. However, the disclosure requirement also includes any record, report, or witness statement in any form, including audio or audiovisual form, concerning the incident that gives rise to the lawsuit. The initial disclosure requirement of a "record" or "report" under Rule 16.1(a)(1)(A)(ii) includes but is not limited to: incident reports, records, logs and summaries, maintenance records, former repair and inspection records and receipts, sweep logs, and any written summaries of such documents. Documents identified or produced under Rule 16.1(a)(1)(A)(ii) should include those that are prepared or exist at or near the time of the subject incident. *Advisory Committee Note – 2019 Amendments,* P. 87

In other words, these comments help make clear that the language "concerning the incident that gives rise to the lawsuit" relates only to records concerning the incident. The comments also refer to the related federal rule and note that the disclosure requirement under the Nevada rule is broader and includes items that might not be included under the related federal rule. The related federal rule is FRCP

[3] "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning."

26(1)(A)(ii).[4] The contrast is clearly significant here. FRCP 26(1)(A)(ii) contains an exception for evidence that would solely be used for impeachment while the Nevada Rules contain the opposite language and clearly state that the evidence to be disclosed include evidence "for impeachment or rebuttal." NRCP 16.1(a)(1)(A)(ii).

Nor does NRCP 37(c)(1) help the Respondents' argument. The Respondents argue that sanctions are not appropriate because the magazine article was not offered to "supply evidence" and was not entered into evidence. However, the transcript shows that this was clearly an effort by Respondent Bartmus' counsel to use the information to impeach a witness. **Vol. IV, AA00487 – AA00497.**[5] Evidence is defined broadly and includes anything which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probably than it would be without the evidence." NRS 48.015. While questioning by itself may not be evidence, this was clearly an attempt to place in the minds of the Jury the existence of facts of consequence to the case and using the

[4] "(ii) a 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, unless the use would be solely for impeachment;"

[5] The citation to the record in Vol. V is two exhibits to the Plaintiffs' 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.

article in that way is forbidden without previously disclosing the article. NRCP 37(c)(1).[6]

Moreover, allowing use of the article without having previously disclosed it is Trial by Ambush. The rules are intended to prevent Trial by Ambush or Unfair Surprise and should be interpreted in that way. *Sanders v. Sears-Page*, 131 Nev. 500, 517, 354 P.3d 201, 212 (Nev. Ct. App. 2015). The fact that the District Court allowed this questioning of a key witness in this way before the Jury is not just an abuse of discretion, it was Plain Error that can best be redressed by ordering a new trial.

C. The failure to disclose the article was neither substantially justified nor harmless.

The Respondents argue in the alternative that the failure to disclose the article was both substantially justified and harmless. **Ans. Br. p. 16;** *see* NRCP 37(c)(1). However, the failure to disclose was neither.

Other than a conclusory statement that it was substantially justified, the Respondents do not even attempt to explain how the failure to disclose was justified. *See* **Ans. Br. p. 16 – 17.** The article in question was published on July 17th, 2017, years before the close of Discovery. **Vol. IV, AA00451.** Even Respondent Bartmus' counsel noted that "it's all online". **Vol. IV, AA00494, ll. 15 – 21.** If this was newly

[6] As discussed further in the Opening Brief and below, use of the article in this way is also forbidden since it is improper reputational evidence and because Respondents failed to lay a proper foundation.

discovered, it was only because respondents failed to adequately research the matter during Discovery. There was no justification for failing to disclose the article.

Nor was it harmless. The record shows that Respondent Bartmus' counsel clearly believed it was relevant and believed it would advance Respondent Bartmus' case, because counsel spent a considerable amount of time on it during trial. *See* **Vol. IV, AA00486 – AA00497.** Because it was not disclosed during Discovery, the Appellants' counsel was unable to review it ahead of time and prepare. Because it was not produced during Discovery, the Appellants' counsel was unable to highlight the difference between what the article actually said and what counsel for Ms. Bartmus was attempting to imply the article said.

Respondents suggest that it was nonetheless substantially harmless because the witness was familiar with the report and discussed it. **Ans. Br. p. 16.** However, there is a significant gulf between a witness having some familiarity with the article in question and the opposing counsel having an opportunity to review it prior to trial. Furthermore, the witness himself asked repeatedly to see the article during the questioning and was rebuffed. *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).

Respondents suggest that *Brame v. Bank of N.Y. Mellon,* 2020 Nev. Unpub. LEXIS 83, at *2-5 (No. 77186; Nev. Jan. 23, 2020) (unpublished disposition)

supports their argument. **Ans. Br. p. 17.** It is distinguishable and inapposite. In *Brame,* there was an alternate basis for affirmance, so the testimony regarding the contested screen of information was truly immaterial. *Brame,* 2020 Nev. Unpub. LEXIS at * 4 - *5. Here, Dr. Marmureanu was the Appellants' only expert as to causation, and his testimony was necessary. *Fernandez v. Admirand,* 108 Nev. 963, 969, 843 P.2d 354, 358 (1992). Dr. Marmureanu's credibility with the Jury was a central matter to the case.

The Respondents also argue that "plaintiffs present no evidence showing that the defense verdict resulted from the questioning of Dr. Marmureanu.". **Ans. Br. at p. 16 - `7.** This implicitly misapprehends the standard and attempts to change the burden on the Appellants. Reversal is appropriate here if this Court finds that there was an error in allowing the questioning, and if "but for the error, a different result might reasonably have been expected." *Hallmark v. Eldridge,* 124 Nev. 492, 505, 189 P.3d 646, 654 (2008).[7] Here, Respondent Bartmus' counsel attacked the credibility of the Appellants' sole expert witness on the question of causation using an undisclosed article. But for this attack on the credibility of what was arguably the most important witness at the entire trial, a different result might reasonably have been expected. Accordingly, reversal is appropriate.

[7] Internal citations and quotation marks omitted. Quoting *Beattie v. Thomas,* 99 Nev. 579, 586, 668 P.2d 268, 273 (1983)

D. NRS 50.085(3) does not allow for the type of generalized attack upon reputation that Respondent Bartmus' counsel attempted.

NRS 50.085(1)-(2) generally forbid an attack on a witness' reputation and character with some narrow exceptions. The use of the article was clearly meant to attack Dr. Marmureanu's reputation and character, and the Respondents do not seem to dispute that. *See* **Vol. IV, AA00487 – AA00497; Ans. Br. p. 18.** Rather, they claim that it fell within the narrow exception allowed by NRS 50.085(3). However, that is a narrow exception and for it to apply, among other things, the evidence must go to the truthfulness or untruthfulness of the witness. NRS 50.085(3). Nothing about the article or the questioning addressed Dr. Marmureanu's truthfulness but rather went to his reputation and general standing in the medical community. *See e.g.* **Vol. IV, AA00487.** It is error to allow an attack on the reputation of a witness of this kind through extrinsic evidence of a collateral matter. *McKee v. State*, 112 Nev. 642, 646, 917 P.2d 940, 943 (1996)

E. The party attempting to introduce evidence has the duty to lay the foundation.

Respondents argue that they laid a proper foundation by asking Dr. Marmureanu about the report. **Ans. Br. at p. 18.** However, the questions asked regarding the article were not geared towards showing that the report was either relevant or authentic. **Vol. IV, AA00487 – AA00497.** The answers did not

authenticate the report, and if anything they challenged the authenticity and accuracy of the way Ms. Bartmus' counsel was attempting to portray the report. *Id.*

Respondents also suggest that authenticity of the report was never challenged. **Ans. Br. at p. 19.** However, this attempts to implicitly shift the burden. A party is required to authenticate a document before using it at trial, and the other party is under no burden to challenge its authenticity until the proffering party makes at least a Prima Facie showing that it is authentic first. *See* NRS 52.015 (discussing authentication); *see also Mishler v. McNally,* 102 Nev. 625, 628, 730 P.2d 432, 435 (1986).[8]

Moreover, even if, *arguendo,* the Appellants had a duty to challenge authenticity, they did so as much as possible under the circumstances. The Appellants' counsel objected to the lack of foundation, which encompasses authenticity. **Vol. IV, AA00489.** The witness himself also asserted that Respondent Bartmus' counsel was misrepresenting the contents of the article. **Vol. IV, AA00487 – AA00489.** Even the Answering Brief acknowledges - as it must - that the witness "disagreed with the way the report was described in counsel's questions", which is

[8] "The memo was also inadmissible because of a lack of foundation as to its authenticity and identity. *See* NRS 52.015. It was an unsigned typewritten photocopy without any indication of the date of receipt by the hospital. The record custodian testified that the hospital investigated Dr. Mishler, but the record custodian did not say when in relation to these investigations the hospital received the memorandum in question."

all the witness could do when the counsel refused to produce the actual article. **Ans. Br. at p. 19.**

F. The Appellants have shown prejudice.

The Respondents claim that "plaintiffs have provided nothing more than speculation that but for this line of questioning, a different result might reasonably have been expected." **Ans. Br. at p. 21.** However, the Appellants have shown, from the record and from prior precedent, that Dr. Marmureanu as the Appellants' only expert as to causation was vital and even necessary. *Fernandez v. Admirand,* 108 Nev. 963, 969, 843 P.2d 354, 358 (1992). The Appellants have shown that the Respondents attacked the key witness' credibility through use of an undisclosed article, and that the questions asked were not even well-supported by the articles. *See e.g.* ***Vol. IV, AA00487 – AA00489.*** This is more than enough to show that the results might reasonably have been expected to be different but for this Trial by Ambush, which is a relevant matter. *Hallmark v. Eldridge*, 124 Nev. 492, 505, 189 P.3d 646, 654 (2008).

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II. The Trial Court separately erred by excluding Dr. Wiencek since he had been previously disclosed as a witness, and any inadequacy in the Disclosure was substantially justified and harmless.

A. The Disclosure of a Dr. Wiencek as a treating physician was adequate.

The Respondents argue that Dr. Wiencek was disclosed initially as a non-retained expert witness, and that this was not adequate disclosure because Dr. Wiencek did not release an expert report. **Ans. Br. p. 22.** The Respondents also argue that even if Dr. Wiencek were to testify only as a treating physician, that Nevada requires even a treating physician to provide a summary of his opinions during Discovery. However, the record shows that Dr. Wiencek was adequately disclosed under the circumstances as a treating physician. *See e.g.* **Vol. VI, AA00806, . Vol. V, AA00683.**

In the Initial Disclosures, it was stated that Dr. Wiencek was expected to testify as to "Plaintiff's medical treatment from Robert Wiencek, M.D. and are expected to testify as to the facts and circumstances surrounding the medical care, treatment, and/or billing for said care and treatment provided to Plaintiff. The individual physicians disclosed will testify in their capacity as a treating physician, including their expert opinions as to causation, care, and reasonableness of medical expenses." **Vol. VI, AA00806.** This discloses that he was being identified both as a treating physician prepared to testify as to what happened in his office and opinions

formed entirely in the course of treatment and potentially as a non-retained expert that would testify as to causation. *Id.* However, it was later clarified that the Appellants only intended to call Dr. Wiencek as a treating physician and not as a non-retained expert. *See e.g.* **Vol. V, AA00683.**[9]

A treating physician is explicitly exempt from the requirement to provide an expert report so long as they limit their testimony to events that occurred during the treatment and opinions which were formed during the course of treatment. *FCH1, Ltd. Liab. Co. v. Rodriguez,* 130 Nev. 425, 433, 335 P.3d 183, 189 (2014). The Respondents nonetheless argue that even if Dr. Wiencek was only going to testify as a treating physician that a summary of his opinion was necessary. **Ans. Br. p. 24.** However, that is not what the relevant rules state. A treating physician who is testifying as a treating physician is only required to provide the summary of the facts and opinions required under NRCP 16.1(a)(2)(C)(ii) to the extent practical. NRCP 16.1(a)(2)(C)(ii), here numerous documents from Dr. Wiencek were timely provided, as even the District Court noted. **Vol. V, AA00653.**[10] In fact, later in their Brief, the Respondents properly acknowledge that there was "adequate documentation depicting Dr. Wincek's positions on the issues". **Ans. Br. p. 27.** The

[9] "He is not being called as a non-retained expert. He is being called as a treating physician."

[10] "Every single witness that testified, and every single document we've looked at, has had Dr. Wiencek all over it."

Respondents therefore had adequate disclosures regarding Dr. Wiencek's opinion.[11] Further, the Respondents properly acknowledge that there were challenges related to Dr. Wiencek's health. **Ans. Br. at p. 8;** *See* **Vol. V, AA00642.**

Therefore, under the circumstances, the Disclosures were clearly adequate to identify him as a treating physician which would testify as to the medical care and treatment done by Dr. Wiencek himself and the billing for that care issued by Dr. Wiencek's office. **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).

B. Even if, hypothetically, the Disclosure was somehow insufficient or untimely, it was substantially justified and harmless.

The Respondents also argue that they were prejudiced by the late Disclosure of Dr. Wiencek as a witness. **Ans. Br. at p. 24 – 27.** As discussed above, Dr. Wiencek was disclosed prior to the close of Discovery as a potential witness and also listed in the Pretrial Disclosures as a potential Witness. **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).

[11] Or, in the alternative, the Respondents clearly had sufficient disclosure that they could not have been prejudiced by any technical failing in the Disclosures, as is elaborated on further below.

The late disclosure that the Respondents seem to be complaining of then is that in this case the Appellants only provided final confirmation that they would call Dr. Wiencek and notice regarding which day during the trial they planned to call Dr. Wiencek the day before the Appellants intended to call him. ***See* Vol. V, AA00683 – AA00685** (email chain stating that the Appellants planned to call Dr. Wiencek the next day). However, this still provided more than 24 hours' notice regarding the exact time the Appellants planned to call Dr. Wiencek, which is reasonable notice under the circumstances, even in light of a Stipulation to provide reasonable notice prior to calling a specific Witness.

Even if, hypothetically, any part of the Appellants' disclosure was technically untimely or insufficient, it should be excused because it was both substantially justified and harmless. *See* NRCP 37(c)(1).[12] It was substantially justified because there were difficulties with Dr. Wiencek's health which made it difficult to, among other things, determine if and when it would be possible for him to testify. **Vol. V, AA00654 – 655.**

It was also harmless. The Respondents argue that they were harmed because they "could not simply request that the court reopen discovery". **Ans. Br. p. 27.**

[12] Notably, NRCP 37(c) uses the phrase "substantially justified or is harmless…". While the Appellants assert that any technical failure in the Disclosure was both substantially justified and harmless, it is adequate to show that either one applies.

However, this response is disingenuous under the circumstances. There is the fact that Dr. Wiencek was a possible witness was disclosed during Discovery. **Vol. VI, AA00806**. Moreover, Dr. Wiencek's name was ubiquitous on documents which were disclosed and admitted at trial. *See e.g.* **Vol. V, AA00653.**[13] The Defendants had abundant notice during Discovery that Dr. Wiencek was a significant figure in the case and was a potential Witness at Trial.

The Respondents do not seem to argue that the fact the time of his proposed testimony was only disclosed 24 hours ahead of time prejudiced them. *See generally* **Ans. Br.** But any potential argument on that topic must fail. 24-hour notice is reasonable and if, hypothetically, Respondents needed more notice, that could have been cured by a short continuance of the Trial.

Dr. Wiencek was adequately disclosed in a way that satisfies all requirements which the Appellants were required to meet. However, in the alternative, it should be found that any technical failure in the disclosure was both substantially justified and harmless.

III. Conclusion

The District Court made errors in its decisions regarding the admission of evidence which can only be cured by a new Trial. The District Court improperly

[13] "Every single witness that testified, and every single document we've looked at, has had Dr. Wiencek all over it."

allowed the Respondents to attempt to impeach a key expert witness using materials which were not disclosed during Discovery and which could not have been used for the purpose of impugning the witness' reputation even if they had been disclosed. The District Court also improperly excluded the testimony of the treating physician for the Appellants, even though the treating physician had been disclosed as a possible Witness during Discovery. But for these errors by the District Court, the result of the Trial would likely have been different. Accordingly, Appellants respectfully request, and justice requires, an Order for a new Trial.

Dated this 11th day of October, 2021.

E. BREEN ARNTZ, CHTD.

By: */s/ E. Breen Arntz*
E. Breen Arntz, Esq.
Nevada Bar No. 3853
Attorney for Appellants

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 4,498 words.

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3. Finally, I hereby certify that I have read this Appellants' Reply 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 11th day of October, 2021

E. BREEN ARNTZ, CHTD.

By: */s/ E. Breen Arntz*
E. Breen Arntz, Esq.
Nevada Bar No. 3853
Attorney for Appellants

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I certify that I am an employee of E. Breen Arntz, Chtd. and that on this 11th day of October, 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.

Robert McBride, Esq
McBride Hall
8329 W. Sunset Rd., Ste. 260
Las Vegas, NV 89113

Keith A. Weaver, Esq.
Lewis Brisbois Bisgaard & Smith, LLP
6385 S. Rainbow Blvd., Ste. 6000
Las Vegas, NV 89118

By: */s/ E. Breen Arntz*
An employee of E. Breen Arntz, Chtd.