No. 81659

In the Supreme Court of the State of Nevada

DARELL L. MOORE, et al.,
Plaintiffs-Appellants,

v.

JASON LASRY, M.D., et al., et al.,
Defendants-Respondents.

Appeal from the Eighth Judicial District Court, Clark County
District Court Case Number A-17-766426-C
The Honorable Kathleen E. Delaney

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Respondent Terry Bartmus, RN, APRN has no parent corporations, and no publicly held company owns ten percent or more of Respondent's stock.

Respondent is represented in these appeal proceedings by the law firm of Lewis Brisbois Bisgaard & Smith LLP. Respondent was represented in the district court proceedings by the law firms of Lewis Brisbois Bisgaard & Smith LLP.

DATED: September 10, 2021

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By: */s/ Keith A. Weaver*

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II.

STATEMENT OF THE CASE

In this medical malpractice action, plaintiffs/appellants Darrell ("Moore") and Charlene Moore (collectively, "plaintiffs") brought suit against nurse practitioner Terry Bartmus, RN, APRN ("Bartmus") and Jason Lasry, M.D. (collectively, "defendants") for allegedly failing to properly treat Moore's ischemic leg when Moore visited the emergency room on December 25, 2016. This allegedly caused Moore to return to the emergency room three days later for further treatment. Moore eventually needed to have part of his left leg amputated.

During trial, the court permitted Bartmus's counsel to cross-examine plaintiffs' standard of care and causation witness, Dr. Alexander Marmureanu ("Dr. Marmureanu"), regarding an article pertaining to Dr. Marmureanu's performance ratings and mortality rates ("article") and a 2017 report by the California Office of Statewide Health Planning and Development ("report"). Plaintiffs' counsel failed to

properly object to the presentation of the article. The court also excluded Dr. Robert Wiencek ("Dr. Wiencek") from testifying due to plaintiffs' untimely disclosure of him as a witness.

After a thirteen-day trial, the jury rendered a unanimous verdict favoring defendants. Plaintiffs then brought a motion for a new trial. Plaintiffs argued they were prejudiced by the trial court's decision to allow Dr. Marmureanu's cross-examination and to exclude Dr. Wiencek from testifying. The trial court denied the motion. This appeal followed.

III.

STATEMENT OF THE FACTS

A. Darrell Moore's Injury.

On December 25, 2016, Moore arrived at St. Rose-St. Martin Hospital emergency room with a one day history of pain in his left calf. 1 App. 137. Bartmus was a nurse practitioner who treated Moore at the hospital. 1 App. 138. At the hospital, the staff performed an ultrasound revealing an "occlusion of the left femoral-popliteal arterial bypass graft." 1 App. 137. Moore was not admitted into the hospital. It was recommended that he follow-up with his treating cardiovascular surgeon as an outpatient. *Id.*; 10 App. 1518.

On December 28, 2016, Moore returned to the St. Rose-St. Martin Hospital emergency room with the same lower calf pain. 1 App. 137–38. Testing revealed that

he suffered from "occlusion of the left leg graft vasculature with no flow detected in the left posterior tibial anterior tibial or dorsalis pedis arteries." 1 App. 138. Treatment for Moore's injury eventually required him to have part of his left leg amputated. *Id.*

B. Plaintiffs' Complaint.

On December 20, 2017, plaintiffs filed their operative complaint against Bartmus and other defendants. 1 App. 134. The operative complaint included a claim against Bartmus for professional negligence. 1 App. 144.

C. Dr. Marmureanu's Testimony and Cross-Examination.

At trial, plaintiffs presented Dr. Marmureanu as their expert witness on standard of care and causation. 4 App. 461; 11 App. 1566–68. Although not an emergency medicine clinician, Dr. Marmureanu testified extensively about his credentials, expertise and experience. 11 App. 1568–74. In part to establish his credentials to testify regarding the standard of care of an emergency medicine clinician, he testified at length about the important positions he held, his board certification, his faculty positions, medical school committees he had been on, and lectures he has given around the world—all of which he described at length in boastful terms. *Id.*

On cross-examination, Bartmus's counsel asked Dr. Marmureanu about the 2017 report by the California Office of Statewide Health Planning and Development. 4 App. 487. Bartmus's counsel asked if Dr. Marmureanu had been listed in the top three percent of the worst cardiothoracic surgeons in California. *Id.* Bartmus's counsel

also asked if Dr. Marmureanu believed the California Society of Thoracic Surgeons supported a report that identified him as one of the top seven worst cardiothoracic surgeons in California. 4 App. 487–88. In addition, counsel asked Dr. Marmureanu whether he made certain statements to a reporter for Kaiser News ("article"). 4 App. 488.

Dr. Marmureanu was intimately familiar with the report and vigorously disputed the date of the report, the meaning of the report, the accuracy of the report and counsel's interpretation of the report. 4 App. 490–97. Dr. Marmureanu was given a full opportunity to explain his view of the report. 4 App. 490–91, 495. He did so in great detail, uninterrupted for several minutes. *See* 4 App. 491–94, 496–97. Dr. Marmureanu agreed he had made the comment he was questioned about in the article and explained what he meant by it. *Id.* at 488.

The sole objection made by plaintiffs' counsel during the questioning was that "he's [defense counsel] not laying the proper foundation." 4 App. 489. An unreported bench conference ensued, and the court overruled the objection. *Id.*

Later, outside the presence of the jury, the court summarized the discussion held during the bench conference. 4 App. 522–24. The court noted that "when we came to the bench conference, the argument was that Mr. Weaver [defense counsel] was not actually confronting the witness with these reports, that he would be required to do so,

and that . . . it was not an appropriate line of questioning." 4 App. 523. The court went on to summarize its disagreement with the objection, explaining that:

> [W]hen there was testimony obviously by the doctor regarding his qualifications and this information called into question that testimony, that the proper impeachment is to ask certain things–obviously, you have to have your ethical obligations fulfilled that you have a good faith belief to ask the question and that ultimately there was no reason to believe otherwise–certainly Mr. Weaver was able to do so without actually requiring confrontation with documentation, ..."

4 App. 523.

In the court's opinion, confrontation with documentation would be "akin to impeachment with extrinsic evidence; and that is something that is not allowed, other than in certain circumstances, really more things that go towards credibility of testimony, that's not what this would have been." 4 App. 524.

Finally, the court summarized its ruling during the bench conference that "although the plaintiffs' counsel may wish to challenge if Mr. Weaver [defense counsel] was misrepresenting any such reports and could potentially do so on redirect, that it was not required of Mr. Weaver to confront the witness with actual reports." 4 App. 524. When asked if he had anything to add to what occurred at the bench conference, plaintiffs' counsel said "no." *Id.* At no time did plaintiffs' counsel request the jury be admonished, move for a mistrial, or request the report or article be identified for the record or admitted into evidence. Plaintiffs' counsel made no effort

to rehabilitate Dr. Marmureanu on redirect, even after Dr. Marmureanu himself brought up the article and report and disputed its accuracy. *See* 4 App. 502–03.

At a further bench conference on February 3, 2020, the report and article came up again. 12 App. 1860–64. The court again emphasized the door had been opened to this line of questioning when Dr. Marmureanu testified as an expert for plaintiffs, "and he had discussed and for lack of a better term he had tauted [sic] his bona fides and his qualifications." *Id.* at 1861. Plaintiffs' counsel stated that "the only thing [he] would like to add is that [he] had an opportunity to review the article that Mr. Weaver was citing to . . . it is not anything close to what he represented" and the court should review it. *Id.* at 1861–62. Plaintiffs' counsel did not say anything with respect to the report.

The accuracy of the court's description of the bench conference discussion became a subject of dispute after trial when plaintiffs claimed for the first time that the court had not accurately recited the discussions. Plaintiffs' effort to discredit the court and the record was made in reply to defendants' opposition to plaintiffs' motion for new trial. One of defendants' arguments was that plaintiffs failed to preserve their objections to Dr. Marmureanu's cross-examination. 4 App. 548–59. In reply, plaintiffs argued for the first time that the court had failed to provide a complete recitation of the discussion at the bench conference regarding plaintiffs' objection to the cross-examination. 6 App. 717–18.

In their reply, plaintiffs' counsel described the first bench conference quite differently from the court's recitation on the record during trial, to which counsel had previously made no objection. 6 App. 795–96. Plaintiffs' counsel claimed to have made four objections at the first bench conference: (1) this was impeachment evidence that was not produced during discovery; (2) lack of foundation; (3) improper evidence to impeach reputation; and (4) lack of relevance. *Id.* Counsel's declaration further represented that the court's ruling during the bench conference was that defense counsel "could question him [Dr. Marmureanu] about the article and imposed an obligation to act in good [faith], fairly representing the content of the article." 6 App. 796.

In supplemental briefing, defendants objected to plaintiffs' reply and argued it was improper for counsel's declaration to raise this new claim for the first time in a reply. 6 App. 822–24. In addition to improperly raising new arguments and presenting new facts for the first time in a reply, defendants argued: (1) the record of the bench trial was not incomplete; (2) plaintiffs failed to preserve the record; (3) plaintiffs invited any error by remaining silent at trial; and (4) plaintiffs failed to show a new trial was warranted. 6 App. 825–27.

D. <u>The Trial Court Excludes Dr. Wiencek.</u>

Before the last day of trial, plaintiffs disclosed Dr. Wiencek as a witness. 5 App. 683–85. Bartmus immediately filed an emergency motion to exclude Dr. Wiencek. In

the motion, Bartmus argued Dr. Wiencek was not properly disclosed as either an expert witness or a treating physician. 5 App. 674–77. Plaintiffs did not submit an expert report by Dr. Wiencek or a proper summary of Dr. Wiencek's opinions. *Id.* Further, Dr. Wiencek's late disclosure created an unfair surprise for Bartmus at a very late stage during the trial. 5 App. 678–79.

In opposition, plaintiffs argued Bartmus was on notice that Dr. Wiencek could be called as a witness because he was included in all of plaintiffs' pretrial disclosures as a possible witness. 5 App. 645–46. Plaintiffs further argued Dr. Wiencek would be a critical part of their case. 5 App. 644. Plaintiffs explained they did not initially inform Bartmus that Dr. Wiencek would testify at trial because Dr. Wiencek had health complications that prevented him from being in the courtroom. 5 App. 642. Dr. Wiencek finally agreed to testify on the last day of trial. 5 App. 642–43.

The trial court excluded Dr. Wiencek from testifying. 5 App. 653. The parties stipulated before the trial that they would provide reasonable advanced notice of witnesses to be called. 5 App. 651. Plaintiffs did not provide Bartmus with reasonable notice. 5 App. 655. Additionally, it was far too late in the trial to be disclosing new witnesses. 5 App. 653. The court determined that plaintiffs would not be prejudiced by Dr. Wiencek's absence because enough documentation of Dr. Wiencek's opinions were admitted into evidence. 5 App. 655.

E. The Court Enters Judgment in Favor of Defendants.

The jury reached a unanimous verdict in favor of defendants. 3 App. 426–28. The court then entered judgment for defendants on March 10, 2020. 3 App. 429–35.

F. Plaintiffs Move for a New Trial.

Following the adverse judgment, plaintiffs moved for a new trial. 4 App. 436. Plaintiffs argued they were entitled to a new trial because the trial court allowed Bartmus to cross-examine Dr. Marmureanu regarding an article and report relating to his reputation as a cardiothoracic surgeon. 4 App. 438. The article had no relationship to his testimony and was not disclosed to plaintiffs prior to the trial. *Id.* Plaintiffs also contended the court should have permitted Dr. Wiencek to testify because he was properly disclosed, and his testimony was critical to understanding the case. *Id.*

Bartmus opposed plaintiffs' new trial motion. She argued plaintiffs waived any objection to Dr. Marmureanu's cross-examination when they failed to renew their objection to the cross-examination at the trial. 5 App. 548. Further, plaintiffs' argument that Dr. Wiencek should not have been excluded was bereft of legal argument. *Id.*

In reply, plaintiffs insisted their objection to Dr. Marmureanu's cross-examination was sufficient to support their motion for new trial. 6 App. 716–20. Plaintiffs also contended that they renewed their objection during an unrecorded sidebar conversation with the judge, and that the court should have recorded the

sidebar conversation. 6 App. 717–18. Plaintiffs' counsel filed a declaration describing the sidebar conversation and objections allegedly made. 6 App. 795–96. Plaintiffs also contended in their reply that Bartmus's cross-examination of Dr. Marmureanu constituted unfair surprise. 6 App. 720. Additionally, plaintiffs insisted Dr. Wiencek was properly disclosed as a witness during pretrial disclosures. 6 App. 721. They contended Dr. Wiencek was a critical part of their case against Bartmus, and his exclusion prejudiced them during the trial. 6 App. 721–22.

Bartmus filed a supplemental opposition to plaintiffs' motion for new trial following plaintiffs' reply. 6 App. 818. Bartmus contended plaintiffs could not introduce new evidence of the sidebar conversation in their reply. 6 App. 822–24. Further, plaintiffs failed to ensure the record included the sidebar conversation at the time of the trial. 6 App. 826.

The trial court denied plaintiffs' motion for a new trial. 6 App. 829–30. The court ruled that it did not err when it excluded Dr. Wiencek from testifying. 6 App. 829. In addition, the court ruled that it may have erred in allowing Dr. Marmureanu's cross-examination, but found that the cross-examination "did not substantially prejudice Plaintiffs' right to a fair trial." *Id.*

G. <u>Plaintiffs' Appeal.</u>

Plaintiffs timely appealed from the trial court's order denying their motion for a new trial on August 14, 2020. 6 App. 838–39.

IV.

STANDARD OF REVIEW

The appellate court reviews a district court's grant or denial of a motion for new trial under an abuse of discretion standard. *Krause Inc. v. Little,* 117 Nev. 929, 933 (2001). The district court's decision will not be overturned absent "a palpable abuse of discretion." *Id.*; *Allum v. Valley Bank of Nevada,* 114 Nev. 1313, 1324 (1998).

V.

SUMMARY OF RESPONDENT'S ARGUMENT

The trial court correctly permitted the cross-examination of Dr. Marmureanu. Plaintiffs did not properly object to the cross-examination because they did not raise the objection at trial. Plaintiffs' claims that they raised the objections during an unrecorded sidebar conversation are not supported by the record.

Further, Nevada law does not require the disclosure of impeachment evidence prior to trial. Even if Nevada law did require the report and article's disclosure, plaintiffs have offered no evidence of how they were prejudiced by Bartmus's failure to disclose the report and article. Bartmus's counsel followed all Nevada procedural laws during his cross-examination of Dr. Marmureanu. Counsel's cross-examination of Dr. Marmureanu followed the procedural requirements of NRS 50.085(3). Counsel also properly laid a foundation for the disputed report and article by asking Dr. Marmureanu questions about the report and article's topic.

The trial court also properly excluded Dr. Wiencek's testimony. Dr. Wiencek's disclosure did not conform with the Nevada requirements for an expert witness or a treating physician. The pretrial disclosure did not contain any hint of Dr. Wiencek's opinions. Plaintiffs also disclosed Dr. Wiencek as a witness much too late in the trial process, which caused Bartmus to experience an unfair surprise at the end of the trial. Ultimately, enough evidence of Dr. Wiencek's opinions existed to prevent plaintiffs from being prejudiced by Dr. Wiencek's exclusion. Accordingly, the trial court's order denying plaintiffs' motion for a new trial should be affirmed.

VI.

ARGUMENT

A. The Trial Court Did Not Err in Allowing Cross-Examination of Plaintiffs' Physician Expert Witness That Contradicted the Expert's Claim of Being a Top Cardiothoracic Surgeon.

1. Plaintiffs waived the newly raised objections by failing to raise them at trial.

Plaintiffs argue the evidence of the report and news article should not have been admitted because it had not been disclosed prior to trial. Appellants' Opening Br. 12. Further, plaintiffs contend the evidence was improper reputation evidence used to show truthfulness or untruthfulness. *Id.* at 15. Finally, plaintiffs argue counsel failed to lay a proper foundation for the evidence. *Id.* at 16. Of these three arguments, only the

last one was raised in some fashion during trial. Plaintiffs waived the remaining arguments raised on appeal.

An objection to evidence must state the specific grounds for the objection. NRS 47.040(1)(a) requires a party who objects to the admission of evidence to make "a timely objection or motion to strike …, stating the specific ground of objection." Contemporaneous objections are required to prevent a waste of resources and the need to relitigate a case. *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 138 (2011). The "failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below." *Pantano v. State*, 122 Nev. 782, 795 n.28 (2006). "'This rule is more than a formality,' since an objection educates both the trial court and the opposing party, who is entitled to revise course according to the objections made." *Thomas v. Hardwick*, 126 Nev. 142, 156-157 (2010) (citing 1 Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, Fed. R. Evid. Manual § 103.02[9], at 103-18 (9th ed. 2006)).

The record reflects plaintiffs did not raise objections regarding failure to disclose and improper reputation evidence at trial regarding the report and news article, and therefore, plaintiffs waived the right to raise those arguments on appeal. *Allum*, 114 Nev. at 1324. Plaintiffs' counsel's post-trial declaration reciting that four objections were raised during the bench trial is inconsistent with the record. 6 App. 795–96. The record reflects plaintiffs objected for failure to lay a proper foundation

and on the ground that defense counsel was required to confront the witness with the actual report. 4 App. 489, 524. The trial judge gave plaintiffs' counsel the opportunity to make additions to the court's recitation of the bench conference at trial, but counsel suggested none. 4 App. 524. Consequently, the arguments raised on appeal regarding objections based on failure to disclose and improper reputation evidence have been forfeited.

2. Plaintiffs' failure to disclose objection is unavailing.

Plaintiffs did not argue during trial that the report and news article were inadmissible because they had not been disclosed before trial. However, even if the court were inclined to consider the argument that the cross-examination of Dr. Marmureanu based on the report and article was error and grounds for a new trial, the argument is meritless for numerous reasons, as discussed below.

(a) There is no obligation to disclose impeachment evidence regarding a witness's qualifications.

Plaintiffs argue Bartmus was required to disclose the report and article based on NRCP 16.1. Appellants' Opening Br. 13. Plaintiffs are mistaken. NRCP 16.1(a)(1)(A)(ii) requires initial disclosure of "a copy—or a description by category and location—of all documents…concerning the incident that gives rise to the lawsuit." The plain language of the statute specifies that the documents required to be disclosed are those that are "concerning the incident that gives rise to the lawsuit."

The article and news report did not concern plaintiffs' personal injury claims, but related to Dr. Marmureanu's qualifications to opine on the standard of care and whether it had been breached. Plaintiffs argue this is an incorrect interpretation of the statute, but offer no legal authority to support their position. Appellants' Opening Br. 14–15.

Contrary to plaintiffs' unsupported position, the Advisory Committee Note to the 2019 Amendment to NRCP 16.1(a)(1)(A)(ii) supports Bartmus's interpretation. The Advisory Committee notes that "Rule 16.1(a)(1)(A)(ii) incorporates language from the federal rule requiring that a party disclose materials that it may use to support its claims or defenses." The Advisory Committee further specifies that documents identified under this rule "should include those that are prepared or exist at or near the time of the subject incident." *Id.* The Advisory Committee note makes a direct correlation between the disclosures required and their relationship to the "subject incident" and the support of the claims or defenses made. This reveals the intent that the disclosure requirements are not so expansive as to include impeachment materials that go to a witness's qualifications or credibility in addition to the claims or defenses regarding the incident that is the subject of the lawsuit.

This interpretation is further borne out by NRCP 37(c)(1), which provides the sanction for failure to disclose pursuant to NRCP 16.1(a)(1): "If a party fails to provide information …, the party is not allowed to use that information … at a trial,

unless the failure was substantially justified or is harmless….” Bartmus’s counsel’s questions about the report and news article were not offered to “supply evidence,” but to address Dr. Marmureanu’s qualifications to opine about the standard of care. Neither the report or the article were offered into evidence, and counsel’s questions were not evidence.

(b) Any failure to disclose was both substantially justified and harmless.

Although not required to be disclosed, the failure to disclose the report and article was both substantially justified and harmless. NRCP 37(c). The trial court did not abuse its discretion in allowing the line of questioning about the report and article because Dr. Marmureanu’s own testimony opened the door to the issue, plaintiffs’ counsel had the opportunity to rehabilitate the witness, and the report and article were provided to plaintiffs’ counsel during trial. Moreover, although plaintiffs’ counsel did not have a copy of the report or article, Dr. Marmureanu was intimately familiar with the contents of the report and the article. He refuted the contents of the report and explained its meaning at length. 4 App. 490–97.

Further, plaintiffs present no evidence showing that the defense verdict resulted from the questioning of Dr. Marmureanu regarding the report or article. Indeed, when the attorneys concluded their examination of Dr. Marmureanu, the court permitted the jurors to present questions to the witness. 5 App. 597–602. The jury did not have a

single question about the article or report or Dr. Marmureanu's qualifications. Rather, they asked questions about the substance of Dr. Marmureanu's testimony, focusing on whether defendants properly felt a pulse in Moore's foot and the medical science surrounding that issue. *Id.*

In *Brame v. Bank of N.Y. Mellon*, 2020 Nev. Unpub. LEXIS 83, at *2–5 (No. 77186; Nev. Jan. 23, 2020; unpublished disposition), the court found no abuse of discretion in allowing witness testimony about the contents of an undisclosed "acquisition screen" because there was no indication the judgment relied on the witness's testimony and further, the court had not abused its discretion in admitting the testimony.

Likewise, here, the court did not abuse its discretion in allowing the questioning about the report and article nor is there evidence plaintiffs' rights were substantially affected by the testimony.

3. The cross-examination was not based on improper reputation evidence.

Although not raised at trial, plaintiffs argue on appeal that the questions about the report and article were improper "reputation evidence" under NRS 50.085(1)–(2). Appellants' Opening Br. 15. The statute provides: "Evidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible." NRS 50.085(2). Plaintiffs contend that "the discussion of the article was an improper attempt to impeach a

witness using collateral matters," and it "constitutes error." Appellants' Opening Br. 16. Not so.

NRS 50.085(3) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to an opinion of his or her character for truthfulness or untruthfulness, ...

Defense counsel's cross-examination of Dr. Marmureanu—who proclaimed himself the only one telling the truth—with specific instances of his conduct was specifically allowed by NRS 50.085(3). The evidence was relevant to his truthfulness and was proper.

4. Plaintiffs' lack of foundation argument is meritless.

Plaintiffs' counsel raised only one objection during the questioning of Dr. Marmureanu about the report and article—lack of foundation. 4 App. 489. Defense counsel, however, laid a proper foundation. While discussing the applicable standard of care, counsel laid the foundation by asking Dr. Marmureanu if he had an opinion how many cardiothoracic surgeons there are in California. 5 App. 550. When asked about the 2017 report, Dr. Marmureanu disagreed with the statement that he was one of the "seven worst cardiovascular surgeons in the entire state out of hundreds." 5 App. 551. Defense counsel laid further foundation for the report by asking Dr.

Marmureanu about his knowledge of the California Society of Thoracic Surgeons and the conclusions expressed in the report. Dr. Marmureanu retorted that counsel was "wrong about the year; you are wrong about the report, you are wrong about what the report says," and asked to be allowed to explain. Dr. Marmureanu was allowed to explain his view of the report and its meaning at length, without further objection by counsel. *Id.*

Plaintiffs argue on appeal counsel "never provided a foundation to show authenticity." Appellants' Opening Br. 16. But, authenticity of the report was never challenged, either by plaintiffs' counsel or by the witness, who simply disagreed with the way the report was described in counsel's questions. The questioning was not improper and no prejudice has been shown.

5. Plaintiffs have not shown their rights were substantially prejudiced.

Plaintiffs contend they should have been granted a new trial because "the jury was almost certainly prejudiced by the insinuations of defense counsel" through the cross-examination questioning of Dr. Marmureanu about the contents of the report and article. Appellants' Opening Br. 12. Plaintiffs offer no further argument or evidence as to any connection between the "insinuations of counsel" and any prejudice to the jury. Plaintiffs have not met their burden of establishing the district court abused its discretion in denying their motion for new trial.

"A new trial is only warranted when an erroneous evidentiary ruling 'substantially prejudiced' a party." *Ruvalcaba v. City of L.A.*, 64 F.3d 1323, 1328 (9th Cir. 1995). When reviewing a district court's decision to deny a motion for new trial, "[the reviewing court] will not disturb that decision absent palpable abuse." *Busick v. Trainor*, 2019 Nev. Unpub. LEXIS 378, at *2 (No. 72966; Nev. March 28, 2019; unpublished disposition) (citing *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036 (1996)); *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 244 (1978) (decision on new trial motion based on error in law objected to by the party making the motion rests in trial court's sound discretion "and will not be disturbed on appeal absent palpable abuse").

In denying plaintiffs' new trial motion, the district court found any potential error in allowing the impeachment of Dr. Marmureanu "did not substantially prejudice plaintiffs in their right to a fair trial." 6 App. 830. Plaintiffs have not shown otherwise.

Plaintiffs contend they were prejudiced by the questioning because Dr. Marmureanu was an important witness. Appellants' Opening Br. 10. They concede the article accurately states Dr. Marmureanu was "a surgeon with an above average death rate after certain procedures," but complain the article does not support the questions asked and does not use the word "worst." *Id.* at 11. Plaintiffs are concerned about what the jury may have implied from the statements Dr. Marmureanu made in the

news article utilized during his cross-examination. *Id.* Plaintiffs contend they could have rehabilitated Dr. Marmureanu if the article had "been available." *Id.* at 12.

However, plaintiffs provide nothing more than speculation that but for this line of questioning, a different result "might reasonably have been expected." *Hallmark v. Eldridge*, 124 Nev. 492, 505 (2008). There is simply no evidence in the record that the questioning at issue caused the jury to find defendants did not breach the standard of care. The jury had the opportunity to observe Dr. Marmureanu's demeanor and strategy to counter the medical evidence by insinuating defendants were lying and to cast doubt on the contemporaneous medical records. Dr. Marmureanu's hyperbole and consistent assertions that defendants' testimony was "impossible" at every turn itself discredited his testimony. On the other hand, there was substantial evidence in defendants' favor on the issue of whether defendants properly felt a pulse in Moore's foot. The jury considered the evidence, followed the jury instructions and found the actual evidence more persuasive than Dr. Marmureanu's theatrics.

Plaintiffs have "not revealed any particular prejudice other than an adverse verdict." *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 (1971). No abuse of discretion occurred and the jury's verdict and judgment should be affirmed.

B. The Trial Court Did Not Abuse Its Discretion When It Excluded Dr. Wiencek from Testifying at Trial.

1. Dr. Wiencek was improperly disclosed as both an expert witness and a treating physician.

Plaintiffs contend the trial court erred when it refused to allow Dr. Wiencek to testify at trial. Appellants' Opening Br. 17–19. Plaintiffs argue Dr. Wiencek was properly disclosed during discovery and pretrial disclosures. *Id.* at 17–18. However, plaintiffs' disclosure of Dr. Wiencek as a potential witness during pretrial disclosures was inadequate, whether Dr. Wiencek was testifying as an expert witness or as plaintiffs' treating physician.

During pretrial proceedings, plaintiffs disclosed Dr. Wiencek as a non-retained expert witness. 6 App. 806. Dr. Wiencek was to testify about Moore's medical treatment, the cost of Moore's medical treatment, and the cause of Moore's injury. *Id.* Dr. Wiencek did not release an expert report about the topics of which he was planning to testify. 5 App. 675; 6 App. 806. This omission is an excludable offense according to the Nevada Rules of Civil Procedure.

NRCP 16.1(a)(2)(B) requires all expert witnesses expected to testify at a trial to release an expert report summarizing their opinions and the basis for the expert's opinions. *Khoury v. Seastrand*, 132 Nev. 520, 536 (2016). Treating physicians, such as Dr. Wiencek, who testify regarding opinions not formed during the course of a

party's treatment cannot testify without providing an expert report. NRCP 16.1(a)(2)(D)(i); *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 435 (2014). *Rodriguez*, 130 Nev. 425, is instructive. In *Rodriguez*, the plaintiff sued the defendant for negligence after sustaining a knee injury while on the defendant's premises. *Id.* at 427. During the bench trial, the court allowed two of the plaintiff's doctors "to testify to the nature and severity of his condition, its causes, and the appropriateness of treatment, both rendered to and recommended for him." *Id.* at 427-28. The trial court would eventually issue a judgment in favor of the plaintiff. The defendant timely appealed. *Id.* at 428.

On appeal, the appellate court in *Rodriguez* held the trial court erroneously considered the testimony of the plaintiff's treating physicians. *Id.* at 433–435. One of the plaintiff's treating physicians testified about "the mechanism" or cause of the plaintiff's injury. *Id.* at 435. The other physician testified about whether another doctor's treatment was "causally related" to the plaintiff's injury. *Id.* Both treating physicians' testimonies were outside the scope of their treatment of the plaintiff. The physicians therefore needed to provide expert reports. The appellate court concluded that without the expert reports, the trial court should not have permitted the treating physicians to testify. *Id.*; *see also Gallardo-Recendez v. Ely*, 2020 Nev. Unpub. LEXIS 942, at *3 (No. 78077; Nev. Oct. 1, 2020; unpublished disposition) (doctor excluded from testifying on topics beyond the scope of his patient's treatment).

Here, as in *Rodriguez*, Dr. Wiencek intended to testify regarding the cause of Moore's injury. 6 App. 806. Dr. Wiencek also intended to testify regarding the facts surrounding Moore's medical billing. Both topics were outside the scope of Dr. Wiencek's treatment of Moore for Moore's injury. Therefore, Dr. Wiencek needed to release an expert report before testifying at trial. NRCP 16.1(a)(2)(B) & (a)(2)(D)(i); *Rodriguez*, 130 Nev. at 435.

Further, even if Dr. Wiencek was testifying only as Moore's treating physician, plaintiffs did not meet Nevada's disclosure requirements. 5 App. 683; 6 App. 806. A treating physician is still required to provide a summary of his opinions prior to testifying. NRCP 16.1(a)(2)(C)(ii) & (a)(2)(D). Here, however, Dr. Wiencek provided information only about the topics on which he was planning to testify, such as Moore's treatment, the cause of Moore's injuries, and the reasonableness of Moore's medical expenses. 6 App. 806. Dr. Wiencek did not provide a summary of his opinions on those topics. *Id.* Therefore, Dr. Wiencek was not properly disclosed as a treating physician and the court correctly excluded him from testifying. NRCP 16.1(a)(2)(C)(ii) & (a)(2)(D).

2. Dr. Wiencek's late disclosure prejudiced Bartmus.

Plaintiffs contend their late disclosure of Dr. Wiencek as a witness was harmless to Bartmus. Appellants' Opening Br. 18. Plaintiffs further argue the trial court should have allowed Dr. Wiencek to testify pursuant to NRCP 37 due to Dr.

Wiencek's testimony being substantially necessary and harmless. *Id.* Plaintiffs are incorrect. Dr. Wiencek's disclosure before the last day of trial was an unexpected surprise that prejudiced Bartmus's case. The Nevada Rules of Civil Procedure were specifically created to prevent such a surprise from occurring during trial.

For example, in *Sanders v. Sears-Page*, 131 Nev. 500 (Ct. App. 2015), the plaintiffs sued the defendant for negligence arising from a motor vehicle accident. *Id.* at 503. During trial, the court allowed a newly discovered medical document to be entered into evidence and a doctor to testify about it on the last day of trial. *Id.* at 502, 506. The doctor's testimony contained a previously undisclosed opinion. *Id.* at 506. On appeal, the plaintiffs challenged the admission of the last minute medical document into evidence and the doctor's testimony about the document. *Id.* at 514. The appellate court concluded that the trial court abused its discretion when it allowed the doctor to testify about a previously undisclosed opinion. *Id.* at 518. The defendant did not reveal the doctor's new opinion pursuant to NRCP 16.1(a)(2), which served to prevent a "trial by ambush." *Id.* at 517. The last second disclosure of the doctor's new testimony unfairly surprised the plaintiffs regardless of whether the defendant intended to hide the opinion. *Id.* at 518. The court's decision to allow the doctor to testify violated the purpose of NRCP 16.1 to create fair trials. *Id.*

Here, as in *Sanders*, plaintiffs ambushed Bartmus with the decision to have Dr. Wiencek testify. Plaintiffs knew that Dr. Wiencek would likely be medically unable to

testify at trial, but still decided to continue with the trial. 5 App. 683. Bartmus's counsel was clearly surprised by plaintiffs' last minute decision to disclose Dr. Wiencek. 5 App. 684. While plaintiffs may not have purposely surprised Bartmus with Dr. Wiencek's testimony, Bartmus was still unfairly ambushed by the new testimony. 5 App. 672–73. Plaintiffs made the late disclosure despite signing a stipulation stating that they would provide Bartmus with reasonable advance notice of their intent to call witnesses. 5 App. 651. Plaintiffs did not provide Bartmus with the required advance notice and did not even inform Bartmus of their attempts to convince Dr. Wiencek to testify. 5 App. 650–51. The court thus properly excluded Dr. Wiencek from testifying. *Sanders*, 131 Nev. at 518.

The timing of Dr. Wiencek's disclosure further indicates the unfairness of the late disclosure. Courts analyzing NRCP 37 do not tend to allow a late disclosure when the disclosure is made close in time to the trial or during the trial. *See JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, 475 P.3d 52, 58 (Nev. 2020) (finding the disclosure of evidence after discovery had closed to be harmful to the opposing party*)*; *Nationstar Mortg. LLC v. W. Sunset 2050 Trust*, 2020 Nev. Unpub. LEXIS 1083, at *2 (No. 79271; Nev. Nov. 13, 2020; unpublished disposition) ("As Nationstar did not demonstrate that its failure to disclose the evidence until shortly before trial was 'substantially justified or harmless,' the district court properly excluded the evidence.").

Since the Dr. Wiencek disclosure occurred the day before the last day of trial, it is undisputable that Bartmus was harmed by Dr. Wiencek's late disclosure. Bartmus could not simply request that the court reopen discovery. *Residential Credit Sols. v. Sfr Invs. Pool 1*, 2020 Nev. Unpub. LEXIS 1091, at *2 (No. 79306; Nev. Nov. 13, 2020; unpublished disposition). The trial court therefore properly recognized the unfair harm caused by the untimely disclosure.

Finally, plaintiffs argue the exclusion of Dr. Wiencek's testimony prejudiced their case because Dr. Wiencek's testimony was necessary to establish Moore's condition. Appellants' Opening Br. 19. However, the trial court correctly ruled that Dr. Wiencek's testimony was unnecessary because adequate documentation depicting Dr. Wiencek's position on the issues of the case was already admitted into evidence. 5 App. 653. Since plaintiffs disclosed Dr. Wiencek much too late into the trial process, the court properly excluded him for testifying.

VII.

CONCLUSION

For the foregoing reasons, Bartmus respectfully requests that this Court affirm the trial court's order denying plaintiffs' motion for a new trial.

DATED: September 10, 2021

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ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2

1. I hereby certify this Respondent's Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type of style requirements of NRAP 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,228 words.

3. Finally, I hereby certify that I have read this Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: September 10, 2021

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith, LLP, and that on this 10th day of September, 2021, I did cause a true copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** to be served via the Court's electronic filing and service system ("E-Flex") to all parties on the current service list:

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