

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 LASRY, M.D. INDIVIDUAL;)
AND TERRY BARTIMUS, RN, APRN,)
Respondents.)

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Supreme Court No. 81659

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 APPENDIX VOLUME V

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

Attorney for Appellant Darrell Moore and Charlene Moore

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CERTIFICATE OF SERVICE

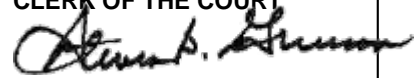
Pursuant to NRAP 25(b), I certify that I am an employee of the law firm and that on this 21st day of July, 2021, I served a true and correct copy of the foregoing **APPELLANT'S APPENDIX VOLUME V** as follows:

- ☐ 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:
- ☒ 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.



1 KEITH A. WEAVER
Nevada Bar No. 10271
2 E-Mail: Keith.Weaver@lewisbrisbois.com
ALISSA BESTICK
3 Nevada Bar No. 14979C
E-Mail: Alissa.Bestick@lewisbrisbois.com
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
702.893.3383
6 FAX: 702.893.3789
Attorneys for Defendant Terry Bartmus,
7 *A.P.R.N.*

8
9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 DARELL L. MOORE and CHARLENE A.
12 MOORE, individually and as husband and
wife;

13 Plaintiffs,

14 vs.

15 JASON LASRY, M.D., individually and
16 TERRY BARTMUS, RN, A.P.R.N.,

17 Defendants.

CASE NO. A-17-766426-C
Dept. No.: XXV

DEFENDANT TERRY BARTMUS,
A.P.R.N.'S OPPOSITION TO PLAINTIFFS
DARELL L. MOORE AND CHARLENE A.
MOORE'S MOTION FOR NEW TRIAL

19 Defendant Terry Bartmus, A.P.R.N. ("defendant") opposes Plaintiffs Darell L.
20 Moore and Charlene A. Moore's Motion for a New Trial. This opposition is based on the
21 attached Memorandum of Points and Authorities, the Declaration of Keith A. Weaver,
22 Esq., and all pleadings, evidence and other matters that may be presented prior to or at
23 the hearing.

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4824-6009-0554.2

DEFENDANT TERRY BARTMUS, A.P.R.N.'S OPPOSITION TO PLAINTIFFS DARELL L. MOORE AND
CHARLENE A. MOORE'S MOTION FOR NEW TRIAL

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION.

3 Hindsight is 2020. The new trial motion filed by plaintiffs Darrell Moore and
4 Charlene Moore (collectively, “plaintiffs”) tries to rewrite the past after plaintiffs’ pervasive
5 tactics of painting defendants Terry Bartmus, A.P.R.N. (Bartmus), and Dr. Lasry (Lasry)
6 as “bad” clinicians who perjured and falsified medical records only resulted in a defense
7 verdict. Rather than accept this tactic backfired, plaintiffs now contend that but for the
8 impeachment of their expert witness, Dr. Marmureanu, they would have prevailed at trial.
9 According to plaintiffs, impeaching Dr. Marmureanu constituted attorney misconduct,
10 caused unfair surprise and now warrants a new trial. The evidence shows, however, that
11 once plaintiffs’ counsel’s initial objection to this line of inquiry was overruled by this court,
12 counsel never renewed the objection, requested the jury be admonished, moved for a
13 mistrial, or attempted to rehabilitate Dr. Marmureanu during re-direct examination.
14 Counsel’s action or, in this case, inaction, speaks louder than his after-the-fact new trial
15 motion. Plaintiffs’ counsel’s utter failure to act *at the time* this alleged misconduct
16 occurred proves counsel never really considered defendant’s counsel’s actions serious
17 enough to cause an unfair trial prejudicing his clients. The alleged impact of the
18 impeachment questioning by defendant’s counsel only became purportedly “prejudicial”
19 after the jury came back with an adverse verdict against plaintiffs.

20 Additionally, plaintiffs argue it was reversible error for the court to exclude plaintiffs’
21 witness, Dr. Wiencek. This argument is undeveloped, bereft of any legal support and a
22 completely insufficient basis upon which to seek a new trial. Argument of counsel is not
23 evidence. Thus, plaintiffs cannot meet their burden to show the court abused its
24 discretion by excluding Dr. Wiencek. Plaintiffs’ motion for new trial should be denied.

25 II. STATEMENT OF RELEVANT FACTS.

26 Plaintiffs sued Bartmus for medical negligence on the theory that Bartmus
27 allegedly failed to diagnose acute ischemia relating to Darell Moore’s (Moore) left leg,
28 which allegedly caused his leg to be amputated above the knee. Bartmus is a board-

1 certified, emergency medicine nurse practitioner who examined Moore. During trial,
2 plaintiffs' expert witness, Dr. Marmureanu, a board-certified cardiothoracic surgeon,
3 testified to the applicable standard of care for emergency room clinicians. On direct
4 examination, plaintiffs' counsel spent extensive time asking Dr. Marmureanu about his
5 credentials, expertise and experience relevant to his opinions in the case. The obvious
6 purpose was to provide gravitas to Dr. Marmureanu's opinions. Plaintiffs' counsel
7 prefaced this line of questioning by stating, "the defense went on for some time about Dr.
8 Samuel Wilson." (The Declaration of Keith Weaver (Weaver Decl.) ¶ 2, Exh. A, 10:8-9.)

9 During this qualifications phase of the direct examination, Dr. Marmureanu testified
10 to the positions he held, which included president and CEO of the California Heart and
11 Lung Surgery Center (his own company), chief of cardio-thoracic surgery, member of the
12 medical executive committee and member of the retro-contract review committee for "one
13 of the major hospitals" where he practices cardiovascular and thoracic surgery. (Exh. A,
14 10:16-25.) Regarding his past positions, Dr. Marmureanu stated "I think you have it
15 better than I do, it's a long CV there, 25 pages." (Exh. A, 11:2-3.)

16 Dr. Marmureanu testified that he participated in a fellowship in cardio-thoracic
17 surgery at UCLA, stayed on as part of UCLA's faculty, became the director of Century
18 City Hospitals (for cardio-thoracic surgery) and has been "to many hospitals, built several,
19 perhaps that deal with cardio-thoracic surgery..." (Exh. A, 11:6-15.) In response to
20 whether he was board certified, and what that meant, Dr. Marmureanu testified that "a
21 board certification is a very rigorous process, and a lot of society and a lot hospitals want
22 you to be, and a lot patients by the way want you to be board-certified..." (Exh. A, 11:24-
23 25, 12:1-2.)

24 Plaintiffs' counsel, Attorney Arntz, also asked Dr. Marmureanu about being
25 "fellowship-trained" (Exh. A, 11:10-13:4), the faculty positions he held over the years
26 (Exh. A, 13:8-24), the medical school committees he has been on (Exh. A, 14:1-14), the
27 advisory boards he served on (Exh. A, 14:16-25; 15: 1-6), and the lectures he has given
28 around the world (Exh. A, 15:7-25; 16:1-1)—all which Dr. Marmureanu described at length

1 and in grandiose terms.

2 Dr. Marmureanu then began his discussion of the applicable standard of care by
3 asserting:

4 There's only one standard of care. In other words, any practitioner that
5 deals with an issue in ER, on the floor, on an out-patient basis, if you deal
6 with that issue, there's only one thing to do, the right thing to do, but that is
follow a certain sequence, pathway, certain rules need to be applied, so
I'm very familiar with that standard.

7 (Exh. A, 16:7-14.) Attorney Arntz then asked Dr. Marmureanu about Bartmus's physical
8 examination of Moore's foot and ankle. Attorney Arntz prefaced the question by stating:

9 Before you go to the ultrasound, Nurse Practitioner Bartmus was here
10 yesterday, testified she did two physical exams of Mr. Moore where she
11 was able to detect a normal pulse in the top of the foot and the ankle, and
12 she was able to determine from getting a normal pulse that she—or he had
no (sic) peripheral perfusion. ***Explain to the jury whether or not that is
even possible in Mr. Moore.***

13 (Exh. A, 24:12-20, emphasis added.) Dr. Marmureanu replied: "First of all, what you
14 heard yesterday is ***absolutely impossible. That is not true and impossible***, and I'll show
15 you why, and you will understand immediately." (Exh. A, 24:21-25, emphasis added.)
16 Testimony regarding the standard of care and Moore's pulse prior to the eventual
17 amputation ensued.

18 On cross-examination, while discussing the applicable standard of care, Attorney
19 Weaver, counsel for Bartmus, laid the foundation for questioning Dr. Marmureanu
20 regarding a 2017 article pertaining to a report by the California Office of Statewide Health
21 Planning and Development regarding the mortality rates of California cardiothoracic
22 surgeons. Attorney Weaver asked Dr. Marmureanu if he had an opinion regarding
23 roughly how many cardiothoracic surgeons there are in California. (Exh. B, 46:4-6.) He
24 also asked Dr. Marmureanu whether anytime he was doing heart surgery this included
25 "vascular." (Exh. B, 11-16.) Attorney Weaver followed up these questions by asking Dr.
26 Marmureanu about his knowledge of the phrases "pot calling the kettle black" and "people
27 who live in glass houses should not throw stones." (Exh. B, 17-25.) Dr. Marmureanu
28 denied any knowledge of either phrase. (*Id.*) Attorney Weaver then asked Dr.

1 Marmureanu whether in 2017 the State of California declared he was one of the “seven
2 worst cardiovascular surgeons in the entire state out of hundreds.” (Exh. B, 47:1-5.) Dr.
3 Marmureanu stated this was “incorrect.” In response to Attorney Weaver’s question that
4 it was Dr. Marmureanu’s testimony that the California Office of Statewide Health Planning
5 and Development did not issue a report listing him in the top 3 percent of the worst
6 cardiovascular surgeons in California, Dr. Marmureanu stated, “You’re untruthful and
7 incorrect, again, sir.” (Exh. B, 47:6-12.)

8 Faced with such denials, Attorney Weaver laid the foundation for the report again
9 and asked about Dr. Marmureanu’s knowledge of the California Society of Thoracic
10 Surgeons and the conclusions expressed in the report in light of Dr. Marmureanu’s
11 membership in that organization. (Exh. B, 47:18-25, 48:1-25.) Attorney Weaver then
12 asked Dr. Marmureanu if he was saying no such report existed. (Exh. B, 49:4-5.) The
13 following exchange occurred:

14 Dr. Marmureanu: Well, not what you said. What you said doesn’t exist.
15 You are wrong about the year; you are wrong about the report; you are
16 wrong what the report says, and I’m not sure if you’re doing it on purpose
or just you don’t know enough about it.

17 Attorney Weaver: Well, I read the report. What does it say? Well, you’re
familiar—

18 Dr. Marmureanu: Allow me to explain. I can explain.

19 Attorney Arntz: Your honor, he’s not laying the proper foundation.

20 (Exh. B, 49:11-15.)

21 Following Attorney Arntz’s objection as to foundation, which was the only objection
22 counsel made on the record, the court held a bench conference regarding the report and
23 Dr. Marmureanu’s impeachment. (Exh. B, 84:1-17.) The court summarized the bench
24 conference for the record, stating plaintiffs’ argument was primarily that Attorney Weaver
25 was not confronting Dr. Marmureanu with the report and article, that he was required to
26 do so and that it was not an appropriate line of questioning. (*Id.*) The court disagreed
27 with plaintiffs’ argument because there was testimony from Dr. Marmureanu regarding his
28 qualifications and the report and article called into question that testimony. (*Id.*)

1 Impeaching the doctor was proper and Attorney Weaver was not required to confront him
2 with the documentation as that would amount to impeachment with extrinsic evidence,
3 which is generally not allowed. (*Id.*) Plaintiffs' counsel could challenge whether Attorney
4 Weaver was misrepresenting the report and article on redirect and it would be fair for
5 plaintiffs' counsel to receive a reference or copy of the documents. (*Id.*) The court
6 concluded by asking Attorney Arntz whether he had anything he would like to add to the
7 bench conference. Attorney Arntz replied, "No, your honor." (Exh. B, 84:18-20.) At that
8 time, Attorney Arntz did not request the jury be admonished or assert that a mistrial had
9 occurred.

10 Following the bench conference, Attorney Weaver continued the line of inquiry
11 regarding the report and article, which concluded with Dr. Marmureanu asserting that the
12 report did not refer to his patients, but rather hospital patients upon whom he operated.
13 (Exh. B, 57:11-19.) Dr. Marmureanu added that these patients returned to other facilities
14 and "for whatever reason, they aspirate, they get pulmonary embolus; they get a stroke,
15 or they get hit by a car. I said car or a bus. I think it was a bus actually...So this has
16 nothing to do with surgical skill." (*Id.*)¹ At no time during Attorney Weaver's questioning
17 did Attorney Arntz make additional objections, request the jury be admonished or move
18 for a mistrial. Nor did counsel ask that the actual report be admitted into evidence to
19 support Dr. Marmureanu's contention that Mr. Weaver misrepresented the report and
20 article.

21 On redirect-examination, Attorney Arntz did not address Dr. Marmureanu's
22 impeachment regarding the article and report or attempt to rehabilitate his witness. (Exh.
23 B, 58:1-62:19.) Attorney Arntz and Dr. Marmureanu instead discussed whether a
24 palpable pulse could have been present in Moore's foot in the days leading up to the
25 _____

26 ¹ Although Dr. Marmureanu represented the report "has nothing to do with surgical skill," the executive
27 summary specifies "[t]he intent of this report is to help improve quality outcomes and appropriateness of
28 CABG surgery by informing potential consumers, hospitals, surgeons and others about the performance of
hospitals and surgeons."

1 amputation. (*Id.*) Dr. Marmureanu continued to assert there was “no way that you can
2 get blood in that area to have pulses, even by Doppler. So go a step further to have
3 palpable pulses, this patient never had palpable pulses. Obviously it’s wrong. It’s
4 impossible.” (Exh. B, 62:15-19.)

5 Lastly, Attorney Arntz asked Dr. Marmureanu whether there was anything
6 discussed during his cross-examination that changed any of his opinions. (Exh. B, 62:20-
7 21.) Dr. Marmureanu then brought up the article and report himself, contending “the
8 study doesn’t say that my mortalities is [sic] nine times more. That’s incorrect. It’s not
9 truthful, and everything else, I disagree with all his statement [sic]. I don’t have anything
10 else.” (Exh. B, 62:22-25, 63:1.)² Attorney Arntz did not address Dr. Marmureanu’s
11 statements or initiate any questions regarding the article and report.

12 Following Attorney Arntz’s re-direct examination of Dr. Marmureanu, the jury had
13 several questions regarding his testimony—none of which pertained to the report and
14 article. Rather, the jury asked Dr. Marmureanu questions regarding the standard of care,
15 detection of pulses, and general medical science involved in assessing Moore. (Exh. B,
16 64:23-25, 65:1 (question 1); 65:2-4 (question 2); 65:5-11 (question 3); 65:12-15 (question
17 4); 69:1-3 (question 5).)

18 **III. THE COURT’S EVIDENTIARY RULING AND ATTORNEY WEAVER’S CONDUCT**
19 **DID NOT PREJUDICE PLAINTIFFS AND DO NOT WARRANT A NEW TRIAL.**

20 **A. The Court Correctly Allowed Attorney Weaver to Cross-Examine Dr.**
21 **Marmureanu About the Article and the Report.**

22 Plaintiffs argue a new trial is warranted because Attorney Weaver—and the court—
23 violated Nevada Rules of Civil Procedure 16.1 (“Rule 16.1”) and Nevada Rules of
24 Evidence 50.085 (“Rule 50.085”) by questioning Dr. Marmureanu about the report and

25 ² When Attorney Arntz gave Dr. Marmureanu the opportunity to clarify his prior testimony, he chose not to.
26 Dr. Marmureanu maintained, therefore, that one of the patients was hit by a bus in Las Vegas, the report
27 was not risk-adjusted, the report was not issued in 2017 and the surgeries evaluated did not occur in 2013-
28 2014 as the report states. Further, Dr. Marmureanu asserted he had not had a patient death since 2013,
which would mean Dr. Marmureanu’s patient deaths all occurred during a single year.

1 article containing statistics of his mortality rate following surgery. As a threshold matter,
2 neither Rule 16.1 nor Rule 50.085 was ever raised during trial. Only now, post-trial, are
3 these objections being made by plaintiffs with the benefit of hindsight. When this line of
4 questioning began, Attorney Arntz made a *single objection: "foundation."* (Exh. B, 49:11-
5 15.) During the bench conference following his objection, the court addressed Attorney
6 Arntz's arguments against the line of questioning as arising out of confrontation and
7 impeachment issues. (Exh. B, 84:1-17.) As such, the court determined the report and
8 article went to Dr. Marmureanu's qualifications and the line of questioning was
9 permissible. (*Id.*) Attorney Arntz did not refer to Rule 16.1 or Rule 50.085 to support his
10 argument that the questioning was incorrect and he added nothing additional to the
11 record during the bench conference with the judge.

12 A further bench conference was held on February 3, 2020, where the report and
13 article once again came up. (Exh. C, 59:1-20.) The court again emphasized that the door
14 had been opened to this line of questioning when Dr. Marmureanu "testified as an expert
15 for the Plaintiffs, and he had discussed and for lack of a better term he had touted [sic] his
16 bona fides and his qualifications." (Exh. C, 59:3-6.) During this conference, Attorney
17 Arntz stated that "the only thing [he] would like to add is that [he] had an opportunity to
18 review the article that Mr. Weaver was citing to...it is not anything close to what he
19 represented" and the court should review it. (Exh. C, 59:24-25, 60:1-5.) However,
20 Attorney Arntz did not raise either Rule 16.1 or Rule 50.085 as a basis for objecting to the
21 line of questioning or the article and the report.

22 The law is clear: the objection need not be elaborate, but it needs to be made.
23 *See State v. Kallio*, 92 Nev. 665, 668 (1976). "[T]he failure to object to allegedly
24 prejudicial remarks at the time an argument is made, and for a considerable time
25 afterwards, strongly indicates that the party moving for a new trial did not consider the
26 arguments objectionable at the time they were delivered, but made that claim as an
27 afterthought." *Beccard v. Nevada National Bank*, 99 Nev. 63, 65-66 (1983). The Nevada
28 Revised Statutes provide that an error may not be predicated upon a ruling that admits

1 evidence unless a substantial right of the party is affected, and “a timely objection or
2 motion to strike appears of record, stating the specific ground of objection.” NRS
3 47.040(1)(a). “Dispensing with the requirement of a contemporaneous objection would
4 allow the proponent of the order in limine to remain silent and hope for a new trial even
5 though, in many instances, an objection and curative instruction would prevent the need
6 to relitigate the case.” *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev.
7 122, 138 (2011) (discussing the need for “contemporaneous objections” to violations of
8 orders arising from motions in limine to prevent litigants from “wasting judicial, party, and
9 citizen-juror resources”). Silence gives consent and, here, plaintiffs have waived any
10 argument that questioning Dr. Marmureanu was improper under either the Nevada rules
11 of civil procedure or rules of evidence.

12 Moreover, plaintiffs fail to meet their burden to demonstrate the court’s evidentiary
13 ruling regarding Attorney Weaver’s questioning warrants a new trial. “A new trial is only
14 warranted when an erroneous evidentiary ruling ‘substantially prejudiced’ a party.”
15 *Ruvalcaba v. City of L.A.*, 64 F.3d 1323, 1328 (9th Cir. 1995); *accord Harper v. City of*
16 *L.A.*, 533 F.3d 1010, 1030 (9th Cir. 2008); *M.C. Multi-Family Dev., L.L.C. v. Crestdale*
17 *Assocs., Ltd.*, 124 Nev. 901, 913 (2008) (stating that the Supreme Court “review[s] a
18 district court’s decision to admit or exclude evidence for abuse of discretion, and . . . will
19 not interfere with the district court’s exercise of its discretion absent a showing of palpable
20 abuse”). A court should find prejudice only if it concludes that, more probably than not,
21 the court’s error tainted the verdict. *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684,
22 688 (9th Cir. 2001). Thus, harmless errors will not justify disturbing a jury’s verdict. *See*
23 *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1439 (9th Cir. 1990). Under this standard,
24 trial courts are granted broad discretion in admitting evidence, and their rulings are
25 reviewed only for an abuse of discretion. *Ruvalcaba*, 64 F.3d at 1328; *Sheehan &*
26 *Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492 (2005) (holding that the trial court
27 has broad discretion to determine the admissibility of evidence); *Club Vista Fin. Servs.,*
28 *LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228 (2012) (“Discovery matters are

1 within the district court's sound discretion").

2 Here, the court properly exercised its discretion when it found plaintiffs' counsel
3 opened the door to the defense impeachment of Dr. Marmureanu's qualifications with the
4 article and report. During direct examination, Attorney Arntz focused at length on Dr.
5 Marmureanu's expertise and qualifications. This included a meandering discussion
6 where Dr. Marmureanu bragged about his education, fellowships, past positions, current
7 positions and even worldwide lectures. This catalogue of Dr. Marmureanu's accolades
8 prompted Attorney Weaver to decide the report and article should be used to impeach Dr.
9 Marmureanu's qualifications—especially given that Dr. Marmureanu was testifying to the
10 standard of care of emergency department clinicians.

11 Even if the court determines Attorney Weaver did not comply with the letter of Rule
12 16.1's disclosures, although defendants assert he did, any technical noncompliance was
13 harmless. NRCP 37(c)(1); *Sfr Invs. Pool 1 v. V.* (Mar. 27, 2020, No. 77898) 2020 Nev.
14 Unpub. LEXIS 342, at *1. First, Rule 16.1 specifies that the parties must provide “a
15 copy...of all documents...that the disclosing party has in its possession, custody, or control
16 and may use to support its claims or defenses, including for impeachment or
17 rebuttal...*concerning the incident that gives rise to the lawsuit.*” Emphasis added. The
18 article and report pertained to Dr. Marmureanu's personal qualifications and credibility—
19 not the incident itself. Further, there was no way of predicting the article and report would
20 become relevant impeachment evidence prior to trial and Dr. Marmureanu's drawn out
21 testimony regarding his personal qualifications.

22 Second, this case is similar to *Brame v. Bank of N.Y. Mellon* (Jan. 23, 2020, No.
23 77186) 2020 Nev. Unpub. LEXIS 83, at *2-5, where plaintiff argued defendant bank's
24 witness could not testify regarding the contents of an “acquisition screen” in his
25 company's computer system when linking other documents to plaintiff's loan because the
26 screen was not part of defendant's pretrial Rule 16.1 disclosures. The Supreme Court
27 found the district court did not abuse its discretion in admitting the evidence. *Id.*; *see M.C.*
28 *Multi-Family Deu., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913 (2008) (providing

1 that this court generally reviews a decision to admit evidence for an abuse of discretion);
2 NRCP 37(c)(1) (allowing a district court to admit previously undisclosed evidence at trial if
3 “the failure [to disclose] was substantially justified or is harmless”). Reversal was also not
4 required as the district court’s judgment did not indicate that it relied on the testimony
5 regarding that screen in reaching its decision. *Id.*

6 Like *Brame*, any failure to disclose the article and report was both substantially
7 justified and harmless. Plaintiffs have not demonstrated that but for this line of
8 questioning of their witness, they would have prevailed. Indeed, the juror questions
9 following Dr. Marmureanu’s impeachment demonstrate the jury did not rely on the article
10 and report when reaching their decision to find for defendants. Rather, the jury seemed
11 to focus on whether defendants properly felt a pulse in Moore’s foot and the medical
12 science surrounding that issue. (Exh. B, 64:23-25, 65:1 (question 1); 65:2-4 (question 2);
13 65:5-11 (question 3); 65:12-15 (question 4); 69:1-3 (question 5).)

14 Additionally, plaintiff’s authority, *Finner v. Hurless* (Apr. 25, 2018, No. 70656) 2018
15 Nev. Unpub. LEXIS 287 at *11, actually supports a finding that *at most* the undisclosed
16 article and report amount to harmless error. In *Finner*, the appellate court considered
17 whether the verdict should be set aside, in part, due to the district court allowing
18 defendants to impeach plaintiff’s expert witness with a settlement agreement that was not
19 specifically disclosed before trial. *Id.* at *9. In light of the entire record, the appellate court
20 held the line of questioning was harmless, and did not warrant reversal, because the
21 expert’s testimony opened the door to the issue and plaintiff’s counsel had the opportunity
22 during the redirect examination to rehabilitate the witness and refute the impeachment. *Id.*
23 at *9-11. Such was the case here.

24 While plaintiffs also rely on *JPMorgan Chase Bank v. Sfr Invs. Pool 1* (Mar. 2,
25 2020, No. 76952) 2020 Nev. Unpub. LEXIS 236 at *2, that case is distinguishable as
26 involving a summary judgment motion supported by documents and printouts from
27 databases that were not disclosed during discovery. The district court determined that
28 the evidence related to a “pivotal and dispositive” issue in the case, Rule 16.1 required

1 disclosure, and therefore granted the motion to strike the evidence. This is a far cry from
2 the line of questioning here that went to Dr. Marmureanu's qualifications. As the juror
3 questions indicate, the issues surrounding Moore's pulse at the time defendants
4 examined him were the "pivotal and dispositive" issues of the case. Also inapposite is
5 plaintiffs' citation to the Mississippi authority, *Wiggins v. State of Mississippi*, 733 So.2d
6 872, 874 (Miss. App. 1999), which is from a completely unrelated state or federal
7 jurisdiction.

8 Further, even if plaintiffs' claim that the report and article constitute reputation
9 evidence is also considered despite their failure to properly object and raise the issue at
10 trial, the line of questioning was proper under NRS 50.085(3). Under both NRS 50.085
11 and its analogous federal rule of evidence 608(b), Attorney Weaver had a good faith
12 basis for cross-examining Dr. Marmureanu regarding the article and report. *See United*
13 *States v. Zidell*, 323 F.3d 412, 426 (6th Cir. 2003).

14 Here, the crucial provisions of NRS 50.085(3) are that specific instances of the
15 conduct of a witness "may, however, *if relevant to truthfulness*, be inquired into on cross-
16 examination of the witness...who testifies to an opinion of his or her character for
17 truthfulness or untruthfulness." Emphasis added. As discussed above, when Dr.
18 Marmureanu testified extensively regarding his skills, expertise and experience, he put
19 his skill as a surgeon at issue. This strategy was solidified when Dr. Marmureanu framed
20 his standard of care opinions in personal terms, stating:

21 There's only one standard of care. In other words, any practitioner that
22 deals with an issue in ER, on the floor, on an out-patient basis, if you deal
23 with that issue, there's only one thing to do, the right thing to do, but that is
follow a certain sequence, pathway, certain rules need to be applied, so
I'm very familiar with that standard.

24 (Exh. A, 16:7-14.)

25 When questioned regarding Bartmus's testimony that she detected a pulse when
26 she examined Moore, Dr. Marmureanu again tied his response to his own reputation and
27 truthfulness by asserting that "[f]irst of all, what you heard yesterday is ***absolutely***
28 ***impossible. That is not true and impossible***, and I'll show you why, and you will

1 understand immediately.” (Exh. A, 24:21-25, emphasis added.) These statements,
2 combined with the aforementioned qualifications testimony, put Dr. Marmureanu’s
3 truthfulness squarely at issue. In the face of overwhelming testimony demonstrating
4 neither defendant had misrepresented detecting Moore’s pulse, the jury certainly could
5 and did find for defendants. Plaintiffs’ tardy arguments are not a basis for granting
6 a new trial.

7 **B. Attorney Weaver Properly Cross-Examined Dr. Marmureanu About the**
8 **Report and Article.**

9 It is well established that a moving party must meet a high standard of proving
10 substantial interference with his or her interest to receive a new trial because of purported
11 attorney misconduct in a civil case. *S E C v. Jasper*, 678 F.3d 1116, 1129 (9th Cir. 2012);
12 *see also Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002) (stating that a
13 new trial based on attorney misconduct is “available only in ‘extraordinary cases.’”).
14 Indeed, a new trial on this basis should only be granted “where the flavor of misconduct . .
15 . sufficiently permeate[s] an entire proceeding to provide conviction that the jury was
16 influenced by passion and prejudice in reaching its verdict.” *Settlegoode v. Portland Pub.*
17 *Sch.*, 371 F.3d 503, 516-17 (9th Cir. 2004).

18 On this record, plaintiffs fail to establish their substantial rights were affected when
19 the district court overruled their single objection to the impeachment line of inquiry and did
20 not admonish the jury. Under NRCP 59(a)(2), the district court may grant a new trial if the
21 prevailing party committed misconduct that affected the moving party’s “substantial
22 rights.” In *Lioce v. Cohen*, 124 Nev. 1, 14-26 (2008), the Supreme Court revised its
23 attorney misconduct jurisprudence and clarified the standards applicable to granting or
24 denying a new trial based on attorney misconduct. Under *Lioce*, the Supreme Court
25 decides (1) whether attorney misconduct occurred; (2) the applicable legal standard for
26 determining whether a new trial was warranted; and (3) whether the district court abused
27 its discretion in applying that standard. *Id.*

28 There are three possible scenarios arising out of a perceived incident of attorney

1 misconduct—and each is reviewed under a distinct standard. First, if an attorney commits
2 misconduct, and an opposing party objects, the district court should sustain the objection
3 and admonish the jury and counsel. *Lioce v. Cohen, supra*, 124 Nev. at 17. When a
4 proper objection and admonition occurs at trial, “a party moving for a new trial bears the
5 burden of demonstrating that the misconduct [was] so extreme that the objection and
6 admonishment could not remove the misconduct’s effect.” *Id.* Second, if the district court
7 overrules the objection, the moving party must show that the district court erred in its
8 ruling and that “an admonition to the jury would likely have affected the verdict in favor of
9 the moving party.” *Id.* at 18. Determining whether an admonition to the jury “would likely
10 have affected the verdict in favor of the moving party” requires the district court to
11 “evaluate the evidence and the parties’ and the attorneys’ demeanor to determine
12 whether a party’s substantial rights were affected by the court’s failure to sustain the
13 objection and admonish the jury.” *Id.*, citing NRCP 59(a)(2) (providing that a new trial
14 may be granted when a party’s substantial rights have been affected by misconduct).
15 Third, an attorney’s failure to object constitutes waiver of an issue, unless the failure to
16 correct the misconduct would constitute plain error. *Id.* at 19. Establishing plain error
17 requires a party to show that “the attorney misconduct amounted to irreparable and
18 fundamental error,” resulting “in a substantial impairment of justice or denial of
19 fundamental rights.” *Id.* In other words, plain error exists only “when it is plain and clear
20 that no other reasonable explanation for the verdict exists.” *Ringle v. Bruton*, 120 Nev.
21 82, 96 (2004).

22 Here, Attorney Arntz raised a single objection to the line of inquiry on the ground of
23 “lack of foundation.” Under the *Lioce* standards, plaintiffs must show the trial court
24 erroneously overruled the foundation objection. This they cannot do. As discussed
25 above, the court conducted a thorough review following the objection and found the door
26 was opened to the line of questioning. (Exh. B, 84:1-17.) During the bench conference,
27 Attorney Arntz did not raise any additional objections, request an admonishment be made
28 to the jury or argue a mistrial occurred. (*Id.*) Attorney Weaver then resumed questioning

1 and further laid the foundation for the article and report. (Exh. B, 57:11-19.) While
2 plaintiffs argue Dr. Marmureanu was “wrongfully discredited on the stand without means
3 for rehabilitation resulting in prejudicial error,” the record speaks for itself. (Motion for
4 New Trial, p. 11) On re-direct examination, Attorney Arntz made no attempt whatsoever
5 to rehabilitate Dr. Marmureanu. Instead, Dr. Marmureanu attempted to rehabilitate
6 *himself* by raising the issue and asserting the report and article were misrepresented and
7 incorrect. (Exh. B, 62:22-25, 63:1.) As noted, however, what Dr. Marmureanu actually
8 did in attempting to rehabilitate himself was to solidify prior questionable statements to
9 the jury regarding the report and article.

10 The *Lioce* inquiry next turns to whether an admonition to the jury “would likely have
11 affected the verdict in favor of the moving party,” which requires the district court to
12 “evaluate the evidence and the parties’ and the attorneys’ demeanor to determine
13 whether a party’s substantial rights were affected by the court’s failure to sustain the
14 objection and admonish the jury.” The evidence presented at trial focused on whether
15 defendants had actually detected Moore’s pulse during their examination of him. Dr.
16 Marmureanu’s strategy for countering this evidence was to insinuate defendants were
17 lying and to cast doubt on the contemporaneous medical records. This strategy was
18 accomplished through asserting defendants’ testimony was “impossible” at every turn.
19 The jury’s verdict demonstrates they considered the actual evidence more persuasive
20 than Dr. Marmureanu’s theatrics. Sustaining the objection and admonishing the jury
21 would not have resulted in a verdict for plaintiffs due to the substantial evidence on the
22 pulse issue in defendants’ favor.

23 Attorney Arntz’s demeanor, expressed through his single objection, failure to
24 request an admonition and failure to assert a mistrial, solidifies that this was not
25 misconduct and did not substantially affect plaintiffs’ right to a fair trial. The impeachment
26 of Dr. Marmureanu did not rise to the severity and pervasiveness discussed in *Lioce*
27
28

1 where the Supreme Court held granting a new trial was warranted by the defense
2 counsel's comments during closing argument.³ Unlike the counsel in *Lioce*, Attorney
3 Weaver did not encourage the jury to ignore any facts or decide the case based upon
4 their personal prejudices and opinions.

5 Plaintiffs have thus not met their burden to prove the alleged misconduct had any
6 effect on the jury, let alone a substantial one. Plaintiffs' citation to an *unpublished trial*
7 *order* (*Coleman v. Las Vegas Paving Corp.* (July 3, 2014, No. A-11-633110-C, Dept. No.:
8 XXVII) 2014 Nev. Dist. LEXIS 3911) and does not alter this conclusion. NRAP 36(2)-(3).

9 Finally, plaintiffs' argument that the article and report "were never produced or
10 entered into evidence as an exhibit" is without merit. (Motion for New Trial, p. 11.)
11 Rather, the record shows otherwise. During the weekend following Day 5 of the trial,
12 Attorney Weaver sent Attorney Arntz the article and the report. (Weaver Decl., ¶8.) On
13 Monday, a second bench conference was held where these issues were raised again.
14 (Weaver Decl., ¶9.) Attorney Arntz asserted he had reviewed the article and report and
15 the article was "not anything close to what he represented." (Exh. C, 60:3-4.) The judge
16 requested briefing. Attorney Weaver informed the court that a request for judicial notice
17 was already going to be filed so that the jury could evaluate for itself what the documents
18 said. (Weaver Decl., ¶9.) The request for judicial notice was filed, but plaintiffs did not
19 respond with any briefing of their own. (Weaver Decl., ¶10.)⁴ The defense ultimately
20 withdrew the request once it appeared plaintiffs no longer contested the appropriateness
21 of Attorney Weaver's conduct. Again, plaintiffs did not respond or seek to introduce the
22 article and report into evidence on their own let alone stipulate to the request for judicial

23
24 ³ However, Attorney Arntz's conduct during closing argument *did* rise to the level disapproved of in *Lioce*,
25 which required a new trial. This court repeatedly admonished counsel for accusing the defense of
26 misconduct, which would support a new trial for *defendants*. (Exh. F, 45:16-25, 46:1-4; 160:1-25; 162:6-
11.) Plaintiffs' counsel's other misconduct during the trial would have also supported a new trial for
defendants.

27 ⁴ The request for judicial notice inadvertently included an executive summary for surgeries for 2016 and
28 2017 rather than 2013 and 2014 and would have been amended if the requested hearing had occurred.

1 notice. (Weaver Decl., ¶10.) Although plaintiffs were given every opportunity to
2 challenge this line of questioning and rectify their perceived misrepresentations of the
3 documents, they chose not to do so.

4 **IV. IMPEACHING DR. MARMUREANU WITH THE REPORT AND ARTICLE DID**
5 **NOT CONSTITUTE UNFAIR SURPRISE WARRANTING A NEW TRIAL.**

6 The granting of a new trial based upon a claim of surprise or accident must result
7 from some fact, circumstance, or situation in which a party is placed unexpectedly,
8 through no negligence of the party, and which ordinary prudence could not have guarded
9 against. *Havas v. Haput*, 94 Nev. 591, 593, 583 P.2d 1094 (1978). The Supreme Court
10 has held that a new trial is not warranted on the grounds of surprise where there was
11 testimony which, with reasonable diligence, could have been anticipated. *DeLee v.*
12 *Roggen*, 111 Nev. 1453, 1456-57. Thus, a new trial will not be granted unless it clearly
13 appears that a different result will be reached. *Id.*

14 Here, this argument is undeveloped in plaintiffs' motion. Plaintiffs necessarily fail to
15 meet their burden of demonstrating that the testimony and evidence presented at trial
16 could not have been anticipated with reasonable diligence. The article and report
17 pertaining to Dr. Marmureanu were widely available to the public and a simple Google
18 search (which is all defense counsel did) would have revealed their existence. (Weaver
19 Decl., ¶11.) As discussed at length above, Dr. Marmureanu's testimony regarding his
20 qualifications, especially relating to standard of care, opened the door to Attorney
21 Weaver's line of questioning. Plaintiffs permitted Dr. Marmureanu to maintain a demeanor
22 on the stand that relied on theatrics and self-aggrandizement; they cannot now claim
23 surprise that the report and article were used to impeach that demeanor.

24 **V. THE COURT CORRECTLY RULED THAT DR. WIENCEK SHOULD BE**
25 **EXCLUDED FROM TESTIFYING AT TRIAL.**

26 Plaintiffs contend a second instance of error requiring a new trial occurred when
27 the court excluded Dr. Wiencek from testifying. Plaintiffs cite to no legal authority in
28 support of this ground for a new trial. Instead, they argue that Dr. Wiencek was

1 previously identified as a defense witness and his notes and records became “such a
2 focal point” at trial that the court abused its discretion by precluding him from testifying.
3 Dr. Wiencek was Moore’s treating vascular doctor. As demonstrated in the defense’s
4 emergency motion, plaintiffs did not properly disclose him as a witness for their case-in-
5 chief in their pre-trial disclosure. On each day of the trial, the parties participated in
6 scheduling discussions with the court. At no time did Attorney Arntz suggest plaintiffs
7 would call Dr. Wiencek to testify or issue a trial subpoena to this effect. On the Friday
8 before plaintiffs attempted to call him, plaintiffs informed the defense and the court that
9 their last witnesses would be plaintiffs themselves. Plaintiffs did not tell the defense or
10 the court that they had tried to contact Dr. Wiencek and were not sure of his availability.
11 Instead, plaintiffs waited until all defense experts had testified to inform the defense Dr.
12 Wiencek would be testifying.

13 Bartmus brought an emergency motion to preclude Dr. Wiencek from testifying,
14 based on the foregoing circumstances, as well as plaintiffs’ failure to either disclose Dr.
15 Wiencek as a non-retained expert (and prepare a report) or a treating provider. (Exh. G,
16 Bartmus Emergency Motion, p. 6.) Thus, plaintiffs violated NRCP 16.1(a)(2)(c), which
17 provides the requirements for non-retained experts, and NRCP 16.1(a)(2)(D) governing
18 the disclosure of treating physicians. *See Figuerado v. Crawford*, (Sept. 23, 2016, No. A-
19 15-715772-C) 2016 Nev. Dist. LEXIS 1464, *2 (holding disclosure of three physicians as
20 non-retained experts was not sufficient because plaintiffs did not disclose a summary of
21 their opinions or facts relied upon); *Donley v. Miles*, (Aug. 28, 2013, No. CV10-00959)
22 2013 Nev. Dist. LEXIS 3512, *11 (physician’s testimony inadmissible at trial where
23 plaintiff failed to meet expert disclosure requirements but attempted to use the same
24 physician’s testimony as a treating provider).

25 Plaintiffs also violated a stipulation regarding motions in limine that provided the
26 parties would give “reasonable advance notice” of witnesses before they were called.
27 Waiting until Sunday afternoon to inform defense counsel plaintiffs intended to call Dr.
28 Wiencek on Monday amounted to undue prejudice and unfair surprise. After hearing

1 extensive argument on February 10, 2020, the court excluded Dr. Wiencek. (Exh. E, 4:9-
2 23:19.) The court reasoned as follows:

3 At the end of the day, like I said, I think ample testimony has been had
4 from both sides related to Dr. Wiencek's prior treatment, how that might
5 have impacted things, and certainly any confusion can be cleaned up in
6 closings. We have the plaintiff, and the plaintiffs to testify today, and I do
7 not see any legitimate legal or factual basis to allow Dr. Wiencek to be
8 called at this time based on the pre-trial disclosures, Based open[sic] the
stipulated motion in limine as a courtesy to provide information, reasonable
advanced notice, and ultimately the communications up through and
including Friday as to what this trial proceedings would be. So for all of
those reasons Dr. Wiencek will not be called today, and we will proceed as
schedules[sic] with the Plaintiffs.

9 (Exh. E, 23: 3-19.)

10 As the court's ruling demonstrates, the court carefully considered the issues at
11 stake and did not abuse its discretion by excluding Dr. Wiencek. Plaintiffs once again
12 cannot meet their burden to prove a new trial is warranted on this ground.

13 VI. CONCLUSION

14 For the foregoing reasons, defendant Terry Bartmus, A.P.R.N., respectfully
15 requests plaintiffs' motion for new trial be denied.

16 DATED this 21st day of April, 2020

17 LEWIS BRISBOIS BISGAARD & SMITH LLP

18
19
20 By /s/ Keith A. Weaver

21 KEITH A. WEAVER

22 Nevada Bar No. 10271

23 ALISSA N. BESTICK

24 Nevada Bar No. 14979C

25 6385 S. Rainbow Boulevard, Suite 600

26 Las Vegas, Nevada 89118

27 *Attorneys for Defendant Terry Bartmus,*
28 *A.P.R.N.*

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2020, a true and correct copy of
DEFENDANT TERRY BARTMUS, A.P.R.N.'S OPPOSITION TO PLAINTIFFS DARELL
L. MOORE AND CHARLENE A. MOORE'S MOTION FOR NEW TRIAL was served
electronically with the Clerk of the Court using the Wiznet Electronic Service system and
serving all parties with an email-address on record, who have agreed to receive
Electronic Service in this action.

Matthew W. Hoffman, Esq.
ATKINSON WATKINS & HOFFMAN, LLP
10789 W. Twain Avenue, Ste. 100
Las Vegas, NV 89135
Tel: 702-562-6000
Fax: 702-562-6066
Email: mhoffmann@awhlawyers.com
Attorney for Plaintiffs

Robert McBride, Esq.
Chelsea R. Hueth, Esq.
CARROLL, KELLY, TROTTER,
FRANZEN & MCBRIDE
8329 W. Sunset Road, Ste. 260
Las Vegas, NV 89113
Tel: 702-792-5855
Fax: 702-796-5855
Email: rcmcbride@cktfmlaw.com
Email: crhueth@cktfmlaw.com
Attorneys for Defendant, Jason Lasry, M.D.

Breen Arntz, Esq.
5545 Mountain Vista, Suite E
Las Vegas, NV 89120
Tel: 702-384-8000
Fax: 702-446-8164
Email: breen@breen.com
Attorney for Plaintiffs

By /s/ Michelle Krestyn
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT A

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TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

DARELL MOORE, ET AL,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. A-17-766426-C
)	Dept. No. 25
JASON LASRY, M.D., ET AL,)	
)	
<u>Defendants.</u>)	

JURY TRIAL

Before the Honorable Kathleen Delaney

Friday, January 31, 2020, 9:00 a.m.

Reporter's Transcript of Proceedings

REPORTED BY:

BILL NELSON, RMR, CCR #191
CERTIFIED COURT REPORTER

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APPEARANCES:

For the Plaintiffs: Breen Arntz, Esq.
 Philip Hymanson, Esq.
 Joseph Hymanson, Esq.

For the Defendants: Robert McBride, Esq.
 Keith Weaver, Esq.
 Alissa Bestick, Esq.

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I N D E X

WITNESS	DR	CR	RDR	RCR
Dr. Alexander Marmureanu	9	48		

1 surgery, vascular surgery.

2 Q. You have had a chance to review all the
3 materials involving Mr. Moore's case, his past
4 medical treatment, and treatment associated with his
5 care on the 25th of December 2016?

6 A. Yes, sir.

7 Q. Let's go through your qualifications.

8 The Defense went on for some time about Dr.
9 Samuel Wilson.

10 Do you know Dr. Wilson?

11 A. No, sir.

12 I know from reading his reports, and that's
13 it.

14 Q. Okay.

15 Currently what are your positions you hold?

16 A. I'm the president and CEO of California
17 Heart And Lung Surgery Center, which is my company.

18 We practice in nine hospitals heart
19 surgery, lung surgery, vascular surgery.

20 I'm the chief of cardio-thoracic surgery
21 and in two other private practice hospitals.

22 And I'm on the medical executive committee,
23 as well as the retro-contract review committee for
24 one of the major hospitals where I practice
25 cardiovascular and thoracic surgery.

1 Q. What types of past positions have you held?

2 A. Well, I think you have it better than I do,
3 it's a long CV there, 25 pages.

4 Q. I can --

5 A. Let me answer the best way I can.

6 I came in Los Angeles in 2000, started
7 UCLA, did my fellowship in cardio-thoracic surgery,
8 stayed on faculty for a while, then I became the
9 director of Century City Hospitals, which is for
10 cardio-thoracic surgery.

11 Then I've been to many hospitals, built
12 several, perhaps that deal with cardio-thoracic
13 surgery, Broadman (Phonetic) Hospital, St. Aneela
14 (Phonetic) Medical Center, California Hospital,
15 Valley Presbyterian Hospital, and so on.

16 Q. Are you board-certified?

17 A. Yes.

18 Q. What are you board-certified in?

19 A. In general surgery, covers the surgery of
20 the whole body, and then board-certified in
21 cardio-thoracic surgery.

22 Q. Explain for the jury what it means to be
23 board-certified.

24 A. Board certification is a very rigorous
25 process, and a lot of society and a lot of hospitals

1 want you to be, and a lot of patients by the way want
2 you to be board-certified, due to to fact you have to
3 pass exams every few years, you have to go to
4 meetings, you have to get what is called CMEs,
5 continuing medical education.

6 In other words, you have to be up to date,
7 you don't just move somewhere and practice medicine
8 like the way you did for the last 30 years, things
9 change over time.

10 Q. Let's talk about what it means to be
11 fellowship-trained.

12 You are fellowship-trained?

13 A. Yes, sir.

14 Q. That is different than being
15 board-certified?

16 A. That's correct.

17 So for the jury, you go to medical school,
18 finish medical school, you do what is called a
19 residency, you do it for general surgery, it's five
20 years you train, and then I've done academic medicine
21 and research, like I've done -- you have to do some
22 research during your training, so I've done a year of
23 research in New York University in New York, and then
24 you move from there, pass your general surgery
25 boards, and that is a requirement to be

1 board-certified in cardio-thoracic surgery, so heart
2 and lung surgery.

3 Then you do a fellowship, two years of
4 training in heart and lung and vascular surgery.

5 Q. Okay.

6 What faculty positions have you held over
7 the years?

8 A. Well, I've been a teaching assistant on a
9 faculty during my tour at New York University and Mt.
10 Sinai New York, and been a junior faculty at UCLA
11 while I worked for time with staff with faculty, and
12 I belong to different societies and organizations as
13 well.

14 Q. Are you currently in a formal position
15 where you're doing teaching?

16 A. We do teaching every day, and if you see my
17 CV, I've had hundreds of talks, as well as at
18 probably close to a hundred places over the world,
19 from Uzbekistan, to Mongolia, to China, to Africa, to
20 London where you teach younger surgeons, that is
21 international.

22 At a local level the same thing in the
23 hospital, basically you teach residents, nurses, as
24 well as other doctors.

25 Q. You have been on a number of different

1 medical school committees.

2 What does that involve?

3 A. It's an honor, privilege, and a lot of work
4 to be on a committee. They basically want your
5 opinion in regards to the current status of that
6 issue and what should we do with it.

7 In other words, the committee is about
8 critical care, about working for example with the
9 myocardial infarction, how fast that is to work-up
10 when we do operate.

11 In other words, a lot of committees that --
12 medical executive committees where issues in the
13 hospital come up and have to be decided a bit like
14 here.

15 Q. Okay.

16 I'm not going to go through every single
17 thing on your CV, but what is the significance of
18 different advisory boards you have been on?

19 A. Advisory boards, companies come up with a
20 new product, and a new stent, or device perhaps, a
21 new device that is more or less like Crazy Glue,
22 using humans, called Bio Glue, that helps us seal the
23 vascular procedures, so a patient don't bleed to
24 death.

25 So all those companies coming out, they

1 want physicians advice in regards to can we improve
2 this product and what we're going to do.

3 So that comes from general medication to
4 body devices that we operate.

5 The surgeon could be in Vegas, and the
6 patient to be in Los Angeles for example.

7 Q. The different lectures you gave around the
8 world, do some of them involve the issues -- Maybe we
9 can talk specifically about presentations you have
10 given involving issues that might be dealt with in
11 this case, given lectures on those types of things?

12 A. The answer is, yes.

13 The issue we have here is not about
14 medicine, it's about the proper work-up, the patient
15 having the proper work-up promptly and timely,
16 realizing it, and making the proper diagnosis, and
17 doing the proper work-up, which means a battery of
18 tests that we need to do to figure out what is going
19 on, and then I like to say, it's like in the Army, it
20 has to be done by the book.

21 Once you figure the diagnosis and
22 treatment, and then you hope for the best outcome.

23 So medicine is not separate.

24 So to summarize your question, the answer
25 is, yes, a lot of vascular issues come into play and

1 in to my area.

2 Q. Are you familiar with the standard of care,
3 would it be appropriate for the health care providers
4 and Defendants in this case, and Nurse Practitioner
5 Bartmus and Dr. Lasry?

6 A. Yes, sir.

7 There's only one standard of care.

8 In other words, any practitioner that deals
9 with an issue in ER, on the floor, on an out-patient
10 basis, if you deal with that issue, there's only one
11 thing to do, the right thing to do, but that is
12 follow a certain sequence, pathway, certain rules
13 need to be applied, so I'm very familiar with that
14 standard.

15 Q. Did you treat patients similar to Mr.
16 Moore?

17 A. Every day, sir.

18 Q. Okay.

19 Did you develop a number of different
20 opinions in this case?

21 A. Yes.

22 Q. Do you have an opinion specifically in
23 regards to the standard of care, and whether that
24 standard of care was breached by the Nurse
25 Practitioner Bartmus and Dr. Lasry?

1 understand what the issue is.

2 He goes back to the ER in 2016 complains of
3 pain here when he walks, and we know all his history.

4 So somebody would think that he have
5 another problem here. Once they start clotting,
6 chances are they would continue to clot.

7 So once he gets to the ER, it's been
8 documented he has a history of fem pop grafts, and
9 the first thing that is being done is a test to look
10 if there's a clot in his veins, which is actually a
11 good idea.

12 Q. Before you go to the ultrasound, Nurse
13 Practitioner Bartmus was here yesterday, testified
14 she did two physical exams of Mr. Moore where she was
15 able to detect a normal pulse in the top of the foot
16 and the ankle, and she was able to determine from
17 getting a normal pulse that she -- or he had no
18 peripheral perfusion.

19 Explain to the jury whether or not that is
20 even possible in Mr. Moore.

21 A. First of all, what you heard yesterday is
22 absolutely impossible.

23 That is not true and impossible, and I'll
24 show you why, and you will understand immediately.

25 First of all, the gentleman never had, for

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REPORTER'S CERTIFICATE

I, Bill Nelson, a Certified Court Reporter
in and for the State of Nevada, hereby certify that
pursuant to NRS 2398.030 I have not included the
Social Security number of any person within this
document.

I further Certify that I am not a relative
or employee of any party involved in said action, not
a person financially interested in said action.

_____/s/ Bill Nelson_____

Bill Nelson, RMR, CCR 191

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) SS .

I, Bill Nelson, RMR, CCR 191, do hereby
certify that I reported the foregoing proceedings;
that the same is true and correct as reflected by my
original machine shorthand notes taken at said time
and place.

/s/ Bill Nelson

Bill Nelson, RMR, CCR 191
Certified Court Reporter
Las Vegas, Nevada

EXHIBIT B

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DARELL L. MOORE and CHARLENE A.)
MOORE, individually and as)
husband and wife,)

Plaintiffs,)

vs.)

CASE NO.)

JASON LASRY, M.D.,)
individually; FREMONT EMERGENCY)
SERVICES (MANDAVIA), LTD.;)
TERRY BARTMUS, RN, APRN; and)
DOES I through X, inclusive;)
and ROE CORPORATIONS I)
through V, inclusive,)

A-17-766426-C)

DEPT. NO. 25)

Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS OF JURY TRIAL

P.M. SESSION

BEFORE THE HONORABLE KATHLEEN E. DELANEY

FRIDAY, JANUARY 31, 2020

APPEARANCES:

For the Plaintiffs:

E. BREEN ARNTZ, ESQ.
HANK HYMANSON, ESQ.
PHILIP M. HYMANSON, ESQ.

For the Defendants:

ROBERT C. MCBRIDE, ESQ.
KEITH A. WEAVER, ESQ.
ALISSA BESTICK, ESQ.

REPORTED BY: DANA J. TAVAGLIONE, RPR, CCR No. 841

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I N D E X

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JOINT EXHIBIT	MARKED	ADMITTED
104	Record of Irwin Simon, M.D.	58

1 LAS VEGAS, NEVADA, FRIDAY, JANUARY 31, 2020

2 1:36 P.M.

3 * * * * *

4 (Outside the presence of the jury.)

5 THE COURT: All righty. I hope everybody
6 had a good lunch. I understand there's some things
7 outside the presence. Did you get your transcript?

8 MR. WEAVER: Yes, ma'am. May I give you a
9 copy.

10 THE COURT: Yes, please.

11 So just to orient, for the record and for
12 the reporter who has joined us for this afternoon,
13 there was an argument made before we resumed the
14 trial this morning that Mr. Arntz had, from counsel,
15 Mr. Weaver's estimation, made argument in his opening
16 statement that -- or made statements in his opening
17 statement that related to consequences of the
18 amputation and the need for other equipment or other
19 things that the plaintiff could not afford to buy
20 and tied that into what ultimately would be the ask
21 for damages.

22 And Mr. Weaver was arguing, still waiting
23 for the transcript specifics, but arguing that had
24 he done so, then while there is not applicability
25 collateral source generally med-mal; but there is,

1 know, that there's stuff out there that he needs is
2 somehow opening the door to something that is very
3 clearly determined by our Supreme Court not a couple
4 years ago to be not able to be done, and I don't
5 know how do we promote, sort of these generalized
6 door opening and, you know, generalized what
7 collateral source is or isn't and when it works
8 above what the actual, you know, reality of this
9 case is.

10 So, for instance, Mr. Arntz is inquiring of
11 Dr. Fish, and Dr. Fish specifies this wheelchair
12 that isn't, you know, arguably available under
13 Medicare, but he doesn't like ask that question, but
14 it's obviously something that he was describing
15 earlier in his argument today, a lighter type of
16 wheelchair, so maybe like Medicare doesn't cover,
17 and then these other things that, you know, should
18 be known to the parties whether or not Medicare
19 covers or doesn't cover.

20 Are you still suggesting that you would be
21 able still inquire of Dr. Fish, "well, tell me
22 what's covered by Medicare and what isn't," to plant
23 the seed that things are covered by Medicare when
24 you don't have any evidence that what he's
25 testifying to is not covered by Medicare?

1 I mean, that a little different than just
2 Medicare is covering the plaintiff and, you know,
3 diminish his claim that way.

4 MR. ARNTZ: So 42.021, that's a statute
5 that's talking mostly about past medical bills.
6 There's no -- there's no exception to the collateral
7 source rule as it relates to future economic
8 damages, and that's what this is. This is future
9 economic damages. So they don't get to come in and
10 say, "well, some portion of your future economic
11 damages are covered by Medicare and some aren't"
12 because that's collateral source.

13 THE COURT: The title of the statute
14 belying your argument there, Mr. Arntz, in that it
15 refers to future damages by periodic payments,
16 bottom line, we'll have the argument once we hear
17 what Dr. Fish has to say.

18 MR. ARNTZ: Well, I'm certain that there
19 are going to be things that Dr. Fish has in his
20 Life Care Plan that are covered by Medicare. I
21 mean, that's -- I know that to be true. But that
22 doesn't mean they get to bring in that collateral
23 source, and I did nothing to open the door to a
24 collateral source.

25 THE COURT: Beauty is in the eye of the

1 Q. In 2017, the State of California declared
2 that you are one of the seven worst cardiovascular
3 surgeons in the entire state out of hundreds;
4 correct?

5 A. Incorrect, sir. I would like to see that.

6 Q. So is it your testimony, Dr. Marmureanu,
7 that the office of -- the California Office of
8 Statewide Health Planning and Development didn't
9 issue a report that listed you in the top 3 percent
10 of the worst cardiovascular surgeons in California?

11 A. You're untruthful and incorrect, again,
12 sir.

13 Q. Okay. So what would you need to be
14 convinced that that report exists?

15 A. Show it.

16 Q. Okay. We'll come back to that.

17 A. Go ahead.

18 Q. Let me do what's called "lay a little
19 foundation." So do you know what the "California
20 Society of Thoracic Surgeons" is?

21 A. Very well.

22 Q. Okay. And you don't believe that the
23 president of the California Society of Thoracic
24 surgeons supported a report that identified you as
25 one of the top seven worst cardiovascular surgeons in

1 California; correct?

2 A. Not only do I don't believe, I'm saying
3 you're wrong.

4 Q. And I would also be wrong if you told a
5 reporter for Kaiser News that, in effect, hospital
6 patients don't care if they're, in your case, nine
7 times more likely to die under your care?

8 A. That's not what I said. You're not telling
9 the truth again.

10 Q. Did you say something to that effect, that
11 hospital patients don't care about that report; the
12 only people who care about the data are the
13 journalists?

14 A. That could be.

15 Q. But it's in the context of the report that,
16 out of 271 cardiovascular surgeon in California,
17 found you one of the worst seven?

18 A. It's absolutely not true. And, I mean, I
19 don't want to judge upset, but I think it's
20 despicable what you're saying.

21 Q. And would it also be despicable if Hollywood
22 Presbyterian Hospitals got one of the worst rankings
23 as a hospital because of your ranking by the State of
24 California's Office of Statewide Health Planning and
25 Development?

1 A. That's not true again, sir. You will have
2 to show me.

3 Q. Okay. We'll come back to that.

4 Sir, you're saying no such report exists;
5 right?

6 A. Well, not what you said. What you said
7 doesn't exist. You are wrong about the year; you
8 are wrong about the report; you are wrong what the
9 report says, and I'm not sure if you're doing it on
10 purpose or just you don't know enough about it.

11 Q. Well, I read the report. What does it say?
12 well, you're familiar --

13 A. Allow me to explain. I can explain.

14 MR. ARNTZ: Your Honor, he's not laying the
15 proper foundation.

16 THE COURT: Hold on. There's an objection
17 posed, and I'm going to have counsel back at the
18 bench so we can try to resolve it more quickly.

19 (Bench conference.)

20 THE COURT: The objection is overruled.
21 You may proceed, Mr. Weaver.

22 BY MR. WEAVER:

23 Q. Dr. Marmureanu, you were quoted, weren't
24 you, after the report came out, by a reporter from
25 Kaiser Health News where you were identified in a

1 with the mortality after surgery, and some of those
2 are my patients. But it doesn't say I'm the worst
3 surgeon than the guy who did only three cases and
4 nobody died.

5 Q. It does.

6 A. No, it doesn't.

7 Q. Because it takes the -- it says, out of
8 100 patients who get surgery, 100 patients who get
9 surgery, you have nine times the rate of patients who
10 die.

11 A. I will need to see that. But, again, those
12 are not my patients. Sir, those are hospital
13 patients, yes, that I operate on; and then they go
14 back to other facilities, and for whatever reason,
15 they aspirate, they get pulmonary embolus; they get
16 a stroke, or they get hit by a car. I said car or a
17 bus. I think it was a bus actually. So I did say
18 before that. So this has nothing to do with the
19 surgical skill.

20 MR. WEAVER: Okay. I don't have any
21 additional questions. Thank you, sir.

22 THE COURT: Thank you. Mr. Arntz.

23 MR. ARNTZ: Thank you, Your Honor.

24 What exhibit is that? Is that 104? I
25 don't think it's in. I'd like to move for the

1 admission of Exhibit 104.

2 THE COURT: Joint Exhibit 104 is being
3 moved for admission. Any objection?

4 MR. WEAVER: One moment, Your Honor,
5 please.

6 THE COURT: That's fine. Can you identify
7 generally what it is, Mr. Arntz.

8 MR. ARNTZ: I'm only going to use one
9 letter from it.

10 THE COURT: Whose records they are, what it
11 is so that they can get --

12 MR. WEAVER: It's Dr. Irwin.

13 MR. ARNTZ: Dr. Irwin.

14 THE COURT: Thank you. Any objection?

15 MR. MCBRIDE: No objection.

16 MR. WEAVER: No objection, Your Honor.

17 THE COURT: Exhibit, Joint Exhibit 104 is
18 admitted. You may inquire.

19 (Whereupon Joint Exhibit No. 104 was
20 admitted into evidence.)

21

22 REDIRECT EXAMINATION

23 BY MR. ARNTZ:

24 Q. Dr. Marmureanu, I'm going to put up a letter
25 here. Have you seen this letter?

1 A. Yes, sir. I think it's from Dr. Wienczek,
2 yeah.

3 Q. Okay. And I'll refresh your memory that in
4 December of 2014, Mr. Moore was hospitalized for a
5 blood clot, and so this is probably three or four
6 weeks after that hospitalization, maybe a month.
7 And I'd like to draw your attention specifically
8 to -- it seems as though I was wrong about the DVT,
9 the emphasis I put on that.

10 But let me ask you something: First of all,
11 what is the importance of the fact that the DVT was
12 the primary differential diagnosis?

13 A. Well, like I said, DVT should have been
14 part of differential diagnosis, but it should have
15 never been the first thing. A DVT, or a deep vein
16 thrombosis, below the knee, more likely than not
17 will not kill a patient or make him lose a leg.
18 Arterial insufficiency, ischemia, it will do that.

19 In other words, there is a differential
20 diagnosis. There are things that you have in your
21 mind when you work out a patient. The standard of
22 care in this patient, because of his prior arterial
23 insufficiency history, should have been, the No. 1
24 should have been leg ischemia. Not only wasn't
25 No. 1, not only wasn't No. 2, wasn't 3, wasn't on

1 the list.

2 So even though I don't believe there was a
3 problem ruling out -- actually, I think it's good to
4 rule out the deep vein thrombosis, my issue is that
5 there was nothing done.

6 Q. And once the ultrasound came back with a
7 blocked arterial graft, what does the standard of
8 care indicate that they should have done at that
9 point?

10 A. At that point, they need to continue the
11 workup. It's not the Five Ps. It's not the
12 physical exam only. It's something needs to be
13 done. All his symptoms, all his complaints lead
14 toward an arterial problem, not the venous problem.
15 And at that point, you know that basically, again,
16 it's impossible to have normal pulses.

17 He never had pulses before the bypass. And
18 the bypass is done, according to that ultrasound, he
19 definitely didn't have pulses by Doppler, definitely
20 not palpable. So at that point, you will need to do
21 some sort of an imaging study. You can't -- would
22 be fair to say, you have a venous duplex for the
23 veins. You want to get an arterial duplex for the
24 arteries, which will show it's blocked.

25 And at that point, you need to get an

1 angiogram, which will basically be as a roadmap,
2 clearly will show you where the blockage is, what's
3 blocked, how deep, et cetera. And then obviously
4 you have to treat it, start medical management,
5 medication, Heparin. That stops the more clot from
6 being formed versus TPA, which is a clot buster.
7 Call intervention radiology to start those. Call
8 vascular to hopefully try the percutaneous open or
9 do any sort of procedures.

10 Q. You saw other letters from Dr. Wiencek where
11 he talks about good pulses.

12 what was significant by what you read in
13 those records about those pulses?

14 A. It's very interesting because his own
15 surgeon who knows him the best -- he evaluated him,
16 he done the bypasses -- never used the word
17 "palpable." Never. Because the pulses were never
18 palpable. He used "very good pulses," which we're
19 happy to have them, by Doppler. You put it. You
20 find it where you do it, and then you hear (witness
21 makes sound). They're palpable -- well, they're
22 Dopplerable pulses.

23 So his surgeon is saying that, before the
24 bypass, there were no pulses, Doppler or palpable.
25 After the bypass, we've looked at the report, there

1 was Dopplorable in one area. And I think in this
2 letter, if I recall correct, he's saying that
3 they're good pulses by Doppler while the graft is
4 open. while the graft is closed -- it's right
5 here -- he had excellent pulses in the foot, current
6 by Doppler. In other words, they're not palpable.
7 Nobody uses the machine if you can feel them.

8 So it's very difficult for me to understand
9 or actually it's impossible to say that even after
10 the bypass, there were only pulses by Doppler, and
11 before the bypass, there were no pulses at all.
12 Once a bypass is down, and we know from the venous
13 duplex that the bypass is closed, there are no
14 pulses. They can't be.

15 The blood -- there's no way that you can
16 get blood in that area to have pulses, even by
17 Doppler. So go a step further to have palpable
18 pulses, this patient never had palpable pulses.
19 Obviously it's wrong. It's impossible.

20 Q. All right. Anything discussed during your
21 cross-examination change any of your opinions?

22 A. Other than his statements are wrong in
23 regards to study. The study doesn't say that my
24 mortalities is nine times more. That's incorrect.
25 It's not truthful, and everything else, I disagree

1 with all his statement. I don't have anything else.

2 Q. In regards to your opinions, have your
3 opinions changed in any way?

4 A. Absolutely not.

5 MR. ARNTZ: Okay. That's all I have.

6 MR. MCBRIDE: No questions.

7 MR. WEAVER: No questions.

8 THE COURT: May I see, by a show of hands,
9 if there are any jurors who have questions for this
10 witness. I believe that there was a reference made
11 on the lunch break that there might be a question
12 for this witness. Then we'd ask the marshal to make
13 sure that you write it down and have it ready.

14 If there are questions, please prepare
15 them. I'm just going to remind you to make sure
16 your name and badge number, for the current seat you
17 are in, is on the question and that you use the
18 entire piece of paper.

19 Can I just see a show of hands right now
20 how many questions we have. Two. Looks like two
21 people have questions. Okay. Finish them up, and
22 whenever you're ready to hand them in, you'll give
23 them to the marshal. She'll bring them forward.

24 I don't know if you notice, our marshal
25 shrunk a little bit.

1 MR. MCBRIDE: She's probably just as strong
2 though.

3 THE COURT: Oh, my money is on her.
4 Did you get the one that --

5 THE MARSHAL: Yeah, she's still writing.

6 THE COURT: She's still writing.

7 You getting close there, Juror No. 8?

8 Thank you. All right. May I have counsel at the
9 bench to read the questions.

10 (Bench conference.)

11 THE COURT: All right. Doctor, we do have
12 some questions from the jurors. There are multiple
13 questions on the sheet, and I think that they're
14 sort of standalone. So here's how this process is
15 going to work, if you're not familiar:

16 I'm going to read the question exactly as
17 written. I'm not at liberty, nor are the jurors, to
18 respond and have a dialogue like the counsel would
19 have. What you do is you answer the question, to
20 the best of your ability, and then the counsel will
21 have an opportunity to follow-up and flesh out those
22 answers, if need be.

23 Okay. First question: "Are there
24 instances when an occlusion in a graft dissolves or
25 otherwise goes away without medicine or surgery?"

1 THE WITNESS: Never.

2 THE COURT: "Will or can blood flow from
3 collaterals demonstrate a pulse in the foot?"

4 THE WITNESS: No. Not in this case, no.

5 THE COURT: "In your opinion, does the
6 standard of care mandate the administration of
7 medicine, like Heparin, if a graft appears occluded
8 or possibly has an occlusion?"

9 THE WITNESS: 100 percent, yes. Very good
10 question. Immediately. There is no downside. It's
11 better safe than sorry.

12 THE COURT: "Can you clarify what you meant
13 when you stated that it is impossible for PT pulses
14 to have been detected on 12/25/16, due to the 2012
15 fem-pop."

16 THE WITNESS: Repeat the question.

17 THE COURT: Yes. "Can you clarify what you
18 meant when you stated that it is impossible for
19 PT pulses to have been detected on 12/25/16, due to
20 the 2012 fem-pop."

21 THE WITNESS: I'm sorry I'm having
22 repeating it. 12? Which one was the last date?
23 12/26? 12/25? 12/28?

24 THE COURT: I'll read it again, as it's
25 written, and I'll state the date in not number

1 terms. Okay? "Can you clarify what you meant when
2 you stated that it is impossible for PT pulses to
3 have been detected on December 25th, 2016, due to
4 the 2012 fem-pop."

5 THE WITNESS: Yes. May I show?

6 THE COURT: You may.

7 THE WITNESS: Very good question. Let's
8 look at the facts.

9 (Reporter request.)

10 THE WITNESS: Okay. Very good question.
11 Let's look at the facts.

12 THE COURT: So let me first interrupt,
13 Doctor. You can't illustrate this answer from the
14 sheet that you already have.

15 THE WITNESS: I cannot do new ones?

16 THE COURT: Okay. I would like you to
17 return to your seat. I would like you to answer the
18 question, to the best of your ability, if you may;
19 and then, as I mentioned, counsel will have an
20 opportunity to follow-up, and they can determine how
21 they wish to proceed in that regard.

22 THE WITNESS: Thank you.

23 The medical documents show that, before the
24 bypass in 2012, there are no pulses. That's what
25 the surgeon said. We looked at it. After the

1 bypass, he documented he was happy that, by Doppler,
2 he was able to obtain a PT pulse, and he also
3 document in that note that that pulse wasn't present
4 before the bypass. So the bypass that he clearly
5 said he had very good flow brought, allowed him to
6 detect a Doppler, a PT pulse, a foot pulse, with the
7 Doppler, not palpable.

8 The reason I said it's impossible to have
9 the same PT pulse, on 12/25, is that the bypass is
10 gone. There is no more bypass. It's simple.
11 Before the bypass, he said there was no PT pulse.
12 He did a bypass, and he got a PT pulse.

13 That bypass in December 25 is gone. And
14 the reason we know it's gone, No. 1, the study show
15 that it's occluded, and we also know he lost his leg
16 three days after. So if the bypass is gone, it's
17 very simple that there was no pulse because only the
18 bypass allows him to bring the flow in there to
19 create the same PT.

20 So no PT pulse or no foot pulse before the
21 bypass in 2012. If, after the bypass, there is a
22 foot pulse, if you take the bypass away, there is --
23 you're not going to get that pulse in there, and
24 that's the way it is. 100 percent, you're not going
25 to have a palpable pulse. Impossible because he

1 never had a palpable pulse. Nowhere in any medical
2 record it says that there is a palpable pulse.

3 I will actually guarantee you, which we can
4 look in the records, the surgeon says before the
5 bypass, he had no pulses at all. But even in 2012,
6 he had no pulses, mean no palpable pulses, no pulses
7 by Doppler. After a bypass, only by Doppler, for
8 some time. And when the graft goes bad, that
9 Doppler pulse is gone because only the --

10 If I can show -- can I show the old
11 picture?

12 THE COURT: That's fine. Just remember the
13 reporter needs to hear you.

14 THE WITNESS: I'm sorry? I didn't hear you.

15 THE COURT: Just remember the reporter
16 needs to hear you.

17 THE WITNESS: This bypass is what brings
18 the blood down to the foot pulses where the PT is.
19 Surgeon says, before he did this, there was nothing
20 here. After he did this, he said he had a PT pulse
21 by Doppler. All what you need to do, if you take
22 this away, this is gone, (indicating). There is no
23 pulse in here by Doppler, and that's what I mean.
24 That's why it was impossible.

25 THE COURT: Okay. One additional question:

1 "On February 8, 2016, Dr. Wiencek state the showed
2 good pulses on both lower extremities. Was this
3 only by Doppler?"

4 If that's what you were just talking about,
5 or can you clarify?

6 THE WITNESS: Very good question, and I
7 actually looked in the records.

8 THE COURT: There's a reference, by the
9 way, to Exhibit 109, page 36.

10 THE WITNESS: I've looked at this. Can we
11 put back the letter?

12 Surgeons are happy to say "Very good
13 pulses. By Doppler, we can see there are still good
14 pulses, better than no pulses. In his notes --
15 actually, the two notes that he's talking, he just
16 said "very good pulses." He didn't say "palpable,"
17 but he didn't say "by Doppler" either.

18 In the letter -- first of all, in the O.R.,
19 he's describing Doppler. In the letter, he's
20 describing "very good pulses by Doppler." Nowhere
21 he's saying "palpable pulses." The word "palpable"
22 is not being used.

23 So now what I look at, more likely than
24 not, when the bypass, I know that he never said
25 "palpable." Usually, it's not enough load to create

1 to this Court's opinion, would be akin to impeachment
2 with extrinsic evidence; and that is something that
3 is not allowed, other than in certain circumstances,
4 really more things that go towards credibility of
5 testimony, that's not what this would have been.

6 So the Court indicated that, although the
7 plaintiffs' counsel may wish to challenge if
8 Mr. Weaver was misrepresenting any such reports and
9 could potentially do so on redirect, that it was not
10 required of Mr. Weaver to confront the witness with
11 actual reports. Although, I do think it was fair
12 for Mr. Arntz to ask to be given a reference to or
13 copy of or citation to what reports he was referring
14 to; and I believe Mr. Weaver agreed, when he left
15 the bench, to do so. He indicated it was all online
16 and there was a website that could be given. So,
17 again, that inquiry continued.

18 Mr. Arntz, do you have anything you want to
19 add to this bench conference?

20 MR. ARNTZ: No, Your Honor.

21 THE COURT: Mr. McBride?

22 MR. MCBRIDE: Nothing, Your Honor.

23 THE COURT: Mr. Weaver, this was more your
24 inquiry.

25 MR. WEAVER: No, Your Honor.

C E R T I F I C A T E

STATE OF NEVADA)
)SS:
COUNTY OF CLARK)

I, Dana J. Tavaglione, RPR, CCR 841, do
hereby certify that I reported the foregoing
proceedings; that the same is true and correct as
reflected by my original machine shorthand notes
taken at said time and place, and prepared in daily
copy, before the Hon. Kathleen E. Delaney,
District Court Judge, presiding.

Dated at Las Vegas, Nevada, this 1st day of
February 2020.

/S/Dana J. Tavaglione

Dana J. Tavaglione, RPR, CCR NO. 841
Certified Court Reporter
Las Vegas, Nevada

EXHIBIT C

1 TRAN

2
3
4 IN THE EIGHTH JUDICIAL DISTRICT COURT
5 CLARK COUNTY, NEVADA
6
7

8 DARELL MOORE, ET AL.,)

9 Plaintiff,)

10 vs.)

Case No.

) A-17-766426

11 JASON LASRY, M.D., ET)
12 AL.,)

) Dept. No. 25

13 Defendant.)
14 -----

15 JURY TRIAL
16 -----

17 Before the Honorable Kathleen Delaney
18 Monday, February 3, 2020, 1:30 p.m.

19 Reporter's Transcript of Proceedings
20 -----
21
22
23
24

25 REPORTED BY ROBERT A. CANGEMI, CCR 888

1 APPEARANCES:

2 FOR THE PLAINTIFFS: Breen Arntz, Esq.
3 Philip Hymanson, Esq.
4 Henry Hymanson, Esq.

5 FOR THE DEFENDANTS: Robert McBride, Esq.
6 Keith Weaver, Esq.
7 Alissa Bastick, Esq.
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I N D E X

WITNESSES :

D C RD RC FD FC

JASON LASRY

6

1 indicated in the bench conference that I did not
2 believe that that was the case, that I allowed the
3 questioning of Dr. Marmureanu, because he had
4 testified as an expert for the Plaintiffs, and he
5 had discussed and for lack of a better term he had
6 tauted his bona fides and his qualifications and his
7 circumstance, and I felt it was fair game for that
8 to take place on the side of the defense.

9 That had not yet occurred in the testimony
10 of Dr. Lasry so I did not feel that that door had
11 been opened, and when the questioning resumed,
12 Mr. Arntz went to another area, so I did ultimately
13 sustain the objection, because at that point,
14 whether it was either not relevant, or whether or
15 not the door had not been opened for it Dr. Lasry's
16 testimony, both are applicable for me to deny.

17 But, Mr. Arntz, did you want to add anything
18 -- well, I will start with the objecting party.

19 Mr. McBride, did you want to add anything to
20 your objection?

21 MR. McBRIDE: No, Your Honor.

22 THE COURT: Mr. Arntz, did you want to add
23 anything to your argument at the bench?

24 MR. ARNTZ: The only thing I would like to
25 add is that I had an opportunity to review the

1 article that Mr. Weaver was citing to when
2 Dr. Marmureanu was on the stand.

3 It is not anything close to what he
4 represented. I would like to have the Court look at
5 that and --

6 THE COURT: Well, I always hate to put
7 counsel through additional work, but I think that
8 somebody has to brief something.

9 MR. WEAVER: Sure.

10 THE COURT: Somebody needs to brief it to
11 say here's the article.

12 Here is what I believe it says, and as I
13 gave Mr. Weaver the benefit of the doubt at the time
14 of the questioning, but counsel has an obligation
15 not to pose a question for which he doesn't have a
16 good faith basis to do.

17 So we won't have -- you guys have dailies,
18 so you can point to some transcript portions of what
19 was said and what wasn't.

20 MR. WEAVER: Sure.

21 We will brief it, because we are doing a
22 request for judicial notice of the public report,
23 which is what the primary questioning was.

24 The only time I got into any questions about
25 the news articles had specifically to do with his

1 quotes in the news articles.

2 THE COURT: Did you hear that statement
3 that they will do a motion to ask the Court to take
4 judicial notice of the report, and I believe his
5 inquiries were limited to questions of
6 Dr. Marmureanu's responses to the report.

7 I don't know if you heard that, Mr. Arntz.
8 You were talking to Mr. Hymanson.

9 MR. ARNTZ: I did hear that, and I couldn't
10 disagree more.

11 THE COURT: Well maybe the easiest way to do
12 it -- how quickly or when were you planning on
13 filing your motion for judicial notice?

14 MR. WEAVER: We were going to file the motion
15 for judicial notice tomorrow with the request for a
16 hearing on it.

17 THE COURT: That seems to be a good place to
18 respond to the fact that the other issues that are
19 related to it, including the use of it, and whether
20 or not it was an accurate use of it, and whether or
21 not there is some further information that would
22 need to be provided to the jury or not.

23 MR. ARNTZ: Okay.

24 THE COURT: That seems to be the easiest
25 path.

1 REPORTER'S CERTIFICATE

2
3 STATE OF NEVADA)

4) ss.

5 CLARK COUNTY)
6
7

8 I, Robert A. Cangemi, a certified court
9 reporter in and for the State of Nevada, hereby
10 certify that pursuant to NRS 239B.030 I have not
11 included the Social Security number of any person
12 within this document.

13 I further certify that I am not a relative
14 or employee of any party involved in said action,
15 nor a person financially interested in said action.
16
17

18 (signed) /s/ Robert A. Cangemi

19 -----
20 ROBERT A. CANGEMI, CCR NO. 888
21
22
23
24
25

1 C E R T I F I C A T E

2 STATE OF NEVADA)

3) ss.

4 CLARK COUNTY)

5

6

7

8

9 I, Robert A. Cangemi, CCR 888, do
10 hereby certify that I reported the foregoing
11 proceedings, and that the same is true and
12 accurate as reflected by my original machine
13 shorthand notes taken at said time and place.

14

15

16 (signed) /s/ Robert A. Cangemi

17

18 -----
Robert A. Cangemi, CCR 888

19 Certified Court Reporter

20 Las Vegas, Nevada

21

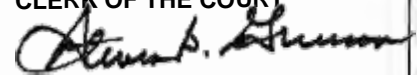
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EXHIBIT D



1 KEITH A. WEAVER
Nevada Bar No. 10271
2 E-Mail: Keith.Weaver@lewisbrisbois.com
DANIELLE WOODRUM
3 Nevada Bar No. 12902
E-Mail: Danielle.Woodrum@lewisbrisbois.com
4 ALISSA BESTICK
Nevada Bar No. 14979C
5 E-Mail: Alissa.Bestick@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 *Attorneys for Defendant Terry Bartmus,*
A.P.R.N.

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

13 DARELL L. MOORE and CHARLENE A.
14 MOORE, individually and as husband and
wife;

15 Plaintiffs,

16 vs.

17 JASON LASRY, M.D., individually;
FREMONT EMERGENCY SERVICES
18 (MANDAVIA), LTD.; TERRY BARTMUS,
RN, APRN; and DOES I through X,
19 inclusive; and ROE CORPORATIONS I
through V, inclusive;

20 Defendants.
21

CASE NO. A-17-766426-C
Dept. No.: XXV

DEFENDANT TERRY BARTMUS,
A.P.R.N.'S REQUEST FOR JUDICIAL
NOTICE

HEARING REQUESTED

23 Defendant Terry Bartmus, A.P.R.N., by and through her attorneys, the law firm
24 LEWIS BRISBOIS BISGAARD & SMITH LLP hereby respectfully requests that the Court
25 take judicial notice of the following documents pursuant to NRS 47.130:

26 ///

27 ///


1 Exhibit 1: Coronary Artery Bypass Graft: Surgeon Performance Ratings, 2013-
2 2014 for Alexander Marmureanu, M.D. available at:
3 [https://oshpd.ca.gov/visualizations/coronary-artery-bypass-graft-cabg-surgery-california-](https://oshpd.ca.gov/visualizations/coronary-artery-bypass-graft-cabg-surgery-california-surgeon-performance-ratings-2013-2014/)
4 [surgeon-performance-ratings-2013-2014/](https://oshpd.ca.gov/visualizations/coronary-artery-bypass-graft-cabg-surgery-california-surgeon-performance-ratings-2013-2014/).

5 Exhibit 2: The Executive Summary of the California Report on Coronary Artery
6 Bypass Graft (CABG) Surgery 2017: Hospital Data.
7

8 Exhibit 3: Article by Anna Gorman of Kaiser Health News dated July 17, 2017,
9 titled "California hits nerve by singling out cardiac surgeons with higher patient death
10 rates."
11
12

13 DATED this 5 day of February, 2020
14

15 LEWIS BRISBOIS BISGAARD & SMITH LLP
16

17 By 
18 KEITH A. WEAVER
19 Nevada Bar No. 10271
20 DANIELLE WOODRUM
21 Nevada Bar No. 12902
22 ALISSA N. BESTICK
23 Nevada Bar No. 14979C
24 6385 S. Rainbow Boulevard, Suite 600
25 Las Vegas, Nevada 89118
26 *Attorneys for Defendant Terry Bartmus,*
27 *A.P.R.N.*
28

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 5th day of February, 2020, a true and correct copy
3 of DEFENDANT TERRY BARTMUS, A.P.R.N.'S REQUEST FOR JUDICIAL NOTICE
4 was served electronically with the Clerk of the Court using the Wiznet Electronic Service
5 system and serving all parties with an email-address on record, who have agreed to
6 receive Electronic Service in this action.

7 Matthew W. Hoffman, Esq.
8 ATKINSON WATKINS & HOFFMAN, LLP
9 10789 W. Twain Avenue, Ste. 100
10 Las Vegas, NV 89135
11 Tel: 702-562-6000
12 Fax: 702-562-6066
13 Email: mhoffmann@awhlawyers.com
14 *Attorneys for Plaintiffs*

Robert McBride, Esq.
Chelsea R. Hueth, Esq.
CARROLL, KELLY, TROTTER,
FRANZEN & MCBRIDE
8329 W. Sunset Road, Ste. 260
Las Vegas, NV 89113
Tel: 702-792-5855
Fax: 702-796-5855
Email: rcmcbride@cktfmlaw.com
Email: crhueth@cktfmlaw.com
Attorneys for Defendant, Jason Lasry, M.D.

13 Breen Arntz, Esq.
14 5545 Mountain Vista, Suite E
15 Las Vegas, NV 89120
16 Tel: 702-384-8000
17 Fax: 702-446-8164
18 Email: breen@breen.com
19 *Attorneys for Plaintiffs*

20 By /s/ Emma L. Gonzales
21 An Employee of
22 LEWIS BRISBOIS BISGAARD & SMITH LLP
23
24
25
26
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28

EXHIBIT 1

Coronary Artery Bypass Graft: Surgeon Performance Ratings, 2013-2014

This report provides quality ratings for 271 California Surgeons who performed coronary artery bypass graft (CABG) surgery during 2013-2014. The performance ratings are based on risk-adjusted operative mortality rates for Isolated CABG surgery. It also includes the number of isolated CABG surgery cases and deaths that each surgeon performed as well as the location of hospitals where the surgeon performed CABG surgery.

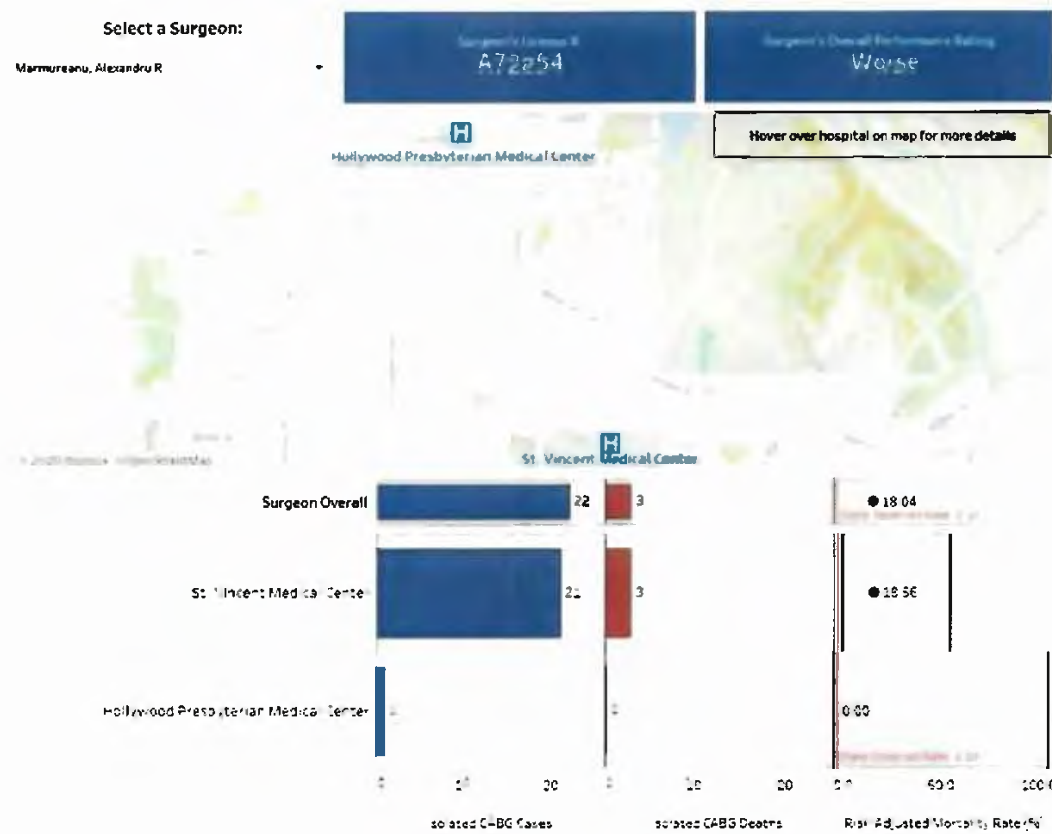


EXHIBIT 2

The California Report on Coronary Artery Bypass Graft (CABG) Surgery 2017: Hospital Data

Coronary artery bypass graft (CABG) surgery is one of the most expensive and common cardiac surgeries performed in California. Improved medical interventions and quality improvement efforts have contributed to a declining mortality rate over the last 15 to 20 years. However, post-operative death and major complications (e.g. stroke, surgical site infections) still occur at rates that can and should be reduced. The intent of this report is to help improve quality outcomes and appropriateness of CABG surgery by informing consumers, hospitals, surgeons and others about the performance of hospitals.

The *California Report on Coronary Artery Bypass Graft (CABG) Surgery 2017: Hospital Data* provides quality ratings for the 126 California-licensed hospitals performing adult isolated CABG¹ or CABG + Valve² surgery during 2016 and 2017. Hospital results for isolated CABG operative mortality and internal mammary artery (IMA)³ utilization are based on calendar year 2017 data. Hospital results for CABG + Valve operative mortality and isolated CABG post-operative stroke are based on combined 2016-2017 calendar year data to increase statistical reliability.

The outcome measures are risk-adjusted, a statistical technique that enables fair comparison of hospitals even though some treat sicker patients.

- Isolated CABG operative mortality includes all deaths that occurred during the hospitalization, up to 90 days, in which the CABG surgery was performed, or all deaths after transfer to another acute care center up to 90 days and/or deaths within 30 days after the surgery (no matter where they occurred). This definition was revised starting with 2015 data. Readers should exercise caution when comparing operative mortality rates in this report to those in previous years.
- CABG + Valve operative mortality includes all deaths as defined above.
- Post-operative stroke is defined as a central neurologic deficit that occurred after the surgery and did not resolve within 24 hours. This measure only applies to isolated CABG surgeries.

¹ Isolated CABG surgery refers to heart bypass surgery without other major surgery, such as heart or lung transplantation, valve repair, etc. performed concurrently with the bypass procedure. Patients undergoing CPR en route to the operating room are excluded.

² CABG + Valve surgery refers to heart bypass surgery that also includes repair or replacement of the mitral valve and/or aortic valve. Patients with salvage operative status are excluded.

³ The internal mammary artery (IMA) supplies blood to the front chest wall and the breasts. It is a paired artery, running on each side of the inner chest. Evidence shows that the IMA, when grafted to a coronary artery, is less susceptible to obstruction over time and remains fully open longer than vein grafts.

Also included in this report is the IMA utilization rate for hospitals. Research shows that high rates of IMA use result in long-term graft patency and improved patient survival, making it an important process measure of surgical quality.⁴

The California CABG Outcomes Reporting Program (CCORP) provided each hospital with a preliminary report containing the risk-adjusted models, explanatory materials, and results for all hospitals. Hospitals were given a 60-day review period to submit statements to CCORP for inclusion in this report. (INSERT NUMBER) hospitals submitted comment letters, which can be viewed by the hospital name with † in this report. These statements may help readers understand the concerns of healthcare providers regarding their performance information.

Hospital Operative Mortality Findings

2017 Isolated CABG Operative Mortality

The operative mortality rate for isolated CABG surgery in California was 2.22 percent (290 deaths after 13,049 procedures) in 2017. This rate is slightly lower than the rate reported for 2016 (2.37 percent). Overall, the 2017 rate represents a 23.71 percent reduction since 2003 (2.91 percent), the first year of mandated public reporting.

- After adjusting for patients' pre-operative health conditions, 96.8 percent of all hospitals performed within the statistically acceptable range of the state average. No hospital was rated **"Better"** than the state average operative mortality rate.
- After adjusting for patients' pre-operative health conditions, four hospitals were rated **"Worse"** than the state average operative mortality rate (French Hospital Medical Center, Providence Little Company of Mary Medical Center – Torrance, Valley Presbyterian Hospital, and West Anaheim Medical Center).

2016-2017 CABG + Valve Operative Mortality

The operative mortality rate for CABG + Valve surgery in California was 4.63 percent in 2016-2017 (210 deaths after 4,531 procedures). This rate decreased by 6.09 percent from 2015-2016 when the rate was 4.93 percent.

- After adjusting for patients' pre-operative health conditions, 98.37 percent of all hospitals performed within the statistically acceptable range of the state average. No hospital was rated **"Better"** than the state average operative mortality rate.
- After adjusting for patients' pre-operative health conditions, two hospitals were rated **"Worse"** than the state average operative mortality rate (Long Beach Memorial Medical Center and Palomar Health Downtown Campus).

⁴ IMA utilization was assessed only for first-time, isolated CABG surgeries where the operative status was elective or urgent and the left anterior artery was bypassed.

2016-2017 Hospital Post-Operative Stroke Findings

The post-operative stroke rate for isolated CABG surgery in California was 1.47 percent (380 strokes after 25,913 procedures) in 2016-2017. This represents a slight decrease in California's average post-operative stroke rate from 2015-2016 when the rate was 1.50 percent. This represents a 2.80 percent increase in California's average post-operative stroke rate since 2007-2008 when the rate was 1.43 percent.

- After adjusting for patients' pre-operative health conditions, 98.41 percent of all hospitals performed within the statistically acceptable range of the state average. No hospital was rated **"Better"** than the state average post-operative stroke rate.
- Two hospitals were rated **"Worse"** than the state average post-operative stroke rate (Cedars Sinai Medical Center and Stanford Hospital).

2017 Hospital Internal Mammary Artery (IMA) Usage Findings

The IMA is the preferred conduit for CABG surgery of the left anterior descending artery. Hospitals with *high* rates of IMA usage are adhering to nationally recognized best practices in heart bypass surgery. There is no consensus on an optimal usage rate, so **"Better"** performance ratings are not given. The average IMA usage rate among California hospitals was 98.22 percent in 2017, 97.89 percent in 2016, and 89.56 percent⁵ in 2003.

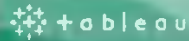
- Four California hospitals (Antelope Valley Hospital, Beverly Hospital, Centinela Hospital Medical Center and Garfield Medical Center) were rated **"Low"** with IMA usage rates significantly lower than the state average. Antelope Valley Hospital had low IMA usage rates historically and was rated **"Low"** from 2008 to 2017 except 2011.

For information on research methods and statistical results, please see the *Technical Note for the California Report on Coronary Artery Bypass Graft Surgery 2017: Hospital Data*.

<https://oshpd.ca.gov/data-and-reports/healthcare-quality/cabg-reports/>

⁵ The increase in the statewide IMA usage rate over the last 10 years is partly due to a change in the IMA measure. Beginning in 2008, patients who did not have the left anterior descending artery bypassed were excluded from the denominator.

EXHIBIT 3



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Practices

California hits nerve by singling out cardiac surgeons with higher patient death rates

by Anna Gorman, Kaiser Health News | Jul 17, 2017 11:42am



A public database of California heart surgeons identified physicians who had a higher-than-average death rate for patients who underwent a common bypass procedure.

Michael Koumjian, M.D., a heart surgeon for nearly three decades, said he considered treating the sickest patients a badge of honor. The San Diego doctor was frequently called upon to operate on those who had multiple illnesses or who'd undergone CPR before arriving at the hospital.

Recently, however, Koumjian received some unwelcome recognition: He was identified in a public database of California heart surgeons as one of seven with a higher-than-average death rate for patients who underwent a common bypass procedure.

"If you are willing to give people a shot and their only chance is surgery, then you are going to have more deaths and be criticized," said Koumjian, whose risk-adjusted death rate was 7.5 per 100 surgeries in 2014-15. "The surgeons that worry about their stats just don't take those cases."

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Now, Koumjian said he is reconsidering taking such complicated cases because he can't afford to continue being labeled a "bad surgeon."

California is one of a handful of states—including New York, Pennsylvania and New Jersey—that publicly reports surgeons' names and risk-adjusted death rates on a procedure known as the "isolated coronary artery bypass graft." The practice is controversial: Proponents argue transparency improves quality and informs consumers. Critics say it deters surgeons from accepting complex cases and can unfairly tarnish doctors' records.

"This is a hotly debated issue," said Ralph Brindis, M.D., a cardiologist and professor at UC-San Francisco who chairs the advisory panel for the state report. "But to me, the pros of public reporting outweigh the negatives. I think consumers deserve to have a right to that information."

Prompted by a state law, the Office of Statewide Health Planning and Development began issuing the reports in 2003 and produces them every two years. Outcomes from the bypass procedure had long been used as one of several measures of hospital quality. But that marked the first time physician names were attached—and the bypass is still the only procedure for which such physician-specific reports are released publicly in California.

California's law was sponsored by consumer advocates, who argued that publicly listing the names of outlier surgeons in New York had appeared to bring about a significant drop in death rates from the bypass procedure. State officials say it has worked here as well: The rate declined from 2.91 to 1.97 deaths per 100 surgeries from 2003 to 2014.

"Providing the results back to the surgeons, facilities and the public overall results in higher quality performance for everybody," said Holly Hoegh, manager of the clinical data unit at the state's health planning and development office.

Since the state began issuing the reports, the number of surgeons with significantly higher death rates than the state average has ranged from six to 12, and none has made the list twice. The most recent [report](#), released in May, is based on surgeries performed in 2013 and 2014.

In this year's report, the seven surgeons with above-average death rates—out of 271 surgeons listed—include several veterans in the field. Among them were Daniel Pellegrini, M.D., chief of inpatient quality at Kaiser Permanente San Francisco and John M. Robertson, M.D., director of thoracic and cardiovascular surgery at Providence Saint John's Health Center in Santa Monica. Most defended their records, arguing that some of the deaths shouldn't have been counted or that the death rates didn't represent the totality of their careers. (Kaiser Health News, which produces California Healthline, is not affiliated with Kaiser Permanente.)

"For the lion's share of my career, my numbers were good and I'm very proud of them," said Pellegrini. "I don't think this is reflective of my work overall. I do think that's reflective that I was willing to take on tough cases."

During the two years covered in the report, Pellegrini performed 69 surgeries and four patients died. That brought his risk-adjusted rate to 11.48 deaths per 100, above the state average of 2.13 per 100 in that period.

Pellegrini said he supports public reporting, but he argues the calculations don't fully take the varying complexity of the cases into account and that a couple of bad outcomes can skew the rates.

Robertson said in a written statement that he had three very "complex and challenging" cases involving patients who came to the hospital with "extraordinary complications and additional unrelated conditions." They were among five deaths out of 71 patients during the reporting period, giving him an adjusted rate of 9.75 per 100 surgeries.

"While I appreciate independent oversight, it's important for consumers to realize that two years of data do not illustrate overall results," Robertson said. "Every single patient is different."

The rates are calculated based on a nationally recognized method that includes deaths occurring during hospitalization, regardless of how long the stay, or anytime within 30 days after the surgery, regardless of the venue. All licensed hospitals must report the data to the state.

State officials said that providing surgeons' names can help consumers make choices about who they want to operate on them, assuming it's not an emergency.

"It is important for patients to be involved in their own health care, and we are trying to work more and more on getting this information in an easy-to-use format for the man on the street," said Hoegh, of the state's health planning and development office.

No minimum number of surgeries is needed to calculate a rate, but the results must be statistically significant and are risk-adjusted to account for varying levels of illness or frailty among patients, Hoegh said.

She acknowledged that "a risk model can never capture all the risk" and said her office is always trying to improve its approach.

Surgeons sometimes file appeals—arguing, for example, that the risk was improperly calculated or that the death was unrelated to the surgery. The appeals can result in adjustments to a rate, Hoegh said.

Despite the controversy it generates, the public reporting is supported by the California Society of Thoracic Surgeons, the professional association representing the surgeons. No one wants to be on the list, but "transparency is always a good thing," said Junaid Khan, M.D., president of the society and director of cardiovascular surgery at Alta Bates Summit Medical Center in the Bay Area.

"The purpose of the list is not to be punitive," said Khan. "It's not to embarrass anybody. It is to help improve quality."

Khan added that he believes outcomes of other heart procedures, such as angioplasty, should also be publicly reported.

Consumers Union, which sponsored the bill that led to the cardiac surgeon reports, supports expanding doctor-specific reporting to include a variety of other procedures — for example, birth outcomes, which could be valuable for expectant parents as they look for a doctor.

"Consumers are really hungry for physician-specific information," said Betsy Imholz, the advocacy group's special projects director. And, she added, "care that people receive actually improves once the data is made public."

But efforts to expand reporting by name are likely to hit opposition. Officials in Massachusetts, who had been reporting bypass outcomes for individual doctors, stopped doing it in 2013. Surgeons supported reporting to improve outcomes, but they were concerned that they were being identified publicly as outliers when they really were just taking on difficult cases, said Daniel Engelman, M.D., president of the Massachusetts Society of Thoracic Surgeons.

"Cardiac surgeons said, 'Enough is enough. We can't risk being in the papers as outliers,'" Engelman said.

Engelman said the surgeons cited research from New York showing that public reporting may have led surgeons to turn away high-risk patients. Hoegh said research has not uncovered any such evidence in California.

In addition to Koumjian, Robertson and Pellegrini, the physicians in California with higher-than-average rates were Philip Faraci, Eli R. Capouya, Alexander R. Marmureanu, Yousef M. Odeh. Capouya declined to comment.

Faraci, 75, said his rate (8.34 per 100) was based on four deaths out of 33 surgeries, not enough to calculate death rates, he said. Faraci, who is semi-retired, said he wasn't too worried about the rating, though. "I have been in practice for over 30 years and I have never been published as a below-average surgeon before," he said.

Odeh, 45, performed 10 surgeries and had two deaths while at Presbyterian Intercommunity Hospital in Whittier, resulting in a mortality rate of 26.17 per 100. "It was my first job out of residency, and I didn't have much guidance," Odeh said. "That's a recipe for disaster."

Odeh said those two years don't reflect his skills as a surgeon, adding that he has done hundreds of surgeries since then without incident.

Marmureanu, who operates at several Los Angeles-area hospitals, had a mortality rate of 18.04 based on three deaths among 22 cases. "I do the most complicated cases in town," he said, adding that one of the patients died later after being hit by a car.

"Hospital patients don't care" about the report, he said. "Nobody pays attention to this data other than journalists."

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EXHIBIT E

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TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

DARELL MOORE, ET AL,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. A-17-766426-C
)	Dept. No. 25
JASON LASRY, M.D., ET AL,)	
)	
<u>Defendants.</u>)	

JURY TRIAL

Before the Honorable Kathleen Delaney
Monday, February 10, 2020, 1:30 p.m.
Reporter's Transcript of Proceedings

REPORTED BY:

BILL NELSON, RMR, CCR #191
CERTIFIED COURT REPORTER

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APPEARANCES:

For the Plaintiffs: Breen Arntz, Esq.
Philip Hymanson, Esq.
Joseph Hymanson, Esq.

For the Defendants: Robert McBride, Esq.
Keith Weaver, Esq.
Alissa Bestick, Esq.

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I N D E X

M = McBride
B = Bestick

WITNESS	DR	CR	RDR	RCR
Charlene Moore	25	62-M 85-B	89	98-M
Darell Moore	107			

1 Las Vegas, Nevada, Monday, February 10, 2020

2 * * * * *

3
4 (Thereupon, the following proceedings were
5 had out of the presence of the jury.):

6 THE COURT: All right.

7 Anything outside the presence before we get
8 started?

9 MR. MC BRIDE: Yes, Your Honor.

10 Yesterday afternoon at about 1:27 to be
11 exact we, Mr. Weaver and I, received an e-mail from
12 Mr. Arntz where he advised for the first time that he
13 intended to call Dr. Wiencek today as a witness.

14 He said that in response to several e-mails
15 back and forth have he said that it only became
16 apparent to him the last couple of days that Mr.
17 Wiencek might be an essential witness, and that is
18 somewhat surprising, given the fact Dr. Wiencek was
19 the original surgeon who treated Mr. Moore for
20 several years since 2012 for issues relating to his
21 popliteal graft.

22 The concern that we have is -- I think
23 several-fold.

24 First of all, when on Friday Mr. Arntz said
25 in his e-mail he's been trying to reach out to Dr.

1 Wiencek for several days last week.

2 If there was what we discussed, the
3 schedule, the remaining schedule for this week and
4 the witnesses to be called, so we could advise the
5 jury and let them know how much longer the trial
6 would go, Mr. Arntz never mentioned that he had
7 reached out to Dr. Wiencek, or thought that he could
8 potentially call him.

9 He never let us or the Court know of that
10 in advance.

11 I think that our concern is, that at this
12 late stage to have him as a witness to testify on the
13 last full day before trial, after Defense -- all of
14 Defendants experts have testified, especially Dr.
15 Wilson, the vascular surgeon, to address the vascular
16 issues, it is actually a classic sandbagging by the
17 Plaintiff in this case.

18 There was no reason why we shouldn't have
19 been informed that there were efforts to try to get
20 Dr. Wiencek here before that.

21 We could have made arrangements to have Dr.
22 Wilson testify as our last witness, let them finish
23 experts their witnesses all together, and then make
24 arrangements to have him testify.

25 We didn't do that because the only expert

1 they retained in this case to testify, the only
2 vascular surgeon they indicated they were going to
3 call, was Dr. M.

4 So in this particular situation it creates
5 a huge detriment to the Defense in this particular
6 case.

7 It's also our position that he wasn't
8 properly identified on the Plaintiff's pre-trial
9 disclosures. In fact, he's only listed on the
10 pre-trial disclosures as the person most
11 knowledgeable, or custodian of records, there's no
12 scope of anticipated testimony he's supposed to
13 offer, and that is the same for a number of other
14 entities, St. Rose and other providers as well, the
15 same designations, not as an individual witness -- or
16 not they anticipated calling him.

17 So I think it's our position, and I'll let
18 Mr. Weaver chime in as well, because I think he has
19 some points to make, but it's our position at this
20 late stage that is an improper attempt to sandbag the
21 Defense and creates a difficult situation for us, and
22 I think that it is not proper pursuant to their
23 pre-trial disclosures.

24 THE COURT: Mr. Weaver, anything to add?

25 MR. WEAVER: Thank you, Your Honor.

1 I would briefly add, we briefed this issue
2 before the Court, as it wasn't just Mr. Arntz saying
3 that he he became aware a few days ago, he said,
4 quite a few days ago.

5 So at the same time while the Court is
6 telling the jury on Friday at the lunch break there
7 was two witnesses in the afternoon, Nurse
8 Practitioner Bartmus and Dr. Barcay, and two today,
9 and we would be done today, instructions tomorrow,
10 and it certainly wouldn't go into Wednesday, not a
11 word, not a peep, no heads up, no information, not
12 anything.

13 And what is particularly disturbing is,
14 every single day we talked about witnesses on
15 Thursday, I set out the discussion in part that
16 carried over until Friday, when even the Court
17 acknowledged based on the Court's information that
18 Mr. and Mrs. Moore were the final two witnesses
19 today, that part of what was happening on Friday, and
20 this is on the record, was if we're to not interfere
21 with Mr. and Mrs. Moore having the entire afternoon
22 to testify today, number one, would've fully
23 truncated the testimony of Nurse Practitioner
24 Bartmus, and in addition truncated and shortened the
25 testimony of Dr. Barcay, so we finished before 4 to

1 make sure that Mr. Arntz had all the time he needed
2 for cross-examination.

3 He said he would take an hour, took 30
4 minutes, but there was plenty of juror questions, but
5 all of that was done to make sure it didn't interfere
6 with the last two witnesses today.

7 Meanwhile, they've known for at least a
8 week, maybe ten days before that they were intending,
9 or hoping, or scheduling Dr. Wiencek for today.

10 So that we're trying to do what we can to
11 make sure we don't go past Tuesday and doing as well
12 what we can with the witnesses, we're getting
13 sandbagged, not knowing we're going to find out
14 yesterday when we are trying to prepare for Mr.
15 Moore, and trying to prepare for closing arguments, a
16 surprise to Dr. Wiencek is coming.

17 On Thursday afternoon I called, it was
18 hectic, and e-mailed Dr. Barcay when there was a
19 discussion about potentially -- this was at 3:30
20 about potentially Mrs. and Mrs. Moore having their
21 testimony on Friday afternoon to accommodate them to
22 get it done.

23 It was decided that the best thing would be
24 to leave them until today uninterrupted.

25 So to find out yesterday afternoon that

1 this was a set up to have the Plaintiff's case
2 continue over to today, and Dr. Wiencek, a surprise
3 witness, is quite frankly intolerable, just not fair.

4 What are we going to do, bring Dr. Wilson
5 back tomorrow?

6 That is not even likely possible.

7 But Dr. Wilson had every right to rely on
8 whatever Dr. Wiencek might say, not the other way
9 around.

10 THE COURT: Mr. Hyamson.

11 MR. P. HYMANSON: Phil Hymanson on behalf
12 of Mr. and Mrs. Moore.

13 This is not a sandbag.

14 This is what we call trial.

15 As of last Thursday the discussion between
16 counsel about whether they were going to call Dr.
17 Wiencek or not, and Mr. McBride said, no, it's not
18 their intention, Mr. Arntz was under the impression
19 they were, which was good because we were having
20 until Friday to get him, didn't think we would be
21 able to get him.

22 THE COURT: I don't have a lot of volume
23 today, so bear with me.

24 Can you just clarify?

25 You're using a lot of pronouns there.

1 You said, they were talking about it, they
2 were okay, they weren't.

3 I did not follow who you were saying.

4 As far as I'm getting what you gentlemen
5 are saying, Friday was the first time they heard
6 about him coming today, or maybe Sunday.

7 I'm sorry.

8 What's the first time they heard about Dr.
9 Wiencek?

10 MR. P. HYMANSON: I'll be clear on that.

11 Your Honor, that is absolutely correct.

12 We didn't know that Dr. Wiencek would be
13 available until a telephone conference yesterday, and
14 as soon as we learned from Dr. Wiencek he would be
15 available, we notified Defense counsel approximately
16 24 hours before they were going to testify.

17 We weren't aware of it until Sunday he was
18 in fact going to be able to testify.

19 He has some physical issues, and we didn't
20 think he was going to be able to.

21 THE COURT: When did you begin reaching out
22 to him?

23 MR. P. HYMANSON: I'll have to defer to Mr.
24 Arntz because I wasn't involved in the reach.

25 MR. ARNTZ: Probably about a week ago.

1 I think I was able to get ahold of him
2 through the office, and what he told me was, he was
3 not be able to come testify because he had bad
4 neuropathy, didn't want to come into your courtroom.

5 He said, if you can have me testify by
6 video conference, I'll agree to it.

7 I said, I don't think I can do that.

8 So I essentially gave up on it, but I
9 reached out to him one more time Friday, and it was
10 about 7:00 Friday night that I finally got a text
11 from him where he said -- he agreed to come.

12 I didn't make a decision then.

13 I wouldn't call him until I had a chance to
14 talk to him.

15 So I talked to him on Sunday, it was the
16 afternoon, the three of us were there on speaker
17 phone talking to him, and after that I decided to
18 call him, and I immediately notified counsel of my
19 decision.

20 There was no sandbagging. I just didn't
21 think I could get him here.

22 THE COURT: Well, let me go back to Mr.
23 Hymanson.

24 Whether or not the intent was there, the
25 sandbagging, it's just not sandbagging, if they were

1 standing up at the last witness with a witness you
2 had no idea was in play that day before that witness
3 was supposed to testify, you would not be up here
4 having that same thing?

5 MR. P. HYMANSON: No, Your Honor, I don't
6 think so.

7 I call that trial. I call that trial, Your
8 Honor.

9 It was quite clear on Friday after -- as
10 the Court said to them, we allowed them to put their
11 experts in out of place, it was quite clear after
12 their experts testified how critical this doctor was
13 going to be, and I specifically said to Mr. Arntz
14 after Friday that if Dr. Wiencek. If we have him
15 listed, and we tried to get him, we need to try and
16 get him one more time because based on Friday's
17 testimony that would be critical for him to be here.

18 This isn't a surprise to the Defense.

19 They've known of this doctor from the
20 beginning.

21 They are the ones mentioned him in their
22 opening statement.

23 They are the ones that had their experts
24 refer to him.

25 So there's no surprise.

1 He is a treating physician, no surprise
2 there.

3 And what he's going to testify to would be
4 quicker than what this argument is going to be.

5 THE COURT: One more follow-up to Mr.
6 Hymanson before the response.

7 MR. MC BRIDE: Sure.

8 THE COURT: Wait.

9 You all have to try to listen.

10 I'm speaking as loudly as I can.

11 One more follow-up to Mr. Hymanson.

12 What Mr. McBride indicated about the actual
13 pre-trial disclosures, those have some meaning. If
14 he's not disclosed on there as a potential witness,
15 how is it you're calling him now?

16 I know all day long trial is trial, but
17 their indication is, and I did not re-review that
18 because I had no idea about talking about
19 sandbagging, about this argument coming, so you know
20 what is the actual disclosure?

21 MR. P. HYMANSON: Number 22.

22 MR. MC BRIDE: 20.

23 MR. ARNTZ: No, 22.

24 The supplement.

25 MR. P. HYMANSON: It says:

1 Dr. Wiencek, these witnesses expect to
2 testify regarding Plaintiff's medical treatment, from
3 Dr. Wiencek, M.D., expected to testify to the facts
4 and circumstances surrounding the medical care,
5 treatment, and/or billing for said care and treatment
6 provided to Plaintiff.

7 THE COURT: What was the supplement?

8 MR. MC BRIDE: I don't have a supplement,
9 Your Honor.

10 MR. WEAVER: There's no supplement, Your
11 Honor.

12 MR. ARNTZ: Your Honor, Dr. Wiencek
13 actually has been named since the first supplement.

14 He's been in every supplement since then.

15 THE COURT: They indicated he was named,
16 but as custodian of records.

17 MR. MC BRIDE: I have the pre-trial
18 disclosures here, Your Honor, if you would like to
19 take a look at it.

20 THE COURT: I'm taking your
21 representations.

22 I was just told there was a couple numbers
23 there, I was wondering whether it was filed.

24 MR. ARNTZ: The 13th, and included in that
25 one and every other one.

1 THE COURT: Hold on, you guys are talking
2 over each other.

3 I'm checking the file.

4 MR. P. HYMANSON: The supplement was
5 November 21st, Your Honor.

6 THE COURT: The supplement you're reading
7 from now?

8 MR. P. HYMANSON: The 13th supplement,
9 11/21, Your Honor.

10 MR. ARNTZ: That wasn't the first
11 supplement we filed.

12 THE COURT: There's a difference, is there
13 not, gentlemen, between ongoing supplements along the
14 way of all the potential witnesses that might have
15 something to do with the case and the actual
16 pre-trial disclosure of witnesses?

17 MR. ARNTZ: Well, he's disclosed as a
18 witness.

19 THE COURT: I'm not in the mood, Mr. Arntz.

20 I just said I thought very clearly there is
21 not a difference between ongoing supplemental
22 disclosure, the requirements, as pre-trial
23 disclosures that is required under the EDCR when you
24 all get together and meet and confer and list out
25 your witnesses and list out your documents, and say

1 who you are calling.

2 If you are not required to update on the
3 pre-trial disclosures who you are actually going to
4 call and what they are going to be called for --

5 MR. ARNTZ: Well, it doesn't list on there
6 what -- doesn't recite the same paragraph that is in
7 the disclosure in the supplement, that's true.

8 THE COURT: Okay.

9 I'm not worried about that right now.

10 Final arguments?

11 MR. MC BRIDE: I do have the pre-trial
12 disclosure filed by Plaintiff December 27th, 2019.

13 Number 20, like I said, custodian of
14 records, and/or person most knowledgeable, and just
15 Robert Wiencek, M.D., St. Rose Sienna.

16 That is the same identification, nothing
17 more, the same identification they give for every
18 other potential witness, Paul Weazner Associates,
19 John Oh, M.D., Nevada Comprehensive, /PRO care, then
20 as Your Honor is aware as part of the pre-trial
21 disclosures it even says, has a section says,
22 Plaintiff's expect to present the following witnesses
23 at trial if a need arises, Plaintiff's reserve the
24 right to call any and all witnesses called by any
25 other party, and there is nobody identified.

1 There's also nobody identified by
2 deposition, nobody identified that they were
3 subpoenaed.

4 Our point, Your Honor, again goes to the
5 fact that this is a witness who is -- Well, first of
6 all, it was mentioned in passing as a treating
7 physician in my opening statement as part of my
8 chronology explaining who he treated with. That in
9 and of itself should have been enough for the
10 Plaintiff to identify that Dr. Wiencek likely had
11 some information that would be relevant to their case
12 in this particular issue, even if it's about as a
13 treating provider, or damages, or anything else.
14 That wasn't done.

15 Your Honor, you are absolutely correct, the
16 pre-trial disclosures are really the operative
17 pleading that takes effect for trial.

18 I understand Mr. Hymanson thinks that this
19 is all well and good to have a Perry Mason moment and
20 call Dr. Wiencek, and at the last minute, but what it
21 also does is, it complicates matters to the extent
22 even if the Court were to allow him to testify, and
23 limit his testimony, what that problem creates for
24 the jurors, who are all -- have been very attentive
25 and who ask questions, when they are not able to ask

1 questions that may go beyond the potential role as
2 just a treating physician, that opens up a whole
3 other cap of worms.

4 In this particular case, Your Honor, this
5 is classic sandbagging, and I think it's an absolute
6 detriment to the Defense, given the fact we've
7 already completed our experts, in particular Dr.
8 Wilson, who as Mr. Weaver pointed out would be the
9 key witness to comment on any testimony from Dr.
10 Wiencek.

11 THE COURT: Anything else to add, Mr.
12 Weaver?

13 MR. WEAVER: Briefly, Your Honor.

14 Again, it's not the trial, it's a sandbag.

15 They are not even on the same page with al
16 due respect.

17 Mr. Arntz said quite a few days now it been
18 known that Dr. Wiencek is a potential witness without
19 a word to us.

20 Mr. Hymanson just said, it became apparent
21 on Friday afternoon after our experts left.

22 They are not reconcilable, it don't make
23 sense, and the bottom line is in trial what makes
24 sense is to say, here are experts that we are
25 calling, how are we going to coordinate it?

1 What isn't trial is to conceal a witness
2 from the other side and not tell them until the day
3 before.

4 It's true we've gone back and forth, and
5 with all due respect it hasn't been total
6 accommodation for our experts. We've done what we
7 can to make our experts available, including Dr.
8 Wilson being here for this for three days in order
9 not to hold up any trial.

10 So the idea there's just this
11 over-accommodation for Defendants isn't even fair.

12 THE COURT: Okay.

13 So it hasn't been mentioned yet in
14 argument, but one of the things I recall -- I looked
15 it up while I was listening to your arguments -- was
16 there was also a stipulation and order on motions in
17 limine signed off on by all the parties, which again
18 technically has not been filed, but of course was
19 submitted to the Court prior to trial, I actually
20 have a stamp on it January 29th when it was submitted
21 to the Court, so it might have actually just been
22 after trial started, but stipulation order on motions
23 in limine, the sixth of which is, as a courtesy the
24 parties agree to provide reasonable advanced notice
25 of witnesses to be called to the extent possible.

1 Actually, when I was reviewing these
2 orders, I was very glad to see that because one of
3 the things as a Judge, I see counsel do it all the
4 time, is decide how they are going to do their case
5 and not necessarily share as things are evolving that
6 information with the other side.

7 I'm not going to call it sandbagging
8 because I don't disagree with Mr. Hymanson or Arntz,
9 it's very possible as the trial evolves they came
10 about their decision the way they came about their
11 decision.

12 The argument and calling it sandbagging is
13 like saying, by design they waited until the last
14 minute to call Dr. Wiencek.

15 I take it at face value, Mr. Hymanson's
16 representations. Although, Mr. Arntz may have
17 attempted to reach out sometime ago just to see if he
18 was available, and had given up, that that was going
19 to work.

20 Mr. Hymanson, after hearing the testimony
21 on Friday, said, let's try it again, and as luck
22 would have it Mr. Wiencek -- Dr. Wiencek was
23 available.

24 At the end of the day it was absolutely
25 obvious to this Court from the get go that Dr.

1 Wiencek could, potentially should, have been a
2 witness in this case.

3 Every single witness that testified, and
4 every single document we've looked at, has had Dr.
5 Wiencek all over it.

6 In fact, to the degree where I've actually
7 been sitting here concerned that the jurors don't
8 even know who the Defendants are because Dr.
9 Wiencek's name had come up so many times.

10 That said, all the testimony has come in
11 except for the Plaintiffs.

12 We are at the conclusion of this trial,
13 there are ample documentation affixed to this
14 involving Dr. Wiencek can be pointed to as need be to
15 clarify any of those issues.

16 This is far too late in the process to be
17 disclosing a witness.

18 The appropriate time to the disclose this
19 witness would have been when the decision was made to
20 reach out to see if he was available.

21 The Court deserved that courtesy, counsel
22 deserved that courtesy, it did not happen.

23 It was not included in the pre-trial
24 disclosure, that might have saved -- or might have
25 made some different impact on the Court's decision

1 here today.

2 If he had been listed in there the same way
3 he was listed in the November multiple supplements,
4 13, or whatever it was, but there's got to be some
5 benefit to the Court and to counsel these pre-trial
6 meet and confers, they are not just empty exercises
7 where everything is listed, they should not be that,
8 where everything just gets listed the way it's been
9 previously listed and cut and pasted by some staff
10 member, and we actually have no damn idea who's going
11 to be called at trial.

12 This Court has been every day at the end of
13 last week figuring out who is being called and when.

14 I didn't care who was being called and
15 when, I did not care how long a time it was going to
16 be taken, I just needed to know, so I could keep this
17 trial moving and going.

18 To find out now that on Sunday was the
19 first time Defense was notified Dr. Wiencek was in
20 play, and the Court didn't know until it came in here
21 today, I appreciate we were copied on some e-mail
22 yesterday as well, but that was not provided to me by
23 my staff this morning, and it's in the pile of
24 additional instructions and things we have now, but I
25 didn't get it until just now.

1 So as I came in here today I had zero idea
2 this was an issue.

3 At the end of the day, like I said, I think
4 ample testimony has been had from both sides related
5 to Dr. Wiencek's prior treatment, how that might have
6 impacted things, and certainly any confusion can be
7 cleaned up in closings.

8 We have the Plaintiff, and the Plaintiff's
9 to testify today, and I do not see any legitimate
10 legal or factual basis to allow Dr. Wiencek to be
11 called at this time based on the pre-trial
12 disclosures, based open the stipulated motion in
13 limine as a courtesy to provide information,
14 reasonable advanced notice, and ultimately the
15 communications up through and including Friday as to
16 what this trial proceedings would be.

17 So for all of those reasons Dr. Wiencek
18 will not be called today, and we will proceed as
19 schedules with the Plaintiffs.

20 Anything else we need to address?

21 MR. MC BRIDE: Thank you, Your Honor.

22 MR. ARNTZ: No, Your Honor.

23 MR. MC BRIDE: No, Your Honor.

24 THE COURT: Thank you.

25 Do you need to communicate with Dr.

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REPORTER'S CERTIFICATE

I, Bill Nelson, a Certified Court Reporter
in and for the State of Nevada, hereby certify that
pursuant to NRS 2398.030 I have not included the
Social Security number of any person within this
document.

I further Certify that I am not a relative
or employee of any party involved in said action, not
a person financially interested in said action.

 /s/ Bill Nelson

Bill Nelson, RMR, CCR 191

C E R T I F I C A T E

STATE OF NEVADA)

) SS .

CLARK COUNTY)

I, Bill Nelson, RMR, CCR 191, do hereby
certify that I reported the foregoing proceedings;
that the same is true and correct as reflected by my
original machine shorthand notes taken at said time
and place.

/s/ Bill Nelson

Bill Nelson, RMR, CCR 191
Certified Court Reporter
Las Vegas, Nevada

EXHIBIT F

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DARELL L. MOORE and CHARLENE A.)
 MOORE, individually and as)
 husband and wife,)

Plaintiffs,)

vs.)

CASE NO.

JASON LASRY, M.D.,)
 individually; FREMONT EMERGENCY)
 SERVICES (MANDAVIA), LTD.;)
 TERRY BARTMUS, RN, APRN; and)
 DOES I through X, inclusive;)
 and ROE CORPORATIONS I)
 through V, inclusive,)

A-17-766426-C

DEPT. NO. 25

Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS OF JURY TRIAL

P.M. SESSION, CLOSING ARGUMENTS

BEFORE THE HONORABLE KATHLEEN E. DELANEY

WEDNESDAY, FEBRUARY 12, 2020

APPEARANCES:

For the Plaintiffs:

E. BREEN ARNTZ, ESQ.
 HANK HYMANSON, ESQ.
 PHILIP M. HYMANSON, ESQ.

For the Defendants:

ROBERT C. MCBRIDE, ESQ.
 KEITH A. WEAVER, ESQ.
 ALISSA BESTICK, ESQ.

REPORTED BY: DANA J. TAVAGLIONE, RPR, CCR No. 8411

I N D E X

CLOSING ARGUMENT

PAGE NUMBER

BY Mr. Arntz 23

BY Mr. McBride 76

By Mr. Weaver 116

By Mr. Arntz 159

1 wouldn't have got a pulse, and the outcome would
2 have been different. So these are just a bunch of
3 different pages showing you different entries in the
4 record, again, that were available to Nurse
5 Practitioner Bartmus. If she'd clicked on that date
6 in the record where it showed that he had been
7 hospitalized in June of 2015, if she just clicked on
8 that and pulled that record up, she would have seen
9 all this stuff. She would have seen the presentation
10 that he made in that hospitalization.

11 Okay. So these are the next one of these
12 records from Dr. Wiencek, and these are important
13 for a couple of reasons: One is that every one of
14 the pulses Dr. Wiencek ever got was by Doppler. But
15 you'll remember when these slides were first put up,
16 and this really shows the effort on the part of
17 defense to try and deceive you and try to get you
18 to --

19 MR. MCBRIDE: Your Honor, that's
20 inappropriate comment during closing.

21 THE COURT: Can we have counsel at the
22 bench briefly. I just want to make sure we're on
23 the same page.

24 (Bench conference.)

25 THE COURT: Thank you.

1 The Court will instruct the jurors to
2 disregard any commentary by counsel with regard to
3 the actions of opposing counsel. That is not proper
4 argument in closings. And Mr. Arntz will proceed.

5 MR. ARNTZ: Okay. I'll let you judge this
6 how you want to. But when Mr. Weaver put this top
7 slide up, you'll remember that he did not put this
8 slide up, and those are from the same page. This
9 top slide gives the impression that they were able
10 to palpate pulses, and that was the purpose of him
11 putting the slide up. He asked about it. He gave
12 the impression that it was to show that there were
13 palpable pulses, but he didn't show you this part of
14 the page.

15 This part of the page makes it clear that
16 the purpose for which he was presenting this top
17 part was not accurate. They were not palpable
18 pulses. They were only pulses you could get by
19 Doppler. That's on that day. The next one was on
20 2/8/2016. Same entry at the beginning shows that
21 the pulses, they're good pulses there, but then
22 clarifies on the bottom part of the page that it's
23 by Doppler. Now, something has to be said about the
24 pain management clinic -- there's another one from
25 5/9/2016. Same thing happened.

1 putting up testimony from people but would cut it
2 off. He didn't allow you to see the entire
3 response. He did that when --

4 MR. WEAVER: Misstates the evidence,
5 Your Honor. I did it every single time.

6 THE COURT: There were some slides.

7 MR. WEAVER: I don't know why the attacks.

8 THE COURT: I got it. There were some
9 slides that were gone through, could have been
10 result of time or subject to argument.

11 But we did have the admonishment earlier
12 that commenting counsel's performance is not
13 necessarily appropriate argument. We'd like to
14 stick to the facts, Mr. Arntz.

15 MR. ARNTZ: Well, I am. There were
16 instances where he cut the line off at line 2 --

17 THE COURT: You may proceed.

18 MR. ARNTZ: -- instead of giving the entire
19 testimony.

20 THE COURT: You may proceed. Overruled.
21 You may proceed. Just clarify the instruction.

22 MR. ARNTZ: You don't have to conclude that
23 Nurse Bartmus, Nurse Practitioner Bartmus and
24 Dr. Lasry are lying for any particular reason. I
25 don't know why they did what they did. I don't know

1 why they put the entries the way they did. What I
2 started out talking to you about at the beginning
3 was what's possible and what's not possible.

4 This is a man who has, by their account,
5 severe ischemic disease. Okay. That's the starting
6 point when he goes in on the 25th of December 2016.
7 He's suffering from that; he has for a long time.
8 He's got a fem-pop in his left leg that's blocked,
9 and they want you to believe that it's possible to
10 get a normal palpation of a pulse with all that
11 going on.

12 The reason why I brought up smoking was
13 because smoking should have been another factor they
14 considered. Is it in part of the record? Yeah,
15 it's listed. But is it listed in their assessment
16 of the patient? No. It's not even figured into
17 whether or not they could have done the things that
18 they say they did. So do I know why they did what
19 they did? I don't.

20 All I'm telling you is that the evidence
21 makes it clear that you can't feel a normal palpable
22 pulse in the foot with all that going on. That's
23 just a fact. It's not possible. When I asked
24 Dr. Wilson, I said, "Dr. Wilson, if you got an
25 occluded fem-pop graft, do you think you'd be able

1 to still feel a pulse from collaterals?" And his
2 answer was "well, it's possible."

3 And I said, "Is it common?" He said no.

4 MR. WEAVER: Misstates the evidence,
5 Your Honor.

6 MR. ARNTZ: Did I get up and say you
7 misstated the evidence every time you did?

8 THE COURT: Mr. Arntz, Mr. Arntz. You know
9 better. Do not respond to counsel, please.

10 Mr. Weaver. Overruled. And you may
11 proceed.

12 MR. ARNTZ: That is the question I asked
13 him later on in his testimony. I said, "Is it
14 possible to get a pulse in the foot by palpation, by
15 only collaterals if you've got all that going on?"
16 And he said "It's possible." well, it's possible to
17 get a pulse by Doppler. But a normal pulse by
18 palpation? It just defies logic.

19 So when I look at these records and I see
20 that the sign-in time for Dr. Lasry is 9:26 -- or
21 I'm sorry -- 12/26/2016 at 9:18 in the morning, I
22 wonder why. And a more pressing question is --

23 (Request to put up slide.)

24 MR. ARNTZ: That one, that one.

25 I'm trying to figure out why they would go

C E R T I F I C A T E

STATE OF NEVADA)
)SS:
COUNTY OF CLARK)

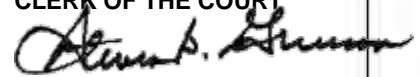
I, Dana J. Tavaglione, RPR, CCR 841, do
hereby certify that I reported the foregoing
proceedings; that the same is true and correct as
reflected by my original machine shorthand notes
taken at said time and place before the
Hon. Kathleen E. Delaney, District Court Judge,
presiding.

Dated at Las Vegas, Nevada, this 19th day
of February 2020.

/S/Dana J. Tavaglione

Dana J. Tavaglione, RPR, CCR NO. 841
Certified Court Reporter
Las Vegas, Nevada

EXHIBIT G



1 KEITH A. WEAVER
Nevada Bar No. 10271
2 E-Mail: Keith.Weaver@lewisbrisbois.com
DANIELLE WOODRUM
3 Nevada Bar No. 12902
E-Mail: Danielle.Woodrum@lewisbrisbois.com
4 ALISSA BESTICK
Nevada Bar No. 14979C
5 E-Mail: Alissa.Bestick@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 *Attorneys for Terry Bartmus, A.P.R.N.*

9
10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 DARELL L. MOORE and CHARLENE A.
13 MOORE, individually and as husband and
14 wife;

15 Plaintiffs,

16 vs.

17 JASON LASRY, M.D., individually; and
TERRY BARTMUS, RN, APRN

18 Defendants.
19

CASE NO. A-17-766426-C
Dept. No.: XXV

HEARING REQUESTED

DEFENDANT TERRY BARTMUS,
A.P.R.N.'S EMERGENCY MOTION TO
PRECLUDE TESTIMONY FROM
ROBERT WIENCEK, M.D.

20 ///

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1 Defendant Terry Bartmus, A.P.R.N. by and through her attorneys of record, LEWIS
2 BRISBOIS BISGAARD & SMITH LLP, hereby files this Emergency Motion to Preclude
3 Testimony from Robert Wiencek, M.D.

4 DATED this 10th day of February, 2020

5 LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7
8 By 

9 KEITH A. WEAVER

10 Nevada Bar No. 10271

11 DANIELLE WOODRUM

12 Nevada Bar No. 12902

13 ALISSA N. BESTICK

14 Nevada Bar No. 14979C

15 6385 S. Rainbow Boulevard, Suite 600

16 Las Vegas, Nevada 89118

17 *Attorneys for Defendant Terry Bartmus,*
18 *A.P.R.N.*

1 I. INTRODUCTION

2 Counsel arguably has a duty of candor to opposing counsel, but they absolutely
3 have a duty of candor to the Court. The exact opposite has occurred here when it comes
4 to Plaintiffs' intention to call Dr. Wiencek as a witness today.

5 Plaintiffs' counsel sent e-mail correspondence to Defendants yesterday afternoon
6 stating that he would be calling Robert Wiencek, M.D., a local cardiovascular surgeon, to
7 testify at trial at 1:30 pm today. Defense counsel was shocked to learn that Plaintiffs'
8 counsel had "been trying to get Dr. Wiencek to come in to testify." No trial subpoena was
9 ever issued or served on Dr. Wiencek by Plaintiffs or any party. Plaintiffs' counsel claims
10 that it's been "obvious to [them] for quite a few days now that Dr. Wiencek is an essential
11 witness" and one they intended to call, including by last week attempting to arrange
12 scheduling for his appearance.¹

13 Yet, never, ever—not once—have Plaintiffs advised the Court or Defendants that
14 they intend to call Dr. Wiencek as a witness.² Nor, have they ever—not once—in response
15 to direct questions from the Court about scheduling and appearances of witnesses even
16 *hinted* Dr. Wiencek would be called.

17 In fact, just the opposite. On January 31, 2020, 10 days ago at the end of the day,
18 the Court asked who was going to testify on Monday February 3:

19 ///

20 ///

21 _____
22 ¹ See e-mail correspondence from Plaintiffs' counsel, attached as "Exhibit A." In retrospect, it appears that
23 Plaintiffs may have been intending to call Dr. Wiencek for at least 10 days or more but have concealed that
24 from the Court and Defendants even when asked directly what remaining witnesses, if any, Plaintiffs
25 intended to call and when. Ten days ago, on January 31, 2020, during the an exchange about whether
26 Plaintiffs may attempt to have introduced evidence through Dr. Fish about whether the medical expenses
incurred by Mr. Moore are reasonable and necessary, Mr. Hymanson said he would defer that questioning
to a different witness. Defendants assumed that meant Plaintiffs meant Defendants' expert Dr. Wilson. In
retrospect, it appears Plaintiffs meant Dr. Wiencek.

27 ² In fact, when the Court directed counsel to state to the jury during introductions names (parties, attorneys,
witnesses, etc.) the jurors might hear testify or see the name of in the medical records, Plaintiffs did not
even breathe Dr. Wiencek's name.

1 The Court: And so we'll start at 1:30 p.m. on Monday. My understanding
2 then on Monday is - again, who are we having?

3 Mr. Arntz: I'm going to start with Dr. Lasry.

4 The Court: Dr. Lasry.

5 Mr. Arntz: And then I'm going to go as long as I can, get as many of my
6 witnesses on and probably finish with either Darell or Charlene. But
7 probably not that day.³

8 (Emphasis added.)

9 There were additional discussions on and off the record about Plaintiffs' witnesses.
10 Based on the understanding that after Dr. Lasry's testimony (and the conclusion of Dr.
11 Fish's) the only remaining witnesses in Plaintiffs' case were the Plaintiffs themselves,
12 Defendants continued to as expeditiously as possible coordinate their witnesses'
13 testimony. Defendants did so based on an understanding that in going out of order the
14 only witnesses who would go after Defendants' witnesses were Mr. and Mrs. Moore—not
15 somebody as "essential" as Dr. Wiencek, obviously. Otherwise, Defendants' experts,
16 especially Dr. Wilson, would not have been put on until after Dr. Wiencek. Little did
17 Defendants know that at the exact same time Plaintiffs were both concealing their intent
18 to call Dr. Wiencek and attempting to schedule his appearance.

19 As late as Friday, February 7, 2020, based on the information Plaintiffs had
20 provided to the Court and Defendants, both Defendants and the Court understood that
21 Mr. and Mrs. Moore were Plaintiffs final witnesses who would testify today. In fact, as a
22 "housekeeping" issue on Friday, NP Bartmus's counsel advised the Court that in order to
23 not interfere with Plaintiffs having a full afternoon today to question Mr. and Mrs. Moore
24 so that testimony could conclude today and instructions and closing arguments go
25 forward tomorrow, NP Bartmus would be called very briefly before Dr. Barcay.

26 ³ See excerpt from January 31, 2020 trial transcript attached as "Exhibit B." Defendants obviously took this
27 to mean that except for Dr. Fish (who had just testified with the parties were directed to coordinate his
28 return), Plaintiffs' remaining, final witnesses were Dr. Lasry and Mr. and Mrs. Moore whose testimony likely
wouldn't be concluded February 3, 2020.

1 Here is that exchange with the Court:

2 MR. WEAVER: Your honor, one more quick housekeeping thing. In order,
3 because we're going to finish on Tuesday and Mr. Arntz is putting on his
4 clients on Monday, before my expert, Dr. Barcay starts this afternoon, I'll
5 have Nurse Practitioner Bartmus on for 15 minutes.

6 THE COURT: So you'll do the same thing that Mr. McBride did this
7 morning as far as with the client. I wasn't sure. You hadn't mentioned
8 yesterday if you were--

9 MR. WEAVER: Well, that's true. I hadn't mentioned yesterday because I
10 was thinking Monday--

11 THE COURT: I assumed--

12 MR. WEAVER: -- but then when I realized it's not only Mr. Moore on
13 Monday, but it's Mrs. Moore, and to no run any risk that we get jammed, it
14 will only be 15 minutes today.

15 THE COURT: Yeah, the tenor of the discussion was, of course, that the
16 Moores would be the final witnesses on Monday and would take all
17 Monday afternoon. Even if we trickle over into Tuesday with one of them,
18 as long as we have time to instruct and close, you know, Tuesday, we can.
19 My preference though would be to just instruct and close on Tuesday, if we
20 can get there. (Emphasis added.)

21 See "Exhibit C." When the Court made this statement, there was not a peep out of
22 Plaintiffs' counsel even though they had known "for many days" Dr. Wiencek was an
23 "essential witness" and they had already been trying last week to schedule his
24 appearance for today if not earlier.

25 Further, based on the Court's and Defendants' understanding at the start of court
26 Friday, February 7, 2020, that Mr. and Mrs. Moore were the only two remaining witnesses
27 to be called by Plaintiffs, before the lunch recess (after Dr. Lasry and Dr. Shoji testified)
28 the Court addressed the jury:

THE COURT: We are, in fact, going to have to continue into next week.
We do not believe we will continue any further than Tuesday, and there are
basically four additional witnesses that need to be heard from. We expect
two to finish today, and we expect two to finish Monday.⁴ If we do have a
brief carryover into Tuesday, that shouldn't impact things. And then
Tuesday, we would instruct you on the law, and counsel would make their

⁴ The Court was referring to finishing NP Bartmus and Dr. Barcay "today" and finishing Mr. and Mrs. Moore "Monday."

1 closing arguments, and then you would deliberate. Really, we can see no
2 basis upon which we go to Wednesday. I'm sorry we haven't informed you
3 sooner. But it really is sort of this flow of how these, you know,
4 conversations go to have a full understanding of when we might continue
5 into next week before we can tell you. But we're quite certain today that
6 we can tell you that it would be no later than Tuesday. (Emphasis added.)

7 See "Exhibit C." Despite hearing what the Court was saying to the jurors, and while
8 knowing that they were both concealing their intent "for many days" to call Dr. Wiencek as
9 an "essential witness," while at the same time already have been trying to schedule his
10 testimony, Plaintiffs' counsel did not say a word to the Court or to Defendants. They
11 simply waited to spring it on Defendants the afternoon before they scheduled Dr. Wiencek
12 to testify—presumably knowing that Defendants would be preparing for Plaintiffs'
13 testimony as well as closing arguments. As a basic issue of ethics and fairness to
14 Defendants, Plaintiffs should not be permitted to call Dr. Wiencek as a "surprise"
15 concealed witness today. This is the worst possible kind of intolerable gamesmanship.

16 In addition, for the reasons explained below, Dr. Wiencek was disclosed as a non-
17 retained expert, but Plaintiffs didn't meet the disclosure requirements. No expert report
18 has ever been disclosed or produced for Dr. Wiencek. Plaintiffs now claim they will call
19 Dr. Wiencek, not as a non-retained expert, but as a treating provider. Importantly,
20 Plaintiffs didn't meet the disclosure requirements to disclose Dr. Wiencek as a treating
21 provider, either. They can't have it both ways.

22 Defendants are concerned that Plaintiffs will attempt to back door expert testimony
23 regarding causation under the guise of Dr. Wiencek's treatment of Mr. Moore.
24 Accordingly, because Dr. Wiencek was disclosed as a non-retained expert, Plaintiffs
25 shouldn't be permitted to now call him to testify as a "treating provider" instead.

26 In addition, Plaintiffs' counsel signed a Stipulation regarding Motions in Limine
27 which provided that the parties would provide "reasonable advance notice" of witnesses
28 to be called. Obviously, waiting until Sunday afternoon to inform defense counsel he
29 would be calling Dr. Wiencek on Monday, when he hadn't once previously mentioned or

1 suggested he had been trying to contact Dr. Wiencek , and having represented he would
2 be calling the Plaintiffs in this action as his final witnesses, is not reasonable.

3 As this Court is aware, all of the defense's experts have already testified at trial in
4 this matter. Dr. Wiencek has not been deposed in this matter, so his deposition testimony
5 was not available to expert witnesses in forming their conclusions or preparing their
6 reports. Because Plaintiffs' counsel did not inform defense counsel of his plan to call Dr.
7 Wiencek until after all defense experts had already testified, the Defendants will be
8 substantially prejudiced, as their experts won't have the opportunity to respond to Dr.
9 Wiencek's testimony.⁵

10 II. ARGUMENT

11 A. Dr. Wiencek Cannot Testify Regarding Causation of Mr. Moore's Injuries.

12 Dr. Wiencek is identified in Plaintiffs' Expert Disclosure as a non-retained expert
13 witness. However, the disclosure is insufficient. In their Expert Disclosure, Plaintiffs
14 listed 35 different medical facilities and providers from whom Plaintiffs might call as non-
15 retained expert witnesses. Each disclosure said the same thing:

16 "[T]he individual physicians disclosed will testify in their capacity as a
17 treating physician, including their expert opinions as to causation, care,
and reasonableness of medical expenses."

18 See "Exhibit D." Disclosures naming every conceivable witness who might know
19 something about this case is not an NRCP 16.1(a)(2) disclosure of an expert witness.
20 "Disclosing a person as a witness and disclosing a person as an expert witness are two
21 distinct acts." *Musser v. Gentiva Health Services*, 356 F.3d 751, 757-58 (7th Cir. 2004).
22 "Formal disclosure of experts is not pointless. Knowing the identity of the opponent's
23 expert witnesses allows a party to properly prepare for trial. [The defendant] should not
24

25 ⁵ It should be noted that Plaintiffs were particularly intent in making sure that when it came to Defendants'
26 experts' testimony that there not be any testimony outside the four corners of their reports. In fact, Plaintiffs'
27 tried to exclude some of Dr. Wilson's opinions on the ground that they were identified in a "rebuttal" report
28 rebutting Plaintiffs' experts opinions. Then, during trial, for example, Plaintiffs' objected to Dr. Wilson
discussing literature Dr. Marmureanu relied on for his deposition opinions. That's just one example how
"formal" Plaintiffs have been regarding witnesses and testimony when it comes to Defendants witnesses..

1 be made to assume that each witness disclosed by the [plaintiff] could be an expert
2 witness at trial." *Id.* In addition, in Plaintiffs' pre-trial disclosures, Plaintiffs listed Dr.
3 Wiencek under the Custodian of Records/Person Most Knowledgeable, and not
4 separately as an anticipated witness.

5 NRCP 16.1(a)(2)(C) provides as follows:

6 Unless otherwise stipulated or ordered by the court, if the witness is not
7 required to provide a written report, this disclosure must state:

8 (i) the subject matter on which the witness is expected to present evidence
under NRS 50.275, 50.285, and 50.305;

9 (ii) a summary of the facts and opinions to which the witness is expected to
10 testify;

11 (iii) the qualifications of that witness to present evidence under NRS
50.275, 50.285, and 50.305, which may be satisfied by the production of a
12 resume or curriculum vitae; and

13 (iv) the compensation of the witness for providing testimony at deposition
and trial, which is satisfied by production of a fee schedule.

14 See NRCP 16.1(a)(2)(B). Accordingly, by virtue of identifying Dr. Wiencek as a non-
15 retained expert, Plaintiffs were required to disclose a summary of the facts and opinions
16 to which Dr. Wiencek was expected to testify, Dr. Wiencek's qualifications to present
17 evidence (i.e., his curriculum vitae), and the compensation of the witness for providing
18 testimony at deposition and trial (i.e., his fee schedule). Instead, the description of the
19 testimony anticipated from Dr. Wiencek states general categories wherein he may offer
20 opinions (i.e., causation, damages and the reasonableness of medical bills), but does not
21 state what those opinions are. The description of the anticipated testimony also doesn't
22 describe the facts Dr. Wiencek has relied on in forming his opinions and does not provide
23 his qualifications or fee schedule. See *Figuerado v. Crawford*, 2016 Nev. Dist. LEXIS
24 1464, *2. In *Figuerado v. Crawford*, the Clark County District Court found that a
25 disclosure of three physicians as non-retained experts was not sufficient because the
26 plaintiffs didn't disclose a summary of what the opinions of the witnesses actually were
27 and what facts the witnesses relied on in forming the basis of their opinions.
28

1 Accordingly, because Dr. Wiencek is identified as a non-retained expert, but
2 Plaintiffs failed to satisfy the requirements of the disclosure, most importantly, the
3 summary of Dr. Wiencek's opinions and the facts forming the basis for his opinions, Dr.
4 Wiencek should be precluded from testifying as to causation in this matter.

5 **B. Dr. Wiencek Should Be Precluded from Testifying as a Treating Provider.**

6 Plaintiffs' counsel stated in e-mail correspondence later on Sunday, February 9,
7 2020, that Dr. Wiencek would not be testifying as a non-retained expert, but rather, as a
8 treating physician. This statement is completely contradicted by Plaintiffs' expert
9 disclosure where it provides that Dr. Wiencek may testify as an expert. Plaintiffs cannot
10 on the one hand claim Dr. Wiencek is not an expert, and on the other hand assert that he
11 is. *See Donley v. Miles*, 2013 Nev. Dist. LEXIS 3512, *11.

12 NRCP 16.1(a)(2)(D) governs the disclosure of treating physicians and provides as
13 follows:

14
15 A treating physician who is retained or specially employed to provide
16 expert testimony in the case, or whose duties as the party's employee
17 regularly involve giving expert testimony on behalf of the party, must
18 provide a written report under Rule 16.1(a)(2)(B). Otherwise, a treating
19 physician who is properly disclosed under Rule 16.1(a)(2)(C) may be
20 deposed or called to testify without providing a written report. A treating
21 physician is not required to provide a written report under Rule
22 16.1(a)(2)(B) solely because the physician's testimony may discuss
23 ancillary treatment, or the diagnosis, prognosis, or causation of the
24 patient's injuries, that is not contained within the physician's medical chart,
25 as long as the content of such testimony is properly disclosed under Rule
26 16.1(a)(2)(C)(i)-(iv).

21 *See* NRCP 16.1(a)(2)(D) (emphasis added). As noted above, Plaintiffs did not meet the
22 requirements of NRCP 16.1(a)(2)(C), because they didn't provide a summary of Dr.
23 Wiencek's opinions or the facts that formed the basis of those opinions, or his curriculum
24 vitae and fee schedule. Accordingly, while Plaintiffs now claim Dr. Wiencek will testify as
25 a treating provider, Plaintiffs didn't meet the disclosure requirements to disclose Dr.
26 Wiencek as a treating provider pursuant to NRCP 16.1(a)(2)(D).

27 Further, again, as noted above, Plaintiffs cannot on the one hand claim Dr.
28 Wiencek is a non-retained expert, and on the other hand assert that he isn't an expert, but

1 will testify as a treating provider. *See Donley v. Miles*, 2013 Nev. Dist. LEXIS 3512, *11.
2 In *Donley*, the plaintiff disclosed a physician as an expert, but failed to meet the
3 disclosure requirements. The plaintiff then attempted to use the same physician's
4 testimony as a treating provider, rather than an expert. The Court ruled that the
5 physician's testimony was inadmissible at trial.

6 Where a treating physician's testimony exceeds the scope of his treatment, he or
7 she testifies as an expert and is subject to the relevant requirements. *Goodman v.*
8 *Staples the Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011); *see Rock Bay, LLC*
9 *v. Eighth Judicial Dist. Court*, 298 P. 3d 441, 445 n. 3 (2013). In *FCH1, LLC v. Rodriguez*,
10 335 P.3d 183, the plaintiff's "treating physician" witnesses testified as to the "mechanism"
11 or the plaintiff's injury and another doctor's treatment of the plaintiff as causally related to
12 plaintiff's injury. The Nevada Supreme Court held that allowing this testimony without
13 requiring the appropriate expert disclosure was an abuse of the district court's discretion.
14 "Once they opined as to the cause of [plaintiff's] condition and treatments they should
15 have been subject to the section's disclosure standard."

16 Plaintiffs have identified Dr. Wiencek as a provider who will testify as an expert as
17 to causation and damages. Accordingly, pursuant to the Court's reasoning in *Donley*,
18 Plaintiffs should not be permitted to now call Dr. Wiencek to testify as a treating provider
19 instead. Based on Plaintiffs' identification of Dr. Wiencek as an expert, if Dr. Wiencek
20 were permitted to testify within the limitations placed on the testimony of treating
21 providers, it would be a slippery slope regarding what is truly an opinion Dr. Wiencek had
22 at the time of his treatment of Mr. Moore, and what expert opinions he has regarding
23 causation and damages that he developed outside the course of his treatment of Mr.
24 Moore.

25 ///

26 ///

27 ///

28 ///

1 C. Calling Dr. Wiencek As a Witness Amounts to Undue Prejudice and Unfair
2 Surprise.

3 Plaintiffs have participated in scheduling discussions for the past 10 days of trial
4 and have not once suggested they would call Dr. Wiencek as a witness or were waiting to
5 hear back from Dr. Wiencek regarding his availability. This would have been important
6 for the defense to know, as witnesses have been called out of order and all of the defense
7 experts have already testified. Although Plaintiffs' counsel was attempting to coordinate
8 Dr. Wiencek's trial testimony, he did not disclose that to defense counsel. Obviously, had
9 defense counsel known Plaintiffs' counsel was coordinating with Dr. Wiencek, defense
10 experts would have been called later in the case, after the opportunity to review Dr.
11 Wiencek's testimony. Instead, Plaintiffs' counsel waited until the last defense experts had
12 been called to inform counsel he would be calling Dr. Wiencek.

13 One of the purposes of discovery is to "safeguard against surprise..." *Greyhound*
14 *Corp. v. Superior Court*, 56 Cal.2d 355, 376. Surprise evidence is not allowed. *Castaline*
15 *v. City of Los Angeles*, 47 Cal.App.3d 580 (1975). The same should hold true for trial. In
16 fact, the policy reasons to safeguard against surprise are even more applicable in trial
17 because there is usually not time for a remedy.

18 Further, trial courts have a duty to suppress evidence of inexcusable surprise that
19 results in a disadvantage to the opponent. Fed. R. Civ. P. 37(c)(1) describes the
20 sanctions for failure to provide the information required under Fed. R. Civ. P. 26(a). *See*
21 Fed. R. Civ. P. 37(c)(1). Specifically, the Rule specifies that unless the failure to comply
22 with the discovery requirements of Fed. R. Civ. P. 26(a) was "substantially justified or
23 harmless," "the party is not allowed to use that information or witness to supply evidence
24 at trial." *See* Fed. R. Civ. P. 37(c)(1). The party who is facing sanctions has the burden
25 of proving substantial justification or harmlessness. *See Yeti by Molly Ltd. v. Deckers*
26 *Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001). As such, a party will not ordinarily
27 be permitted to use, on direct examination, any expert testimony that does not conform to
28 the disclosure requirements. *See O'Connell v. Chapman Univ.*, 245 F.R.D. 652, 655 (C.D.

1 Cal. 2007) (*citing* Fed. R. Civ. P. 37 advisory committee's notes). As the Advisory
2 Committee notes explain, such sanctions were intended to provide an incentive for full
3 disclosure. *Yeti*, 259 F.3d at 1107. Therefore, implementation of the sanction is
4 appropriate even if the litigant's entire cause of action or defense will be precluded. *Id.*
5 *Sempra Energy v. Marsh USA, Inc.*, No. CV 07-05431 SJO (JC, 2008 U.S. Dist. LEXIS
6 128349, at *26-27 (C.D. Cal. Oct. 15, 2008).

7 Accordingly, the proper sanction here for the unfair ambush by Plaintiffs in trying to
8 provide surprise trial testimony is to preclude them from calling Dr. Wiencek. Otherwise,
9 Defendants will be seriously disadvantaged and unduly prejudiced.

10 **D. Should Dr. Wiencek be Allowed to Testify, Emergency Relief is Warranted.**

11 If the Court intends to permit Dr. Wiencek to testify at trial, Defendants request a
12 stay of that testimony so that they may consider seeking emergency relief from the
13 appellate court pursuant to NRAP 27(e) and any other applicable rules to prevent the
14 undue prejudice to Defendants that will occur should the jury be able to hear Dr. Wiencek
15 testify.

16 **II. CONCLUSION**

17 The Nevada Rules of Civil Procedure required Plaintiffs to disclose timely, a
18 summary of Dr. Wiencek's opinions, the facts that formed the basis of those opinions, a
19 curriculum vitae, and a fee schedule. Instead, Plaintiffs' counsel waited until the last
20 defense experts testified at trial and provided last minute notice that Plaintiffs' counsel
21 had been in contact with Dr. Wiencek to coordinate his testimony and that he would be
22 testifying the next day. To allow Dr. Wiencek to testify under these circumstances would
23 be extraordinarily prejudicial to the Defendants. Such classic sandbagging and ambush
24 tactics should not be tolerated or rewarded. Accordingly, this Court should grant the
25 instant motion and prohibit Dr. Wiencek from testifying at this trial. If the Court disagrees,
26 then before Dr. Wiencek testifies Defendants should be afforded the opportunity to seek
27 emergency relief from the Nevada Court of Appeals.

28

1 DATED this 10th day of February, 2020

2 LEWIS BRISBOIS BISGAARD & SMITH LLP

3
4
5 By



6 KEITH A. WEAVER

7 Nevada Bar No. 10271

8 DANIELLE WOODRUM

9 Nevada Bar No. 12902

10 ALISSA N. BESTICK

11 Nevada Bar No. 14979C

12 6385 S. Rainbow Boulevard, Suite 600

13 Las Vegas, Nevada 89118

14 *Attorneys for Terry Bartmus, A.P.R.N.*

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 10th day of February, 2020, a true and correct copy
3 of DEFENDANT TERRY BARTMUS, A.P.R.N.'S DEFENDANT TERRY BARTMUS,
4 A.P.R.N.'S EMERGENCY MOTION TO PRECLUDE TESTIMONY FROM ROBERT
5 WIENCEK, M.D. was served electronically with the Clerk of the Court using the Wiznet
6 Electronic Service system and serving all parties with an email-address on record, who
7 have agreed to receive Electronic Service in this action.

8 Matthew W. Hoffman, Esq.
9 ATKINSON WATKINS & HOFFMAN, LLP
10 10789 W. Twain Avenue, Ste. 100
11 Las Vegas, NV 89135
12 Tel: 702-562-6000
13 Fax: 702-562-6066
14 Email: mhoffmann@awhlawyers.com
15 *Attorneys for Plaintiffs*

Robert McBride, Esq.
Chelsea R. Hueth, Esq.
CARROLL, KELLY, TROTTER,
FRANZEN & MCBRIDE
8329 W. Sunset Road, Ste. 260
Las Vegas, NV 89113
Tel: 702-792-5855
Fax: 702-796-5855
Email: rcmcbride@cktfmlaw.com
Email: crhueth@cktfmlaw.com
Attorneys for Defendant, Jason Lasry, M.D.

14 Breen Arntz, Esq.
15 5545 Mountain Vista, Suite E
16 Las Vegas, NV 89120
17 Tel: 702-384-8000
18 Fax: 702-446-8164
19 Email: breen@breen.com
20 *Attorneys for Plaintiffs*

21 By /s/ Emma L. Gonzales
22 An Employee of
23 LEWIS BRISBOIS BISGAARD & SMITH LLP
24
25
26
27
28

EXHIBIT A

Weaver, Keith

From: BREEN ARNTZ <breenarntz@me.com>
Sent: Sunday, February 9, 2020 5:15 PM
To: Weaver, Keith
Cc: Hueth, Chelsea; McBride, Robert; breen@breen.com; Bestick, Alissa
Subject: Re: [EXT] Re: Moore v. Lasry, et al/PROPOSED VERDICT FORM

Keith,

As for your other question, it has seemed obvious to me for quite a few days now that Dr. Wiencek is an essential witness. I thought you guys were calling him because he was mentioned by Bob at the beginning. I asked Bob last week if he was calling him and he told me no. I started reaching out to Dr. Wiencek sometime last week and it didn't look like I could get him to come to court for health reasons. He got back to me Friday after court and agreed to come. I didn't make the final decision until today, right before I notified you. He is not being called as a non-retained expert. He is being called as a treating physician, just as he is identified in our supplement.

Let me know if you have anymore questions.

Breen Arntz
2270 S. Maryland Pkwy.
Suite 100
Las Vegas, NV 89109
m: 702.524.7059
f: 702.446.8164
breen@breen.com

On Feb 9, 2020, at 5:05 PM, BREEN ARNTZ <breenarntz@me.com> wrote:

Keith,

Dr. Wiencek is listed as person #20 in our Pretrial disclosures and he is listed as #22 in our supplements.

Breen Arntz
2270 S. Maryland Pkwy.
Suite 100
Las Vegas, NV 89109
m: 702.524.7059
f: 702.446.8164
breen@breen.com

On Feb 9, 2020, at 2:40 PM, Weaver, Keith <Keith.Weaver@lewisbrisbois.com> wrote:

Good afternoon Breen,

As a starting point regarding your calling Dr. Wiencek tomorrow, I could be continuing to miss it, but could you please asap let us know whether in your initial or even rebuttal disclosure you have listed Dr. Wiencek as a non-retained expert? Also, could you let us know where in your pre-trial disclosures you identified him as a witness? Also, the latest 16.1 disclosure (13th supplement) I can find, which encompasses all witnesses currently and previously identified by Plaintiffs, doesn't even have Dr. Wiencek listed. Is there a later one where he's listed? Finally, for how long have you been anticipating calling Dr. Wiencek as a witness and trying to get him to come testify? Could you let us know within the next hour or so if possible?

Thanks Breen.
Keith

<LB-Logo_7c9c5bd0-0a1e-47b8-a3b1-a4b5cdfed8fa.png>
Keith A. Weaver
Partner
Keith.Weaver@lewisbrisbois.com

T: 702.693.4337 F: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | LewisBrisbois.com

Representing clients from coast to coast. View our locations nationwide.

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From: BREEN ARNTZ [mailto:breenarntz@me.com]
Sent: Sunday, February 9, 2020 1:27 PM
To: Hueth, Chelsea
Cc: DelaneyK@clarkcountycourts.us; knightm@clarkcountycourts.us; McBride, Robert; breen@breen.com; Weaver, Keith; Bestick, Alissa
Subject: [EXT] Re: Moore v. Lasry, et al/PROPOSED VERDICT FORM

External Email

I am writing to advise the court and others of a couple things.

First, I am willing to accept the verdict form proposed by Mr. McBride. Except that I think it should lead with a finding for or against plaintiff with the damages and then a breakdown of liability amongst the defendant. I object to having the hospital on the verdict form.

Second, I have been trying to get Dr. Wiencek to come in to testify. He has agreed to come tomorrow at 1:30. I anticipate that his testimony will be very short.

Please let me know if you have any questions.

Breen Arntz
2270 S. Maryland Pkwy.
Suite 100
Las Vegas, NV 89109
m: 702.524.7059
f: 702.446.8164
breen@breen.com

On Feb 9, 2020, at 11:55 AM, Hueth, Chelsea <crhueth@cktfmlaw.com> wrote:

Dear All,

Attached please find a courtesy copy of Dr. Lasry's proposed Special Verdict that was e-filed and e-served.

Thank you,

Chelsea

Chelsea R. Hueth
crhueth@cktfmlaw.com | www.cktfmlaw.com
<image003.jpg>
Carroll, Kelly, Trotter, Franzen & McBride
8329 W. Sunset Road
Suite 260
Las Vegas, Nevada 89113
Telephone: (702) 792-5855
Facsimile: (702) 796-5855

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<Lasry Proposed Special Verdict.pdf>

EXHIBIT B

1 IN THE EIGHTH JUDICIAL DISTRICT COURT

2 CLARK COUNTY, NEVADA

3
4 DARELL L. MOORE and CHARLENE A.)
MOORE, individually and as)
husband and wife,)5 Plaintiffs,)
6))

7 vs.)

CASE NO.

8 JASON LASRY, M.D.,)
individually; FREMONT EMERGENCY)
SERVICES (MANDAVIA), LTD.;)
9 TERRY BARTMUS, RN, APRN; and)
DOES I through X, inclusive;)
10 and ROE CORPORATIONS I)
through V, inclusive,)

A-17-766426-C

DEPT. NO. 25

11 Defendants.)
12))

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS OF JURY TRIAL

14 P.M. SESSION

15 BEFORE THE HONORABLE KATHLEEN E. DELANEY

16 FRIDAY, JANUARY 31, 2020

17 APPEARANCES:

18 For the Plaintiffs:

19 E. BREEN ARNTZ, ESQ.
20 HANK HYMANSON, ESQ.
21 PHILIP M. HYMANSON, ESQ.

22 For the Defendants:

23 ROBERT C. MCBRIDE, ESQ.
24 KEITH A. WEAVER, ESQ.
25 ALISSA BESTICK, ESQ.

REPORTED BY: DANA J. TAVAGLIONE, RPR, CCR No. 841

1 THE WITNESS: No. Tuesday is the only day.

2 THE COURT: You'll have to figure this out,
3 out of here.

4 MR. MCBRIDE: We'll make it work.

5 THE COURT: Thank you, Dr. Fish. Sorry for
6 the time frames. It's how this stuff goes
7 sometimes.

8 And so we'll start at 1:30 on Monday. My
9 understanding then on Monday is -- again, who are we
10 having?

11 MR. ARNTZ: I'm going to start with
12 Dr. Lasry.

13 THE COURT: Dr. Lasry.

14 MR. ARNTZ: And then I'm just going to go
15 as long as I can, get as many of my witnesses on and
16 probably finish with either Darell or Charlene. But
17 probably not that day.

18 THE COURT: All right. And that was my
19 other question. I think have the Moores -- they've
20 left? I wasn't looking up earlier.

21 THE CLERK: Yes.

22 THE COURT: We do need to, of course,
23 figure out how is Mr. Moore going to testify. The
24 only other time, since I've been in back in this
25 space, that we've had occasion with someone who's

EXHIBIT C

1 IN THE EIGHTH JUDICIAL DISTRICT COURT

2 CLARK COUNTY, NEVADA

3
4 DARELL L. MOORE and CHARLENE A.)
MOORE, individually and as)
husband and wife,)5)
6) Plaintiffs,)
7)

8) vs.)

CASE NO.

9 JASON LASRY, M.D.,)
10 individually; FREMONT EMERGENCY)
SERVICES (MANDAVIA), LTD.;)
11 TERRY BARTMUS, RN, APRN; and)
DOES I through X, inclusive;)
12 and ROE CORPORATIONS I)
through V, inclusive,)

A-17-766426-C

DEPT. NO. 25

11)
12) Defendants.)
13)

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS OF JURY TRIAL

14 A.M. SESSION

15 BEFORE THE HONORABLE KATHLEEN E. DELANEY

16 FRIDAY, FEBRUARY 7, 2020

17
18 APPEARANCES:

19 For the Plaintiffs:

20 E. BREEN ARNTZ, ESQ.
HANK HYMANSON, ESQ.
21 PHILIP M. HYMANSON, ESQ.

22 For the Defendants:

23 ROBERT C. MCBRIDE, ESQ.
KEITH A. WEAVER, ESQ.
24 ALISSA BESTICK, ESQ.

25 REPORTED BY: DANA J. TAVAGLIONE, RPR, CCR No. 841

1 was going to bring out with Dr. Lasry, just very
2 briefly today, is the fact that he has to return to
3 work next week, just so the jury knows that he's,
4 you know, not just --

5 THE COURT: well, it gives the opportunity
6 to point out, if you wish, Mr. Arntz, then or later,
7 that the Moores are also not present today for, you
8 know, circumstances. And remind them that we
9 explained to them that it's possible -- and it's not
10 their choice necessarily, but it's possible that
11 folks may not be here.

12 MR. MCBRIDE: Right.

13 MR. WEAVER: Your Honor, one more quick
14 housekeeping thing. In order, because we're going
15 to finish on Tuesday and Mr. Arntz is putting on his
16 clients on Monday, before my expert, Dr. Barcay
17 starts this afternoon, I'll have Nurse Practitioner
18 Bartmus on for 15 minutes.

19 THE COURT: So you'll do the same thing
20 that Mr. McBride did this morning as far as with the
21 client. I wasn't sure. You hadn't mentioned
22 yesterday if you were --

23 MR. WEAVER: well, that's true. I hadn't
24 mentioned yesterday because I was thinking Monday --

25 THE COURT: I assumed --

1 MR. WEAVER: -- but then when I realized
2 that it's not only Mr. Moore on Monday, but it's
3 Mrs. Moore, and to not run any risk that we get
4 jammed, it will only be 15 minutes today.

5 THE COURT: Yeah, the tenor of that
6 discussion was, of course, that the Moores would be
7 the final witnesses on Monday and would likely take
8 all Monday afternoon. Even if we trickle over into
9 Tuesday with one of them, as long as we have time to
10 instruct and close, you know, Tuesday, we can. My
11 preference though would be to just instruct and
12 close on Tuesday, if we can get there.

13 MR. WEAVER: Yeah.

14 THE COURT: But, of course, as Mr. Arntz
15 pointed out yesterday in the discussion about
16 Dr. Lasry, there still needs to be time to cross
17 Ms. Bartmus. And there was fairly lengthy, much
18 lengthier testimony with Nurse Bartmus, Nurse
19 Practitioner Bartmus -- I'm sorry -- before. So,
20 again, hopefully, we'll have time for all of it.

21 All right. Let's go ahead and have the
22 jurors.

23 (Jury enters the courtroom.)

24 THE COURT: Good morning, ladies and
25 gentlemen. Please take your seats as you reach

1 discussed today the possibility of continuing into
2 next week and that we may be doing that.

3 We are, in fact, going to have to continue
4 into next week. We do not believe we will continue
5 any further than Tuesday, and there are basically
6 four additional witnesses that need to be heard
7 from. We expect two to finish today, and we expect
8 two to finish on Monday. If we do have a brief
9 carryover into Tuesday, that shouldn't impact
10 things. And then Tuesday, we would instruct you on
11 the law, and counsel would make their closing
12 arguments, and then you would deliberate.

13 Really, we can see no basis upon which we
14 would go to Wednesday. I'm sorry we haven't
15 informed you sooner. But it really is sort of this
16 flow of how these, you know, conversations go to
17 have a full understanding of when we might continue
18 into next week before we can tell you. But we're
19 quite certain today that we can tell that it would
20 be no later than Tuesday.

21 Obviously you get whatever time you wish to
22 take to deliberate. I'm just talking about when we
23 would conclude it and give it to you, and we do
24 anticipate concluding it and giving it to you with
25 time to deliberate on Tuesday. So but that's

EXHIBIT D

DOEW
MATTHEW W. HOFFMANN, ESQ.
Nevada Bar No. 009061
RACHEAL A. ROSS, ESQ.
Nevada Bar No. 14943
ATKINSON WATKINS & HOFFMANN, LLP
10789 W. Twain Ave., Suite 100
Las Vegas, NV 89135
Telephone: 702-562-6000
Facsimile: 702-562-6066
Email: mhoffmann@awhlawyers.com
Email: rross@awhlawyers.com
Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

DARELL L. MOORE and CHARLENE A.
MOORE, individually and as husband and
wife;

Plaintiffs,

v.

DIGNITY HEALTH d/b/a ST. ROSE
DOMINICAN HOSPITAL – SAN MARTIN
CAMPUS; JASON LASRY, M.D.,
individually; FREMONT EMERGENCY
SERVICES (MANDAVIA), LTD.; TERRY
BARTMUS, RN, APRN; and DOES I through
X, inclusive; and ROE CORPORATIONS I
through V, inclusive;

Defendants.

CASE NO.: A-17-766426-C

DEPT. NO.: Dept. 25

**PLAINTIFFS' SECOND SUPPLEMENTAL DISCLOSURE OF EXPERT WITNESSES
AND EXPERT WITNESS REPORTS**

COMES NOW, Plaintiffs DARELL L. MOORE and CHARLENE A. MOORE (hereinafter
referred to as "Plaintiffs"), by and through their attorneys of record, MATTHEW W. HOFFMANN,
ESQ. of the law firm of ATKINSON WATKINS & HOFFMANN, LLP, and, pursuant to NRCPC
16.1(a)(2)(B), hereby submits their Second Supplemental Disclosure of Expert Witnesses and
Expert Witness Reports as follows (**supplements are in bold**):

1
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RETAINED EXPERTS

1. R. Scott Jacobs, M.D. FAAEM
1669 Torrance Street
San Diego, California 92103

Dr. Jacobs is expected to testify as to his opinions in his report dated December 8, 2017, as well as any supplements thereto. Dr. Jacobs will testify that Dr. Jason Lasry and/or Terry Bartmus were negligent in the care of Darell Moore in several respects. Dr. Jacobs will testify that Dr. Lasry's and/or Terry Bartmus' incomplete assessment and lack of understanding of Mr. Moore's disease process led to Mr. Moore being prematurely discharged, which directly led to the progressive ischemia of Mr. Moore's left leg, and ultimately to his subsequent need for an above the knee amputation of his leg.

Dr. Jacobs is a physician and has been licensed to practice medicine in California since 1975. Dr. Jacobs is board certified in emergency medicine and has been such since 1983.

The statement of the subject matter(s) of Dr. Jacobs' testimony and the summary of his facts and opinions indicated therein are for the purpose of disclosing a retained expert witness under NRCP 16.1(a)(2)(B) and is not intended to be a complete statement of all opinions to be expressed, the basis or reasons therefore, or of the data or other information considered by the witness in forming opinions.

Dr. Jacobs' Curriculum Vitae, Deposition/Trial Log, and Fee Schedule/Invoice are collectively attached hereto as Exhibit 1.

Dr. Jacobs' report dated September 28, 2018, is attached hereto as Exhibit 2.

Dr. Jacobs' report dated April 12, 2019, attached hereto as Exhibit 3.

2. Alexander R. Marmureanu, M.D.
6253 Hollywood Blvd., #1108
Los Angeles, CA 90028

1 **Dr. Marmureanu is expected to testify as to his opinions in his report dated June 6,**
2 **2019, as well as any supplements thereto. Dr. Marmureanu will testify that Dr. Jason Lasry**
3 **and/or Terry Bartmus were negligent in the care of Darell Moore in several respects. Dr.**
4 **Marmureanu will testify that Dr. Lasry's and/or Terry Bartmus' incomplete assessment and**
5 **lack of understanding of Mr. Moore's disease process led to Mr. Moore being prematurely**
6 **discharged, which directly led to the progressive ischemia of Mr. Moore's left leg, and**
7 **ultimately to his subsequent need for an above the knee amputation of his leg.**

8 **Dr. Marmureanu is a surgeon and is licensed to practice medicine in California. Dr.**
9 **Marmureanu is board certified in thoracic surgery and has been such since 2003.**

10 **The statement of the subject matter(s) of Dr. Marmureanu's testimony and the**
11 **summary of his facts and opinions indicated therein are for the purpose of disclosing a**
12 **retained expert witness under NRCP 16.1(a)(2)(B) and is not intended to be a complete**
13 **statement of all opinions to be expressed, the basis or reasons therefore, or of the data or**
14 **other information considered by the witness in forming opinions.**

15 **Dr. Marmureanu's Curriculum Vitae, Deposition/Trial Log, and Fee Schedule are**
16 **collectively attached hereto as Exhibit 4.**

17 **Dr. Marmureanu's report of June 6, 2019, is attached hereto as Exhibit 5.**

18 **3. David E. Fish, M.D.**
19 **1350 Davies Drive**
20 **Beverly Hills, CA 90210**

21 **Dr. Fish is expected to testify as to his opinions in his reports dated July 19, 2019, and**
22 **July 20, 2019, as well as any supplements thereto. Dr. Fish is further expected to testify as to**
23 **any documents reviewed by him in reaching his opinions and any other documents or reports**
24 **that may be relevant to his opinions or defense of those opinions.**

25 **..**

1 **Dr. Fish is Board Certified in Physical Medicine and Rehabilitation; Electrodiagnostic**
2 **Medicine; Brain Injury, Spinal Cord Injury, Sports Medicine; and Pain Medicine. He is**
3 **licensed to practice in California and Nevada.**

4 **The statement of the subject matter(s) of Dr. Fish's testimony and the summary of his**
5 **facts and opinions indicated therein are for the purpose of disclosing a retained expert witness**
6 **under NRCP 16.1(a)(2)(B) and is not intended to be a complete statement of all opinions to**
7 **be expressed, the basis or reasons therefore, or of the data or other information considered**
8 **by the witness in forming opinions.**

9 **Dr. Fish's Curriculum Vitae, Deposition/Trial Log, and Fee Schedule are collectively**
10 **attached hereto as Exhibit 6.**

11 **Dr. Fish's Medical Evaluation and Records Review report of July 19, 2019, is**
12 **attached hereto as Exhibit 7.**

13 **Dr. Fish's Medical Evaluation and Life Care Plan report of July 20, 2019, is attached**
14 **hereto as Exhibit 8.**

15 **4. Terrence M. Clauretie, Ph.D.**
16 **217 Palmetto Pointe Dr.**
17 **Henderson, NV 89012**

18 **Dr. Clauretie is expected to testify as to his opinions in his report dated July 26, 2019,**
19 **as well as any supplements thereto. Dr. Clauretie is further expected to testify as to any**
20 **documents reviewed by him in reaching his opinions and any other documents or reports that**
21 **may be relevant to his opinions or defense of those opinions.**

22 **Dr. Clauretie is and has been an emeritus professor of economics from July, 2011 to**
23 **the present. Dr. Clauretie will testify as to the estimated present value of future medical costs**
24 **for Mr. Moore.**

The statement of the subject matter(s) of Dr. Clauretie's testimony and the summary of his facts and opinions indicated therein are for the purpose of disclosing a retained expert witness under NRCP 16.1(a)(2)(B) and is not intended to be a complete statement of all opinions to be expressed, the basis or reasons therefore, or of the data or other information considered by the witness in forming opinions.

Dr. Clauretie's Curriculum Vitae, Deposition/Trial Log, and Fee Schedule are collectively attached hereto as Exhibit 9.

Dr. Clauretje's report of July 26, 2019, is attached hereto as Exhibit 10.

Plaintiff reserves the right to call any other treating physician witness identified throughout the course of litigation by any party and/or witness, whether by deposition testimony, discovery responses or NRCP 16.1 and NRCP 26. Each treating physician will testify as to their specific treatment of Plaintiff, the opinions formulated during their treatment of Plaintiff as indicated in the records disclosed by Plaintiff and Defendants in this litigation.

DATED this 3rd day of September, 2019.

ATKINSON WATKINS & HOFFMANN, LLP

/s/Matthew W. Hoffmann, Esq.
MATTHEW W. HOFFMANN, ESQ.
Nevada Bar No. 9061
RACHEAL A. ROSS, ESQ.
Nevada Bar No. 14943
10789 W. Twain Ave., Suite 100
Las Vegas, NV 89135
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Atkinson Watkins & Hoffmann, LLP and that on the 3rd day of September, 2019, I caused to be served via Odyssey, the Court's mandatory efilings/eservice system, a true and correct copy of the document described herein.

Document Served: PLAINTIFFS' SECOND SUPPLEMENTAL DISCLOSURE OF EXPERT WITNESSES AND EXPERT WITNESS REPORTS

Person(s) Served:

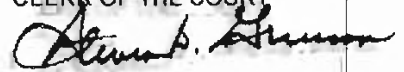
Chelsea Hueth, Esq.
Nevada Bar No. 10904
Anna Karabachev, Esq.
Nevada Bar No. 14387
CARROLL, KELLY, TROTTER, FRANZEN,
MCBRIDE & PEABODY
8329 W. Sunset Road, Suite 260
Las Vegas, NV 89113
Attorneys for Defendant Jason Lasry, M.D.

Keith A. Weaver, Esq.
Nevada Bar No. 10271
Bianca Gonzalez, Esq.
Nevada Bar No. 14529
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
*Attorneys for Defendants Fremont Emergency Services (Mandavia), Ltd.
and Terry Bartmus, A.P.R.N.*

Breen Armtz, Esq.
Nevada Bar No. 3853
5545 Mountain Vista, Suite E
Las Vegas, NV 89120
Ph: 702-384-8000
Fax: 702-446-8164
Co-Counsel for Plaintiffs

/s/ Erika Jimenez

An Employee of Atkinson Watkins & Hoffmann LLP



PTD
MATTHEW W. HOFFMANN, ESQ.
Nevada Bar No. 009061
ATKINSON WATKINS & HOFFMANN, LLP
10789 W. Twain Ave., Suite 100
Las Vegas, NV 89135
Telephone: 702-562-6000
Facsimile: 702-562-6066
Email: mhoffmann@awhlawyers.com

E. BREEN ARNTZ, ESQ.
Nevada Bar No. 003853
2770 S. Maryland Pkwy., Suite 100
Las Vegas, NV 89109
Ph: 702-384-1616
Fax: 702-384-2990
Email: breen@breen.com
bartnz@ggrmlawfirm.com
Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

DARELL L. MOORE and CHARLENE A. MOORE, individually and as husband and wife;

Plaintiffs,

v.

JASON LASRY, M.D., individually;
FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.; **TERRY BARTMUS, RN, APRN**; and **DOES I through X**, inclusive; and **ROE CORPORATIONS I through V**, inclusive;

Defendants.

CASE NO.: A-17-766426-C

DEPT. NO.: Dept. 25

PLAINTIFFS' PRE-TRIAL
DISCLOSURES PURSUANT TO
N.R.C.P. 16.1(a)(3)

COME NOW, Plaintiffs, DARELL L. MOORE and CHARLENE A. MOORE (hereinafter referred to as "Plaintiffs"), by and through their attorney of record, MATTHEW W. HOFFMANN, ESQ., of the law firm of ATKINSON WATKINS & HOFFMANN, LLP, and hereby submit the following list of documents and witnesses pursuant to pursuant to NRCP 16.1(a)(3):

I.

LIST OF WITNESSES

A. Plaintiffs expect to present the following witnesses at trial:

1. Darell L. Moore
c/o Matthew W. Hoffmann, Esq.
Atkinson Watkins & Hoffmann, LLP
10789 W. Twain Avenue, Suite 100
Las Vegas, NV 89135
2. Charlene A. Moore
c/o Matthew W. Hoffmann, Esq.
Atkinson Watkins & Hoffmann, LLP
10789 W. Twain Avenue, Suite 100
Las Vegas, NV 89135
3. Christopher Owen Moore
c/o Matthew W. Hoffmann, Esq.
Atkinson Watkins & Hoffmann, LLP
10789 W. Twain Avenue, Suite 100
Las Vegas, NV 89135
4. Terry Bartmus, A.P.R.N.
c/o Keith A. Weaver, Esq.
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
5. Jason Lasry, M.D.
c/o Robert C. McBride, Esq.
Chelsea R. Hueth, Esq.
Carroll, Kelly, Trotter, Franzen & McBride
8329 W. Sunset Road, Suite 260
Las Vegas, NV 89113
6. Custodian of Records and/or
Person Most Knowledgeable
St. Rose Dominican Hospital – San Martin Campus
Stan T. Liu, M.D.
8280 West Warm Springs Road
Las Vegas, NV 89113
7. Custodian of Records and/or
Person Most Knowledgeable
Fremont Emergency Services
Jason Lasry, M.D.

1 Logan Cole Sondrup, M.D.
2 P.O. Box 638972
3 Cincinnati, OH 45263

4 8. Custodian of Records and/or
5 Person Most Knowledgeable
6 Radiology Associates of Nevada
7 Danny Eisenberg, M.D.
8 P.O. Box 30077
9 Dept. 305
10 Salt Lake City, UT 84130

11 9. Custodian of Records and/or
12 Person Most Knowledgeable
13 Desert Radiologists
14 Ashok Gupta, M.D.
15 Charles Hales, M.D.
16 P.O. Box 3057
17 Indianapolis, IN 46206

18 10. Custodian of Records and/or
19 Person Most Knowledgeable
20 Shadow Emergency Physicians, PLLC
21 Oscar Rago, M.D.
22 P.O. Box 13917
23 Philadelphia, PA 19101

24 11. Custodian of Records and/or
25 Person Most Knowledgeable
26 Advanced Prosthetics and Orthotics
27 Holman Chan, M.D.
28 1505 Wigwam Parkway, Suite 340
Henderson, NV 89074

12. Custodian of Records and/or
Person Most Knowledgeable
Spring Valley Hospital
Irfana Razzaq, M.D.
5400 S. Rainbow Blvd.
Las Vegas, NV 89118

13. Custodian of Records and/or
Person Most Knowledgeable
R. Scott Jacobs, M.D. FAAEM
c/o Atkinson Watkins & Hoffmann, LLP
1669 Torrance Street
San Diego, CA 92103

14. Custodian of Records and/or
Person Most Knowledgeable
Scott Greaves, M.D.
2120 Golden Hill Road, Suite 102
Paso Robles, CA 93446
15. Custodian of Records and/or
Person Most Knowledgeable
Johnathan Riegler, M.D.
1255 Las Tablas Road, Suite 201
Templeton, CA 93465
16. Custodian of Records and/or
Person Most Knowledgeable
James Hayes, M.D.
St. Rose Hospital San Martin
8280 W. Warm Springs Road
Las Vegas, NV 89113
17. Custodian of Records and/or
Person Most Knowledgeable
Irwin B. Simon, M.D.
2150 W. Horizon Ridge Pkwy, Ste. 100
Henderson, NV 89052
18. Custodian of Records and/or
Person Most Knowledgeable
John F. Pinto, M.D.
1701 N. Green Valley Parkway
Henderson, NV 89074
19. Custodian of Records and/or
Person Most Knowledgeable
Armour Christensen, Chtd.
2450 W. Horizon Ridge Parkway, Suite 100
Henderson, NV 89052
20. Custodian of Records and/or
Person Most Knowledgeable
Robert Wiencek, M.D.
St. Rose Sienna
7190 S. Cimarron Road,
Las Vegas, NV 89113
21. Custodian of Records and/or
Person Most Knowledgeable
Noel L. Shaw, D.C.
1101 North Wilmot Road, Suite 229

Tuscon, AZ 85712

22. Custodian of Records and/or
Person Most Knowledgeable
Sang Tran, M.D.
Procure Medical Center
6870 S. Rainbow Blvd., Suite 106
Las Vegas, NV 89118
23. Custodian of Records and/or
Person Most Knowledgeable
Patrick Frank, M.D.
St. Rose San Martin
8280 W. Warm Springs Road
Las Vegas, NV 89113
24. Custodian of Records and/or
Person Most Knowledgeable
Paul Wiesner and Associates
5495 S. Rainbow Blvd.
Las Vegas, NV 89118
25. Custodian of Records and/or
Person Most Knowledgeable
John Oh, M.D.
8551 W. Lake Mead Blvd.
Las Vegas, NV 89128
26. Custodian of Records and/or
Person Most Knowledgeable
Stephen A. Gephardt, M.D.
7220 S. Cimarron Road, Suite 270
Las Vegas, NV 89113
27. Custodian of Records and/or
Person Most Knowledgeable
Antonio Flores Erazo, M.D.
9280 W. Sunset Road, Suite 306
Las Vegas, NV 89148
28. Custodian of Records and/or
Person Most Knowledgeable
Collin Rock, M.D.
Nevada Comprehensive Pain Center
1655 W. Horizon Ridge Parkway
Henderson, NV 89012

