IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMBERLY TAYLOR,

Appellant,

v.

KEITH BRILL, M.D. and WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC,

Respondents

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SUPREME COURT CASE NO. 83847

Dist. Court Case No. A-18-773472-C

APPELLANT'S APPENDIX

VOLUME V

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. 25, I hereby certify that on the 10th day of March, 2022, a copy of the foregoing **APPELLANT'S APPENDIX, VOLUME V** via the method indicated below:

X	Pursuant to NRAP 25(c), by electronically serving all counsel and e-mails registered to this matter on the Supreme Court Electronic Filing System.
	Pursuant to NRCP 5, by placing a copy in the US mail, postage pre-paid to the following counsel of record or parties in proper person:
	Via receipt of copy (proof of service to follow)

An Attorney or Employee of the firm:

/s/ Sarah Daniels
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DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY D. TAYLOR, an Individual,

Plaintiff,

vs.

KEITH BRILL, MD, FACOG, FACS, an Individual; WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA – MARTIN, PLLC, a Nevada Professional Limited Liability Company; TODD W. CHRISTENSEN, MD, an Individual; DOES I through XXX, inclusive; and ROE CORPORATIONS I through XXX, inclusive;

Defendants.

CASE NO.: A-18-773472-C
DEPT: III

DEFENDANTS' REPLY IN SUPPORT OF MOTION IN LIMINE NO. 3 TO EXCLUDE DEFENDANTS' INSURANCE COVERAGE

DATE OF HEARING: 09/20/2021

TIME OF HEARING: 11:30 A.M.

COMES NOW, Defendants, KEITH BRILL, MD, FACOG and WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA – MARTIN, PLLC, by and through their counsel of record, ROBERT C. McBRIDE, ESQ. and HEATHER S. HALL, ESQ. of the law firm of McBRIDE HALL, and hereby submit their Reply in Support of Motion in Limine No. 3 to

Exclude Defendants' Insurance Coverage.

This Reply is made and based upon the attached Memorandum of Points and Authorities, the Affidavit of Heather S. Hall, Esq., the papers and pleadings on file herein, and any oral argument made at the time of the hearing of this matter.

DATED this 13th day of September 2021.

McBRIDE HALL

/s/ Heather S. Hall

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This is a medical malpractice case filed on April 25, 2018. Plaintiff's "Omnibus Statement of Facts" informs this Court that there is no dispute that the resectoscope perforated the uterus and bowel during the subject surgery. Plf's Opp., 2: 20 – 22. However, there is a dispute as to whether the complication occurred while Dr. Brill was advancing the resectoscope (as Defendants maintain) or while Dr. Brill was activating the cutting mechanism of the resectoscope (as Plaintiff maintains). Further, there is a dispute whether the complication occurred as a result of negligence. Defendants deny that negligence occurred.

Much of Plaintiff's Opposition to this Motion in Limine focuses on assertions that this Court should permit voir dire on insurance and tort reform and give the jury an instruction on Dr. Brill's insurance coverage. *Capanna v. Orth*, 134 Nev. 888, 432 P.3d 726 (2018) does not stand for the proposition for which it is cited by Plaintiff. The jury instruction Plaintiff wants to use in this case is **not** applicable in any manner, nor did the Court in *Capanna* address whether its use is proper in a medical malpractice matter. The instruction Plaintiff wants this Court to give is:

> INSURANCE:
>
> COLLATERAL SOURCES
>
> [You are not to discuss or even consider whether or not the plaintiff was carrying insurance to cover medical bills, loss of earnings, or any other damages he claims to have sustained.]
>
> [You are not to discuss or even consider whether or not the defendant was carrying insurance that would reimburse him for whatever sum of money he may be called upon to pay to the plaintiff.]
>
> [Whether or not either party was insured is immaterial, and should make no difference in any verdict you may render in this case.]

NEV. J.I. 1.07.

This is an incorrect statement of the law in a medical malpractice action where NRS

42.021 specifically allows Defendants to introduce evidence of collateral sources for the jury's consideration. Further, specific reference to Defendants' insurance would be highly prejudicial to Defendants in this matter. The parties this instruction is purportedly designed to protect (Defendants) do not want this instruction given. Based upon that objection, this instruction should not be given.

This Court should decline to permit improper voir dire questioning on insurance and properly instruct the jury with instructions applicable to this action and not a general negligence matter. All evidence of Defendants' liability insurance should be excluded. Accordingly, Defendants' Motion in Limine No. 3 to Exclude Defendants' Insurance Coverage should be granted in its entirety.

II.

LEGAL ARGUMENT

A. EVIDENCE RELATING TO THE EXISTENCE OF MEDICAL MALPRACTICE INSURANCE COVERAGE IS IRRELEVANT AND SHOULD NOT BE REFERENCED DURING VOIR DIRE.

Once again, Plaintiff relies on personal injury cases, not medical malpractice case law. In *Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 774 P.2d 1044 (1989), the Nevada Supreme Court noted that automobile insurance is mandatory and most jurors are aware of the existence of insurance coverage with respect to automobiles. *Id.* at 312, 1046. In Nevada, medical malpractice insurance is **not** mandatory and most jurors would not be familiar with medical malpractice insurance. Thus, neither side should be permitted to question the jury regarding insurance during voir dire. If a prospective juror raises the issue of insurance during voir dire, it can be dealt with appropriately at that time. However, there is no reason for any of the attorneys or their testifying witnesses to bring this issue up in the presence of the jurors unless and until that occurs.

The rationale behind excluding evidence of liability insurance is that a jury may award damages based on the fact that a defendant is covered by insurance. *See* NRS 48.135(1). It is one thing to question potential jurors regarding employment in general and quite another to specifically single out insurance company employees prior to that issue being raised by potential

jurors or to ask questions directly commenting on the existence of Defendants' malpractice insurance. Under no circumstances is Defendants' insurance relevant to any issue in this case. The parties have stipulated "that Women's Health Associates of Southern Nevada is vicariously liable for any acts or omissions of Keith Brill M.D. should the jury find any violations of the standard of care by Keith Brill, M.D." Thus, there will never be a reason to attempt to introduce evidence of Defendants' insurance pursuant to NRS 48.135(2). Just as it would be improper for Dr. Brill to testify that he cannot pay a large award, it would be equally improper for Plaintiff and her counsel to underscore to the jury that Dr. Brill has insurance to cover any large award.

Because of the high likelihood of prejudice to the Defendant, Plaintiff should not be permitted to present evidence of Defendants' medical malpractice insurance or to question prospective jurors regarding the same, unless and until the issue of insurance is raised by prospective jurors.

B. NEVADA PATTERN INSTRUCTION 1.07 IS INAPPROPRIATE IN THIS MEDICAL MALPRACTICE MATTER.

Capanna v. Orth, 134 Nev. 888, 432 P.3d 726 (2018) did not address whether it was appropriate for the trial court to give Nevada Pattern Jury Instruction 1.07. In the trial court, counsel for Dr. Capanna objected to the judge giving Nev. J.I. 1.07 on the grounds that it tended to highlight Defendant's insurance and may be used as a tactic to improperly emphasize insurance. Over the objection of defense counsel, the trial court gave the contested instruction. During closing argument, Plaintiff's counsel then did exactly what defense counsel had predicted and what the district court indicated would be "incredibly improper". Counsel displayed the jury instruction on insurance and proceeded to make statements that "whether or not the defendant was carrying insurance" and plaintiff' s counsel told the jury that "whether or not the defendant was insured is immaterial" and that the jury not to consider "where the money comes from". *See* **Exhibit "A"**, Appellant's Opening Brief in *Capanna* appeal, pages 45 – 47.

The issue of whether the trial court committed error in giving this instruction was not the subject of the appeal. Instead, the issues raised on appeal were:

1. Whether the district erred by preventing defense counsel from cross-examining a key medical witness regarding the witness' financial relationship with plaintiff's counsel.
2. Whether the district court erred by allowing a last-minute build-up of damages, i.e., by allowing late supplemental medical reports regarding damages, allowing untimely disclosures of damages calculations, and allowing doctors to testify beyond the scope of their treatment.
3. Whether the district court erred by allowing plaintiff's counsel to commit repeated and persistent misconduct.
4. Whether the district court erred in its awards of attorneys' fees and costs.

See **Exhibit "A"**, page 2, Statement of Issues.

Thus, any assertion that the Nevada Supreme Court has approved giving juries in medical malpractice cases specific instruction on the existence of a defendant's malpractice insurance is wrong. That is not at all what was decided in *Capanna*. Capanna considered whether it was attorney misconduct for Plaintiff's counsel to repeatedly reference defendant's insurance during trial, including during closing argument. *See* **Exhibit "B"**, *Capanna v. Orth*, 134 Nev. at 891, 432 P.3d at 731. Because the defense counsel did not object to the statements during closing argument, the Supreme Court had to apply the "irreparable and fundamental error" standard which applies to unobjected-to attorney misconduct. *Id.* The Court concluded that counsel's closing argument did not amount to irreparable and fundamental error warranting relief. *Id.*

As evidenced by the fact that Plaintiff also seeks to improperly ask questions of potential jurors to unfairly prejudice Defendants, the true purpose behind Plaintiff proposing instruction 1.07 is to inform the jury that Defendants have insurance. Plaintiff should not be permitted to wrongfully place evidence of Defendants' liability insurance before the jury including by means of repeated reference to its existence.

C. PLAINTIFF SHOULD NOT BE PERMITTED TO QUESTION POTENTIAL JURORS ABOUT TORT REFORM.

Voir dire is not a platform from which Plaintiff's counsel may educate prospective jurors about the case or compel them to commit themselves to a particular disposition of the matter, to

prejudice them for or against a party, or to "indoctrinate" them. *People v. Visciotte*, 2 Cal. 4th 1, 48, 825 P.2d 388, 412 (1992). Nevada law is clear that questions that are repetitive and aimed at indoctrination rather than the acquisition of information regarding bias or the ability to apply the law are inappropriate. *See Hogan v. State*, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987); *See also Oliver v. State*, 85 Nev. 418, 456 P.2d 431 (1969).

In opposing this Motion, Plaintiff's counsel indicates he intends to ask potential jurors the following questions:

- Do you know what KODIN is?
- If you lived in Clark County in 2004, do you remember how you voted on KODIN?
- Do you think there is a crisis for medical malpractice insurance rates for doctors?
- If you felt a doctor would have to personally pay a large judgment instead of having it covered through insurance, would that affect your verdict?
- Do you feel that if you rule against the Defendant in this case, his malpractice insurance premiums might increase? Would that affect your verdict in this case?
- If the judge instructed you in this case not to consider whether the doctor defendant had medical malpractice insurance, do you think you could follow that instruction?

See Plf's Opp, 6:4 – 12.

The proposed voir dire is a thinly veiled attempt to find out how a prospective juror may rule in this case by asking specific questions to bias the jury in favor of Plaintiff. These questions are aimed more at indoctrination than for the determination of bias or inability to apply the law. The proposed questions are a thinly veiled attempt to find out how a prospective juror may rule in this case by asking specific questions about tort reform. Responses to these questions are not necessary to empanel a fair and impartial jury in this medical malpractice case and it would be prejudicial to Defendants to allow repeated reference to and emphasis of tort reform and Defendants' liability insurance. Tort reform has existed in this state since 2004.

Plaintiff points to no evidence of any recent or ongoing media campaigns regarding medical malpractice and tort reform to justify asking potential jurors questions which seek opinions on political issues.

Likewise, Plaintiff's counsel should question potential jurors about Defendants' liability insurance. On the one hand, Plaintiff claims to want to prevent jurors from considering the existence of Defendants' liability insurance but then proposes voir dire questions emphasizing the existence of Defendants' insurance. Considering proposed instruction 1.07 and these questions together, it is clear that the intent is to repeatedly reference Defendants' malpractice insurance in an effort to emphasize that any verdict would not be paid directly by Dr. Brill or WHASN. This is clear attorney misconduct and should not be permitted. Plaintiff's counsel should not be permitted to ask potential jurors questions commenting on Defendants' insurance including the proposed questions. As recognized by the trial court in *Capanna*, to allow Plaintiff's counsel to emphasize and mention Defendants' liability insurance would be "incredibly improper."

Even when voir dire questioning on insurance is permitted in non-medical malpractice cases, the Nevada Supreme Court has made clear that "the proper approach in *voir dire* involving **personal injury cases** is to allow 'good faith' questioning of the *venire* concerning interests in, or connections with, casualty insurance companies." *Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 312-13, 774 P.2d 1044, 1046-47 (1989) [Emphasis added]. The questioning must be "for the purpose of ascertaining the qualifications of prospective jurors and for ferreting out bias and prejudice, and **not for the purpose of informing them that there is insurance in the case**." *Id.* at 313, 1047 [Emphasis added]. The proposed voir dire is not 'good faith questioning'. If any questions regarding insurance are asked of potential jurors, it should be by the trial judge and concise, good faith questioning to ascertain potential bias.

III.

CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court enter an order precluding any reference to or testimony concerning the existence of Defendants' medical

malpractice insurance coverage and limit Plaintiff's counsel to **appropriate** voir dire questioning. Any questions of the jury regarding affiliations with insurance companies should be brief and conducted by the Court so as to avoid any potential attorney misconduct.

DATED this 13th day of September 2021.

McBRIDE HALL

/s/ Heather S. Hall

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of September 2021, I served a true and correct copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION IN LIMINE NO. 3 TO EXCLUDE DEFENDANTS' INSURANCE COVERAGE** addressed to the following counsel of record at the following address(es):

☒ **VIA ELECTRONIC SERVICE**: By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

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Attorneys for Plaintiff

/s/ Natalie A. Jones
An Employee of *McBRIDE HALL*

EXHIBIT "A"

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D.,
Appellant/Cross-Respondent,
vs.
BEAU R. ORTH,
Respondent/Cross-Appellant.
/

ALBERT H. CAPANNA, M.D.,
Appellant,
vs.
BEAU R. ORTH,
Respondent.
/

No. 69935

No. 70227

APPEAL FROM JUDGMENT AND POST-JUDGMENT ORDERS
IN THE EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY,
THE HONORABLE DOUGLAS W. HERNDON, DISTRICT JUDGE

APPELLANT'S OPENING BRIEF

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ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D.,
Appellant/Cross-Respondent,
vs. No. 69935

BEAU R. ORTH,
Respondent/Cross-Appellant.
_____/

ALBERT H. CAPANNA, M.D.,
Appellant,
vs. No. 70227

BEAU R. ORTH,
Respondent.
_____/

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: *None*

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg
Lauria, Tokunaga, Gates & Linn

3. If litigant is using a pseudonym, the litigant's true name: *None*

DATED: 11/4/16

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JURISDICTIONAL STATEMENT

This is an appeal from a medical malpractice amended judgment and post-judgment orders. The judgment is appealable under NRAP 3A(b)(1) [final judgment]. The order denying a new trial is appealable under NRAP 3A(b)(2). The orders regarding costs and fees are appealable under NRAP 3A(b)(8) as special orders after final judgment.

Dates establishing timeliness of the appeal are as follows. Notice of entry of the original judgment was served on October 28, 2015. 9 A.App. 1880-86. A motion for new trial or to amend the judgment was filed on November 9, 2015. 9 A.App. 1913-29. On January 28, 2016, an amended judgment was entered, with service of notice of entry on February 3, 2016. 10 A.App. 2279, 2282. An order regarding post-judgment motions was entered on February 10, 2016, with notice of entry served on February 11, 2016. 10 A.App. 2289, 2299. A timely notice of appeal was filed within 30 days, on March 7, 2016. 11 A.App. 2377.

The order granting plaintiff's attorneys' fees was entered on April 15, 2016, with notice of entry served on April 18, 2016. 11 A.App. 2436, 2440. Capanna filed a timely supplemental notice of appeal on April 18, 2016. 11 A.App. 2448. An order awarding costs was entered on April 21, 2016, with notice of entry served on

April 25, 2016. 11 A.App. 2459, 2462. Capanna filed a timely second supplemental notice of appeal on May 2, 2016. 11 A.App. 2469.

ROUTING STATEMENT

This appeal is presumptively retained by the supreme court under NRAP 17(a)(13) and (14), and 17(b)(2), because there are questions of first impression, questions of statewide public importance, and a judgment of more than $250,000 in a tort case.

STATEMENT OF ISSUES

1. Whether the district court erred by preventing defense counsel from cross-examining a key medical witness regarding the witness's financial relationship with plaintiff's counsel.

2. Whether the district court erred by allowing a last-minute build-up of damages, i.e., by allowing late supplemental medical reports regarding damages, allowing untimely disclosures of damages calculations, and allowing doctors to testify beyond the scope of their treatment.

3. Whether the district court erred by allowing plaintiff's counsel to commit repeated and persistent misconduct.

4. Whether the district court erred in its awards of attorneys' fees and costs.

STATEMENT OF THE CASE

Plaintiff filed his medical malpractice complaint on September 8, 2011. 1 A.App. 1. A jury trial was held in August/September of 2015; the verdict was approximately $4.3 million. 7 A.App. 1431-32. Judgment was entered on October 26, 2015 (8 A.App. 1639), and post-judgment motions were decided thereafter. Among other things, the district court ordered entry of an amended judgment, pursuant to medical malpractice statutes; the amended judgment was $941,435.34. 10 A.App. 2279-81. The district court also awarded plaintiff $169,989.58 for attorneys' fees and $123,322.20 for costs. 11 A.App. 2436-39, 2459-61. This appeal followed.

STATEMENT OF FACTS[1]

Plaintiff Beau Orth was having low back pain in August 2009, followed by shooting pain down his leg. 19 A.App. 4515-16, 4521-29; 20 A.App. 4600. Albert

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[1] Unfortunately, the trial transcript is difficult to read. Bench conferences were transcribed, but sometimes they are not in the transcript at the correct chronological location; transcribed bench conferences are sometimes grouped together in locations different from where the conferences actually occurred. Also, some portions of testimony are not in chronological sequence. These problems occasionally require a person reading the transcript to jump between transcript locations. To help the court follow the trial transcript, we have inserted pages into the appendix, providing directions to the reader at various places.

Capanna, M.D., is a neurosurgeon who has been practicing since 1979. 19 A.App. 4307. Plaintiff was referred to Dr. Capanna in the fall of 2010, for evaluation of plaintiff's back/leg pain. 19 A.App. 4529-31. Earlier testing had revealed a small protrusion from a disc in plaintiff's low back between the fifth lumbar and first sacral vertebrae (L5-S1 disc). 18 A.App. 4193-94. An MRI of plaintiff's low back the day after Dr. Capanna first saw plaintiff confirmed a disc bulge at L5-S1. 15 A.App. 3555-56.

Dr. Capanna performed surgery to repair the disc problem at L5-S1 on September 17, 2010. 16 A.App. 3764-65. At trial, medical witnesses had differing views about what happened during the surgery. Some doctors opined that Dr. Capanna operated on a disc at the wrong level of plaintiff's back, namely, the L4-5 disc, immediately above the L5-S1 level; other doctors opined that Dr. Capanna operated on the correct disc. In any event, Dr. Capanna recognized that he entered the L4-5 disc during the operation, causing damage to that disc. 20 A.App. 4782.

The jury ruled in plaintiff's favor. For purposes of this appeal, Dr. Capanna does not contend that there was insufficient evidence to support the jury's presumed finding that he either operated on the wrong disc or damaged the L4-5 disc, and that his operation was below the applicable standard of care.

Other facts will be discussed below.

SUMMARY OF ARGUMENT

Dr. Capanna did not receive a fair trial. During discovery, plaintiff engaged in gamesmanship and sandbagging, failing to make required disclosures regarding expert opinions and medical expenses. The district court essentially allowed a last-minute loading of medical expenses, primarily regarding future treatment amounting to approximately $700,000. The district court erred by failing to require plaintiff to obey the rules, resulting in a miscarriage of justice.

Additionally, defense counsel was entitled to cross-examine the key medical witness regarding financial entanglements with plaintiff's counsel. These financial arrangements gave the doctor a huge incentive to slant his testimony in plaintiff's favor. As such, the evidence was admissible and critical to the jury's evaluation of the doctor's credibility.

The district court also erred by allowing plaintiff's counsel to commit repeated and persistent misconduct consisting of improper comments to the jury regarding insurance, improper golden rule arguments, and improper jury nullification arguments.

Finally, the district court failed to comply with mandatory requirements for awards of attorneys' fees and access fees for experts. There was no statutory basis

for the award of attorneys' fees, and the award of excess expert fees was procedurally improper.

ARGUMENT

Standards of review

Discovery and evidentiary rulings are generally reviewed for abuse of discretion. *Club Vista Fin. Servs. v. District Court,* 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (discovery orders); *Mclellan v. State,* 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (evidentiary rulings). *De novo* review applies to whether the district court used the proper legal standard. See *Staccato v. Valley Hospital,* 123 Nev. 526, 530-31, 170 P.3d 503, 505-06 (2007).

An award of attorneys' fees is generally reviewed for abuse of discretion. *Albios v. Horizon Communities, Inc.,* 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006). But *de novo* review applies to whether a district court properly applied legal requirements. See *Yamaha Motor Co., USA v. Arnoult,* 114 Nev. 233, 251-52, 955 P.2d 661, 672-73 (1998) (award of fees reversed).

Although this court reviews an award of costs for abuse of discretion, *Village Builders 96, v. U.S. Laboratories, Inc.,* 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005), interpretations of costs statutes are reviewed *de novo. Washoe Med. Ctr. v. District Court,* 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006).

1. Cross-examination of Dr. Cash

a. Additional facts regarding Dr. Cash cross-examination

One of plaintiff's key medical witnesses was Andrew Cash, M.D., an orthopedic spine surgeon. 15 A.App. 3507. Dr. Cash saw plaintiff shortly after Dr. Capanna's surgery, and Dr. Cash performed a second surgery at levels L4-5 and L5-S1. 15 A.App. 3579-80.

Although Dr. Cash was originally a treating physician, he was later retained by plaintiff's counsel as a medical expert for the lawsuit. More than four years after Dr. Cash performed his surgery on plaintiff, Mr. Prince paid Dr. Cash $10,000 to prepare a medical records review of a thousand pages of medical records. 7 A.App. 1492; 11 A.App. 2495:15-16, 2496:9-10; 19 A.App. 4399. Mr. Prince then paid Dr. Cash another $3,500 to prepare a two-page letter for the lawsuit. *Id.* Mr. Prince also paid Dr. Cash $15,750 for trial preparation and $18,000 for trial testimony. 7 A.App. 1494-96. Mr. Prince and his firm paid Dr. Cash a total of $47,250. 7 A.App. 1444, 1492-96.

Before trial, plaintiff sought to limit defense counsel's right to inform the jury that plaintiff's counsel "has a connection to Plaintiff's treating physicians, including, that Plaintiff's counsel has worked with these same treating physicians on other unrelated personal injury cases." 23 A.App. 5404. Defense counsel opposed the motion, arguing that such evidence establishes potential bias. 23 A.App. 5410.

Plaintiff replied, contending that such cross-examination should not be allowed because Dr. Cash was merely a treating physician, not a retained expert. 23 A.App. 5420-21.

At the hearing on the motion, defense counsel discussed Dr. Cash's deposition testimony that he has been retained by plaintiff's counsel dozens of times. 11 A.App. 2495. Although defense counsel mistakenly stated that the doctor had worked with Mr. Prince "two to three dozen times" (11 A.App. 2495:11-12), Dr. Cash actually testified at his deposition that he has worked as a retained expert for Mr. Prince's law firm up to four dozen times. 5 A.App. 1009(47-48).

Defense counsel argued that the jury should know about the extensive relationship between Mr. Prince and Dr. Cash, to show implied bias and potential favoritism in the doctor's testimony. 11 A.App. 2495-97. Even the trial judge recognized the potential for implied bias, "because he's testified for them in the past and in order for him to get work in the future he has to testify favorably." 11 A.App. 2496:15-17. Plaintiff's counsel requested the district court to "exclude any testimony or information concerning any relationship with me, my firm or former firm." 11 A.App. 2498:21-23.

The district court granted plaintiff's request, severely limiting defense cross-examination of Dr. Cash. 11 A.App. 2500. The district court allowed defense

counsel to inquire whether Dr. Cash had ever worked with plaintiff's counsel in the past, but the district court absolutely prohibited defense counsel from cross-examining regarding "the number of times, dozens of times, three dozen times" that Dr. Cash has worked with Mr. Prince. 11 A.App. 2500:13-14, 20-22.

b. The district court erred by limiting Dr. Cash's cross-examination

Exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986)). The *Robinson* court noted that although *Van Arsdall* was a criminal case, "the same reasoning regarding bias applies in a civil trial." *Id.*

In *Robinson*, an injured plaintiff sued a machine manufacturer, and the jury returned a defense verdict. On appeal, the plaintiff contended that the district court erred by excluding testimony regarding the relationship between the defendant, defense counsel, and one of the defense expert witnesses, who had testified many times for both the defendant and its lawyer. The *Robinson* court reversed, holding that exclusion of the evidence was prejudicial error. Exposure of the witness's relationships to the defendant and defense counsel "may have shown bias on the part of the expert." *Id.* at 143, 808 P.2d at 527. Citing a Texas case, *Robinson* held that

the jury "should be given the opportunity to judge for themselves the witness's credibility in light of the relationship between the parties, the witness's motive for testifying, or any other matter which would tend to influence the testimony given by a witness." *Id.*

Robinson also observed that expert witness testimony is, in some respects, similar to a business arrangement between the witness and the attorney. "The trier of fact has the right to take business associations into account when determining the credibility of witnesses and the weight to give their testimony." *Id.*

Robinson was applied in *Rish v. Simao,* 132 Nev. Adv. Op. 17, 368 P.3d 1203 (2016), where defense counsel questioned the plaintiff's doctor regarding the doctor's history of litigation testimony. The district court sustained the plaintiff's objection, on the ground that the question was barred by a pretrial order. In reversing a judgment for the plaintiff (on other grounds), the court noted that defense counsel's cross-examination questions were relevant to credibility. *Id.* at ____, 368 P.3d at 1210 (n.5). The *Rish* court cited *Van Arsdal* and *Robinson* for the rule that exposure of witness motivation is a proper and important function of cross-examination, and for the rule that the jury has the right to take associations into account when determining the credibility and weight of witness testimony. *Id.*

Other courts have recognized financial incentives showing potential bias by medical witnesses. E.g. *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 832 (2003) (Court recognizes that a medical consultant hired by a disability plan administrator may have an incentive to make a finding of "not disabled," in order to preserve the consulting arrangement with the plan administrator).

In *Noel v. Jones,* 532 N.E.2d 1050 (Ill. App. 1988), the plaintiffs were treated by two doctors who testified at trial. The doctors had a referral relationship with the plaintiff's lawyer's firm. The court held that it was proper for the jury to consider "lucrative referrals" from plaintiff's attorney to the treating physicians, when evaluating credibility, bias, and financial interest of the physicians. *Id.* at 1054; see also *Trower v. Jones,* 520 N.E.2d 297, 300 (Ill. 1988) ("We have long recognized that the principal safeguard against errant expert testimony is the opportunity of opposing counsel to cross-examine, which includes the opportunity to probe bias, partisanship or financial interest.").

In *Flores v. Miami-Dade County,* 787 So.2d 955 (Fla. App. 2001), the jury returned a defense verdict in an accident case. The plaintiff contended that the trial court erred by allowing cross-examination into the fact that, at relevant times, the plaintiff's treating physician had an agreement with plaintiff's previous counsel regarding case referrals. The *Flores* court affirmed, holding that the cross-

examination was pertinent and admissible regarding the physician's bias. *Id.* at 957. When an expert testifies, opposing counsel may cross-examine regarding "any matter" going to the weight of the expert's testimony. *Id.* The expert's past pattern of testifying for one side in litigation is admissible to show a possible bias or prejudice on the part of the witness. *Id.* at 957-58. A doctor's relationship with the plaintiff's lawyer can be viewed as creating bias and motive, which are proper subjects for cross-examination. *Id.* at 958; see also *Worley v. Central Florida Young Men's Christian Ass'n.,* 163 So.3d 1240, 1246 (Fla. App. 2015) (recognizing "well established" rule that financial relationship between a law firm and a treating physician "is relevant to show potential bias").

Here, plaintiff's primary argument against the cross-examination evidence was that Dr. Cash was a treating physician, not a retained expert, and he therefore was subject to a different standard for cross-examination. Although there are distinctions between treating physicians and retained medical experts, these distinctions relate primarily to discovery and disclosure requirements. See *FCH 1, LLC* v. *Rodriguez,* 130 Nev. Adv. Op. 46, 335 P.3d 183, 189 (2014) (treating physicians may be exempt from formal discovery report requirements in limited circumstances); see also *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81, 90 (2016). There is no law holding that a treating physician gets special treatment

and immunity from full cross-examination regarding credibility and potential bias at trial, when the physician gives expert medical opinions. Even if treating physicians are not "retained" experts for pretrial discovery/disclosure purposes, they are nevertheless "expert" witnesses for purposes of evidentiary rules at trial, including cross-examination, because they give expert medical opinions based upon their education, training and experience. See NRS 50.275.

For example, in the present case, plaintiff's initial NRCP 16.1 disclosure identified Dr. Cash as a witness who would "offer expert testimony." 4 A.App. 833:11. At trial, plaintiff's counsel established Dr. Cash's qualifications as an expert medical witness. 15 A.App. 3507-21. Plaintiff's counsel offered Dr. Cash "as an expert in the field of orthopedic spine surgery." 15 A.App. 3521:2-4. The district court ruled that Dr. Cash may "offer expert opinions in his fields of expertise." 15 A.App. 3521:7-10.

Accordingly, Dr. Cash may have started as a treating physician. But he gave expert medical opinions at trial, and he was not immune from the rigors of cross-examination or from adverse evidence relating to his financial incentives and biases, so the jury could fully evaluate his credibility and the weight of his testimony.

Further, a doctor loses "treating physician" status if the plaintiff's attorney gives the doctor medical records, and if the doctor testifies beyond the limited scope

of his treatment of the plaintiff. See *FCH1,* 130 Nev. at ___, 335 P.3d at 189-90. This is exactly what happened with Dr. Cash here. When he testified at trial, he was a treating physician and a retained expert. Thus, even if the permissible scope of cross-examination for expert witnesses at trial is somehow more narrow than usual for treating physician experts (which it is not), this would be inapplicable to Dr. Cash anyway.

Accordingly, even if Dr. Cash started out as a treating physician, he eventually became a retained expert. Mr. Prince paid Dr. Cash $47,250 for litigation services on this case alone. 7 A.App. 1444, 1492-96. Dr. Cash testified (in his deposition) that he had been retained by Mr. Prince or his law firm up to four dozen times in other cases. Applying simple mathematics, an inference can be drawn that Dr. Cash earned (or had the potential to earn) nearly $2.3 million in litigation-related fees on cases in which he was a retained expert for Mr. Prince (assuming an average of $45,250 each, for four dozen cases). Thus, Dr. Cash had a huge, multi-million dollar financial incentive to favor Mr. Prince's clients and thereby to continue doing extremely lucrative litigation work for Mr. Prince. The jury should have been informed of this critical information, which went directly to Dr. Cash's credibility and the weight of his testimony.

Armed with the judge's ruling on this issue, plaintiff's counsel was able to defuse and effectively eliminate any suggestion of bias based upon the extensive financial relationship between Dr. Cash and Mr. Prince. The doctor's direct examination included:

BY MR. PRINCE:

Q. Now, Dr. Cash, before coming to court today, have you and I ever worked together before?

A. Yes.

Q. And have you worked with me both on the plaintiff's side as well as the defense side?

A. Yes, I have.

Q. Have you also been an opposing expert in cases where I've been involved?

A. Yes, I have.

Q. Do you provide your – any services to, you know, the defense in cases, personal injury type cases where they hire you to address spinal issues on their behalf?

A. The defense in general, yes.

15 A.App. 3521:12-24.

Therefore, as a result of the district court's ruling, Mr. Prince was able to leave the jury with the entirely false impression that although Dr. Cash and Mr. Prince had worked together previously, Dr. Cash was essentially a neutral witness who had worked for plaintiffs and defendants. The full extent of Dr. Cash's long-standing

and highly profitable financial relationship with Mr. Prince remained completely hidden from the jury.

Accordingly, the district court erred by prohibiting cross-examination regarding key information going to the doctor's bias and credibility. This error was prejudicial. *Robinson*, 107 Nev. at 144, 808 P.2d at 528 (exclusion of evidence of relationship between witness and parties, showing possible bias of a witness, is reversible error); *Sanders v. Sears-Page*, 131 Nev. Adv. Op. 50, 354 P.3d 201, 213 (Ct. App. 2015) (error is prejudicial where, but for the error, a different result might reasonably have been reached).

Regarding prejudice, evidence of Dr. Cash' extensive ongoing relationship with Mr. Prince would have established that Dr. Cash had an enormous financial incentive to give opinions favorable to Mr. Prince's clients, as the district court recognized (11 A.App. 2496:15-17). Dr. Cash can easily be characterized as one of the most important—if not the most important—witness for plaintiff at trial. He was the first witness for plaintiff. 15 A.App. 3507. His testimony consumes approximately 260 pages of the trial transcript. 15 A.App. 3507-86; 16 A.App. 3587-3679, 3795-3800; 19 A.App. 4372-4455. Plaintiff's counsel relied heavily on Dr. Cash's testimony during opening statement, closing argument and rebuttal argument, mentioning Dr. Cash at least 100 times. 15 A.App. 3443 (opening); 22

A.App. 5146 (closing); 23 A.App. 5278 (rebuttal). And Dr. Cash gave key testimony to the jury on liability and damages, ultimately leading to the verdict of more than $4 million in plaintiff's favor.

Accordingly, but for the error, the jury might reasonably have reached a different result on liability, or the jury might reasonably have rendered a lower verdict on damages. Thus, the error was prejudicial and reversible.

2. Dr. Cash's testimony regarding future damages.

a. Additional facts regarding Dr. Cash's opinions on future damages.

As discussed above, Dr. Cash is a surgeon who performed back surgery on plaintiff shortly after Dr. Capanna's surgery. Plaintiff's initial NRCP 16.1 disclosure identified Dr. Cash, with a vague and general description of his expected testimony. 4 A.App. 833:8-16. More than four years after Dr. Cash's surgery on plaintiff, Dr. Cash reviewed a thousand pages of medical records at the request of plaintiff's counsel, rendering new opinions at that time. 11 A.App. 2495-96; 19 A.App. 4399.

Plaintiff's designation of expert witnesses on November 14, 2014, identified Dr. Cash. 4 A.App. 880. With regard to future damages, plaintiff's disclosure merely stated: "Dr. Cash is also expected to testify regarding any future medical care to be provided to Plaintiff." 4 A.App. 880:26-27. Plaintiff's disclosure did not include a report from the doctor regarding the specific future medical care to be

provided; and the disclosure did not include the doctor's opinion regarding the cost of the future care. *Id.*

On April 8, 2015, after more than three and one-half years of litigation, plaintiff served a "Second Supplement to Designation of Expert Witnesses," which supplemented information regarding Dr. Cash, and which disclosed a 36-page report from Dr. Cash dated April 1, 2015. 5 A.App. 897-932. Dr. Cash had last seen plaintiff more than a year earlier, on March 18, 2014. 5 A.App. 924. Further, Dr. Cash's medical records review shows that the last records he received and reviewed were from June 11, 2014, approximately ten months before his review. 5 A.App. 931. Dr. Cash's report provided to defense counsel was only a medical records review; it did not contain Dr. Cash's opinions regarding plaintiff's need for future medical treatment or future spine surgery. *Id.*

Two weeks after Dr. Cash's report regarding his records review, he prepared a letter dated May 14, 2015, containing new opinions that plaintiff's future medical care will include a two-level lumbar fusion within ten years, at a cost of approximately $350,000. 5 A.App. 970. Plaintiff disclosed this report to defense counsel in a "Seventh Supplement" to NRCP 16.1 disclosures. 5 A.App. 952.

Finally, literally days before trial, plaintiff served a "Tenth Supplement" to NRCP 16.1 disclosures (5 A.App. 1033), disclosing that Dr. Cash had apparently

seen plaintiff on July 28, 2015, approximately two weeks before trial. 5 A.App. 1046-48 (reference to Desert Institute of Spine Care).

Defense counsel filed a pretrial motion to exclude the untimely and improperly disclosed "supplemental" opinions of Dr. Cash. 4 A.App. 808 (countermotion). The district court denied the motion, without any examination of good cause for the late disclosure or even an inquiry into the reasons the disclosure had not been made earlier. 11 A.App. 2603:2-3 (denying countermotion).

b. The district court erred by admitting Dr. Cash's late opinions.

Dr. Cash may have started as a treating physician, but he morphed into a retained expert later in the litigation, at the request of plaintiff's counsel. Regardless of his status, he was required to make timely, adequate disclosures of his expert medical opinions, including his opinions regarding the need for future surgeries costing hundreds of thousands of dollars.

This court dealt with inadmissible testimony by treating physicians in *FCH1*, where the plaintiff's attorney provided treating physicians with medical records from other doctors, and the treating physicians formed and expressed opinions based upon those records. The plaintiff did not provide an expert witness report for these physicians. This court held that although a treating physician is usually exempt from the report requirement, this exemption only extends to opinions formed during the

course of the doctor's treatment. *FCH1,* 130 Nev. at ___, 335 P.3d at 189. "Where a treating physician's testimony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements." *Id.*

FCH1 relied upon *Ghiorzi v. Whitewater Pools & Spas, Inc.,* 2011 WL 5190804 (D. Nevada 2011), where a Las Vegas treating physician was given medical records to review, and where he expressed opinions regarding the care and medical needs of the plaintiff, based upon those records. The *Ghiorzi* court held that the doctor's non-treatment activities changed his status from a treating physician to a retained expert, requiring adequate disclosures. *FCH1* adopted *Ghiorzi's* analysis and holding. 130 Nev. at ___, 335 P.3d at 189-90. In doing so, *FCH1* noted the important purpose of discovery, which is to "take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial." *Id.* at ___, 335 P.3d at 190 (internal quotations omitted).

Here, Dr. Cash was originally a treating physician. But plaintiff's counsel changed him into a retained medical expert (1) by requesting him to review and opine on a thousand pages of records from other doctors (just like what happened in *FCH1*); (2) by paying him $13,500 for the medical records litigation review and the litigation letter—neither of which were performed in the normal course of plaintiff's treatment; and (3) by paying him $33,750 for trial preparation and testimony.

Plaintiff and Dr. Cash then withheld the doctor's opinions regarding plaintiff's need for future surgery until shortly before trial, ramping up the future medical expenses by hundreds of thousands of dollars.[2]

On cross-examination, Dr. Cash expressly admitted that it was his opinion from the very beginning of his treatment of plaintiff (i.e., as early as 2010) that future fusion surgery would be necessary, and the doctor would have advised plaintiff of this opinion at that time. 19 A.App. 4378-79. And plaintiff himself remembered and testified that Dr. Cash told him, in 2010, that he was going to need fusion surgery in the future. 20 A.App. 4575:24-4576:14 (plaintiff testifies that Dr. Cash told him about fusion surgery in the future; "Q. And that's something you've known since basically 2010? A. Yes, sir."). Yet Dr. Cash's 2010 opinion was not disclosed to defense counsel until 2015.

Defense counsel's objections to this last-minute medical expense build-up procedure should have been sustained, and Dr. Cash's new opinions should have been excluded.

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[2] Dr. Cash was guilty of a similar delay in *Baltodano v. Wal-Mart Stores, Inc.*, 2011 WL 3859724 (D. Nevada 2011), discussed later in this brief, where a Las Vegas federal judge excluded his opinions as untimely.

3. Dr. Yoo's late opinions

a. Additional facts regarding Dr. Yoo

Plaintiff filed his complaint on September 8, 2011. 1 A.App. 1. As required by statute, the complaint was supported by an expert affidavit from Frank Yoo, M.D., who opined that Dr. Capanna's surgery did not comply with the applicable standard of care. 1 A.App. 7-8. Dr. Yoo did not give an opinion concerning future medical care. *Id.*

Defense counsel took Dr. Yoo's deposition more than three and one-half years later, on May 26, 2015. 17 A.App. 3896. At the deposition, Dr. Yoo presented a new report dated the same day as the deposition, i.e., May 26, 2015. 17 A.App. 3922. He had prepared the report the night before his deposition, with modifications the morning of the deposition. 5 A.App. 978. He had not prepared a supplemental report during the entire time from his first report in September 2011 until the report he prepared on the day of his deposition in May 2015. 17 A.App. 3922-23.

At his deposition, Dr. Yoo conceded that his original September 2011 report did not discuss the need for future treatment such as fusion surgery. 17 A.App. 3923. He also conceded that the additional materials he had been provided for his May 2015 supplemental opinion consisted largely of medical records dated not later than May 2014, a year before he prepared his supplemental report. 17 A.App. 3924-25.

In fact, when Dr. Yoo rendered his supplemental report on May 26, 2015, plaintiff had not seen any doctors since one year earlier in May 2014. 17 A.App. 3925. Plaintiff never offered an explanation for the year delay between plaintiff's last medical treatment and Dr. Yoo's May 2015 supplemental report. Dr. Yoo's late supplemental report, provided on the day of his deposition, expressed new opinions concerning the need for future treatment, including fusion surgeries.[3]

Before trial, defense counsel objected to plaintiff's last-minute disclosure of Dr. Yoo's new opinions concerning future treatment. 4 A.App. 808-24. The district

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[3] The district court record is somewhat unclear regarding the supplemental report, because the record apparently does not contain a document entitled "supplemental report" with a typed date of May 26, 2015. Plaintiff's opposition to defendant's counter-motion indicated that plaintiff attached Dr. Yoo's supplemental report as Exhibit 4. 5 A. App. 1098:7-8. The document attached to plaintiff's opposition as Exhibit 4 was a supplemental report, but it was dated July 17, not May 26. 6 A.App. 1142-43. Despite this mistake, plaintiff's opposition provided a blocked quote containing two relevant paragraphs from Dr. Yoo's May 26, 2015 report. 5 A.App. 1098. Plaintiff's opposition also referred to Dr. Yoo's July 17, 2015 report (6 A.App. 1142), and plaintiff represented to the court that Dr. Yoo's reports dated May 26 and July 17, 2015, "included the same opinion regarding Plaintiff's future treatment," although the July 17 report included additional documents Dr. Yoo had reviewed. 5 A.App. 1098:21-24. The report was duplicated again at 6 A.App. 1148-49 and 1154-55. Accordingly, plaintiff has expressly conceded that the reports at 6 A.App. 1142-43 and 1148-49 include "the same opinion regarding Plaintiff's future treatment" that was in the May 26, 2015 supplemental report disclosed at Dr. Yoo's deposition. Further, plaintiff provided full quotations of two paragraphs from the May 26, 2015 supplemental report, and these are the only two paragraphs relevant to the issue in this appeal. 5 A.App. 1098.

court allowed the evidence. 6 A.App. 1231-32 (denying countermotion). At the hearing on pending motions, immediately before trial, plaintiff's counsel told the court that Dr. Yoo would not be offering opinions regarding future care. 11 A.App. 2604:5-6 (counsel stating that Dr. Yoo "isn't giving an opinion on future care"). At trial, defense counsel renewed his objection to Dr. Yoo offering testimony regarding future treatment, including fusions, because the doctor's report was untimely. 17 A.App. 4012. The district court refused to change its earlier ruling. 17 A.App. 4019-20.

b. The district court erred by admitting Dr. Yoo's late opinions

Rules of discovery are designed in large part to prevent surprise and to allow parties to prepare fully for trial. See *FCH1,* 130 Nev. at __, 335 P.3d at 190; *Russell v. Absolute Collections Services*, 763 F.3d 385, 396 (4th Cir. 2014) (purpose of discovery rules is to allow parties to prepare adequately for trial). Under NRCP 16.1(a), parties are required to make full disclosures regarding a retained or specially employed expert. Such a report must contain "a complete statement of all opinions to be expressed" at trial. NRCP 16.1(a)(2)(B).

Supplementation of disclosures is governed by NRCP 26(e), which imposes a duty to supplement discovery disclosures in certain circumstances. There is no Nevada published opinion providing guidance on the duty to supplement. The

Nevada rule is similar, if not identical, to the federal rule. Therefore, federal cases provide strong persuasive authority for interpretation of the Nevada rule. See *Exec. Mgmt., Ltd., v. Ticor Title Ins. Co.,* 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

Supplementation under Rule 26(e) is a duty, not a right. In *Luke v. Family Care and Urgent Medical Clinics,* 323 Fed. Appx. 496 (9th Cir. 2009), the plaintiffs made a timely expert disclosure. When the defendant moved for summary judgment, plaintiffs' counsel realized that the disclosure was inadequate. Therefore, plaintiffs served a supplemental expert witness report. The district court excluded the supplemental report and granted summary judgment to the defendant. The Ninth Circuit affirmed, holding that Rule 26(e) creates a duty to supplement, not a right. *Id.* at 500. Further, the rule does not "create a loophole" through which a party who submitted inadequate expert disclosures may simply revise the disclosures to the party's advantage. *Id.* Supplementation means correcting inaccuracies or correcting an incomplete report based upon information not available at the time of the initial disclosure. *Id.*

The *Luke* court cited *Keener v. United States,* 181 F.R.D. 639 (D. Mont. 1998), where the defendant filed an initial expert disclosure, with a doctor's general opinions based upon medical records he reviewed. Less than three months later, the defendant served a supplemental disclosure. The *Keener* court refused to consider

the supplemental reports, and the court ordered that the defendant's trial evidence would be limited to those opinions disclosed in the initial report. *Id.* at 642. The court rejected the defendant's contention that the supplemental report was permissible because it merely expanded the doctor's opinions. *Id.* at 640.

Similarly, in *Plumley v. Mockett,* 836 F.Supp. 2d 1053 (C.D. Cal. 2010), an expert submitted an initial report, followed by a supplemental report with expanded opinions. The court rejected the supplemental report, holding that Rule 26(e) "does not give license to sandbag one's opponent" with opinions that should have been included in the initial expert report. *Id.* at 1062. To rule otherwise "would create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports." *Id.* Enabling this pattern of behavior "would surely circumvent the full disclosure requirement implicit in Rule 26." *Id.*

In *Burger v. Excel Contractors, Inc.,* 2013 WL 5781724 (D. Nevada 2013), a Las Vegas personal injury plaintiff made an initial disclosure of a medical expert report, then served supplemental reports. The court held that the supplemental reports were improper. They did not rely on "new" information, because, although the information was apparently not given to the expert until after his initial report, the information was actually available "well before disclosure of the initial report." *Id.* at *3. Because the supplemental reports did not rely on "new" information, but

instead relied upon information that was available earlier, supplementation was improper. *Id.*

In *Hologram USA, Inc. v. Pulse Evolution Corp.*, 2016 WL 3965190 (D. Nevada 2016), the Las Vegas plaintiff served an initial expert disclosure, followed by a supplemental report. The court granted a defense motion to strike, citing *Keener* for the rule that supplementation does not give an expert the opportunity to "lie in wait" after an initial report. *Id.* at *3. The supplemental report in *Hologram* expressed new opinions based upon information that could have been available to the expert when the initial report was prepared. *Id.* at *1-2. Thus, the supplementation was not appropriate, and it was stricken. *Id.* at *4.

In the present case, plaintiff's counsel retained Dr. Yoo as a specially retained medical expert before the lawsuit was filed in 2011. Dr. Yoo's initial report (in affidavit form) was attached to the complaint. 1 A.App. 7-8. Dr. Yoo opined that Dr. Capanna's surgery was below the standard of care; Dr. Yoo expressed no other opinions. 1 A.App. 8. He had reviewed extensive medical records at that time. 1 A.App. 7:16-20.

Plaintiff's first NRCP 16.1 disclosures did not mention Dr. Yoo as a witness. 4 A.App. 830-36. Nor did plaintiff's multiple supplemental Rule 16.1 disclosures identify Dr. Yoo as a witness. 4 A.App. 839-77. On November 14, 2014, more than

three years after filing the lawsuit, plaintiff served a designation of expert witnesses, which identified Dr. Yoo. 4 A.App. 879-80. An expert disclosure must include a report containing "a complete statement of all opinions to be expressed and the basis and reasons therefor." NRCP 16.1(a)(2)(B). Plaintiff's expert disclosure for Dr. Yoo simply attached the bare-bones report plaintiff had attached to the complaint years earlier. 4 A.App. 885-86.

In November 2014, plaintiff served a supplemental designation regarding Dr. Yoo, but this supplement did not indicate that Dr. Yoo had any opinions in addition to those discussed in his September 2011 report. 4 A.App. 888-92.

In early May of 2015, plaintiff initiated a series of supplemental disclosures, in which plaintiff started to disclose future medical expenses amounting to several hundred thousand dollars. *E.g.,* 5 A.App. 943, 964, 970-71. Then, as noted above, defense counsel took Dr. Yoo's deposition on May 26, 2015. At that time, for the first time, Dr. Yoo presented his supplemental report expressing opinions concerning plaintiff's need for future back fusions. Dr. Yoo's opinions on this subject should have been rendered years earlier, when he first became involved in the case. Additionally, his May 26, 2015 opinions were stated to be based upon additional information he received (presumably from plaintiff's counsel). Yet the additional

information was not newer than May of 2014, a year before his deposition. He offered no explanation for the one-year delay in preparing his supplemental report.

This is the worst form of discovery sandbagging by an expert. Dr. Yoo could have, and should have, expressed his opinions regarding future surgery in his initial September 2011 report. At the very latest, he could have, and should have, expressed the additional opinions by May of 2014. By delaying preparation of the report until the morning of the deposition, Dr. Yoo and plaintiff's counsel effectively deprived defense counsel of meaningful opportunity to conduct discovery and to conduct a thorough deposition. This all occurred less than three months before trial. Yet the district court allowed this last-minute buildup of future medical expenses. This was reversible error.

4. Dr. Ruggeroli's late opinions

a. Additional facts regarding Dr. Ruggeroli

Dr. Ruggeroli is a pain specialist disclosed by plaintiff in initial NRCP 16.1 disclosures. 4 A.App. 831:21-26. Plaintiff's entire description of Dr. Ruggeroli's testimony was: "Dr. Ruggeroli is expected to testify as to the facts and circumstances surrounding this incident and the care and treatment rendered to Plaintiff." *Id.* This disclosure did not provide a hint regarding Dr. Ruggeroli's opinions dealing with future treatment and expenses. *Id.*

Plaintiff supplemented his disclosures later, adding treatment records and billings for Dr. Ruggeroli, with no indication of a claim for future medical expenses. 4 A.App. 854 (Third Supplement). A Fourth Supplement added some additional bills for Dr. Ruggeroli, again with no hint of future medical expenses. 4 A.App. 864-65.

When plaintiff designated experts on November 14, 2014 (4 A.App. 879), plaintiff identified Dr. Ruggeroli as a treating physician, with nothing more than a vague description of his areas of testimony, without any specification of opinions regarding future medical care. 4 A.App. 881.

Finally, in May 2015, virtually on the eve of trial, plaintiff served a "Third Supplement to Designation of Expert Witnesses," providing a letter from Dr. Ruggeroli dated April 27, 2015. 5 A.App. 940, 943. For the first time, Dr. Ruggeroli disclosed his opinion regarding the need for radiofrequency thermal coagulation (RFA) treatments. 5 A.App. 943. Dr. Ruggeroli opined that plaintiff will need such treatments "in excess of twenty years, at a cost of $325,240. 5 A.App. 943.

Dr. Ruggeroli's deposition was taken on May 21, 2015. 5 A.App. 945. He admitted that he had not seen or talked to plaintiff since May of 2014, nearly a full year before he prepared his report dated April 27, 2015. 5 A.App. 946-49. In short, the last time Dr. Ruggeroli treated plaintiff was May of 2014; he did not disclose his

opinion regarding the need for 20 years of RFA treatments until his letter nearly a year later in April of 2015; and his new opinion added another $325,000 to the future damages claim.

Defense counsel objected to Dr. Ruggeroli's last-minute disclosures. 4 A.App. 808-824 (countermotion). The district court ruled for plaintiff. 11 A.App. 2603:2-3.

b. The district court erred by allowing Dr. Ruggeroli's late disclosures

Once again, Dr. Ruggeroli's situation illustrates the hide-the-ball strategy leading to a last-minute buildup of huge medical expenses disclosed by plaintiff's counsel shortly before trial.

Dr. Ruggeroli's situation is somewhat different from Dr. Yoo and Dr. Cash, because Dr. Ruggeroli was more like a treating physician than a retained expert. Nevertheless, the disclosure exemption for treating physicians deals with treatment and opinions developed during the course of the patient's treatment. Presumably a treating physician's medical records and treatment notes will contain at least a hint as to the opinions the physician formed during the course of treatment of the patient. Thus, defense counsel reviewing the records will at least have a general idea about the doctor's opinions, even if the doctor has not rendered a full-blown expert report for the lawsuit.

Additionally, Dr. Ruggeroli's last-minute disclosures regarding future treatment included his opinion regarding the cost of the treatment. 5 A.App. 943. This information, contained in a letter to plaintiff's counsel, was certainly generated solely for purposes of the litigation, to assist plaintiff's claim for a huge amount of future damages; the letter was not written in the course of the doctor's treatment of plaintiff.

There was no excuse for the delay in obtaining and disclosing Dr. Ruggeroli's opinions regarding future medical treatment and expenses. This is particularly true in light of the fact that Dr. Ruggeroli had not seen plaintiff since May of 2014. Dr. Ruggeroli's opinions should have been disclosed much earlier, and the district court committed reversible error by admitting them.

5. Last-minute disclosure of future medical expenses

a. Additional facts regarding failure to disclose future medical expenses

From the time plaintiff's lawsuit was filed in September 2011 until more than three and one-half years later, in May 2015, plaintiff made discovery disclosures and multiple supplements, without complying with NRCP 16.1's requirement for disclosure of the amount to be claimed at trial for future medical expenses. 11 A.App. 2535-36, 2584-85. For example:

- March 2, 2012; plaintiff's initial NRCP 16.1 disclosure; mentions past medical expenses; ignores future expenses. 4 A.App. 836.
- June 21, 2012; plaintiff answers interrogatories, which ask for "every item of special damages" being sought; plaintiff identifies "past medical expenses," but no future expenses. 23 A.App. 5494.
- November 14, 2012; plaintiff's second supplemental disclosures; mentions past medical expenses; ignores future expenses. 4 A.App. 845.
- May 21, 2013; plaintiff's response to defendant's request for production of documents, which asks for "an updated statement of damages," including "all of the special damages you are claiming beyond your past medical expenses." Plaintiff's entire response: "Plaintiff will supplement the requested information as discovery continues." 23 A.App. 5506.
- August 7, 2014; plaintiff's third supplement; mentions past medical expenses; ignores future expenses. 4 A.App. 854-55.
- August 13, 2014; plaintiff's fourth supplement; mentions past medical expenses; ignores future expenses. 4 A.App. 865.
- October 1, 2014; plaintiff's fifth supplement; mentions past medical expenses; ignores future expenses. 4 A.App. 875-76.

- November 14, 2014; plaintiff's designation of expert witnesses; mentions "future medical care" generally, without identifying the actual future care or stating the amount of the future medical expenses. 4 A.App. 879-82.
- November 19, 2014; plaintiff's supplemental expert disclosure; no mention of future medical expenses. 4 A.App. 888-89.
- April 8, 2015; plaintiff's second supplemental expert disclosure; discloses Dr. Cash's medical records review, but no information about future medical expenses. 5 A.App. 894-932.

Plaintiff did not make a full disclosure of claimed future medical expenses from the time he filed his complaint in 2011 until May of 2015. 5 A.App. 962-64. For the first time at that late date, plaintiff claimed several hundred thousand dollars in future medical expenses, including more than $300,000 for RFA treatments and more than $700,000 for future surgeries. 5 A.App. 943, 970-71.

Defense counsel filed a pretrial motion to exclude the improper supplemental disclosures and the late claims for future damages. 4 A.App. 808. The district court denied the motion without inquiry regarding good cause for the untimely disclosure. 11 A.App. 2603:2-3 (denying countermotion). Defense counsel also objected at trial. 11 A.App. 2532-38, 2584-92. The district court overruled the objection. 11

A.App. 2541:2-3 ("So I don't have any problem with the [plaintiff's] disclosure that occurred.").

b. The district court erred by allowing untimely disclosures of future medical expenses

Early disclosure of future medical expenses is mandatory. Pursuant to NRCP 16.1(a)(1)(C), "a party must, without awaiting a discovery request, provide . . . [a] computation of any category of damages claimed," including copies of documents supporting the computation. (Emphasis added.) The computation applies to any special damages. NRCP 16.1(a)(1)(C) (Drafter's Note). Special damages are damages that can be established with reasonable mathematical certainty; in the context of a tort action, special damages include medical expenses. 25 C.J.S. Damages §3 (2011).

Because the Nevada rule is nearly identical to its federal counterpart [FRCP 26(a)(1)(A)], federal cases provide strong persuasive authority. *Exec. Mgmt.*, 118 Nev. at 53, 38 P.3d at 876. The Second Circuit has held that the rule requires more than providing undifferentiated financial statements; instead, the rule requires a computation supported by documents. *Design Strategy, Inc. v. Davis,* 469 F.3d 284, 295 (2d Cir. 2006). When a plaintiff fails to comply, an appropriate sanction is exclusion of any evidence supporting the omitted category of special damages. *Id.* at 294-99; see NRCP 16.1(e)(3)(B) (authorizing district court to prohibit evidence

for violating disclosure requirement). A plaintiff's claim that supplemental disclosures cured any prior defect, and thereby rendered the prior inadequate disclosures harmless, is also without merit. *Carrillo v. B&J Andrews Enterprises, LLC,* 2013 WL 420401, at *4 (D. Nevada 2013).

There are numerous recent cases in which federal courts have required Las Vegas personal injury plaintiffs' attorneys to comply with the rule, and thereby to prevent litigation sandbagging and to deter a late buildup of medical expenses. These cases include a case with a late disclosure by the same Dr. Andrew Cash as in the present case. In *Baltodano v. Wal-Mart Stores, Inc.*, 2011 WL 3859724 (D. Nevada 2011), the plaintiff's initial disclosure contained a placeholder paragraph stating that she was claiming future medical bills "not yet received," and she "reserves the right to supplement and/or amend this Computation of Damages as discovery is continuing." *Id.* at *1. The computation "did not contain any information or details about spinal fusion surgery." *Id.* Plaintiff supplemented her disclosures at various times, without providing information regarding the future medical expenses. *Id.*

Late in discovery, plaintiff's counsel informed defense counsel that plaintiff was scheduled for spinal fusion with her treating physician, Dr. Cash. At Dr. Cash's deposition, defense counsel obtained information regarding the future spinal fusion

surgery and its cost ($400,000). *Id.* The defendant moved to exclude evidence of Dr. Cash's recommended spinal fusion and the related medical expenses that Dr. Cash disclosed late in the litigation. The federal judge granted the motion. *Id.* at *5. The court held: "Disclosing a computation of damages under Rule 26(a)(1) is necessary for the opposing party to produce responding evidence, such as an expert opinion." *Id.* at *3. "Without a computation of damages that includes the estimated costs of the spinal fusion surgery and related expenses, [the defendant] has been unable to obtain and prepare expert witnesses or other evidence to support its defense. This surprise is prejudicial." *Id.*

Additionally, plaintiff's counsel in *Baltodano* argued that his failure was substantially justified because defense counsel had obtained medical authorizations and could have acquired the information on its own. The court flatly rejected this argument because the argument "ignores the discovery obligations of Rule 26(a)." *Id.* at *4.

> Plaintiff has an affirmative duty, without awaiting a discovery request, to provide a computation of each category of damages claimed. Fed.R.Civ.P. 26(a). Harris [plaintiff's counsel] failed to fulfill that duty and has not shown substantial justification for that failure. *Id.*

In another Las Vegas federal case, with facts virtually identical to the present case, the plaintiff was represented by the same law firm that represents the plaintiff in the present case. In *Calvert v. Ellis,* 2015 WL 631284 (D. Nevada 2015), the plaintiff's initial disclosures "did not include a computation, or even a mention of, future medical expenses." *Id.* at *1. The disclosure "did not even provide a placeholder for a future damages category." *Id.* Plaintiff supplemented her disclosure, but still failed to include a computation for future medical expenses. *Id.* A year after the initial disclosures, plaintiff served another supplement, in which she disclosed more than $400,000 in medical expenses for future surgeries. *Id.* This was approximately three months before the discovery deadline. *Id.* These facts are all identical to the present case.

The *Calvert* court granted the defense motion to exclude all evidence of the plaintiff's future surgeries. The court rejected the plaintiff's contention that she was not required to disclose her future damages computation until she received input from her treating physicians. A "future expert analysis does not relieve [plaintiff] of the obligation to provide information reasonably available." *Id.* at *2. After all, a plaintiff's lawyer can obtain the information by simply asking the doctor to provide the information at the onset of the case. In holding that the plaintiff violated disclosure requirements, the court noted that plaintiff's counsel knew plaintiff was

treating, and knew that her physicians were recommending future surgery, but: "Nevertheless, Plaintiff chose to wait over a year to provide a computation for a category of future damages." *Id.* at *3.

The court also rejected the plaintiff's argument that she was not required to disclose future medical expenses until the need for the future surgery became certain. In a personal injury case, the amount, nature and extent of future damages "is a central issue" in the case. *Id.* at *4. "Plaintiff knew since litigation began in this case that Plaintiff was treating and had been recommended for future surgery, so her argument as to the 'certainty' of her need for future surgeries is not persuasive." *Id.* Exclusion of the evidence was proper because: "By waiting over a year to disclose over $400,000, Plaintiff's second supplemental disclosure had the effect of ambushing Defendants." *Id.*

The present case is identical to *Calvert*, with the same plaintiff's law firm. Here, plaintiff made multiple disclosures, never identifying future medical expense until long after such a disclosure should have been made under the rule, then, in 2015, belatedly disclosing a claim for nearly $700,000 for the future surgeries. When Dr. Cash performed his surgery in 2010, a few weeks after Dr. Capanna's surgery, at that time Dr. Cash told plaintiff about the need for future fusion surgeries. 19 A.App. 4378-79. Plaintiff himself expressly conceded that in 2010 he had been

informed by Dr. Cash that future fusion surgery would be needed. Plaintiff testified at trial:

> Q. [by defense counsel] * * * [S]oon after the first time you saw Dr. Cash back in 2010 he was already telling you at that point that you were going to need a fusion, true?
>
> A. [by plaintiff] Yes, sir.
>
> * * *
>
> Q. All right. But Dr. Cash told you, as I guess he told us yesterday, that right from the start it was known that kind of the future path he predicted for you anyway – we've heard different opinions on that, but his prediction was that you were going to go on and have a fusion.
>
> A. Yes, sir.
>
> Q. And that's something you've known since basically 2010?
>
> A. Yes, sir.

20 A.App. 4575-76 (emphasis added).

Nearly five years later, Dr. Cash wrote a letter dated May 14, 2015, at Mr. Prince's request, stating his opinion on the future fusion surgeries. 5 A.App. 970-72; 19 A.App. 4399. Even then, Dr. Cash had all the information he needed for his opinion more than a year earlier. 19 A.App. 4389-90 (Dr. Cash had the information since March 2014; he obtained no new information before he wrote his May 14, 2015 letter). The record contains no explanation for the lengthy delays in disclosing

Dr. Cash's opinion about future surgeries. Like *Calvert*, this had the effect of ambushing the defense.

In *Patton v. Wal-Mart Stores, Inc.*, 2013 WL 6158461 (D. Nevada 2013), the plaintiff was represented by a Las Vegas personal injury firm. She disclosed past medical expenses, but not future medical expenses. She supplemented her disclosures twice, each time itemizing past medical expenses but not future medical expenses. The *Patton* court excluded the plaintiff's untimely disclosed future damages, holding that "litigants should not indulge in gamesmanship with respect to the disclosure requirements." *Id.* at *3. Supplemental disclosures do not create a "loophole" for a party who wishes to revise initial disclosures after deadlines have passed. *Id.* Supplementation allows correcting of inaccuracies; but supplementation does not allow a party simply to add additional information. *Id.*; see also *Shakespeare v. Wal-Mart Stores, Inc.*, 2013 WL 6498898 *3-4 (D. Nevada 2013) (on deadline for expert reports, Las Vegas personal injury attorney produced medical reports with future medical expenses; court excluded such evidence because disclosures regarding future medical expenses should have been made earlier).

The case of *Smith v. Wal-Mart Stores, Inc.*, 2014 WL 3548206 (D. Nevada 2014), also dealt with the trend of some personal injury lawyers in Las Vegas to engage in gamesmanship regarding mandatory disclosures of future medical

expenses, with a last-minute buildup of damages. In *Smith,* the plaintiff's counsel served initial disclosures, without a computation for future medical expenses. He supplemented the initial disclosures multiple times, never including a computation for future medical expenses. Finally, in a seventh supplemental disclosure, plaintiff's counsel listed more than $100,000 in future medical expenses. *Id.*

The *Smith* court found that plaintiff's counsel violated disclosure requirements and engaged in gamesmanship. *Id.* at *2. The plaintiff's failure to make adequate disclosures of the future medical expenses not only violated the disclosure rule, it also impaired defense counsel's ability to prepare for trial. *Id.* The court cited factually analogous situations in other Las Vegas cases, in which courts excluded untimely disclosed damages. *Id.*; see also *Montilla v. Walmart Stores, Inc.,* 2015 WL 5458781 (D. Nevada 2015) (plaintiff supplemented initial disclosures seventeen times, but did not itemize future medical expenses; court granted motion to exclude the evidence); *Clasberry v. Albertson's LLC,* 2015 WL 9093692 (D. Nevada 2015) (failure to disclose future medical expenses; motion to exclude was granted).

In *Alaya v. Wal-Mart Stores, Inc.,* 2012 WL 3262875 (D. Nevada 2012), a Las Vegas personal injury firm made initial disclosures indicating that future medical expenses had not yet been received, and the disclosures would be

supplemented. The firm served two supplements, but did not expand on the damages categories. The firm eventually claimed more than $1 million in previously undisclosed damages. The defendant moved to exclude the evidence. The *Alaya* court granted the motion, rejecting the plaintiff's argument that supplemental disclosures cured the initial failure to disclose future expenses. Although plaintiff's counsel apparently did not receive information from experts until long after the initial disclosures, this was not a legitimate excuse. Instead, the plaintiff had the burden to obtain information from the doctors early. *Id.* at *3-4.

The present case is nearly identical to the numerous Nevada federal cases in Las Vegas, where plaintiffs' attorneys routinely ignored mandatory discovery requirements calling for early disclosures of itemized future medical expenses. Federal courts enforce the applicable rule, refuse to allow plaintiffs' attorneys to engage in gamesmanship, and exclude the late evidence. This court should follow the lead of the federal courts.

Here, plaintiff filed multiple supplemental disclosures, each time failing to itemize future medical expenses. In fact, plaintiff never disclosed future medical expenses until late in the case, after years of litigation, and on the eve of trial. Dr. Plaintiff had been aware of Dr. Cash's opinion about the need for future fusion surgery since 2010. Plaintiff's counsel never offered a plausible excuse for the

delay. Because these damages were not timely disclosed in plaintiff's computation of damages, as required by NRCP 16.1, plaintiff should have been prohibited from offering the evidence and requesting the damages. Defendant was clearly prejudiced by the district court's error, as reflected in the jury's verdict.[4]

6. Reversal is required because of repeated, persistent and extreme misconduct by plaintiff's counsel

In an order in limine, the district court prohibited plaintiff's counsel from making comments about Dr. Capanna's medical malpractice insurance. 11 A.App. 2501. Additionally, this court has prohibited various categories of arguments by counsel, including golden rule and jury nullification arguments. *Lioce v. Cohen,* 124 Nev. 1, 174 P.3d 970 (2008); *DeJesus v. Flick,* 116 Nev. 812, 819, 7 P.3d 459 (2000), overruled on other grounds in *Lioce.*

In *Lioce*, this court held that "[a]n attorney may not make a golden rule argument, which is an argument asking jurors to place themselves in the position of one of the parties." *Lioce*, 174 P.3d at 984. An attorney violates this prohibition by posing hypothetical examples that place jurors in the position of a party. *Id.*

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[4] The jury filled out a verdict form that itemized damages, awarding $350,000 in future medical expenses. 7 A.App. 1432. The judgment includes this amount. 10 A.App. 2280. Thus, the appellate remedy for this error can consist of striking the future medical expenses from the judgment.

Similarly, *Lioce* held that arguments asking a jury to remedy a social ill or send a message about a larger social issue are "irrelevant to the cases at hand and improper in a court of law and constitute a clear attempt at jury nullification." *Lioce*, 124 Nev. at ___, 174 P.3d at 983; see *DeJesus,* 116 Nev. at 818-19, 7 P.3d at 463-64 (attorney's argument, among other things, that jury should "send a message" was "improper and inflammatory, and constituted egregious misconduct").

Here, plaintiff's counsel engaged in all these categories of misconduct during opening statement and closing arguments. Counsel repeatedly referred to Dr. Capanna's medical malpractice insurance; he made forbidden golden rule arguments; and he made improper arguments for jury nullification. Because the district court did nothing to stop this repeated and persistent misconduct, despite defendant's objections, this court should remand for a new trial.

Whether an attorney's comments are misconduct is a question of law reviewed *de novo*. *Lioce,* 124 Nev. at 20, 174 P.3d at 982. This court gives deference to the district court' findings and application of standards to the acts. *Id.*

a. Plaintiff's counsel improperly referred to Dr. Capanna's liability insurance

Misconduct by plaintiff's counsel started at the outset of the trial. Defense counsel previously moved in limine to exclude evidence regarding medical malpractice insurance. 1 A.App. 157. Plaintiff agreed with the motion, and the

district court granted it. 11 A.App. 2501. Nonetheless, plaintiff's counsel started talking to jurors about liability insurance almost immediately, during jury selection. *E.g.*, 13 A.App. 3001-06. Defense counsel objected, pointing out that plaintiff's counsel had raised the subject of insurance with 12 potential jurors, thereby attempting to highlight insurance. 13 A.App. 3006-07. The district court indicated that although plaintiff's counsel had been given permission to discuss limited insurance topics, plaintiff's counsel had gone beyond that limitation. 13 A.App. 3008. Defense counsel moved for a mistrial, which the district court denied. 14 A.App. 3230-35.

In closing argument, plaintiff's counsel again violated the order in limine precluding references to Dr. Capanna's malpractice insurance. Earlier, when the judge and attorneys were settling jury instructions, the judge suggested an instruction telling the jury not to consider whether Dr. Capanna has insurance. 20 A.App. 4665. Defense counsel objected on the ground that the instruction would tend to highlight insurance; and defense counsel reminded the court of the earlier improper insurance comments by plaintiff's counsel. 20 A.App. 4665. Indeed, defense counsel informed the court that, in other trials, defense counsel had personally seen plaintiff's counsel's tactic of using such an instruction to emphasize insurance improperly. 20 A.App. 4667.

The district court decided to give the contested instruction regarding insurance. 7 A.App. 1402; 20 A.App. 4668. Defense counsel then asked that plaintiff's counsel not be permitted to comment on insurance. *Id.* The district court recognized that if plaintiff's counsel displays the instruction and says "don't consider insurance, insurance, insurance," thereby improperly emphasizing insurance, such conduct would be "incredibly improper." 20 A.App. 4668:15-21.

Plaintiff's counsel then did exactly what defense counsel had predicted, and exactly what the district court said would be "incredibly improper." Plaintiff's counsel displayed the jury instruction regarding "whether or not the defendant was carrying insurance," and plaintiff's counsel told the jury that "whether or not the defendant was insured is immaterial." 22 A.App. 5185:17-20. Plaintiff's counsel then told the jury not to consider "where the money comes from." 22 A.App. 5185:21. Plaintiff's counsel then emphasized insurance again, for the fourth time, telling the jury: "But if [during deliberations] someone starts to talk about whether Dr. Capanna has insurance or where the money was going to come from, please remind them that under instruction 20 you can't do that." 22 A.App. 5185:24-5186:1.

Plaintiff's counsel had already violated the order in limine during jury selection, by repeatedly asking potential jurors about insurance. Then, before the

closing arguments even started, the district court was correct in determining that it would be "incredibly improper" for plaintiff's counsel to take unfair advantage of the jury instruction which told jurors not to consider Dr. Capanna's insurance. Yet plaintiff's counsel did take advantage of the instruction, displaying it, emphasizing it, and mentioning liability insurance multiple times. This is precisely what defense counsel had warned the judge about, based upon defense counsel's prior experience with plaintiff's counsel in other trials. The repeated references to liability insurance in the presence of the jury were, indeed, incredibly improper. Under these circumstances, the references were unduly prejudicial, particularly when considered in light of the cumulative impact of other misconduct discussed below.

b. Plaintiff's counsel made improper "golden rule" arguments

Plaintiff's golden rule argument was flagrant. Counsel repeatedly asked jurors to place themselves in the position of a plaintiff, persistently using hypothetical and rhetorical questions with the words "you" and "your," thereby placing jurors in plaintiff's position. 22 A.App. 5198-99. Again, defense counsel objected. 22 A.App. 5198, 5207. The district court overruled the objection. 22 A.App. 5210.

The *Lioce* opinion included four consolidated appeals. In one case (*Lang*), a child was scratched by a dog while at a babysitter's house. 124 Nev. at __, 174 P.3d

at 976. Defense counsel used the following rather innocuous hypothetical example in his closing argument, with no objection:

> *You* send *your* son or *your* daughter over to a slumber party and they're running around, maybe there's a pool in the backyard, running around, opening closing the slider, playing tag, something happens. One of them runs into the slider or shut[s] the door and hurts one of the other boy's fingers, is that an opportunity, does that mean *you* just go out and sue-negligence. It's an accident. If this is not an incident [sic], what is[?]

Id. (emphasis added). On appeal, this court held that the slumber party analogy was a prohibited golden rule argument:

> During his closing argument, Emerson plainly stated to the jurors, '*You* send *your* son or daughter' to a friend's house, where he or she was injured, and questioned, '[D]oes that mean *you* just go out and sue [?]' (Emphasis added.) He invited the jurors to make a decision as if they and their children were involved in his hypothetical situation-a situation that somewhat paralleled the scenario of the Langs' daughter's injuries. This question indicated that the jury could make a decision based on the personal hypothetical designed to trivialize the daughter's injuries instead of deciding the case on negligence law and the evidence that the Langs and Knippenberg presented. Thus, Emerson's comment amounted to an impermissible golden rule argument.

Id. at __, 174 P.3d at 984 (emphasis in original).

In short, *Lioce/Lang* defense counsel's use of the words "you" and "your" in the slumber party hypothetical was enough for the *Lioce* court to find a golden rule violation. In the present case, the hypothetical analogies that plaintiff's counsel gave jurors during his closing argument were far more offensive than the slumber party argument held improper (and thereby justifying a new trial) in *Lioce*. Here, plaintiff's counsel argued:

> [MR. PRINCE:] But let's think about this: Who would volunteer -- what reasonable person would volunteer to --
>
> MR. LAURIA: Your Honor, may we approach, please?
>
> MR. PRINCE: -- give up their hopes and dreams and suffer a lifetime --
>
> * * *
>
> [Bench conference begins at 12:31 p.m.]
>
> MR. LAURIA: That's a little bit like a Golden Rule --
>
> MR. PRINCE: No --
>
> MR. LAURIA: -- argument if he's -- excuse me. That is clearly a Golden Rule argument because he's asking them who would do that which is putting them in that same position, who would give up those opportunities for money. It is -- whether he phrased it as you personally or a third person --
>
> THE COURT: No.
>
> MR. LAURIA: -- would give it up --
>
> THE COURT: No, no, no, no. I disagree.

22 A.App. 5198.

> MR. PRINCE: And what reasonable person would give up their hopes, their dreams and agree to suffer a lifetime of pain, discomfort and limitation for money? Would it be a million dollars -- if I give you a million dollars today, but I give you a 65-year-old man's spine, you won't be able to finish playing your college career, you're going to have discomfort and as you get older, it's going to get worse with time, you're going to need future surgeries, who would do that? Who would sign up for something like that?
>
> * * *
>
> And pain's kind of an interesting cycle because if you have increased pain, then you have anxiety and stress and fear and it affects you and affects your mood, and then, you know, affects your activities and is kind of like in this weird, vicious cycle and pattern.

22 A.App. 5199 (emphasis added).

> MR. PRINCE: * * * But when someone else puts you in a situation where you've lost out on your opportunity to enjoy the prime of your life, that now you suffer chronic pain and that it's going to get worse with time -- when you have to listen to that, that it's going to get -- my condition's going to get worse with time, it'll never improve. There'll be times sure he's have his good days and he's going to have his bad days, but he's going to have a lot to endure.
>
> * * *

22 A.App. 5202 (emphasis added).

[Jury out at 12:45 p.m.]

[Hearing outside presence of jury; defense counsel makes further record of objection based on prohibited golden rule argument; court overrules objection.]

22 A.App. 5207-08, 5210.

Such appeals to jurors to put themselves in the shoes of a plaintiff are improper golden rule arguments. *Lioce* held that defense counsel's use of the words "you" and "your" only four times in the slumber party hypothetical example was sufficient to suggest that jurors should put themselves into the shoes of a person in the hypothetical (i.e., the plaintiff), thereby violating the prohibition against golden rule arguments and calling for a new trial. Here, plaintiff's counsel did the exact same thing, but here he used those words a staggering 19 times.

Indeed, *Lioce* held that arguments parallel to those made by plaintiff's counsel here were improper. In the present case, as in *Lioce*, plaintiff's counsel personalized an emotional appeal to jurors, asking them to consider hypothetical examples involving their own long-term pain and suffering. Immediately after asking the jurors how much money a reasonable person would want for a lifetime of pain, counsel asked jurors to consider an amount of money if "you" have pain, if "you" have anxiety and stress, how pain "affects you and affects your mood" and "affects your activities." 22 A.App. 5199.

Plaintiff's counsel then continued by personalizing arguments to the jurors, asking them to consider "when someone else puts you in a situation where you've lost out on your opportunity to enjoy the prime of your life," and to consider how it would feel if "you suffer chronic pain." 22 A.App. 5202 (emphasis added). As in *Lioce*, such arguments were improper and prejudicial.

c. Plaintiff's counsel made improper jury nullification arguments

Jury nullification is "a jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Lioce*, 124 Nev. at 20, 174 P.3d at 982-83.

Lioce and *DeJesus* make clear that attorneys are absolutely prohibited from arguing that jurors should consider societal values, social ills, and social issues beyond the case itself. *See Lioce*, 124 Nev. at 20-21, 174 P.3d at 982-83; *DeJesus*, 116 Nev. at 818-19, 7 P.3d at 463-64. In *Lioce*, for example, defense counsel discussed frivolous lawsuits, asking jurors to "send a message" about such lawsuits. 124 Nev. at 21, 174 P.3d at 983. The court held that such arguments are improper in civil cases, amounting to prejudicial misconduct justifying a new trial. 124 Nev. at 21-22, 174 P.3d at 983.

Nevada has a "well-established prohibition" against attorneys referring to juries as "the conscience of the community" in closing arguments. *Schoels v. State*, 114 Nev. 981, 987, 966 P.2d 735, 739 (1998). The rule against arguing that the jury is the "conscience of the community" has been applied in medical malpractice cases in other states. For example, in *Suarez Matos v. Ashford Presbyterian Comm. Hosp.*, 4 F.3d 47 (1st Cir. 1993), the plaintiff's counsel in a medical malpractice case argued that the jury was the "conscience of this community." The court held that counsel's argument, when combined with other arguments, "was outrageous," requiring a reversal of a $1.3 million wrongful death verdict. *Id.* at 50-51.

A California court applied the rule in *Regalado v. Callaghan*, 207 Cal. Rptr. 3d 712 (Cal. App. 2016), holding: "The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." *Id.* at 725. A closing argument is improper if it tells the jury that its verdict will have an impact on the community or that the jury's verdict will reflect the conscience of the community. *Id.* at 725-26.

In *Westbrook v. Gen. Tire and Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985), a personal injury plaintiff's counsel argued: "You're going to be the conscience of the community with this verdict." *Id.* at 1238. The court held that this constituted misconduct. *Id.* at 1238-39; see also *Maercks v. Birchansky,* 549 So.2d 199, 199

(Fla. App. 1989) (in the absence of a claim for punitive damages, court would "not condone" argument that jury was "conscience of the community" or asking jury to "send a message with its verdict"); *Erie Ins. Co. v. Bushy,* 394 So.2d 228, 229 (Fla. App. 1981) (reversing because of plaintiff's counsel's "send a message" argument).

The present case is a textbook example of improper jury nullification arguments.

> MR. PRINCE: And your decision here is important because, well, it affects the public. A jury speaks as the conscious (sic) of our community, as the enforcer of our values and our beliefs. And you can see that there's many people here watching this case today because it's open to the public. Everything that we've said and done over the last two weeks is recorded for all time and eternity, and for that reason your decision here is very important.
>
> * * *
>
> And the only protection Beau has -- his only option is to come to court. His only protection is in the law. He has no other protection available to him because Dr. Capanna has always refused to accept any responsibility for what he did.
>
> MR. LAURIA: Your Honor, may we approach, please?
>
> MR. PRINCE: And so for –
>
> [Bench conference begins at 11:05 a.m.]
>
> MR. LAURIA: I believe counsel is making an improper social justice argument here in closing argument, suggesting that they have to

protect society, that this is – from Dr. Capanna (indiscernible) so I'm concerned you know that's improper –

THE COURT: Well --

MR. LAURIA: -- closing argument.

THE COURT: -- I would say generally speaking that comment about responsibility is troublesome. The only thing I would say about this case is that there was a lot of testimony about whether he ever acknowledged anything --

MR. PRINCE: Right.

THE COURT: -- To Beau about the kind of surgery he did or whatnot then or I'm sorry, you know, even if he didn't intend it that he caused him any kind of injury, anything like that, so -- I mean, don't bring it up again in that kind of a contest --

MR. PRINCE: About what?

THE COURT: -- saying he refuses to accept responsibility and that's why we had to come to court. Everybody has --

MR. PRINCE: Okay.

THE COURT: -- everybody has a right to be in court. So it's one thing to say Dr. Capanna has refused to accept responsibility and the evidence shows --

* * *

[Bench conference ends at 11:06 a.m.]

22 A.App. 5149-51 (emphasis added).

[MR. PRINCE:] Dr. King said it best: Injustice anywhere is a threat to justice anywhere -- everywhere.

22 A.App. 5200.

MR. PRINCE: And remember Dr. Capanna, he needs to hear from you. He's not going to -- he's not going to accept any responsibility. You're the only one who has the authority and the power to hold him accountable for what he did to Beau. Thank you.

22 A.App. 5206 (emphasis added).

[Hearing outside presence of jury; defense counsel makes further record of objection based on prohibited argument by plaintiff's counsel regarding sending a message; court overrules objection.]

22 A.App. 5208-10.

These arguments were flagrant violations of *Lioce*, and clear attempts to invoke jury nullification. Counsel asked jurors to render their verdict based on their status as the conscience of the community, and to enforce the community's values and beliefs. Counsel asked jurors to consider the fact that there were "many people watching the case" in the courtroom, and the case was therefore very important to the community. And counsel asked jurors to send a message to Dr. Capanna because he refused to accept responsibility (despite the judge's observation that everyone has the right to be in court). These persistent arguments were improper and highly prejudicial.

As *Lioce* recognized, where counsel engages in persistent misconduct, the opposing party is "placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point."

Lioce at 18, 174 P.3d at 981. In such instances, an attorney who commits repeated misconduct cannot hide behind the veil of harmless error by contending that the misconduct had no effect on the verdict; rather, by engaging in continued misconduct, "the offending attorney has accepted the risk that the jury will be influenced by his misconduct." *Id.* at 18-19, 174 P.3d at 931. As a result, district courts must give "great weight" to the fact that repeated or persistent misconduct might not be curable. *Id.*

Dr. Capanna's counsel made far more objections during closing arguments than counsel in any of the four consolidated cases in *Lioce*. The first consolidated case in *Lioce* was *Castro*, in which the defense attorney made two improper closing arguments. Plaintiffs' counsel did not object. *Id.* at 7-8, 174 P.3d at 974-75. This court characterized the two items of misconduct as "repeated," justifying a new trial. *Id.* at 23-24, 174 P.3d at 984-85. Similarly, in the *Lioce* trial, defense counsel gave improper arguments in two portions of his closing. Plaintiff's counsel did not object (*see id.* at 9-10, 174 P.3d at 975-76), but this court vacated the district court's order denying a new trial and remanded for further proceedings (*id.* at 24-25, 174 P.3d at 985).

The third consolidated case was *Lang,* where the plaintiff's attorney objected to three arguments, but did not object to the slumber party hypothetical. *Id.* at 10-

11, 174 P.3d at 976. This court held that three prior objections were sufficient to preserve the golden rule issue, despite the lack of objection to that argument. *Id.* at 23, 174 P.3d at 984. This court characterized defense counsel's three instances of misconduct as "persistent." *Id.* The fourth consolidated case was *Seasholtz*, in which one portion of defense counsel's closing argument contained an improper jury nullification argument. *Id.* at 12-14, 174 P.3d at 977-78. The plaintiff's counsel did not object. *Id.* This court held that a new trial was appropriate, characterizing defense counsel's argument as irreparable error despite the absence of any objection. *Id.* at 24, 174 P.3d at 985.

Thus, defense counsel in the present case made significantly more objections to attorney misconduct than in any of the four consolidated cases in *Lioce*. As in those cases, therefore, Dr. Capanna adequately preserved his attorney misconduct arguments for review. And as in the four consolidated cases in *Lioce*, the misconduct requires a new trial.

7. The district court erred by awarding attorneys' fees

After trial, plaintiff moved for attorneys' fees. 9 A.App. 1939. The motion was based solely on NRS 18.010(2)(b), which allows a fee award when a party's claims or defenses are brought without reasonable grounds. Dr. Capanna opposed the motion. 9 A.App. 1993. The district court granted the motion, awarding

$169,989.58. 11 A.App. 2439. The district court found that Dr. Capanna's defense on the issue of damages "was made in good faith and with reasonable grounds." 11 A.App. 2437:19. Nonetheless, the district court found that Dr. Capanna's liability defense was not maintained with reasonable grounds.[5] 11 A.App. 2437:18.

Under NRS 18.010(2)(b), a claim is groundless if it is "not supported by any credible evidence at trial." *Bobby Berosini, Ltd. v. PETA,* 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (emphasis added).

In awarding fees, the district court concluded that evidence of Dr. Capanna's liability "was overwhelming." 11 A.App. 2437:22. This is not the correct legal standard. Instead, the standard is whether there was "any credible evidence" supporting Dr. Capanna's position regarding liability. Clearly there was such evidence, as discussed below. Significantly, plaintiff never obtained a pretrial order granting partial summary judgment against Dr. Capanna on the liability issue; nor did plaintiff obtain a judgment as a matter of law against Dr. Capanna at trial. If

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[5] Plaintiff's motion included information regarding settlement offers during trial. 9 A.App. 1942, 1944. Such evidence is not admissible. NRS 48.105(1); *Torres v. Nevada Direct Ins. Co.,* 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1208 (2015). The purpose of this rule is to prevent evidence of settlement offers from haunting future legal proceedings. *Id.* at ___, 353 P.3d at 1208-09. Fortunately, it appears that the district court did not consider plaintiff's improper assertion of information regarding settlement negotiations.

there was truly no evidence whatsoever supporting Dr. Capanna's defense on liability, surely plaintiff would have moved for partial summary judgment or JMOL, and surely the district court would have granted such motions. This did not occur. See *Bobby Berosini,* 114 Nev. at 1353-54, 971 P.2d at 386 (defendant's failure to obtain summary judgment or post-trial JNOV tended to establish that plaintiff's case was brought on reasonable grounds).

The primary issues at trial regarding liability were whether Dr. Capanna operated on the wrong spine level; whether he inadvertently injured the L4-5 disc while attempting to address the herniation at L5-S1; and whether, even if he did injure the L4-5 disc, this was below the standard of care for a surgeon (which is required for a finding of negligence). Evidence was hotly contested on these issues.

One key defense medical witness was Dr. Belzberg, who is a neurosurgeon and a professor of neurosurgery at Johns Hopkins School of Medicine, and who specializes in spine and nerve surgery. 16 A.App. 3697. He testified that Dr. Capanna was targeting the disc herniation at L5-S1 when Dr. Capanna probed the L4-5 disc, entering that disc. 16 A.App. 3745-46. Dr. Belzberg testified that this was a recognized risk and complication from the surgery. 16 A.App. 3746-47. Dr. Belzberg further testified that inadvertent entry into a disc is something he and his colleagues have done in the past, and such an incident is not considered malpractice.

Q. And in your opinion would an inadvertent entry into the disc as you're probing, would that be malpractice or below the standard of care?

A. No, that would not be considered malpractice.

Q. You have had an inadvertent entry into a disc yourself when probing?

A. Yes, I have.

Q. It's happened to your colleagues at Johns Hopkins?

A. Yes. It has.

Q. Doesn't mean you're being careless or not paying attention to what you're doing?

A. You certainly don't want it to happen and you're trying not to do something like that, but I would not consider it malpractice just because it happened.

16 A.App. 3747:2-12.

Dr. Belzberg also testified that, contrary to Dr. Cash's opinions, it is possible to approach the L5-S1 disc coming from above, and this would be within the consent given by the patient. 16 A.App. 3747-49. He also testified that Dr. Capanna's recommendation for conservative treatment after the operation was reasonable. 16 A.App. 3754-55. Finally, he testified that a surgeon can inadvertently enter a disc at the wrong level without violating the standard of care. 16 A.App. 3760-3761.

Dr. Capanna, who has been a neurosurgeon for more than 30 years (19 A.App. 4307), testified consistent with Dr. Belzberg's testimony. Dr. Capanna testified that

doing a microdiscectomy at a wrong level is a recognized complication and is not below the standard of care. 18 A.App. 4233-35. Additionally, Dr. Marc Kaye, a radiologist, testified that there were indications on MRIs that Dr. Capanna performed surgery at the correct L5-S1 level. 21 A.App. 4843-44.

Although the district court may have personally viewed the liability evidence against Dr. Capanna as strong, the legal question on the motion for attorneys' fees was whether there was "any credible evidence" supporting the defense on the liability issue. Considering testimony of doctors Belzberg, Capanna and Kaye, there was, without a doubt, credible evidence at trial supporting Dr. Capanna's position that his surgery on plaintiff did not fall below the standard of care, and therefore he did not commit negligence.

Even if the liability evidence against Dr. Capanna was strong, as the district court found, Dr. Capanna still had the right to defend himself on the issue of damages. On this issue the district court specifically found that Dr. Capanna's defense was made "in good faith and with reasonable grounds." 11 A.App. 2437:19. Neither plaintiff's motion nor the district court's order cited cases holding that liability and damages presentations in a medical malpractice trial can be evaluated separately, in determining whether a defendant has any credible evidence at trial, for purposes of an award of attorneys' fees pursuant to NRS 18.010(2)(b).

Accordingly, the district court applied the wrong legal standard in awarding attorneys' fees, and the district court therefore abused its discretion. The award must be reversed.

8. The district court erred in its award of costs

The district court awarded plaintiff $69,975.95 in expert witness costs. 11 A.App. 2460:12. Dr. Capanna objected to these costs. 7 A.App. 1622-25.

Because statutes permitting costs are in derogation of the common law, they should be strictly construed. *Gibellini v. Klindt,* 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994). Under NRS 18.005(5), a party may recover "not more than $1,500 for each witness," unless extraordinary circumstances exist. When a district court awards expert fees in excess of this limit, the court must state the basis for its decision. *Frazier v. Drake,* 131 Nev. Adv. Op. 64, 357 P.3d 365, 378 (Ct. App. 2015).

In the present case, the district court exceeded the statutory limit for Dr. Yoo ($15,125) and Dr. Cash ($47,250). 7 A.App. 1444:21-22; 11 A.App. 2460:12-14. As the basis for its decision, the district court made a vague, generic finding as follows: "The Court specifically finds that all named experts were necessary to Plaintiff's case, and exceeding the statutory amounts is justified and reasonable for Dr. Yoo and Dr. Cash based on their roles in the litigation." 11 A.App. 2460:12-14.

The *Frazier* court established mandatory guidelines for excess expert witness fees. First, the court concluded "that any award of expert witness fees in excess of $1,500 per expert must be supported by an express, careful explanation and analysis of factors pertaining to the requested fees and whether 'the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.'" *Frazier,* 131 Nev. at ___, 357 P.3d at 377 (emphasis added). In evaluating such requests, district courts should consider numerous factors, which *Frazier* identified. *Id.* at ___, 357 P.3d at 377-78. Evidence must demonstrate that the excess fees were reasonable, necessary and actually incurred. *Id.* at ___, 357 P.3d at 378.

In the present case, the district court awarded more than 10 times the statutory limit for Dr. Yoo, and more than 31 times the statutory limit for Dr. Cash. Rather than articulating an express, careful analysis of the applicable factors, as required by *Frazier*, the district court made only a vague and general comment. The order came nowhere near satisfying the *Frazier* court's requirements. Accordingly, the award must be reversed.

CONCLUSION

For the foregoing reasons, the judgment should be reversed, and this case should be remanded for a new trial. At the very least, the judgment should be reduced by the amount awarded for future damages.

DATED: 11/4/16

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman in 14 point font size.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, beginning with the statement of the case [NRAP 32(a)(7)(C)] and excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 13,995 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume numbers, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: 11/4/16

Robert L. Eisenberg

ROBERT L. EISENBERG

CERTIFICATE OF SERVICE

I certify that I am employee of Lemons, Grundy & Eisenberg and that on this date Appellant's Opening Brief was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I filed Appellant's 23 volumes of Appendix by hand with the Clerk of the Nevada Supreme Court and sent disks of same by U.S. mail, postage prepaid, to:

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EXHIBIT "B"

EXHIBIT "B"

Capanna v. Orth

Supreme Court of Nevada

December 27, 2018, Filed

No. 69935

Reporter

134 Nev. 888 *; 432 P.3d 726 **; 2018 Nev. LEXIS 119 ***; 134 Nev. Adv. Rep. 108; 2018 WL 6804354

ALBERT H. CAPANNA, M.D., Appellant/Cross-Respondent, vs. BEAU R. ORTH, Respondent/Cross-Appellant.ALBERT H. CAPANNA, M.D., Appellant, vs. BEAU R. ORTH, Respondent.

Prior History: [***1] Consolidated appeals and cross-appeal from fin judgment after a jury verdict and post-judgment orders in a medical malpractice suit. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Disposition: Appeals affirmed; cross-appeal dismissed.

Core Terms

district court, attorney's fees, surgery, disclosures, cross-examination, costs, misconduct, bias, pain, parties, jury nullification, medical expenses, expert witness, credible, argues, reasonable ground, golden rule, cross-appeal, challenges

Counsel: Lemons, Grundy & Eisenberg and Robert L. Eisenberg, Reno; Lauria, Tokunaga, Gates & Linn, LLP, and Anthony D. Lauria, Las Vegas, for Appellant/Cross-Respondent.

Eglet Prince and Dennis M. Prince and Kevin T. Strong, Las Vegas; Danielle Tarmu, Las Vegas, for Respondent/Cross-Appellant.

Catherine M. O'Mara, Reno, for Amicus Curiae Nevada State Medical Association.

Erin G. Sutton, Chicago, Illinois, for Amicus Curiae American Medical Association.

Judges: Stiglich, J. We concur: Douglas, C.J., Cherry, J., Gibbons, J., Pickering, J., Hardesty, J.

Opinion by: STIGLICH

Opinion

[729]** **[*888]** BEFORE THE COURT EN BANC.[1]

[730]** By the Court, STIGLICH, J.:

Dr. Albert Capanna operated on Beau Orth to repair a disc herniation. Unfortunately, Capanna entered the wrong disc resulting in severe damage that necessitated additional surgery. Orth filed a complaint against Capanna, alleging medical malpractice and negligence. The jury found that Capanna's negligence caused Orth harm and, accordingly, awarded Orth a significant **[***2]** judgment against Capanna.

Capanna does not dispute his negligence in this appeal. Rather, he argues that the trial was unfair due to various rulings by the district **[*889]** court and attorney misconduct in closing argument. Capanna also disputes the district court's award of attorney fees and costs. On cross-appeal, Orth challenges the constitutionality of NRS 42.021. For the reasons set forth below, we affirm the judgment on the jury verdict and the district court's orders awarding attorney fees and costs. Lastly, we conclude that Orth lacks standing for his cross-appeal and dismiss the same.

BACKGROUND

Orth was a student-athlete with a scholarship to play football for the University of Nevada, Las Vegas. When he developed low back and leg pain, he was referred to Dr. Capanna. An MRI showed that Orth was suffering from a bulging disc between his fifth lumbar and first sacral vertebrae (L5-S1). Capanna recommended surgery to resolve the disc issue at that level and, according to Orth, told him that he would likely be able to return to playing football within weeks of the planned

[1]The Honorable Ron D. Parraguirre, Justice, did not participate in the decision of this matter.

surgery. In September 2010, Capanna operated on Orth, intending to perform an L5-S1 microdiscectomy to repair the disc herniation. **[***3]**

Following the surgery, Orth's pain increased dramatically to the point where he could barely walk, with pain he described as the worst imaginable. Due to the severity of his symptoms, Orth sought a second opinion from Dr. Andrew Cash. Dr. Cash noted that Orth appeared "crippled" and that he had "a disability of 94 percent." Dr. Cash reviewed a post-operative MRI and was surprised to see that the L4-5 disc had been operated on and not the L5-S1 disc.[2] Dr. Cash believed Orth still required surgery on the L5-S1 disc, as had been intended, but that Orth also required additional surgery on the L4-5 disc to address Orth's severe symptoms.

Orth sued Capanna. After an 11-day trial, the jury found that Capanna was negligent in his care and treatment of Orth and that his negligence was the legal cause of Orth's injuries. The jury awarded Orth $136,300.49 in past medical expenses; $350,000 in future medical expenses; $1,800,000 in past pain, suffering, disability, and loss of enjoyment of life; and $2,000,000 in future pain, suffering, disability, and loss of enjoyment of life. Pursuant to NRS 41A.035, the district court reduced the noneconomic damages to $350,000. Additionally, the district court partially **[***4]** granted Orth's motion for attorney fees, pursuant to NRS 18.010(2)(b), after finding that Capanna maintained his liability defense without reasonable grounds. Lastly, the district court awarded costs to Orth, including $69,975.95 for expert witness fees.

[*890] *DISCUSSION*

On appeal, Capanna asserts that Orth's counsel committed misconduct during closing argument by advocating for jury nullification and by making golden rule arguments. Capanna also challenges the district court's restrictions on his cross-examination of an expert witness and its admission of two doctors' opinions as to future medical care and expenses. Lastly, Capanna claims that the district court abused its discretion in awarding attorney fees and costs following trial. On cross-appeal, Orth asks this court to consider the constitutionality of NRS 42.021.

[2] Capanna later admitted to his belief that he entered the L4-5 disc during Orth's surgery.

Attorney misconduct

Capanna seeks a new trial based on attorney misconduct during closing argument.[3] Namely, Capanna argues that Orth's **[**731]** counsel committed misconduct by advocating jury nullification and by making golden rule arguments, tactics we have denounced.

We have reviewed the comments that Capanna says advocated for jury nullification and, when viewed in context, conclude that counsel merely **[***5]** argued the role of the jury in the deliberative process. Jury nullification is the "knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue . . . or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." Lioce v. Cohen, 124 Nev. 1, 20, 174 P.3d 970, 982-83 (2008) (quoting *jury nullification, Black's Law Dictionary* (8th ed. 2004)). To the extent there were statements asking the jury to send a message, we have held that "such arguments are not prohibited **[*891]** so long as the attorney is not asking the jury to ignore the evidence." Pizarro-Ortega v. Cervantes-Lopez, 133 Nev. 261, 269, 396 P.3d 783, 790 (2017). Here, it is clear that counsel did not implore the jury to disregard the

[3] Capanna also argues that Orth's counsel violated an order precluding reference to medical malpractice insurance and repeatedly raised the issue during jury selection. Capanna moved for a mistrial based on these comments, which was denied. We have reviewed the challenged comments and conclude that the district court did not abuse its discretion by denying Capanna's motion for a new trial because the record reflects that a potential juror raised the issue during jury selection in response to an innocuous question and that Orth's counsel asked potential jurors if they could follow the law. *See* Romo v. Keplinger, 115 Nev. 94, 96, 978 P.2d 964, 966 (1999) ("The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion." (internal quotation marks omitted)).

On appeal, Capanna further alleges that Orth's counsel continued to violate the order during closing argument; Capanna did not object to these statements. We conclude counsel's closing argument did not amount to irreparable and fundamental error warranting relief for unobjected-to attorney misconduct. *See* Lioce v. Cohen, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008) (setting forth the applicable standard of review for unobjected-to attorney misconduct). The record demonstrates that counsel simply encouraged jurors to pay attention to the jury instructions.

evidence. See Lioce, 124 Nev. at 20, 174 P.3d at 982 ("Whether an attorney's comments are misconduct is a question of law, which we review de novo . . . ."). As we concluded in Pizarro-Ortega, counsel asked the jury to arrive at its decision "based on the evidence." 133 Nev. at 269, 396 P.3d at 790. Therefore, counsel did not improperly advocate for jury nullification.

We do, however, conclude that counsel improperly made golden rule arguments. During closing argument, Orth's counsel argued "[who would volunteer—what reasonable person would volunteer to—give up their hopes and **[***6]** dreams and suffer a lifetime—." After Capanna objected and the district court disagreed, Orth's counsel continued:

> And what reasonable person would give up their hopes, their dreams and agree to suffer a lifetime of pain, discomfort and limitation for money? Would it be a million dollars—if I give you a million dollars today, but I give you a 65-year-old man's spine, you won't be able to finish playing your college career, you're going to have discomfort and as you get older, it's going to get worse with time, you're going to need future surgeries, who would do that? Who would sign up for something like that?
>
> . . . .
>
> But when someone else puts you in a situation where you've lost out on your opportunity to enjoy the prime of your life, that now you suffer chronic pain and that it's going to get worse with time—when you have to listen to that, that it's going to get—my condition's going to get worse with time, it'll never improve.

Whereas Capanna focuses on the number of times the word "you" was used, we focus on the context in which the challenged comments arose. Counsel walked a fine line, artfully wording his argument as a hypothetical at times, but ultimately his argument asked the **[***7]** jurors to consider how they would feel if they were faced with the same challenges as Orth due to Capanna's negligence. Put simply, counsel's argument veered from hypothetical to Orth's exact scenario. That argument, asking the jurors to consider what it would be like if they were in Orth's situation, is precisely the type of argument we have **[**732]** prohibited as golden rule argument. Lioce, 124 Nev. at 22, 174 P.3d at 984 (an argument that "ask[s] jurors to place themselves in the position of one of the parties" is a golden rule argument).

[*892] Despite this improper argument, we conclude that an admonition by the district court would not have affected the jury's verdict and that Capar substantial rights were not affected by the misconc See id. at 18, 174 P.3d at 981 (providing that "[w]he party objects to purported attorney misconduct but district court overrules the objection[,]" the court m consider "whether an admonition to the jury would lik have affected the verdict" and "whether a part substantial rights were affected by the court's failure sustain the objection and admonish the jury"). Th evidence, including Capanna's own testimon established that Capanna entered the wrong disc durin surgery. Orth, a 20-year-old student-athlete, **[***8]** ultimately had surgery at two different disc levels (versus the one-level surgery that was supposed to be performed by Capanna) and, consequently, is likely to require future surgery. Orth was unable to resume collegiate athletics and continues to experience pain despite remedial treatment and therapy. The verdict and award of damages do not evince a jury controlled by emotions and sympathies but rather a thoughtful contemplation of the evidence presented. Of note, the jury did not award Orth all requested future medical expenses, Accordingly, we decline to reverse the judgment based on this misconduct.

Restrictions on cross-examination

Capanna argues that the district court improperly limited his cross-examination of Dr, Cash, specifically with regard to Dr. Cash's relationship with Orth's counsel. This court has held that a "district court has discretion to limit the scope of cross-examination . . . [but] that the district court's discretion to curtail cross-examination is more limited if the purpose of cross-examination is to expose bias," Crawford v. State, 121 Nev. 746, 758, 121 P.3d 582, 591 (2005); see also Robinson v. G.G.C., Inc., 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) (extending to the realm of civil proceedings the criminal-law principle that exposure of a witness's bias or motivation is proper subject **[***9]** for cross-examination). In so holding, we have recognized the importance of exposing relationships so that the jury may "judge for themselves the witness's credibility in light of the relationship between the parties, the witness's motive for testifying, or any matter which would tend to influence the testimony given by a witness." Robinson, 107 Nev. at 143, 808 P.2d at 527 (internal quotation marks omitted). One such relationship that might influence an expert witness's testimony is the "business arrangement between the witness, the hiring attorney and the client." Id. The jury therefore has a right to consider that relationship "when

determining the credibility of [expert] witnesses **[*893]** and the weight to give their testimony." *Id.* Even so, the district court "retain[s] wide latitude to restrict cross-examination to explore potential bias based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant." *Leonard v. State, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001)* (internal quotation marks omitted).

During deposition, Dr. Cash stated that he had worked with Orth's counsel, or counsel's firm, approximately three to four dozen times. Before trial, Orth moved to preclude Capanna **[***10]** from referring to Dr. Cash's work with Orth's counsel on unrelated cases, and the district court granted the motion in part. Recognizing the potential for bias, the district court allowed Capanna to ask Dr. Cash about his history of testifying for plaintiffs and defendants and whether he had worked with Orth's counsel before. The district court only precluded Capanna from eliciting the number of times Dr. Cash had worked with Orth's counsel or counsel's firm, finding that information irrelevant. At trial, Dr. Cash testified as to his work as an expert with Orth's counsel, on behalf of plaintiffs and defendants, as well as to his payments for time and testimony.

There is no question that Dr. Cash's testimony was a critical part of Orth's case. Dr. Cash was not only Orth's treating physician, performing the second surgery, but he was **[**733]** also designated an expert witness for trial. The district court recognized the importance of allowing Capanna to explore Dr. Cash's possible bias but restricted Capanna's cross-examination by disallowing questions *as to the number of times* Dr. Cash had worked with counsel or counsel's firm. However, the district court's ruling did not preclude Capanna from **[***11]** exposing possible bias between Dr. Cash and Orth's counsel, as Capanna was free to ask other questions to develop the same information.[4] That Capanna's cross-examination of Dr. Cash as to possible bias was not extensive does not demonstrate that the district court's ruling was a severe limitation on his cross-examination. The record reveals that Capanna failed to explore the vast areas available to develop bias that were not covered by the district court's ruling. Instead, we conclude this minor restriction by the district court did not curtail Capanna's ability to explore Dr. Cash's potential bias and was a proper exercise of the district court's discretion.

Future medical care and expenses

Capanna argues the district court erred in allowing two doctors—Dr. Cash and Dr. Kevin Yoo—to opine about Orth's future medical **[*894]** care and expenses because their related reports and disclosures were untimely.[5] Capanna claims that Orth improperly supplemented his designation of expert witnesses in May 2015 with new opinions and information that were available long before the disclosure. Capanna asserts that there was no good cause for the late disclosures and therefore the related opinions should have **[***12]** been excluded at trial in August 2015. Capanna alleges prejudice in that he was deprived of a meaningful opportunity to conduct discovery and thorough depositions of the two doctors.

This court reviews a district court's decision regarding the admissibility of expert testimony for an abuse of discretion. *Schwartz v. Estate of Greenspun, 110 Nev. 1042, 1046, 881 P.2d 638, 640 (1994)*. Pursuant to *NRCP 16.1(a)(2)*, both parties were required to disclose the identity of anyone they intended to call as an expert witness at trial and to provide a written report prepared and signed by that witness. And we clarified in *FCH1, LLC v. Rodriguez, 130 Nev. 425, 434, 335 P.3d 183, 189-90 (2014)*, when a treating physician must provide an expert report. Additionally, a party is required pursuant to *NRCP 16.1(a)(1)(C)* to make an initial disclosure regarding the computation of the damages claimed, including future medical expenses. *See Pizarro-Ortega, 133 Nev. at 264-66, 396 P.3d at 786-87*. "A party is under a duty to supplement at appropriate intervals its disclosures under *Rule 16.1(a)* . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known . . . ." *NRCP 26(e)(1)*. If a party fails to comply with the disclosure requirements of

[4] For example, the district court's ruling did not preclude Capanna from asking Dr. Cash what percentage of his practice was devoted to work as an expert witness or what percentage of his income came from reimbursement from Orth's counsel or counsel's firm.

[5] On appeal, Capanna also complains about the late disclosure of another doctor's, Dr. Anthony Ruggeroli's, opinions as to future treatment and expenses. However, Capanna concedes that Dr. Ruggeroli did not testify at trial, and Orth did not request future medical expenses related to Dr. Ruggeroli's opinions. Accordingly, Capanna was not harmed by the district court's ruling in this respect. *NRCP 61*.

NRCP 16.1 or NRCP 26(e)(1), the party cannot use any witness or information not so disclosed unless the party shows [***13] a substantial justification for the failure to disclose or unless the failure is harmless. NRCP 37(c)(1); see also NRCP 16.1(e)(3)(B).

The issue before us is not whether Dr. Cash and Dr. Yoo were required to prepare reports, as both parties agree that the doctors prepared such reports. Nor is the issue whether Orth was required to disclose a dollar-figure computation for his claim for future medical expenses, as both parties agree that such an amount was provided. Rather, the issue is whether the district court abused its discretion when it allowed the doctors to testify as to their opinions as to future medical care and as to the future-medical-expenses computation when Capanna [**734] claims the information was not initially disclosed and was untimely supplemented.

[*895] At a hearing on Capanna's countermotion to exclude the testimony, the district court noted that the disclosures were made within the discovery deadlines, albeit late in the discovery process. The district court also noted the changing nature of medical treatment in general as well as the possibility of collecting more information with each doctor's visit. The district court recognized that Capanna was on notice of Orth's request for future damages and discussed [***14] Capanna's ability to review and prepare for challenges to the future care amounts. It also stated that it understood "why the disclosures were being made at the time they were being made by [Orth]." The district court carefully considered the timeliness of Orth's disclosures and found that Orth satisfied his duty to supplement the disclosures "at appropriate intervals." NRCP 26(e)(1). To the extent Orth's disclosures could be viewed as not complying with the NRCP, the district court's remarks demonstrate its belief that Capanna was not harmed by the timetable of Orth's disclosures. See NRCP 37(c)(1). Based on the record before us, we are unable to discern an abuse of discretion by the district court in allowing this testimony. See Leavitt v. Siems, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances.").

Attorney fees and costs

Capanna challenges both the award of attorney fees and costs following trial. The district court's decision to award attorney fees is within its discretion and "will not be disturbed on appeal absent a manifest abuse of discretion." Bobby Berosini, Ltd. v. People for t Treatment of Animals, 114 Nev. 1348, 1353 P.2d 383, 386 (1998). And the decision to awa is also "within the sound discretion of the [district Id. at 1352, 971 P.2d at 385.

NRS 18.010(2)(b) allows [***15] the district co award attorney fees to a prevailing party "when the finds that the claim, counterclaim ... or defense opposing party was brought or maintained wi reasonable ground or to harass the prevailing pa "The court shall liberally construe the provisions of [I 18.010(2)(b)] in favor of awarding attorney's fees in appropriate situations," and "[i]t is the intent of Legislature that the court award attorney's fees pursua to [NRS 18.010(2)(b)] . . . in all appropriate situations punish for and deter frivolous or vexatious claims an defenses." Id. "For purposes of NRS 18.010(2)(b), claim is frivolous or groundless if there is no credible evidence to support it." Rodriguez v. Primadonna Co., 125 Nev. 578, 588, 216 P.3d 793, 800 (2009).

In granting Orth's motion for attorney fees, the district court determined that the defense as to liability was maintained without reasonable ground:

[*896] The presentation of evidence on Defendant's liability, which it should be noted included evidence and opinions from some of Defendant's own experts, was overwhelming. It could not only be characterized as clearly exceeding the civil burden of proof standard but, arguably, the totality of evidence showing that the original surgery was performed at the wrong level of the spine [***16] would meet a "beyond a reasonable doubt" standard.

In contrast, the district court acknowledged that Capanna's defense as to damages was made and maintained with reasonable grounds. Accordingly, the court only awarded attorney fees it estimated were incurred during the liability portion of the trial, 80 percent of the total fees.

Capanna argues the district court used the wrong standard for determining whether his liability defense was maintained without reasonable grounds, as the district court found evidence of his liability "overwhelming" but did not find there was no credible evidence to support his defense. While the district court may not have explicitly used the words "no credible evidence," the district court's order, which included the observation that some evidence of Capanna's liability came from his own experts, clearly evinces its belief that

there was no credible evidence. Given the record supporting the **[**735]** district court's assessment of the evidence establishing Capanna's liability and the Legislature's mandate that the district court liberally construe the statute in favor of awarding attorney fees, we find no abuse of discretion in the district court's decision to award **[***17]** Orth's attorney fees reasonably incurred during the liability portion of the trials.[6]

Regarding the award of costs, NRS 18.005(5) defines costs in relevant part as "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." Capanna argues that the district court's decision to grant fees for Dr. Yoo and Dr. Cash in excess of $1,500 was not supported by an express and careful analysis of the necessity for the statutory deviation. We disagree. The district court found that both doctors were necessary to Orth's case and that the requested fees were justified and reasonable based upon the doctors' **[*897]** roles in the litigation. While the district court could have elaborated on its analysis of the doctors' necessity, *see* Frazier v. Drake, 131 Nev. 632, 650, 357 P.3d 365, 377 (Ct. App. 2015) (directing district courts to support the decision to award excessive expert witness fees with "an express, careful, and preferably written explanation of the court's analysis of factors pertinent to determining **[***18]** the reasonableness of the requested fees" and listing various factors), we find no abuse of discretion by the district court in its granting of expert fees for Dr. Yoo and Dr. Cash in excess of the statutory amount.

Cross-appeal

Before trial, Orth asked the district court to declare NRS 42.021 unconstitutional. The district court denied the motion. On appeal, Orth raises the same request, claiming the statute, which allows defendants in medical malpractice cases to introduce evidence of collateral payments the plaintiff received from third parties, violates the equal protection clauses of the United States and Nevada Constitutions and is unconstitutionally vague. We decline to consider his argument because he is not an aggrieved party and therefore lacks standing to appeal from the final judgment. *See* Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Judicial Dist. Court, 122 Nev. 230, 239-40, 130 P.3d 182, 189 (2006) ("Under NRAP 3A(a), . . . only aggrieved parties may appeal [and] [a] party is aggrieved . . . when either a personal right or right of property is adversely and substantially affected by a district court's ruling." (internal quotation marks omitted)). While Capanna introduced collateral source evidence at trial, the jury awarded Orth the entirety of his requested past medical expenses. Therefore, the collateral source evidence **[***19]** did not diminish Orth's recovery and did not affect any personal or property right. And as Orth lacks standing to appeal, and "[w]e do not have constitutional permission to render advisory opinions," City of N. Las Vegas v. Cluff, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969) (citing Nev. Const. art. 6, § 4), we dismiss the cross-appeal.

In accordance with the foregoing analyses, we affirm the judgment on the jury verdict and the post-judgment orders related to attorney fees and costs.

/s/ Stiglich, J.

Stiglich

We concur:

/s/ Douglas, C.J.

Douglas

/s/ Cherry, J.

Cherry

/s/ Gibbons, J.

Gibbons

/s/ Pickering, J.

Pickering

/s/ Hardesty, J.

Hardesty

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[6] Capanna suggests that the district court lacked authority to separately consider the presentation of evidence for his liability defense and for his damages defense in determining whether there was any credible evidence. We disagree, as this court has instructed district courts to "allocate . . . attorney's fees between the grounded and groundless claims." Bergmann v. Boyce, 109 Nev. 670, 676, 856 P.2d 560, 563 (1993), *superseded by statute as stated in* In re DISH Network Derivative Litig., 133 Nev. Adv. Rep. 61, 401 P.3d 1081, 1093 (2017).

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DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY TAYLOR,	)	CASE#: A-18-773472-C
Plaintiff,	)	DEPT. III
vs.	)	
KEITH BRILL, M.D., ET AL.,	)	
Defendants.	)	

BEFORE THE HONORABLE MONICA TRUJILLO,
DISTRICT COURT JUDGE

MONDAY, SEPTEMBER 27, 2021

RECORDER'S TRANSCRIPT OF HEARING

DEFENDANTS' MOTION IN LIMINE NO. 1 TO INCLUDE OTHERS ON THE VERDICT FORM

APPEARANCES:

For the Plaintiff: ADAM J. BREEDEN, ESQ.

For the Defendants: HEATHER S. HALL, ESQ.

RECORDED BY: REBECA GOMEZ, COURT RECORDER

RECORDER'S TRANSCRIPT OF HEARING - continued

DEFENDANTS' MOTION IN LIMINE NO. 2 TO ALLOW DEFENDANTS TO INTRODUCE EVIDENCE OF COLLATERAL SOURCES PURSUANT TO NRS 42.021

DEFENDANTS' MOTION IN LIMINE NO. 3 TO EXCLUDE DEFENDANTS' INSURANCE COVERAGE

PLAINTIFF'S MOTION IN LIMINE #1: MOTION TO PERMIT CERTAIN CLOSING ARGUMENT TECHNIQUES OF PLAINTIFF'S COUNSEL

PLAINTIFF'S MOTION IN LIMINE #2: MOTION TO EXCLUDE INFORMED CONSENT FORM AND TERMS AND ARGUMENT REGARDING "RISK" OR "KNOWN COMPLICATION"

PLAINTIFF'S MOTION IN LIMINE #3: MOTION TO EXCLUDE EVIDENCE OF ASSERTED LIABILITY OF OTHER HEALTHCARE PROVIDERS UNDER *PIROOZI*

PLAINTIFF'S MOTION IN LIMINE #4: EXCLUSION OF COLLATERAL SOURCE PAYMENTS

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S NEGLIGENT HIRING, TRAINING AND SUPERVISION CLAIM AGAINST WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA

Las Vegas, Nevada, Monday, September 27, 2021

[Case called at 2:02 p.m.]

THE COURT: All right, calling Case Number A-18-773472-C, Kimberly Taylor versus Keith Brill, M.D., who's here on behalf of the plaintiff?

MR. BREEDEN: Good afternoon, Your Honor. Adam Breeden, 8768, on behalf of Ms. Taylor, the plaintiff.

THE COURT: Good afternoon.

On behalf of defendants?

MS. HALL: Good afternoon, Your Honor. Heather Hall for the defendants.

THE COURT: Thank you.

And we're on for a series of motions in limine, so we're going to start with plaintiff's motion in limine number 1, motion to permit certain closing argument -- argument techniques of plaintiff's counsel. I reviewed that motion, defendants' opposition, as well as the reply.

Anything further, Mr. Breeden?

MR. BREEDEN: Your Honor, I'll -- I'll just make some very brief statements here for the record because I don't think a lot of oral argument on this particular motion is warranted. I started filing this motion because I felt that some of the district court judges were not aware of all the nuances of cases such as *Pizarro* and *Gunderson* and others that are cited in this brief, and without

an opportunity to fully review those cases, they were not making the correct decision during certain closing arguments so we wanted to put these cases in front of you.

The phrase send a message is perfectly fine. It is not limited to punitive damages cases, provided that it is -- the message is being sent is to the defendant.

Discussion of rulebreaking and media coverage was expressly ruled on in the *Pizarro* case. It was found to be proper. Again, perhaps there's a -- a line there that could be crossed, but what I typically do is try to argue word for word what is in the closing in the *Pizarro* case which the Nevada Supreme Court has approved so I don't think I can run afoul of anything.

And then the last issue is this want ad technique. Again, this will not ask jurors what they would want to respond to that ad, they will be asked what they believe my client, the plaintiff in this case, would have needed to respond to that ad. It is a permitted technique, it's been used in this district before, I cited to you a case where Judge Hardy had approved of that, and I would ask that you approve all these techniques.

THE COURT: Ms. Hall.

MS. HALL: Very briefly, Your Honor, just to touch on I guess each of the points that Mr. Breeden addressed.

With respect to media coverage, I'm not aware of there being any media coverage in this case. Certainly, if there is by the point of our trial, I think it would be improper to discuss that in

front of the jury other than, you know, the general admonition that they're not to view any coverage, they're not to do any research on their own which I know the Court gives.

I do not agree, as I stated in the opposition, that *Gunderson* approved use of send a message. I think what the court found in that case is that under the specific facts of that case it was not jury nullification for the attorney to have used the phrase send a message in the exact contacts -- or context that he did.

Here, you know, without yet knowing exactly how Mr. Breeden intends to use it, the way that it was generally stated in the motion in limine I think is more akin to *Lioce* and what the court found to be jury nullification.

This case is about Ms. Taylor's medical care and whether or not Dr. Brill met the standard of care or violated the standard of care. It's not about, you know, general rules of safety for the community or the jury serving as the conscience of the community.

So I think to allow those types of statements from counsel or others would be very prejudicial to the defense and it's not based on any evidence in this case. And I do think that it's important that there is not punitives in this case.

The very last issue, the want ad technique, that -- you know, I do believe that that is a pretty clear violation of, you know, telling the jurors to put themselves in the shoes of Ms. Taylor. The fact that it's, you know, kind of rephrased to say how much would you say it would have taken plaintiff to respond doesn't make it any

different. It's still asking the jury to put themself in the shoes of the plaintiff which I think would be a violation.

With that, Your Honor, you know, I -- I -- I mean no disparagement to Judge Hardy, but Judge Hardy is not precedent. I don't have anything else to add unless Your Honor has any questions for me on that motion.

THE COURT: Okay. Mr. Breeden, anything in addition and then you left out the per diem damages argument, or I don't know if you did that intentionally.

MR. BREEDEN: The per diem was not opposed by the defense so I assume you'll grant that as well.

The only thing that I would have to say in rebuttal, Your Honor, is the -- the comments about news media if you read what was said in the *Pizarro* case which was quoted in our motion, essentially counsel makes an argument that, you know, verdicts sometimes make the paper and, you know, people read about verdicts and determine whether they're going to follow rules from that.

And I'll -- I'll just mention on this particular one, Your Honor, I argued this in front of former Judge Scotti on one occasion and he frankly said to me, he said you know, Mr. Breeden, if I were to have decided these without any cases, I might have ruled differently, but, you know, you've cited these clear Nevada Supreme Court cases and I'm bound by those. And so I think it's fair that, you know, I have read up on what the Nevada Supreme

Court says on these issues and those are fair comments that have been approved by the Nevada Supreme Court, and so I would submit on that.

THE COURT: All right. Thank you.

So as to the send a message argument, and obviously I understand your position that you're saying you would tailor it specifically to this defendant, the Court still doesn't believe that the -- that the phrase send a message is appropriate. Obviously, it's appropriate to say, you know, if you believed he was negligent, then you should find for X, Y and Z, that's different. I -- again I don't -- the Court doesn't approve of the send a message language and certainly not for the community even though I -- like I said, you restricted your argument to it being for defendant.

As to the safety rules and the media, the Court is not going to allow any reference to safety rules or media mentions other than the admonishment by the Court.

As to the want ad, I -- I do believe it invites jury nullification and essentially while you're limiting it to the defendant, I think it allows the jurors to place themselves in that position by merely suggesting it in the fact that it's a want ad. So I don't find that appropriate.

And as to the per diem damages, while I appreciate that you assumed I was going to grant it as unopposed, that's the discretionary rule and I still have to look at the substance, and I also find that the per diem damages arguments invites jury nullification

and asks the jurors to place themselves in the place of the plaintiff. So, that being said, it's going to be denied with that caveat.

MR. BREEDEN: Your Honor, a clarification. Are you saying I'm not permitted to use the phrase send a message at all in closing arguments?

THE COURT: Correct.

MR. BREEDEN: Okay.

THE COURT: All right, on to the next plaintiff's motion in limine number 2, motion to exclude informed consent form and terms or argument regarding risk or known complication. I reviewed that motion, defendants' opposition, as well as the reply, and there was also supplemental briefing on both sides that I reviewed.

Anything further, Mr. Breeden?

MR. BREEDEN: Your Honor, I do think this is the most important motion in limine in front of you today so I do have some additional comments.

I'd like to start by referring to a case called *Andrews versus Harley Davidson*. And this is a 1990 supreme court case from Nevada. And in that case what happened was an intoxicated motorcycle driver rear ended a parked car and he sued and he sued Harley Davison for product defect and he claimed that his injuries were caused by a defectively-designed gas tank which when there was a collision with the motorcycle, a spring clip would fail and it would cause the gas tank to rise above the rider's seat and

therefore in a collision, the rider would hit the gas tank and be more severely injured than they otherwise might have been in a collision.

And what happened was that case went to trial and the district court allowed that evidence of intoxication and the plaintiff lost. And it went up on appeal and what the Nevada Supreme Court said is look, it feels like it ought to be admissible in that case that you had an intoxicated motorcycle drive here. That feels like that ought to be admissible, but it's not probative of any question in the particular case because you have a duty as a motorcycle manufacturer and designer to design a safe product whether or not a person who's riding it is intoxicated or not, so they -- they reversed that.

And I think very similar arguments exist in this case. There is no assumption of risk defense in medical malpractice cases. It does not exist. And actually if it did, Your Honor, as I mentioned in the pleadings, you'd have a case which arguably exist today where doctors just put everything on their consent form or their risk of procedure form and then try to evade liability for negligence, if that occurs, and no patient can consent to a negligent surgery.

The entire defense of this case appears to be premised on them showing the jury this informed consent form, that it does mention perforation to the uterus and small intestine, and instead of arguing the standard of care which is the real issue of fact for the jury to decide, they're just going to argue listen, she was warned

and therefore the doctor shouldn't be responsible.

Courts around the country have found this type of -- of so-called defense in a medical malpractice case to be both irrelevant and prejudicial and I -- I hate to read quotes from other cases, but -- but I would like to in this case because essentially the -- the quote is the argument and this comes from the *Wright versus Kaye* case, which is a recent Virginia Supreme Court, and all the arguments in this case that were accepted by that court are applicable here.

And they stated: Awareness of the general risks of surgery is not a defense available to Dr. Kaye against the claim of deviation from the standard of care. While Wright or any other patient may consent to risks, she does not consent to negligence. Knowledge by the trier of fact of informed consent to risk where lack of informed consent is not an issue does not help the plaintiff prove negligence, nor does it help the defendant show he was not negligent. In such a case, the admission of evidence concerning a plaintiff's consent could only serve to confuse the jury because the jury could conclude contrary to the law and the evidence that consent to the surgery was tantamount to consent to the injury which resulted from that surgery. In effect, the jury could conclude that consent amounted to a waiver which is plainly wrong, end quote.

And this is the exact scenario you have in this case. We've cited numerous court decisions from around the country

stating that this kind of information is -- is inadmissible and certainly more prejudicial than probative.

The parties briefed a supplemental brief on the *Traynor* [ph] case where the Nevada Supreme Court has agreed that a plaintiff cannot consent to negligence through a informed consent form. This is simply the law. And I want to be clear on what we're requesting here.

What we're -- what we're requesting is that these informed consent forms not come into evidence in this case, that the defense and their expert not be able to use the words risks of surgery or complications of surgery. I expect both sides will make proper argument as to the fact that perforations can occur with and without negligence. I don't think that should be barred. And then the experts can detail their reasons why they think this particular injury occurred because of negligent conduct or it occurred without negligence.

But the law on these issues is very clear and we simply ask that you rein in the defense. We cited at least a dozen examples in depositions and expert reports of the defense where this is what they plan on using to defend this case and it is simply an improper defense.

THE COURT: Okay, before I allow Ms. Hall to speak, you mentioned that both parties are going to be discussing that the -- that the -- one second. I guess that the cut so to speak can occur with or without negligence. That's probably not the appropriate

term, but that's what came to mind. So how are you --

MR. BREEDEN: Perforation.

THE COURT: -- how are you differentiating that from it being a known risk and why would that be more prejudicial? If it's possible, then obviously it's a risk, right?

MR. BREEDEN: Yes, but the distinction is that you cannot consent to negligence. They -- you cannot waive the right to sue --

THE COURT: Oh, yeah, I know. I -- I -- but I -- I see that as two different issues. I see the informed consent as one issue and then whether or not it's a known risk that can occur as you just said with or without negligence present, that's a separate issue.

MR. BREEDEN: Well, excluding the informed consent form is going to be meaningless if the Doctor can still get up there and say look, I had this long conversation with Kim and I told her about all the known risks and potential known complications of this procedure and she agreed to it so I shouldn't be held responsible because that's what happened here. That's the inappropriate argument. The appropriate argument that the two parties will make and they disagree on this answer, but the appropriate argument back and forth is was there negligence here, was this an avoidable perforation or was this unavoidable.

THE COURT: All right. Ms. Hall.

MS. HALL: One thing I want to make sure is very clear to the Court and perhaps to opposing counsel is that the defense is not taking the position that Ms. Taylor consented to a negligently

performed surgery. Quite the opposite. You know, one of the -- the defenses that I raise in this case in -- one of the affirmative defenses in our answer to the complaint was assumption of the risk. That is not the same thing as arguing that a consent form somehow inoculates the defendant physician from any negligence if there was some negligence.

The reason that a consent form and there are -- there is more than one consent form. Both I think are very detailed, but the reason that a consent form describes known risk and complications is because those can occur even when the surgery is performed correctly and without negligence. Plaintiff's own expert when I deposed him acknowledged that.

And, you know, I think it's part of the contemporary -- contemporaneous, excuse me, medical record we should --

THE COURT: Oh wait, Ms. Hall, you went out. Ms. Hall?

THE CLERK: Hello?

THE COURT: Ms. Hall?

THE CLERK: She cannot hear us.

THE COURT: Okay.

MR. BREEDEN: I'm still with you, Your Honor, and I cannot hear Ms. Hall either.

THE COURT: Uh-oh.

THE CLERK: Okay, hold on. Let me send her a message.

MS. HALL: Did I cut out?

THE CLERK: Oh, you --

THE COURT: Yes, you were completely out.

MS. HALL: I apologize, Your Honor. I'm on my iPad and I -- I got a phone call so I think that's what happened.

THE COURT: Okay.

MS. HALL: Did you hear any of that or should I just --

THE COURT: I did hear --

MS. HALL: -- wrap this up?

THE COURT: -- I did hear a lot of it. You cut out for about the last minute.

MS. HALL: Okay. I'll -- I'll just really quickly sum it up and -- and say that it's not our intention to argue to the jury that Dr. Brill committed negligence, but Ms. Taylor consented to a negligently performed surgery. Our position is that the reason risk -- known risks and complications are in the consent form is because they can and do occur in the absence of negligence and that is exactly what happened here.

THE COURT: Okay. Mr. Breeden.

MR. BREEDEN: Judge, I -- I don't know -- I -- I -- I agree with Ms. Hall that she's allowed to argue that this type of injury can happen with or without negligence and her expert can say look, this is why we -- we think this particular injury was not caused by negligence. They're free to argue that.

But what they can't do is they can't say hey this is just a risk, we warned her in advance and we're not responsible for this and here's the consent form that she signed and we had a long

conversation with her. They have to focus on what the Doctor did to avoid what happened here within the standard of care, not what my client may have known or been told about potential risks or complications.

And again, if the law were to allow this, you would have a system where doctors simply deemed everything to be an uncontrollable risk or complication of the procedure and therefore you could never sue a doctor. And I would submit to you that that's sort of what's going on in this informed consent form in this case because it mentions extremely rare events.

We have three OBGYNs in this case and none of them have actually seen another case where there was a perforated small intestine from this procedure. It is extremely rare and that is why we're saying that this procedure was not done within the standard of care.

THE COURT: All right. So as to plaintiff's motion in limine number 2, it's going to be granted in part and denied in part.

As to the evidence that Ms. Taylor executed an informed consent form, that's going to be precluded.

As to any verbal discussions between Dr. Brill and Ms. Taylor that she -- that they discussed risks and complications, that's going to be precluded. I think both invite confusion to the jury and are not relevant.

However, I think as acknowledged by both sides, I think it is relevant that perforation is a known risk as long as there's

sufficient foundation for the testimony. So that will be allowed and of course any argument flowing from the evidence thereof.

As to your request for use of a jury instruction advising the jury that it's irrelevant whether perforations in general are a known risk or complication, I'm going to reserve ruling until evidence is presented and we can address that when we settle jury instructions.

MR. BREEDEN: Thank you, Your Honor.

MS. HALL: May I ask a quick I guess point of clarification?

THE COURT: Uh-huh.

MS. HALL: So one of the opinions that's been offered by my expert, Dr. McCarus, he goes into great detail regarding the consent form. Is that ruling also precluding my expert, Dr. McCarus, from discussing his opinions on that subject matter?

THE COURT: If it's about the consent form that was signed by Ms. Taylor, yes, but he can talk about the known risks to the surgery.

MS. HALL: Okay. Thank you.

THE COURT: As to plaintiff's motion in limine number 3, motion to exclude evidence of asserted liability of other healthcare providers under *Piroozi*, I've reviewed that motion, the opposition, as well as the reply and go ahead, Mr. Breeden.

MR. BREEDEN: Your Honor, I -- I won't hide the fact that I do not think the *Piroozi* case was correctly decided. I wonder how much longer we're going to have the *Piroozi* case. There were

certainly three members of the Nevada Supreme Court when it was decided that did not think that case was correctly decided. However, we have it in this case so now we have to grapple with whether it applies on the specific facts of this case and if it does, how it should be applied.

I want to summarize what's going on with some of these positions as to different healthcare providers. First of all, Dr. Brill, the defendant, does not blame any other healthcare provider for any damages or injury to Ms. Taylor. Okay. The defense expert, who is Dr. McCarus, also does not give any opinions or blame any other healthcare provider for any injury or damages to Ms. Taylor.

Plaintiff's expert, who is Dr. Burke, he did do an initial affidavit of merit for this complaint where he blamed Nurse Hutchins, Anderson Hospital and St. Rose for a delay in diagnosis of her injury, but he did not ever do a formal report on that which would be required to use that testimony under Rule 16.1.

Dr. Burke did blame Dr. Brill for all damages and did a formal report against Dr. Brill and an emergency room doctor, Dr. Christensen, stating that Dr. Christensen was responsible for approximately a seven-hour delay in diagnosis and a report was done.

So the -- the question is here, especially in the -- in the *Piroozi* and *Bhatia* cases, you -- you had a case that was clean in the sense that you just sued several medical care providers and you said they are all responsible for a delay in diagnosis or failure to

treat and therefore they're all responsible in different proportions for the same injury, and that scenario is not presented by this case.

This is a case where we are only blaming Dr. Brill for a hundred percent of the damages. He's responsible for everything. There is a window of time of approximately six hours where Dr. Christensen could have caught what happened earlier and treated it.

Now, Dr. Burke who is the expert who talks about this for plaintiff says look, it wouldn't have made any difference in the outcome, Ms. Taylor would have needed the same resection surgery to her small bowel to repair the perforation, but arguably she would have endured six hours less of pain and suffering.

So we talk about, you know, how does *Piroozi* even apply here. You certainly couldn't say to the jury look, apportion all the damages between Dr. Brill and Dr. Christensen and -- and let's say a jury said Dr. Brill is 80 percent responsible and Dr. Christensen is -- is 20 percent. Under that finding, Dr. Brill wouldn't get a 20 percent reduction in damages because Dr. Christensen hasn't been blamed for all the damages. He's only been blamed for additional pain and suffering during a very short window of time.

So I think there's a couple of ways that this can be addressed by the Court. The first is, you just give a jury instruction that says don't award any damages against Dr. Brill that you think Dr. Christensen caused. And I'm okay with that because the admissible testimony in this case is that Dr. Christensen caused

virtually no additional damages. That's -- that's why he was resolved out and we chose not to proceed against him. It's clearly Dr. Brill who's primarily responsible for this injury.

Alternatively, you would have to give a special verdict form to the jury and say look, figure out all the damages for this six hour period of time and then figure out between Dr. Christensen and Dr. Brill what percentage they are responsible for those damages and then you would have I guess another special interrogatory on the form that just says hey excluding those six hours, you know, what are all the other damages that you find in this case.

But what I fear is that the defense is going to try to say oh look, the jury has found Dr. Christensen 10 percent responsible so we get a 10 percent reduction from the entire damages in this case and no expert has supported that.

And I'll conclude my remarks here, but the problem in this case is *Piroozi* and *Bhatia* involve multiple providers accused of causing the same injury and we just don't have that situation here. There's no Nevada Supreme Court case or court of appeals case to my knowledge that says how we are to approach this particular scenario where the doctors are clearly being blamed for different types of damages.

But again, to -- to summarize, at worst I think you would put Dr. Christensen on the verdict form because there is an admissible expert report from my expert before he was dismissed

that says he is responsible for some damages, but when we look at the other provider, Nurse Hutchins, Henderson Hospital, St. Rose, any other nurse or -- or the anesthesiologist, anybody like that, there's no admissible report, expert report of any kind for those providers and clearly those should be excluded from the verdict form. Thank you.

THE COURT: All right. Ms. Hall?

MS. HALL: Your Honor, *Piroozi* is the law in this state and that was decided in 2015. Before that case, when this issue would come up, and I can tell the Court that it comes up frequently in medical malpractice cases and has at least since as long as I've been practicing malpractice, and when it would come up prior to *Piroozi* we would be informed of the amount of a settlement with a settled party and we would request an offset for that amount.

Piroozi said you don't get an offset. Instead, the only way to ensure that you're not being held liable for some other entity or individual's negligence is to put that other party on the verdict form if there's evidence of negligence of others.

And the *Bhatia* case very clearly says -- it's an unpublished case, but I think it's very persuasive -- that you as the plaintiff's attorney do not own your expert's opinions and if your expert has offered an opinion in a case that another party or nonparty was negligent, then the defense may use that testimony. They don't need their own expert or the defendant himself or herself to opine against another healthcare provider.

This is not distinguishable in any way from *Piroozi*. *Piroozi* was not decided on, you know, there being the same exact injury caused, and Dr. Burke very clearly in both his original affidavit, his reports and his deposition testimony said that he believes that there was a violation of the standard of care in causing the perforations to begin with, but that all of the providers, Dr. Brill, Bruce Hutchins, St. Rose, Henderson Hospital, Dr. Christensen, all of those providers were below the standard of care for failing to diagnose this perforation of the bowel. And he even went so far as to say that that -- the negligence of all those other people contributed to the delay in diagnosing and caused Ms. Taylor further pain and suffering.

So the only way -- a jury instruction is far from sufficient to ensure that Dr. Brill is held responsible for the negligence attributed to him, if any. These other people, these other entities must be on the verdict form. And it's of no consequence and that happens all the time where the plaintiff settles with parties throughout the litigation and, you know, there's a last person standing. That does not preclude the defense from using Dr. Burke's original declaration or the deposition testimony that he gave in July of this year.

You know, the idea that -- as Mr. Breeden pointed out in an objection to my pretrial disclosures because I mark expert reports and don't offer them as an exhibit, but I mark them in the exhibit book, expert reports are hearsay and it's what the expert

testifies to on the stand. And to the extent that Dr. Burke gives any opinions in this trial, I should be permitted to cross-examine him on his full and complete opinions which he confirmed as recently as July the 19th.

THE COURT: Okay. Mr. Breeden.

MR. BREEDEN: Judge, the only thing I would have to say in rebuttal is if I came to you and I said, you know, my expert wants to discuss this on the stand but he didn't do it in a formal expert report required by Rule 16.1, you would probably exclude that evidence. And so that's what we have here they're -- they're wanting to try to borrow opinions from our expert when they didn't bother to do any with their own defense doctor or defense expert and that is improper in my opinion and we -- we oppose that.

THE COURT: All right. So, while I agree I wish there was a little more guidance here, I do believe *Piroozi* is the law. While I see that it is somewhat factually different, I don't think *Piroozi* went that extensively into the factual allegations of that case from what I recall reading.

I think the problem here is that we do have the statements that other doctors and nurses and defendants so to speak or parties fell below the standard of care which I'm quite certain exacerbated injuries and damages. So I'm going to allow evidence of asserted liability of other healthcare providers under *Piroozi* so that motion will be denied.

MR. BREEDEN: Judge, do you want to discuss how that's

going to be handled on the verdict form at this time or are you going to reserve that?

THE COURT: No, I'll reserve that. And in fact, while we're on there, I'm going to go through them, but I wanted to reserve on the other verdict forms as well when we argue instructions, but I'm just -- move on to four and then we'll come back to that.

As to plaintiff's motion in limine number 4, exclusion of collateral source payments, I reviewed that motion, the opposition, as -- one second. As well as the reply.

Anything further, Mr. Breeden?

MR. BREEDEN: Yes, Your Honor. So there are two arguments presented in this motion. The first is a constitutional argument. I will not spend much time at all on that argument because it is briefed. But we're making a due process argument, but I want to make clear here at oral argument we're also making a separation of powers argument.

The judicial department and you, Your Honor, are given the power under the Nevada Constitution to make evidentiary rulings and rulings to the effect of whether information is admissible and whether it is more prejudicial than probative and this statute takes that ability away and I think that there's also a separation of powers issue here, but the constitutionality is briefed and -- and I will not supplement that any more here during oral argument.

The issue that I do want to address more in oral argument

is why would this Court allow evidence of insurance payments if there is no evidence that the defense is going to present that the amount of insurance payments or reimbursement rates are the usual, customary and reasonable amount for that billing? They lack that evidence. You just told me when you ruled on the issues in motion in limine number 1 like the send a message argument and those arguments that you are concerned with nullification arguments.

Well, this is absolutely a nullification issue here. If they had a expert who was willing to say that they had timely disclosed, who was willing to say that those insurance reimbursement rates are the usual, customary and reasonable amount of medical expenses, I'm not sure that I would have an argument.

But they don't have that evidence, and in fact what you find time after time again is that doctors don't believe that because doctors want to make money. They think the as-billed amount is the usual, customary and reasonable amount.

And also I can tell you, Judge, every once in a while defense counsel in general -- I'm not referring to Ms. Hall in particular here today, but defense counsel in general will argue that what 42.021 means is that the jury can only award the insurance reimbursed amount and a couple of years ago in the *Capanna versus Orth* case, we had a Nevada Supreme Court decision that says that is clearly wrong. In that case the jury heard the -- the as-billed and as-reimbursed insurance information and they

awarded the entire amount of the bill and that was upheld by the Nevada Supreme Court.

So, the big problem here is under the *Coury* case we know that these insurance payments and write-offs due to insurance contracts are not probative of the usual customary and reasonable value, so for what purpose would those payments possibly be admitted in this case if not to make a nullification argument? And I think the Court should avoid that and not allow that in this case.

One final point, Your Honor, that -- or I -- I'm sorry, I -- I'm getting on to another motion in limine. I -- I'll rest on this particular motion.

THE COURT: All right. Ms. Hall?

MS. HALL: So this is a unique case lately in the sense that we don't have Medicare, we don't have Medicaid. So *McCrosky* and, you know, this being a federal payment doesn't exist in this case. She had private health insurance through Aetna and 42.021 clearly says that defendants may elect in medical malpractice cases to introduce evidence of collateral sources.

That's all we're asking to do here and, you know, the suggestion that a healthcare provider ever gets the as-billed amount when there's a contractual arrangement with private insurance is simply not correct. The -- the fact of the matter is, and we know this from both the spreadsheet that Ms. Taylor provided in this case as well as the Aetna claims records, that the total billed,

and that would include Dr. Brill's surgery which no one has said was necessitated by negligence, she needed the surgery regardless. The total billing in this case was $225,000 and some additional dollars and the total paid by either Ms. Taylor or her private health insurance comes to about $65,000.

So it is highly relevant to the defense and to plaintiff's damages in this case and the defense absolutely under that statute should be permitted to introduce that evidence. I've seen it handled a couple of ways and I don't -- I don't presume that Mr. Breeden would like to do this way, but I've seen people on the plaintiff side only board what was actually paid by Ms. Taylor in her private health insurance. I've also seen plaintiff's counsel board the gross amounts and then the defense introduces the evidence of the collateral sources. I think either is appropriate, but either way I believe it's clear that 42.021 allows us to get that information in front of the jury.

There's -- I don't believe there's been a proper constitutional challenge to the statute and I pointed that out I believe in the opposition, but for that reason, Your Honor, I think that the Court should apply the statute and this motion should be denied.

THE COURT: Mr. Breeden.

MR. BREEDEN: Yes, quickly in rebuttal, as Ms. Hall properly points out, the statute says that a defendant, quote, may elect, end quote, to admit that evidence, but it doesn't say, Your

Honor, that you as the Judge somehow lose your ability to be the arbiter of what is relevant or what is more prejudicial than probative.

And again, there is no witness in this case who's going to come in and say that those insurance reimbursement rates are the usual, customary and reasonable amount that -- that has actually been rejected by the Nevada Supreme Court in the *Coury* case.

So, why would those come into this case if not for the reason that the Doctor just wants to say oh listen, she's claiming 225,000 in medical expenses, but her insurance really only paid 65,000 of that and then hope that the jury just does not obey the instruction to award a usual, customary and reasonable amount. That would be a nullification argument and I think that's the only reason these collateral source payments in this particular case are sought to be admitted by the defense and therefore we're asking you to exclude them.

THE COURT: All right. So I do think that 42.021, the medical malpractice exception, does apply.

As to constitutionality, I don't think the statute is unconstitutional. I think the appropriate test is a rational basis test and I do think that when the legislator -- legislature contemplated NRS 42.021 that it was reasonably related to legitimate government interest, namely keeping doctors here in Nevada.

So that being said, I'm going to deny the motion and evidence and reference to exclusion of collateral source payments

subject to other evidentiary objections, contemporaneous objections at the time of trial will be admitted.

Moving to defendants' motion in limine number 1 to include others on the verdict form and I think I already indicated I mean you guys can argue now or we can -- my inclination is to reserve ruling when we settle instructions and based on the evidence that's presented at trial as to the verdict form. Do you want to go ahead and argue today though?

MS. HALL: Your Honor, if I could really quickly, the -- the title of this motion might be just a tad misleading. It definitely deals with the verdict form, but it also asks to be permitted to cross-examine Dr. Burke on his full and complete opinions. So I would suggest, consistent with your ruling on plaintiff's prior motion, that this motion might be granted in part and denied in part and the issue of the verdict form reserved for later ruling as you said.

THE COURT: Mr. --

MR. BREEDEN: Your Honor, on behalf of plaintiff, we would agree with that. Some of these defense motions are really just mirror images of the plaintiff's motion so I think you've resolved the issues raised in this defense motion.

THE COURT: All right, so that being said, it will be granted in part and denied in part and we'll reserve ruling as to the verdict form when we argue jury instructions.

MS. HALL: Thank you.

THE COURT: As to defendants' motion in limine number 2 to allow well the -- the converse of what we just discussed, to allow defendants to introduce evidence of collateral source -- sources pursuant to NRS 42.021, was there -- I thought there was a portion maybe I'm thinking of another motion that it had another request though. No, I think that's it.

Okay, so in line with my ruling, this will be granted.

And then lastly, defendants' -- one second. Why are the out of order? Defendants' motion in limine number 3 to exclude defendants' insurance coverage. I reviewed that motion, the opposition, as well as the reply.

Ms. Hall.

MS. HALL: So, the point of this motion was to -- and preliminarily in our 247 conference I thought we had an agreement that defendants' malpractice insurance is inadmissible under 48.135. However -- so that's the point of this motion to exclude evidence of the fact that the defendants are covered by professional liability insurance.

In opposing the motion though, plaintiff brought up that he wants to directly question the jury in this case about a variety of issues which I do not agree are appropriate. First being the fact that Dr. Brill has malpractice insurance.

I certainly agree, Your Honor, that it would be appropriate for the Court to generally ask of the panel if anyone has an affiliation with an insurance company or, you know, any bias in that

regard, but that is very very different than asking do you feel that if you rule against the defendant in this case his malpractice insurance premiums might increase.

There's also a proposed voir dire question of if the judge instructed you in this case not to consider whether or not the doctor defendant had insurance, would you be able to follow that instruction. Part of that which is in plaintiff's opposition is the request that this Court give an instruction which is a general negligence instruction, it's pattern instruction 1.07, that the jury is not to consider that Dr. Brill had insurance.

I would object to giving that instruction. I think as I pointed out in our briefs that the *Capanna* appeal did not deal with whether or not it was appropriate to give that instruction by the trial court. Those were not -- that was not any of the -- any issue that was raised on the appeal. And I would find that very prejudicial to my clients and I would submit that the only reason to do that from the plaintiff's perspective would be to get in front of the jury the fact that he's covered by insurance and I don't think that would be appropriate.

I think it would be equally inappropriate for plaintiff's counsel to directly question the jury or proposed, you know, the panel on tort reform. That is a comment on the law.

I have never -- as an example, Your Honor, if there were to be a verdict in this case and the noneconomic damages awarded exceeded the statutory cap of 350,000, that is not an issue that I

would ever raise in front of the jury. I think that's a legal issue to be decided by Your Honor and it would be very prejudicial to the defense to allow voir dire questioning of the panel on tort reform and those related issues. And for that same reason I would object to giving that instruction.

Sorry, bear with me. I just want to make sure I covered everything he had in his opposition.

I think -- I think that was pretty much all that he raised in his opposition, but again, my motion was directed at excluding any evidence of the defendant's malpractice insurance. But those side issues I think should also, you know, be -- it should be noted that I do have objections to asking those questions of the jury.

THE COURT: All right. Mr. Breeden?

MR. BREEDEN: Yes, Your Honor. I'd like to talk about this one in the -- the three different phases of trial and I'll -- I'll start with the -- the easiest one to discuss which is during opening, presentation of evidence, direct and cross, I agree that generally it would be inappropriate to ask any questions of insurance or the defendant's status of whether or not he has insurance.

The only way you'd be able to do that during that phase is what they call curative admissibility. If the Doctor said something foolish and untrue like I don't have insurance, I'll have to pay this out of my own pocket or I could go broke, then you can -- as a curative admissibility, you can bring up insurance. But I -- I don't intend to consistent with what I put in my opposition.

The other two phases are what can be asked in voir dire and what can be said during closing. And I just had a lot of frustration and I -- I do not recall -- Ms. Hall's comments were I thought I had an agreement with opposing counsel on this one and -- and then some different things were said.

I don't recall an agreement on this one because often what I get from defense attorneys is kind of a blanket statement that, you know, plaintiff will never bring up insurance at trial and then when I try to do it during voir dire or closing which is clearly permitted under the case law, they say wait, wait, he -- he agreed to this very broad stipulation here on this motion and so I had proposed some language and -- and Ms. Hall couldn't agree with it so here we are.

But the -- the next phase is during voir dire and I think that the defense says here today hey we understand you can ask broad questions like does anybody work for an insurance company, does anybody have investments in insurance companies, you know, does anybody have a close friend or family member that is an insurance agent or adjuster, that those are clearly permissible under *Silver State Disposal versus Shelley*, that case.

But I went further to explain to you why during voir dire we intend to ask questions about KODIN and -- and how jurors may have voted on KODIN and -- and what they believe about, you know, is there a medical malpractice insurance rate crisis for doctors and I thought it was strange in a way that the defense says

look, KODIN was, you know, 15, 16 years ago, it's a distant memory to all these jurors and so you shouldn't be allowed to bring it up.

So I went and I cited exactly what happened in the *Capanna versus Orth* case where this came up and you see that this is in the mind of jurors. Okay, this isn't something that faded over the last 15, 16 years. Jurors in that case were -- were worried that there were skyrocketing malpractice insurance rates, that there were crazy insurance problems, and I -- I think that's very fair to ask to explore juror bias for this case.

I -- I find it hard to believe that if I was asking a juror hey do -- do you have any strong opinions on, you know, caps in medical malpractices cases, caps on damages, you have any strong opinions on insurance rates that doctors have to pay and the juror says the type of thing that they say in the *Capanna* case which is oh, yeah, there's astronomical insurance rates and doctors are likely to leave town, you know, if there's big judgments and I believe in caps, you know, you shouldn't give an award over $50,000 against a -- a -- a doctor, I mean those jurors have obviously demonstrated bias and in opposing this motion, the defense wants to handicap us and prevent us from asking those questions altogether so those biases do not -- do not get explored.

And again, I -- I would just ask to be able to do the same types of things that were done by other plaintiff counsel and approved by the Nevada Supreme Court in the *Capanna* case.

Now to move to the -- the next section of trial, if you will,

we talk about in jury instructions and closing argument. The defense says we don't want -- in this case we -- we want this to be the one case out of 10,000 in this jurisdiction where you don't read that standard insurance instruction to the -- to the jury.

Now, keep in mind when it deals with things like insurance payments that my client benefited from, they want that in, but when it comes to potential insurance of the defense, they don't want that in. The actual argument of the defendant in the *Capanna* case was hey, by giving this instruction you draw attention to the fact that there may be insurance and -- and that is improper and that is the exact argument the Nevada Supreme Court rejected in the *Capanna* case and they said look, this is a standard instruction.

Counsel has every right to put an instruction up in front of the jury in closing argument and, you know, instruct the jury on it or -- or tell the jury about -- explain further this instruction. And so what actually happens in closing argument in the *Capanna* case is that the exact jury instruction we want to give to the -- to the jury in this case was given properly by the district court and then plaintiff's counsel, who is Mr. Prince, gets up and basically says to the effect, hey, here's this jury instruction number 20, it talks about insurance and, you know, whether the defendant was carrying insurance and it tells you not to consider that, so if you get back there in -- in jury deliberations and one of the jurors brings up, you know, hey, I would feel bad with this award unless insurance was -- was paying

it or, you know, does the defendant have insurance what -- what do people think, if those type of comments come up, then you should remind that fellow juror of yours that you are not to consider whether the defendant has or does not have insurance in coming to your decision.

Now, interestingly, and you see this I think was in the -- the reply brief of the defense, they say look, in *Capanna* they called that type of argument, quote, incredibly inappropriate, end quote.

And while that is true, Judge, that's what the district court said of that argument and then it got appealed and the Nevada Supreme Courts says there's nothing inappropriate with that argument. You -- you are allowed to comment accurately on jury instructions that are given.

So, you have to understand the exact arguments that the defense is making here that this instruction actually draws attention to potential insurance coverage or that it is somehow inappropriate have already been considered by the Nevada Supreme Court in a medical malpractice case and rejected. And therefore, I should be allowed to do what every other plaintiff attorney in these cases is allowed to do, what Mr. Prince did and what the Nevada Supreme Court found was permissible.

And believe me, Judge, when I do this during closing argument, it's going to read almost word for word the exact comments that Mr. Prince made in the *Capanna* case so I can be assured that I don't, you know, overstep something and that I've

complied with that case personally.

And I will tell you, Judge, you know, some defense counsel they -- they act like oh, you know, Mr. Breeden is -- is being slimy or -- or sneaky here or something and all I would say in closing, Judge, is I -- I do a wild thing when I represent clients. I read other opinions by the Nevada Supreme Court and I use them to my client's advantage and there is nothing underhanded or sneaky or impermissible about that and I get very frustrated as a practitioner when judges see an issue like this and essentially say well, that may have been good for Dennis Prince, but I'm not going to allow that of Mr. Breeden.

And that's really a two-tiered system of justice that we have for, you know, certain attorneys in town get to make certain arguments and get good verdicts and then Mr. Breeden is left out in the cold. And I would ask you here just to follow the law on this point. It's very well briefed in front of you and what I intend to do with insurance coverage at trial has been ruled and found permissible by the Nevada Supreme Court.

THE COURT: Thank you. Ms. Hall.

MS. HALL: Your Honor, it is very illogical to suggest that when there is an appeal following a trial that the appellate court considers every single issue that was raised throughout the life of that trial. That's simply not how appeals work.

The appellate court considers the issues raised on appeal. I cited in the reply what issues were considered by the appellate

court in *Capanna*. Nowhere did the court consider whether or not it was appropriate to give that instruction in the first place in a case that was not a general negligence case, so that -- to say that that was approved by the appellate court is not accurate.

And it is also worth pointing out that the defense counsel who is a very good defense counsel in *Capanna*, he made the decision to not object during the closing argument to what he perceived to be attorney misconduct. So as a result of that, the appellate court was forced to consider whether there was attorney misconduct under that very heightened standard of irreparable and fundamental error. That's only, as you know, when there has been no timely objection made by the counsel who's -- now has an issue.

I -- if, you know, I -- I don't believe that should be permitted in this case. As the trial court in *Capanna* said, generally, you know, when -- the instruction is supposedly designed to protect the defense and when the defense objects, that particular trial court often didn't give such an instruction. I've never seen this instruction given and I -- I very clearly object.

And certainly, if it's given over my objection and there is similar conduct from plaintiff's counsel as to what Mr. Prince engaged in, in *Capanna*, I believe that myself or my partner would object to that and that it would be a very different standard considered by the appellate court. But I certainly don't believe that you have any direction from any of our higher courts that require this instruction be given and I don't think that it should be.

THE COURT: Okay. I actually did read *Capanna*, but I want to read it again so I'm going to reserve ruling and I'll -- I'll give you the ruling tomorrow before we start your calendar call, just because I want to re-read the case.

MS. HALL: Can I address --

MR. BREEDEN: Your Honor --

THE COURT: Yes.

MR. BREEDEN: Go ahead, Ms. Hall.

MS. HALL: I'm sorry, Your Honor. Can I address one point that I -- I had forgotten to address?

THE COURT: Yes.

MS. HALL: He raised the issue the -- the questioning regarding tort reform. I would propose, you know, the way that would be appropriate to handle that is to ask the panel do you have any strong feelings one way or another about lawsuits involving physicians. It's not to directly comment on the existence of tort reform. That's it, Your Honor, thank you.

MR. BREEDEN: Your Honor, if I could comment about your remark that you're going to review the *Capanna* case --

THE COURT: Uh-huh.

MR. BREEDEN: -- as often happens, sometimes things are addressed in a cursory manner in the opinion and I think in -- in the briefing in this particular case, we actually included appellant and respondent's brief in the *Capanna* case so that it was clearer the facts that the Nevada Supreme Court were hearing and ruling on

and I would say that the devil is in the details and I would encourage you to read those sections which are quoted again in the briefs from the *Capanna* case which clarified exactly what the arguments were and exactly what was done in the *Capanna* case.

And I -- I would remark by way that I -- I disagree with Ms. Hall's comments that the ruling was based on the fact that there was unobjected to a comment at trial. If you read the briefs, you'll see that Mr. Lauriu had apparently litigated several matters against Mr. Prince and was getting beaten and -- and didn't like it and he had filed a motion in limine on this issue which was somehow granted or denied in part and then this issue still arose.

So the -- the motion in limine would preserve the issue. It was not unobjected to conduct.

THE COURT: Okay. And just for clarification, I know with *Capanna* it's with regard to the instruction, but my inclination for the tort reform is no questions on tort reform. Obviously, if it comes up from a juror in questioning which it might, I will allow individual questioning as to that juror so that you can appropriately explore any biases or prejudice.

As to the voir dire on the insurance, generally speaking I don't see either how either side's insurance, medical malpractice or if it were another case, would be appropriate.

Again, I think both of you pointed out that affiliations with insurance companies, maybe personal experiences, things like that, that's okay to explore bias, but nothing with regard to premiums

and payments I don't think that's appropriate.

And in the last case I did, it did come up and obviously if it does from a person's personal perspective, we'll decide at that time how to handle it, but that's my inclination with regards to those two in the motion and then I'll read the case with regard to the instruction.

MR. BREEDEN: You know, Your Honor, I -- I don't mean to exhaustively spend your afternoon here, but I -- I've never seen a case before where plaintiff was not allowed to ask prospective jurors about their beliefs on caps in damages and -- and attitudes like that and frankly, there could be a juror on this jury pool that -- that wrote parts of KODIN and -- and lobbied for KODIN and -- and worked for that doctor's group to pass that law and if I'm not allowed to ask those questions, I don't know how that would ever be discovered. But I think that what you're going to do is give us a more detailed ruling tomorrow so I'll -- I'll await those comments.

THE COURT: All right. Anything else, Ms. Hall?

MS. HALL: Yes, just on the reserved issue, Exhibit A to my reply was the actual opening brief in *Capanna* and I think I referenced it throughout the reply. I think that would also be of assistance to the Court in -- in issuing a ruling on that.

THE COURT: All righty. Okay, so if there's nothing else, then I will see you tomorrow at calendar call and I think we put it at a separate -- yeah, at 10:30.

MS. HALL: Perfect.

THE CLERK: Judge, the defendants' motion for partial summary judgment?

THE COURT: It's -- it was a stip and order. It's off --

THE CLERK: Okay.

THE COURT: All right. Thank you so much. Have a good day.

MR. BREEDEN: Thank you, Your Honor.

MS. HALL: For the orders, Your Honor, do you want one order, two orders, or how would you like us to handle that?

THE COURT: I -- I'll let you guys decide, but I have been asking defendant to -- to do their motion in limine orders and plaintiff to do theirs, show it to opposing counsel, submit it to chambers, but if you guys want to do one, I'm fine with that. I'll leave that up to you guys.

MS. HALL: Okay. I like your suggestion. Thank you.

THE COURT: All right. Thank you. Have a good day.

MS. HALL: You too. Thank you.

[Proceedings concluded at 3:07 p.m.]

* * * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

Tracy A. Gegenheimer, CERT-282
Court Recorder/Transcriber

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

KIMBERLY D. TAYLOR, Plaintiff, vs. KEITH BRILL, M.D., WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA - MARTIN PLLC, UNITED HEALTH SERVICES, Defendants.	)	CASE NO. A-18-773472-C DEPT. NO. III **Transcript of Proceedings**

BEFORE THE HONORABLE MONICA TRUJILLO, DISTRICT COURT JUDGE

CALENDAR CALL

TUESDAY, SEPTEMBER 28, 2021

APPEARANCES:

For the Plaintiff: ADAM J. BREEDEN, ESQ.
[Via Video Conference]

For the Defendants: HEATHER S. HALL, ESQ.
[Via Video Conference]

RECORDED BY: REBECA GOMEZ, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript produced by transcription service.

TUESDAY, SEPTEMBER 28, 2021, AT 10:36 A.M.

THE COURT: Case number A-18-773472-C, *Kimberly Taylor versus Keith Brill*. Who is here on behalf of the plaintiff?

MR. BREEDEN: Good morning, Your Honor. Adam Breeden here on behalf of plaintiff, Kimberly Taylor.

THE COURT: And on behalf of defendant?

MS. HALL: Good morning, Your Honor. Heather Hall for defendant.

THE COURT: Good morning. So, we are on for calendar call, as well as the update on my ruling for Defendants' Motion in Limine Number 3, To Exclude Defendants' Insurance Coverage, that we heard argument on yesterday. I reviewed the case, as well as the attached Exhibits, and the Motion is going to be -- one second.

The Motion is going to be granted in part, and denied in part. As to the medical malpractice insurance, the Court finds it is not relevant. There will be no questions regarding the medical malpractice insurance or any other insurance other than what we talked about yesterday, which is: Is anybody associated with the insurance company, previously worked for an insurance company, have family associated with an insurance company? Those kind of initial questions are appropriate, but

nothing with specific regards to the facts of this case or the medical malpractice insurance.

As to the tort reform questions, I'm going to stand by what I said yesterday I was inclined to do, which is no tort reform, questions. There shouldn't be any discussion about KODIN or caps. I don't have a problem with counsel asking questions about potential verdicts, however, obviously, pursuant to *Khoury*, it shouldn't continuously go on and like -- in an attempt to indoctrinate the jury. So, you can question on: Are you okay with X amount of money, whether that's a high or low number? And, then, again, it shouldn't be repetitive.

And, then, finally, I think Mr. Breeden, correct me if I'm wrong, you had specifically asked the Court whether or not you could ask the questions listed in the Exhibit attached to your Opposition on pages 39 and 40. Is that correct?

MR. BREEDEN: I'm sorry, Your Honor. That doesn't sound familiar. In our brief, we did list some bullet points, I believe, on the fourth page that we would ask. I think you've ruled that those are off limits for voir dire or you made clear, in terms of voir dire, what you expect. I wonder if you -- what ruling you are making on the jury instruction and comments on the insurance jury instruction during closing.

THE COURT: So, I'm going to reserve ruling until we argue instructions on that one. But --

MR. BREEDEN: Thank you, Your Honor.

THE COURT: -- I recalled yesterday, I thought you had said you were going to keep your questions in line with the *Capanna*, the -- or briefs, which is what I was referencing, but, if you don't recall that, that's fine.

So, any questions based on that?

MR. BREEDEN: No, Your Honor.

MS. HALL: Not from --

MR. BREEDEN: But I'll state for the record that I intend to follow what was done in *Capanna* during closing.

MS. HALL: Bless you.

THE COURT: All righty. And, then, on to the calendar call portion. So, do we still anticipate -- bless you -- 10 to 14 days for trial?

MR. BREEDEN: Your Honor, on behalf of plaintiff, there is a couple of issues that need to be addressed with trial. The first is I'm not sure that I can answer your question until I know the Court's schedule for full days versus half days. I know that I felt with half days, we could maybe get this done in five calendar days, but the defense thought up to seven should probably be reserved, given the number of witnesses.

THE COURT: Does that include jury selection?

MR. BREEDEN: That would not include jury selection, which we understand is handled either the Thursday or Friday before the Monday trial start.

THE COURT: So, --

MR. BREEDEN: So, jury selection would definitely increase the amount of time that we would need.

THE COURT: So they get -- they set us for jury selection on Wednesdays and Thursdays. And we don't choose that date. They tell us. So, I won't know until I officially send over these are the parties that are announcing -- have announced ready and what are our dates for jury selection. So, it would be either the Wednesday or the Thursday and we could have, obviously, depending, one to two days for jury selection, and then we would start actually the following week.

I do have to hear my other calendars. I will say we will be starting on Tuesday, which would be the 12th, not the 11th. And, then, I have to hear -- I have a civil calendar, but that should be done by 10, 10:30. So, we can start at 10:30 probably. The 13th, I would have to hear my criminal calendar. Again, probably a 10:30 start, because I would advise everyone to come early. And, then, Thursday and Friday we should be able to go all day.

MR. BREEDEN: Your Honor, there is an issue that has to do with the week that this trial is set that I would

like to address with the Court. Unlike many medical malpractice cases, this trial was not given a firm setting. We were given a five-week stack. Unfortunately, there is an issue where the scheduling of this trial and the date that it begins may have a substantive effect on the outcome. We have recently filed or served an Offer of Judgment to the defense and the timing is such that if we begin this trial during the first week, the required amount of days would not have existed prior to trial. But if we start this trial any other week, including the second or third week, which is what plaintiff would request, then the Offer of Judgment would be valid.

It is unfortunate that a scheduling issue might substantively effect the rights of the parties here. Obviously, in discussing things with the defense, they want to go the first week so that the Offer of Judgment isn't valid, and we want to go the other weeks. All I would say is the public policy of the state is to encourage settlements and to encourage these Offers of Judgment. So, we would request that this trial be set on either the second or third week of this stack.

THE COURT: Okay. And, before I allow Ms. Hall to speak, while it wasn't a firm set, I think you're aware that medical -- that malpractice cases take priority. You're the only med-mal case set here, which is why you're

being called first. So, that being said, you should have known you were up to go first.

So, Ms. Hall, any response?

MS. HALL: We -- very briefly. We did know that, Your Honor. And, in fact, at the 2.67 that was held several weeks ago, that was discussed. That's in our Joint Pretrial Memorandum that we knew that we were first. We believed we would start on October 11th. So, that's not at all, you know, why the defense is taking the position -- because both plaintiff and defendants are taking the position that we start the -- we were going to start the first week because we have priority.

The Offer of Judgment that Mr. Breeden is referring to was served a few days late. It's not any tactic by the defense to ask that we be given the priority we both expected. So, I don't think that serving an Offer of Judgment, which was untimely, constitutes good cause to move this trial in any manner.

MR. BREEDEN: Your Honor, I would just disagree that the Offer of Judgment is late. It's perfectly on time for four out of the five weeks on this stack. This was not a firm setting and we would like to take advantage of that rule.

THE COURT: All right. So, I'm going to have to -- I'll trail this and I'm going to see what's going on with

my other cases and then we'll come back to this.

[Case trailed at 10:45 a.m.]

[Case recalled at 11:10 a.m.]

THE COURT: A-18-773472-C, *Kimberly Taylor versus Keith Brill.* On behalf of plaintiff, are you -- Mr. Breeden; on behalf of defendant, Ms. Hall. Are you guys still on?

MR. BREEDEN: This is Mr. Breeden, present.

THE COURT: Ms. Hall?

THE CLERK: You're on mute, Ms. Hall.

MS. HALL: Are you able to hear me now, Judge?

THE COURT: Yes. Okay.

So, I'm going to -- I'm not inclined to push this back into the stack. I'm going to set you on -- the official start date is the 12th, but we will begin jury selection on -- one second. Either the 6th or the 7th, and, obviously, I won't know until I tell them. So, I'll have to e-mail parties. And, then, I'll e-mail a final schedule, but, as I said before, we will be starting -- I do have to hear my morning calendar. So, most likely on Tuesdays and Wednesdays we will be starting at 10:30. And I'll send the schedule and, obviously, if there's scheduling issues, I will let you know.

And, so, you indicated seven days, not including jury selection. So that would be nine days, including jury

selection?

MR. BREEDEN: I think we'll definitely have to go into the next week, Your Honor. What time do you start on Mondays? Is that a full day or a half day?

THE COURT: Mondays I would start at 10:30 because I have a criminal calendar.

MR. BREEDEN: I don't -- Ms. Hall, do you want the 12th through the following Wednesday for trial then?

MS. HALL: I -- yeah. I think seven to nine days would be an accurate estimate. I have a firm setting on a 10-year-old retrial on October the 25th. So, I'm sure we will be done by that date, but I did want to make the Court and opposing counsel aware of that.

So, I think seven to nine is a generous, accurate estimate.

THE COURT: Okay. All right. So, then I will notify you as soon as we -- they send an e-mail out about when we're starting jury selection. And, then, obviously, if we are able to pick a jury quicker, we can just go right into the trial and we don't have to wait until the 12th, but we will be taking the 11th off. I'll leave that up to the parties if you can agree on that, once we, you know, get there. But I'll --

MS. HALL: Okay.

THE COURT: -- send you an e-mail about that and

some housekeeping matters, and I will let you know when they set us for jury selection.

MS. HALL: Thank you, Your Honor.

THE COURT: All right.

MR. BREEDEN: Thank you, Your Honor.

THE COURT: Thank you.

PROCEEDING CONCLUDED AT 11:12 A.M.

* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.

KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

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DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY D. TAYLOR, an Individual, Plaintiff, vs. KEITH BRILL, MD, FACOG, FACS, an Individual; WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA – MARTIN, PLLC, a Nevada Professional Limited Liability Company, Defendants.	**CASE NO.: A-18-773472-C** **DEPT: III** **MOTION TO RECONSIDER OR CLARIFY ORDER REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 2 TO EXCLUDE INFORMED CONSENT FORM AND TERMS OR ARGUMENT REGARDING "RISK" OR "KNOWN COMPLICATION", ON ORDER SHORTENING TIME** **HEARING REQUESTED**

COMES NOW, Defendants, KEITH BRILL, MD, FACOG and WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA – MARTIN, PLLC, by and through their counsel of record, ROBERT C. McBRIDE, ESQ. and HEATHER S. HALL, ESQ. of the law firm of McBRIDE HALL, and hereby submit their Motion to Reconsider or Clarify the Order Regarding Plaintiff's Motion in Limine No. 2 to Exclude Informed Consent Form and Terms or Argument Regarding "Risk" or "Known Complication" on Order Shortening Time.

This Motion is made and based upon the papers and pleadings on file herein, the points and authorities attached hereto and such argument of counsel, which may be adduced at the time of hearing such Motion.

DATED this 3rd day of October, 2021.

McBRIDE HALL

/s/ Heather S. Hall
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Attorneys For Defendants,
Keith Brill, M.D., FACOG and Women's Health Associates of Southern Nevada – Martin, PLLC

ORDER SHORTENING TIME

GOOD CAUSE APPEARING THEREFORE, it is hereby ORDERED that the time for the hearing on the instant **MOTION TO RECONSIDER ORDER REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 2 TO EXCLUDE INFORMED CONSENT FORM AND TERMS OR ARGUMENT REGARDING "RISK" OR "KNOWN COMPLICATION", ON ORDER SHORTENING TIME** ~~be shortened to the _____ day of _____, 2021 at the hour of _____ a.m./p.m.~~ in front of Department 3.

Defendant must serve opposing counsel by tomorrow (10/5) at 5 pm. Opposition is due by 10/6. No written replies allowed. A minute order will be issued and no hearing will be held.

Dated this 4th day of October, 2021

FD9 B72 983E ADD7
Monica Trujillo
District Court Judge

DECLARATION OF HEATHER S. HALL, ESQ. IN SUPPORT OF ORDER SHORTENING TIME

STATE OF NEVADA)
)
COUNTY OF CLARK)

I, HEATHER S. HALL, ESQ. declare under penalty of perjury pursuant to NRCP 43(c) and NRS 53.045 as follows:

1. I am an attorney duly licensed to practice law in the State of Nevada and I am a partner of the law firm of McBride Hall. I have personal knowledge of the matters stated herein and, if called to testify, would and could testify thereto.

2. I am counsel for Defendants Keith Brill, M.D. and Women's Health Associates of Southern Nevada – Martin PLLC, in the above-captioned matter.

3. This Declaration is being submitted pursuant to EDCR 2.26, in support of Defendants' Request for an Order Shortening Time.

4. Pursuant to EDCR 2.24, "Good cause" exists to hear this Motion on an Order Shortening Time.

5. Jury selection is set to begin in this case on October 6th or 7th. Trial is set to commence on Tuesday, October 12, 2021.

6. If the instant Motion for Reconsideration or Clarification is heard in the regular course, the issues raised will be moot, as trial will be completed prior to any hearing.

7. Defendants request this Motion be heard on an expedited basis, prior to trial commencing on October 12, 2021.

8. Good cause exists to hear this Motion on shortened time to clarify and rectify important evidentiary issues prior to commencement of trial.

9. I have provided Plaintiff a copy of this Motion without the Court's signature on the Order Shortening Time to give Plaintiff as much time as possible to address this Motion in the event that it is heard on an expedited basis.

10. This Motion is not filed for the purpose of delay.

11. For the reasons set forth above, it is respectfully requested that this matter be heard on an Order Shortening Time, with the hearing date prior to starting trial on October 12, 2021.

I declare under penalty of perjury that the foregoing is true and correct.

FURTHER YOUR DECLARANT SAYETH NAUGHT.

DATED this 3rd day of October, 2021.

/s/ Heather S. Hall
HEATHER S. HALL, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS & INTRODUCTION

The Plaintiff, Kimberly Taylor, filed a "Complaint for Medical Malpractice" on April 25, 2018, against Defendants Keith Brill, M.D., FACOG, FACS and Women's Health Associates of Southern Nevada, among other healthcare providers. In her Complaint, Plaintiff contended that she underwent a dilation and curettage with hysteroscopy with fibroid removal and hydrothermal ablation surgery at Henderson Hospital on April 26, 2017, which was partially performed. *See* Paragraphs 17 and 18 of Plaintiff's Complaint. Plaintiff further contended that during her April 26, 2017 surgery, she sustained a perforation to the uterine wall and small bowel. *See* Paragraph 19 of Plaintiff's Complaint. Defendants deny all allegations of negligence.

There are two central issues for the jury to decide in this case: (1) whether the uterine and bowel perforation can occur in the absence of negligence, and if so, did it; and (2) whether the alleged failure to recognize and repair the bowel perforation intraoperatively was below the standard of care. Plaintiff, through her expert, intends to tell the jury that Dr. Brill fell below the standard of care in delaying identification and treatment of Ms. Taylor's bowel perforation. *See* **Exhibit "A"**, Dr. Berke's Deposition, 42:10 – 16.

Defendants have presented expert reports stating that not only is a uterine and bowel perforation a known risk and complication of the surgery Plaintiff underwent, but Ms. Taylor had an abnormal uterus that was retroverted and bicornuate in shape, which is associated with increased incidence of perforation. *See* Expert Reports of Stephen McCarus, attached hereto as **Exhibit "B"**. These factors were presented to Ms. Taylor prior to her surgery and discussed with her by Defendant Dr. Brill. A detailed consent form was signed by the Plaintiff as a result of these conversations. The consent form memorialized Plaintiff's acknowledgment that she was advised of the risks and complications of the surgery including:

> Perforation of the Uterus: The most serious complication of the procedure is the creation of a perforation, or hole, in the wall of the uterus. This occurs when the dilator, hysteroscope, or ablation probe is pushed too far or with too much force. **Perforation of the uterus may lead to injury of other structures and organs within the abdomen** (blood vessels, nerves, intestines, and bladder), bleeding or

infection. **Perforation is not common, however, may require another operation to be treated appropriately.**

See **Exhibit "C"**, BRILL MD 000051, BRILL MD 000062 (emphasis added).

This consent form explicitly advises Ms. Taylor that injury to the uterus and bowel (intestines) is a potential complication which may require a second surgery to treat appropriately. As such, the defense's expert, Steven McCarus, M.D., FACOG, has opined to a reasonable degree of medical probability that Dr. Brill did not fall below the standard of care in his care and treatment of the Plaintiff.

On August 18, 2021, Plaintiff filed her Motion in Limine No. 2 to Exclude Informed Consent Form and Terms or Argument Regarding "Risk" or "Known Complication." Plaintiff's Motion in Limine sought to exclude highly relevant evidence that the Plaintiff and Dr. Brill discussed that perforation is a known risk of surgery that can occur in the absence of negligence and signed a consent form that expressly stated that she knew that a bowel perforation was a known risk of surgery and with that information at hand decided to proceed with the April 26, 2017 surgery.

Plaintiff appeared to premise her Motion on a red herring argument that admission of a consent form would confuse the jury that the Plaintiff had consented to negligent surgery and upon the erroneous legal conclusion that "...there is no assumption or risk or known complication defense in a medical malpractice case...". *See* Plaintiff's Motion in Limine No. 2, at Pages 7:2 – 7:5 and 8:1 – 8:2.

Defendants Dr. Brill and Women's Health Associates of Southern Nevada filed their Opposition to Plaintiff's Motion on September 1, 2021. Plaintiff filed a Reply to her Motion in Limine on September 8, 2021. Defendants filed a Supplemental Reply on September 17, 2021, and Plaintiff filed her Supplemental Reply brief that same day, September 17, 2021.

On September 27, 2021, this Honorable Court heard Plaintiff's Motion in Limine No. 2, and granted the Motion in part and denied it in part. Specifically, this Court ruled that perforation being a known risk of Ms. Taylor's April 2017 surgery is relevant and will be allowed in with sufficient foundation for the testimony. *See* Portion of Transcript of September 27, 2021 Hearing,

at Page 15:24 - 16:2, attached hereto as **Exhibit "D"**. However, the Court also held that any verbal discussions between Dr. Brill and the Plaintiff, where they discussed the risks and complications of surgery, would be precluded as not relevant and potentially confusing to the jury. *Id.* at Page 15:20 - 15:23. The Court further ruled that the evidence that Plaintiff executed an informed consent form would be precluded from evidence. *See* **Exhibit "D"**, Page 15:18 – 15:19. This Court reserved ruling on the issue of use of a jury instruction advising the jury that it is irrelevant whether perforations in general are a known risk and complication would be reserved for ruling until such time as jury instructions were settled. *Id.* at Page 16:3 – 16:7.

In practical effect, Defendants are permitted to introduce evidence that this was a known risk and complication, but without being permitted to refer to the consent form or discussions between Dr. Brill and the patient about the known risks prior to surgery, it will be impossible to establish that this was **known to the patient**. The discussions that Plaintiff had with Dr. Brill regarding the known risks and complications of her subject surgery are highly relevant to whether Plaintiff's alleged injury can happen with this type of procedure. Further, it is not clear whether ***all*** consent forms are precluded. In addition to the consent forms signed at Dr. Brill's office, Ms. Taylor signed several consent forms at Henderson Hospital for the April 26, 2017 surgery, including a "Consent to Surgery and Other Invasive Procedures." The Henderson Hospital consent forms were not specifically addressed in Plaintiff's Motion, but Defendants do not want to run the risk of potentially violating an Order of this Court in the event that the reconsideration does not lead to the admission of Dr. Brill's consent forms. Therefore, clarification on that issue is warranted.

This Motion for Reconsideration concerns the issue of admissibility of critical evidence in the form of the discussion that the Plaintiff had with Dr. Brill prior to her subject surgery as well as the consent form she signed pursuant to those discussions. Defendants respectfully request that this Court reconsider its prior holding, on Order Shortening Time, and deny Plaintiff's Motion in Limine No. 2 in its entirety.

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II.

STANDARD OF REVIEW

It is within the discretion of the Court to grant leave for a motion, once heard and disposed of, to be renewed and reheard. *See* EDCR 2.24. Specifically, EDCR 2.24(b) (revised in January of 2020) states the following:

> "A party seeking reconsideration of a ruling of the court, other than any order that may be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60, must file a motion for such relief within 14 days after service of written notice of the order of judgment unless the time is shortened or enlarged by order." *See* E.D.C.R. 2.24.[1]

In other words, a court has inherent authority to reconsider its prior orders. *See Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). Rehearing or reconsideration is also appropriate when a matter of law was overlooked or misapprehended in the Court's prior opinion. *See Nevius v. Warden*, 114 Nev. 664, 667, 960 P.2d 805, 806 (1998). Additionally, rehearing is appropriate when it will promote substantial justice. *Id.*

A court may consider a previously decided issue if the decision is "clearly erroneous." *See Hansen v. Aguilar*, 2016 WL 3136154, *1 (Nev. App. May 25, 2016) (citing *Masonry & Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997)). The "basic grounds" for reconsideration include "'correcting manifest errors of law or fact,' 'newly discovered or previously unavailable evidence,' the need 'to prevent manifest injustice,' or a 'change in controlling law.'" *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 245 P.3d 1190, 1193 (2010) [citation omitted] (analyzing reconsideration under N.R.C.P. 59(e)). Reconsideration of a prior decision should be granted when "there is a reasonable probability that the court may have arrived at an erroneous conclusion or overlooked some important question necessary to a full and proper understanding of the case." *See State v. Fitch*, 68 Nev. 422, 426, 233 P.2d 1070, 1072 (1951) (citation omitted).

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[1] While a signed written Order has not yet been entered nor a draft Order provided to defense counsel for review, Defendants are respectfully submitting this Motion for Reconsideration on Order Shortening Time due to the upcoming October 12, 2021 trial. The underlying Motion was heard by this Honorable Court on September 27, 2021

The term "erroneous" is defined as "[i]ncorrect; inconsistent with the law or facts." Black's Law Dictionary (11th ed. 2019). A district court's findings have been held to be "clearly erroneous" where they were "not based on substantial evidence." *See Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 803–04 (1998) (quoting *Gibellini v. Kindt*, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994)). The Court in *Lorenz* then defines the term "substantial evidence" as that which "a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations and internal quotation marks omitted). In other words, an erroneous decision involves (i) an inconsistency with the law or facts, and/or (ii) a lack of substantial evidentiary support.

Here, Defendants respectfully request that this Honorable Court reconsider its ruling on Plaintiff's Motion in Limine No. 2, as it pertains to Ms. Taylor's discussions with Dr. Brill regarding the risks and complications of her subject surgery and the consent form signed therefrom as such is highly relevant as show that uterine and bowel perforation are known risks, which is why they were disclosed to the patient prior to surgery. It is further relevant to show

III.

ARGUMENT

A. IN ORDER FOR THE JURY TO DETERMINE WHETHER PLAINTIFF'S ALLEGED INJURIES OCCURRED IN THE ABSENCE OF NEGLIGENCE, THE JURY MUST BE PERMITTED TO CONSIDER ALL RELEVANT EVIDENCE.

The central issues in this case for the jury to decide are whether the perforation of Plaintiff's uterine wall and bowel could occur in the absence of negligence, and if so, whether it did. To decide these issues, the jury must be permitted to consider all relevant evidence, including the discussions that Dr. Brill had with the Plaintiff prior to surgery and the consent forms stemming therefrom.

To be relevant, evidence must have "some tendency in reason to establish a proposition material to the case." *Land Resources Dev. v. Kaiser, et al.*, 100 Nev. 29, 34, 676 P.2d 235, 238 (1994); NRS 48.015 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence"). There must be a "clear connection" between the evidence and

the proposition for which it is offered. *See Beck v. State*, 105 Nev. 910, 912, 784 P.2d 983, 984 (1989).

Nevada's patient bill of rights and almost any surgery standard of care require a surgeon to discuss significant medical risks and obtain informed consent. *See* NRS 449.710(b) Specific Rights; *see also Smith v. Cotter*, 107 Nev. 267, 271, 810 P.2d 1204 (Nev. 1991). As such, consent was necessarily discussed by the Plaintiff and Dr. Brill prior to her April 2017 surgery.

Evidence of known complications associated with the surgery is very relevant to the issues of negligence. Plaintiff, through her expert, is asserting that Plaintiff's alleged injuries are as a result of negligence. The defense experts, however, argue that perforation can and does happen even when a physician follows the proper standards of care, especially when operating on a patient with anatomical complications like Plaintiff. This, in part, is why the risk is disclosed prior to surgery. It is not disclosed for the purpose of having the patient assume the risk of any alleged negligence.

Evidence that the risk of uterine and bowel perforation is probative and highly relevant to the issues in this matter in that this is a kind of injury that can happen with this type of procedure, and providing informed consent to prepare the Plaintiff for the potential that it could occur is relevant. Excluding this evidence is highly prejudicial to the Defendants, whereas any perceived prejudice to Plaintiff can be cured by means of a limiting instruction advising the jury that they are not to consider that the Plaintiff consented to a negligently performed surgery. *See Busick v. Trainor*, 437 P.3d 1050, No. 72966, 2019 Nev. Unpub. LEXIS 378, at *4-5 (Nev. 2019).

Plaintiff did not cite to any Nevada case law to support the contention that evidence that a patient discussed known risks and complications of a surgery with her surgeon prior to the procedure is irrelevant, confusing, or should otherwise be excluded. Rather, Plaintiff's argument is that because "...as a matter of law there is no assumption or risk or known complication defense in a medical malpractice case" consent is irrelevant. *See* Plaintiff's Motion in Limine No. 2, at Page 8:1 – 8:2). Again, Plaintiff has not cited to any Nevada case law to support this contention. On the other hand, the Nevada Supreme Court has previously held that a district court's decision to allow in evidence of a consent form signed by the Plaintiff along with a jury instruction that the

fact the Plaintiff consented to the surgery did not grant consent for the procedure to be performed negligently was not an abuse of discretion "...because the jury was properly instructed to not consider Ricky's informed consent as consent to a negligently performed hip replacement." *See Busick v. Trainor*, 437 P.3d 1050, No. 72966, 2019 Nev. Unpub. LEXIS 378, at *4-5 (Nev. 2019).

Additionally, the Nevada Supreme Court has recognized that the mere happening of a bad result, by itself, is insufficient to find negligence. *See Gunlock v. New Frontier Hotel Corp.*, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962) ("The mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability."); *see also Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 194 P.3d 1214 (2008). The jury is entitled to consider evidence that shows the application of that principle to the facts of this case.

Several, non-Nevada courts have held that informed consent evidence – such as testimony or a list of risks that appear on an informed consent sheet – may be relevant to the question of negligence. *See, e.g., Brady v. Urbas*, 111 A. 3d 1155, 1162 – 64 (Pa. 2015) (declining to hold that all aspects of informed consent information are always "irrelevant in a medical malpractice case", noting that the threshold for relevance is low due to the liberal "any tendency" prerequisite); *Viera v. Cohen*, 283 Conn. 412, 927 A.2d 843, 868 – 69 (Conn. 2007) (finding that a trial court reasonably admitted evidence of informed consent where the applicable standard of care obligated the doctor to discuss particular risks); and *Liscio v. Pinson*, 83 P.3d. 1149, 1156 (Colo. Ct. App. 2003) (evidence pertaining to a patient's informed consent admissible when a plaintiff's inquiries opened the door to defendants' inquiries).

In *Brady*, the Pennsylvania Supreme Court noted that it was important to recognize that informed consent evidence is multi-faceted:

> "it reflects the doctor's awareness of possible complications, the fact that the doctor discussed them with the patient, and the patient's decision to go forward with treatment notwithstanding the risks."
>
> *Brady v. Urbas*, 111 A.3d at 1162 – 64.

Here, the multi-faceted nature of the potential informed consent evidence is demonstrated by the facts and testimony in the record. While this Honorable District Court has currently ruled that evidence demonstrating that perforation is a known risk of surgery is relevant and will be

allowed in at the time if trial, the preclusion of testimony regarding the fact that this known complication can and does occur in the absence of negligence which is why it was discussed with Plaintiff prior to surgery presents practical issues at the time of trial of how Defendants can present this evidence. This is particularly true as Defendants' medical expert properly disclosed in his expert report his opinions regarding the consent form. *See* Transcript of September 27, 2021 Hearing, at Page 16:9 – 16:17, attached hereto as **Exhibit "D"**; *See also*, **Exhibit "B"**, Dr. McCarus's February 16, 2021 Report, MCCARUS 000005. In order to show that perforation of the uterus and bowel are known risks of surgery, Defendants must, respectfully be allowed to offer evidence that this information was discussed with Plaintiff prior to surgery and that she signed a form memorializing such conversations.

This Court's ruling that such discussions about complications and consent are *per se* irrelevant is unduly prejudicial to Defendants. As such, Defendants Dr. Brill and Women's Health Associates of Southern Nevada – Martin, PLLC, respectfully request that this Court reconsider its prior decision and fully deny Plaintiff's Motion in Limine No. 2. This information is relevant and any potential confusion to the jury can be sufficiently addressed through a limiting instruction as approved by the Nevada Supreme Court in *Busick v. Trainor*, 437 P.3d 1050, No. 72966, 2019 Nev. Unpub. LEXIS 378, at *4-5 (Nev. 2019).

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IV.

CONCLUSION

Based upon the foregoing, Defendants respectfully request this Honorable Court reconsider its previous decision granting in part Plaintiff's Motion in Limine No. 2 to Exclude Informed Consent Form and Terms or Argument Regarding "Risk" or "Known Complications" to allow in evidence that Ms. Taylor had a discussion with Dr. Brill to discuss the risks and complications of the subject surgery and that she signed an informed consent that detailed these risks prior to the procedure. If this Court is not inclined to allow the consent form from Dr. Brill's office into evidence, Defendants seek clarification on whether **all** consent forms related to Ms. Taylor's April 26, 2017 surgery are excluded.

DATED this 3rd day of October, 2021.

McBRIDE HALL

/s/ Heather S. Hall
ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 7082
HEATHER S. HALL, ESQ.
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8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Attorneys For Defendants,
Keith Brill, M.D., FACOG and Women's Health Associates of Southern Nevada – Martin, PLLC

EXHIBIT "A"

EXHIBIT "A"

In the Matter Of:

Taylor, Kimberly vs Brill, M.D.

DAVID BERKE, D.O.

July 19, 2021

Job Number: 775800

A. That would be much less than the other. I would imagine 1 to 2 percent, uncommon.

Q. In this particular case, was Dr. Brill aware of those conditions of Ms. Taylor before he began the hysteroscopy?

A. Yes.

MR. BREEDEN: Those are all the questions that I have.

BY MS. HALL:

Q. Just a few follow-up, Dr. Berke. The opinions that Mr. Breeden just covered with you regarding let's start with Bruce Hutchins and Henderson Hospital. Overall, one of the opinions that you've offered in this case is that there was a delay in identifying and treating Ms. Taylor's bowel perforation, correct?

A. Correct.

Q. And the standard of care violations that you identify in this affidavit for Bruce Hutchins and Henderson Hospital, the standard of care violation by those two individuals or entities, you do believe those actions did contribute to a delay in diagnosing and treating her bowel perforation?

A. I do.

Q. And same questions with respect to Dr. Christensen and St. Rose Hospital, and the decision not to admit

Ms. Taylor when she presented to the E.R., do you believe those violations of the standard of care which you identified did contribute to a delay in diagnosing and treating her bowel perforation?

A. I do.

Q. In fact, and I'm happy to show it to you, but in that February report that you authored in this case, you noted that the violation of standard of care by Dr. Christensen led to increased pain and suffering and a worsening of the patient's condition when diagnosis was delayed. Is that still your opinion today?

A. Yes.

MS. HALL: Okay. That's all I have, Dr. Berke.

BY MR. BREEDEN:

Q. Just a quick follow-up to that. So during Dr. Brill's procedure, there is an injury or perforation to the uterus and the bowel of Ms. Taylor. At that point will Ms. Taylor require a bowel resection procedure regardless of when this is diagnosed, or in your opinion, was it the delay in diagnosis that caused the need for the resection surgery?

MS. HALL: Form, foundation. It's beyond the scope and it asks for a new opinion which has never been disclosed before.

Q. You can answer.

A. The delay did not cause -- the initial injury was

EXHIBIT "B"

EXHIBIT "B"

STEVEN McCARUS, MD, FACOG
McCarus Surgical Specialists for Women
Advent Health Gynecology
100 N Edinburgh Dr #102, Winter Park, FL 32792

February 16, 2021

Heather Hall
McBride Hall
8329 West Sunset Road,
Suite 260
Las Vegas, Nevada 89113

Re: *Taylor v. Brill, MD*

Dear Ms. Hall:

Thank you for asking me to provide my opinions in this case regarding the care and treatment Keith Brill, MD provided to Kim Taylor. I have reviewed all of the materials your office has provided me. Based upon my review of those materials, as well as my education, training and extensive practice as a Board Certified OB/GYN surgeon and a Fellow of the American College of Obstetricians and Gynecologists, it is my opinion to a reasonable degree of medical probability that Dr. Brill fully complied with the standard of care in the care and treatment he provided.

Background & Qualifications

I graduated cum laude from West Virginia University in 1977. I obtained my medical degree from Marshall University School of Medicine in 1982. I then completed a residency in obstetrics-gynecology at Greater Baltimore Medical Center. I was Chief Resident from 1985 – 1986. I was certified by the American Board of Obstetrics and Gynecology in 1989 and have continuously recertified. I am a Fellow of the American College of Obstetricians and Gynecologists I am currently licensed to practice medicine in Florida, Nevada and Texas. I am Chief of Gynecological Surgery at AdventHealth Celebration and Winter Park and the Founder/Director of McCarus Surgical Specialists for Women. In addition to my practice, I currently serve as an Assistant Professor in the Department of OB/GYN at University of Central Florida.

A complete copy of my C.V. is provided with this report. I am familiar with the issues in this case and am qualified to offer expert opinions regarding Dr. Brill's care and treatment of Kim Taylor.

Records Reviewed

To date, I have reviewed the following documents:

1. Complaint with attached expert affidavits
2. Medical records from Women's Health Associates (BRILL 0001-118)
3. Henderson Hospital Operative Report of 4/26/17 (2 pages)
4. Henderson Hospital medical records (HH 0001-200)
5. St. Rose Dominican Hospital – Siena 4/27/17 First ER (SR 1- 0001-24)
6. St. Rose Dominican Hospital – Siena 4/27/17 Admit (SR 2- 0001-85)
7. Deposition transcript of Plaintiff Kim Taylor
8. Plaintiff's Responses to Discovery

I have requested all pertinent documents in this case, including deposition transcripts. It is my understanding, as of the date of this report, only Ms. Taylor's deposition is available for my review. I will review any additional document as they are made available to me.

Summary of Care

Ms. Taylor was a 45 year-old woman who treated with Dr. Brill for several years prior to the incident in question. She had a history of menorrhagia and had a bicornuate uterus with a fibroid. After consulting with Dr. Brill, she agreed to dilation and curettage (D&C) with hysteroscopy with fibroid removal and hydrothermal ablation, all to be performed by Dr. Brill. Dr. Brill's April 21, 2017 pre op note states "Discussed procedure, options, risks and complications as well as benefits" and he documents similar information on the day of surgery.

On April 26, 2017, Ms. Taylor presented to Henderson Hospital for the referenced surgical procedure. During the resection portion of procedure Dr. Brill noticed a uterine perforation while advancing the camera. Upon identifying the perforation, Dr. Brill stopped the procedure to investigate the extent of the damage by direct visualization with a diagnostic hysteroscope. He documents finding an anterior perforation, but seeing no evidence of bowel injury or injury to other organs. Because he saw no other injury to the bowel or other organs, Dr. Brill determined that it was not necessary to perform a diagnostic laparoscopy. Due to the perforation, Dr. Brill did not proceed with the resectoscope and did not utilize the endometrial ablation device. He performed the curettage, removing a small amount of endometrial tissue, and stopped the procedure. Ms. Taylor was taken to recovery in stable condition.

While in recovery at Henderson Hospital, Ms. Taylor was under the care of Bruce Hutchins, RN, where she remained for approximately 7 hours. During her postoperative stay, she was medicated for ongoing abdominal pain and nausea and thereafter

discharged.

Approximately 7.5 hours after being discharged from Henderson Hospital (on 4/27/17 around 12:30 a.m.), Ms. Taylor was transported by ambulance to St. Rose Dominican – Siena Hospital where she was treated by Dr. Todd Christiansen. Ms. Taylor continued to complain of extreme abdominal pain and diffuse torso pain. A CT scan of her abdomen and pelvis were performed which showed postoperative pneumoperitoneum and small to moderate ascites. Ms. Taylor was then treated for her nausea and was discharged after approximately 3 hours. She was instructed to return if her condition worsened and to follow-up with the surgeon, Dr. Brill.

Approximately 6 hours after being discharged from St. Rose Hospital, Ms. Taylor returned to St. Rose Hospital via ambulance complaining of worsening abdominal pain. She arrived at approximately 1:30 p.m. with complaints of diffused sharp and burning abdominal pain in all quadrants, radiating to her shoulders and groin. Dr. Brill was called at 2 p.m. and Samantha Schoenhaus, D.O., the OB/GYN who was covering for Dr. Brill, returned the call. Once labs were available, Dr. Schoenhaus did not want to start antibiotics at that time. Dr. Schoenhaus personally evaluated Ms. Taylor in the emergency department and she was admitted to WHASN's service. IV antibiotics were started and the patient was kept NPO.

Dr. Schoenhaus's Initial H&P documents that there was an incidental uterine perforation during Dr. Brill's procedure and the procedure was aborted. CT results demonstrated intraperitoneal fluid and air which was reported by the radiologist as post op surgical changes. Dr. Schoenhaus indicated that, if her condition worsened, she may need additional surgery or evaluation by a general surgeon.

Later that day, Ms. Taylor was seen and evaluated by general surgeon Elizabeth Hamilton, M.D. Dr. Hamilton performed an examination and reviewed the CT findings which showed free air and free fluid that Dr. Hamilton thought could likely be the result of a perforated viscus or the result of the gynecologic procedure itself. On exam, she had rigid abdomen with peritoneal signs throughout.

Dr. Hamilton consented the patient for a diagnostic laparoscopy with possible exploratory and she was taken to the operating room. Dr. Hamilton performed the surgery with Jocelyn Ivie, M.D. assisting. The diagnostic laparoscopy was converted to an exploratory laparotomy. Intraoperatively, she found a 3 cm perforation of the small bowel about 1 foot proximal to the terminal ileum. Dr. Hamilton successfully performed a small bowel resection and anastomosis. The surgery was completed with no complications.

Following surgery, Dr. Brill documents that he saw the patient on 4/28/17 and reviewed with her the perforation that had occurred during the hysteroscopy he performed. Per his documentation, at the time of the perforation, he did not suspect that

the myomectomy device was actively cutting. He also did not see any bowel adjacent to the uterine perforation. Because Dr. Brill was beginning an in-house OB laborist shift at another hospital when he was notified of her presentation to the emergency department, Dr. Ivie (on-call physician for the group) assisted with Dr. Hamilton's surgery.

She continued to be followed by surgery and WHASN. She was seen by Dr. Brill again on post-op day 2, 4/29/17, and reported she was getting better and ambulating. Dr. Brill saw her post-op day 3 and she was having difficulty with passing flatus and advancing her diet. On 5/3/17, she was seen by Dr. Brill. His documentation states that he discussed with the patient that if her vaginal bleeding did not improve, he would recommend either medical treatment or hysterectomy once she was healed from the bowel surgery.

That same day, infectious disease was consulted due to lack of appetite and concerns her condition was not improving. A repeat CT demonstrated a resolved ileus. She was cleared for discharge by OB, surgery, and ID on 5/6/17 and discharged home on 5/6/17, 9 days after admission.

Expert Opinions

Based upon my review of the materials, to a reasonable degree of medical probability, Dr. Brill and Women's Health Associates of Southern Nevada fully complied with the standard of care in the care and treatment provided to patient Kim Taylor.

Plaintiff's expert, Dr. Berke, states that Dr. Brill fell below the standard of care by causing the perforations of Ms. Taylor's uterine wall and small bowel with use of a thermal instrument, continuing the surgical procedure despite noting the perforation injury, failing to properly evaluate and diagnose the extent of the damage to Ms. Taylor following discovery of the perforation to her uterine wall and failing to inform and instruct PACU of the uterine perforation and to advise them to look for specific concerns which could evidence additional damage and require further examination. I disagree with Dr. Berke's criticisms and will address each of them.

The surgery Dr. Brill performed on April 26, 2017 was indicated and appropriate surgical technique was utilized. It is appropriate to treat a patient of Ms. Taylor's age with abnormal uterine bleeding via hysteroscopic approach and the instrumentation Dr. Brill used was appropriate.

During the procedure, Ms. Taylor experienced a known risk and complication – uterine perforation. This known risk and complication occurs even without a breach of the standard of care. The patient's complication was not caused by any deviation in the standard of care on the part of Dr. Brill. The fact that Ms. Taylor has a retroverted uterus likely contributed to her complication. In the Op Note, her uterine horns were noted to be very narrow which increases the potential for perforation. It was not a deviation of the

standard of care.

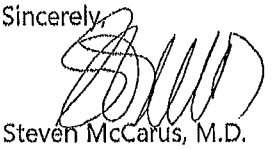
Not only is this a known risk, but the patient had an abnormal uterus. The uterus was retroverted, meaning the uterus tilts back, instead of up to the bladder floor. A retroverted uterus that is bicornuate in shape and abnormal with the submucous fibroid and/or septum is associated with an increased incidence of uterine perforation, in particular the anterior wall, which in fact is exactly where the perforation occurred. These factors were well known by the patient and Dr. Brill as noted at the April 4, 2017 visit, prior to the April 26, 2017 surgery. A detailed consent form was signed by Ms. Taylor.

I disagree with Dr. Berke that he continued the procedure. Dr. Brill immediately noticed a perforation of the uterus anteriorly, following the resection. Dr. Brill did the appropriate thing upon recognition of the uterine perforation. He stopped the procedure. I also disagree that Dr. Brill needed to perform a laparoscopy to inspect the bowel. The standard of care does not always require a laparoscopy to be performed. That is only necessary if Dr. Brill saw some evidence of possible bowel injury or had some reason to suspect that was a possibility. His Op Note states: "No evidence of bowel or other organs in area of uterine perforation". If Dr. Brill directly visualized the area and saw no evidence of injury to the bowel or other organs, scoping the patient was not required by the standard of care. This is a known risk and complication that can and does occur in the absence of negligence. Dr. Brill recognized it immediately and met the standard of care. He noted the complication of the uterine perforation in his operative report under the heading complication.

I am unable to render an opinion on Dr. Brill's communications with the PACU nurses, as I have not received a deposition of Dr. Brill or the PACU nurses. I can state that, generally, PACU nurses are trained to look for signs and symptoms of surgical complications and to relay those to the physician if there is any change in the patient's condition. I see no evidence that any nurse failed to do so here because of an alleged lack of communication of the intraoperative complication to the PACU. Assessment of pain and treatment would be expected due to the nature of the procedure. Vital signs remained normal as did the examination throughout the recovery period and prior to discharge. The patient was given postoperative material including uterine perforation as a complication.

All of my opinions expressed in this report are held to a reasonable degree of medical probability. Please continue to provide me with materials as they become available and I will notify you if my opinions change in any regard.

Sincerely,



Steven McCarus, M.D.

STEVEN McCARUS, MD, FACOG
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100 N Edinburgh Dr #102, Winter Park, FL 32792

May 17, 2021

Heather Hall
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Las Vegas, Nevada 89113

Re: *Taylor v. Brill, MD*

Dear Ms. Hall:

Since my initial report, I have reviewed the following items:

1. Deposition transcript of Szu Nien Yeh, M.D.
2. Plaintiff's Initial Expert Disclosure
3. Expert Report of David Berke, D.O.
4. Deposition transcript of Keith Brill, M.D.

These materials do not change my opinions discussed in my prior expert report. Dr. Brill's care and treatment met the standard of care. Plaintiff's expert, Dr. Berke, acknowledges that single perforation of the uterus is a known complication of the procedures performed by Dr. Brill that can occur in the absence of negligence, but claims the size means it was negligence. I disagree with the opinion of Dr. Berke that the size of a perforation determines whether or not a surgeon fell below the standard of care. Uterine perforation is a known risk and complication and the fact that it occurred here does not lead to the conclusion that the standard of care was violated.

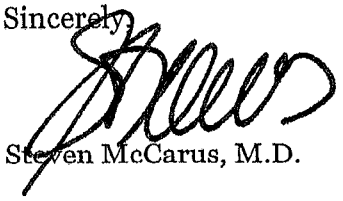
Bowel perforation is also a known risk and complication that occurred in the absence of any violation of the standard of care. At his deposition, Dr. Brill explained that he had clear visualization of the uterine perforation and was able to see there was no injury to the bowel at the time of the hysteroscopy. Based upon this information, he did not perform a laparoscopy and one was not required to be performed. At his deposition, Dr. Brill explained that when he noted the uterine perforation, he stopped the procedure before getting to the hydrothermal ablation. This was appropriate and within the standard of care.

As for communicating the known uterine perforation to the patient, the standard of care does not require the physician to tell the patient in the recovery room that there

was uterine perforation. It was part of the procedure and Dr. Brill appropriately dictated it into his Operative Report which was timed 10:08 a.m. At his deposition, Dr. Brill explained that it is not his custom and practice to speak to a patient directly after anesthesia. He testified that after dictating his Operative Report, he spoke to her family about the uterine perforation and his decision not to continue with the remainder of the surgery. Dr. Brill was never contacted by the PACU nurse about this patient.

All of my opinions expressed in this report are held to a reasonable degree of medical probability. Please continue to provide me with materials as they become available and I will notify you if my opinions change in any regard.

Sincerely,



Steven McCarus, M.D.

STEVEN McCARUS, MD, FACOG
McCarus Surgical Specialists for Women
Advent Health Gynecology
100 N Edinburgh Dr # 102, Winter Park, FL 32792

August 31, 2021

Heather Hall
McBride Hall
8329 West Sunset Road,
Suite 260
Las Vegas, Nevada 89113

Re: *Taylor v. Brill, MD*

Dear Ms. Hall:

I have recently reviewed the new report from Dr. Berke. In it, he offers additional opinions and corrects several factual errors in his prior reports. Specifically, Dr. Berke now understands the correct size of the bowel and that the hydrothermal ablation portion of the procedure was never completed.

I continue to disagree with Dr. Berke's opinion that Dr. Brill caused the perforations during use of the yellow pedal to activate the RF resection device. It is more likely than not that, in the specific case of Ms. Taylor, the injury occurred from the blunt tip of the resectoscope and not during the use RF resectoscope.

Dr. Brill made clear in his Operative Report, when he advanced the resectoscope, he followed the same path. In a patient with normal anatomy, fundal perforation is the most common perforation to occur from the blunt tip of the resectoscope. Ms. Taylor did not have normal anatomy. She had a retroverted uterus, meaning the uterus tilts back when the patient is lying down. The most common perforation in a retroverted uterus would be in the anterior wall of the uterus. If you have a retroverted uterus, tilting back, and you are advancing a resectoscope into the cervix, the tip of the camera would perforate the anterior part of the uterus, not the fundus. That is exactly where Ms. Taylor's perforation occurred.

In addition, the pathology report following Dr. Hamilton's resection notes a 1.6 x 1.2 cm transmural defect consistent with blunt injury. The pathologist found no evidence of a thermal injury as would have been the case if the injury were caused by activation of the RF resectosope. For these reasons and all the reasons previously stated, it is more likely than not that the injury occurred at the time of advancing the resectoscope.

I continue to hold the opinion, to a reasonable degree of medical probability, that Dr. Brill fully complied with the standard of care.

Sincerely,

Steven McCarus, M.D.

EXHIBIT "C"

EXHIBIT "C"

COPY

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SOUTH VALLEY WEST

PROCEDURE EDUCATION LITERATURE

We recommend that you read this handout carefully in order to prepare yourself or family members for the proposed procedure. In doing so, you will benefit both the outcome and safety of the procedure. *If you still have any questions or concerns, we strongly encourage you to contact our office prior to your procedure so that we may clarify any pertinent issues. "An educated patient is the best patient."*

ENDOMETRIAL ABLATION

Definition
Endometrial = pertaining to the tissue layer that forms the inner lining (endometrium) of the uterine (womb) wall
Ablation = Removal of a body part or the destruction of its function, as by a surgery, disease, or noxious substance.
Hystero = of or denoting the womb (uterus)
Scopy = examination with an instrument for improved viewing, often with magnification and directed lighting

Heavy or irregular vaginal bleeding is a common problem for women in their reproductive years. The menstrual cycle is designed to prepare a healthy endometrial lining for a fertilized egg to grow in. Once a month, if a woman does not become pregnant, the "old" lining is shed through the cervical canal with the menstrual period and replaced with "new" lining in preparation for pregnancy. This cycle is repeated throughout a woman's lifetime until her ovaries no longer make enough of the hormones needed to continue a regular, monthly cycle. Alterations in this cycle and irregularities of the lining of the uterus (such as polyps or fibroids) can lead to episodes of vaginal bleeding that are unpredictable, heavy, or cause significant discomfort.

Irregular uterine bleeding during your reproductive years is rarely due to uterine cancer. Uterine cancer is more common in older women than in younger women, and in women with continuous high levels of estrogen. It is, however, important that the cause of bleeding be investigated and treated. Cancers of the uterus, when discovered early in their development, can be cured.

There are several tests your doctor may perform to investigate the cause of your abnormal uterine bleeding prior to initiating treatment or continuing unsuccessful treatments. Many times it is necessary to sample the endometrium (with an endometrial biopsy or D&C) to look for concerning overgrowth (hyperplasia) and malignancies (cancer) of the lining. Visualization of

Patient Initials: KS

the contour and any irregularities of the uterine lining can be accomplished with ultrasound, x-rays or direct visualization using a hysteroscope.

After successfully excluding irregularities of the uterine lining and shape of the cavity, your doctor will begin medical treatment. Medical treatment of heavy uterine bleeding commonly involves the combinations of hormone therapy (estrogen and/or progesterone), anti-inflammatory medications, and occasionally steroids and medications to cause a "medical menopause". This approach is usually very effective, but when medical treatment fails, the next step typically involves surgery.

Surgical treatment of heavy or excessive uterine bleeding includes dilation and curettage, endometrial ablation and hysterectomy. Dilation and curettage can be a useful procedure to treat sudden heavy bleeding that has resulted in severe anemia; however, for most women it offers no long-term improvement. Approximately 600,000 hysterectomies are performed each year in the United States. Almost half of these are done for abnormal bleeding. For women who wish to preserve their uterus, who wish to avoid major surgery, or are at increased surgical risk (from other conditions), but who are finished with childbearing, treatment may be performed by endometrial ablation.

Endometrial ablation, the destruction of the lining of the uterus, is an alternative to hysterectomy for many women with heavy uterine bleeding who do not respond to medical management. This is a procedure that has traditionally been performed in the outpatient (same-day) surgery center but now can also be performed in your doctor's office with devices designed for that purpose. Most women have a rapid recovery with little discomfort and are able to return to normal activity by the following day. Women who wish to preserve fertility or who have significant menstrual pain are not candidates for endometrial ablation and should consider alterative treatments.

The vast majority of women are pleased with the results of their procedure, though only some will have a complete absence of uterine bleeding after ablation. The success of endometrial ablation varies depending on the method of ablation, the presence of irregularities of the uterine contour, and the goals of the treatment.

Patient Initials: KB

Preparation

In-office procedure: Preparation for an in-office ablation will depend on the method of pain control used by your doctor. The procedure can be comfortably performed with administration of oral or intravenous medications, usually along with injection of local anesthetic. Intravenous medications are given to produce a "conscious sedation" and often require an empty stomach. Your doctor will give you instructions based on the planned procedure and anesthetic choice.

Outpatient hospital procedure: As with all procedures in which general anesthesia is administered, you will be asked not to eat or drink anything after a certain time, typically midnight, on the evening prior to your surgery. You may brush your teeth in the morning but should not swallow the water. If you are on medications that must be taken; you will have discussed this with us and/or the anesthesiologist and instructions will have been given to you. *Please refer to the attached list and tell us if you took any of these within the past 10 days.* If your new medication is not on the list, alert us immediately so that we may ensure optimal

procedure safety. We will have reviewed all of your current medications with you during the pre-operative/pre-procedure consultation. You are obligated to inform us if anything has changed (medication or otherwise) since your previous visit.

Procedure

Endometrial ablation is an outpatient procedure that takes between 30 minutes and one hour to complete, though some in-office procedures are quite brief. If you are to receive any medication for pain control and sedation, it will be given before the procedure begins.

You will be lying on your back with your knees bent and heels in stirrups as you would for a pelvic examination. A brief examination to find out the location of your cervical opening and the size and shape of your uterus will be done.

Following this, a speculum will be placed in the vagina to hold it open and an antimicrobial soap will be used to clean the vagina and cervix. Again, depending on the method of anesthesia, an injection of numbing medicine into the cervix might be given at this point. The cervix is lightly grasped with an instrument to hold it still, while the opening is gradually dilated with surgical instruments until the hysteroscope or ablation probe can be inserted without force.

The cavity of the uterus is much like a balloon: when empty it is flat but when inflated, space is created inside the balloon where there was none. Performing hysteroscopy involves "inflating" the cavity of the uterus with a liquid or gas so that each surface can be seen. Miniaturized instruments can then be placed along with the hysteroscope to correct many of the abnormalities of the shape of the cavity. When your doctor performs a hysteroscopic ablation (using a resectoscope), the lining is either cut out using miniaturized cutting instruments designed for ablation or destroyed using electrical energy. A resectoscope can also be used to remove polyps of the lining or fibroids on the surface before or as part of ablation.

Destruction of the lining can be accomplished by a variety of methods: heating, freezing, and electrical energy. The method used will vary depending on your circumstances, anatomy, and what is available for your doctor's use.

Patient Initials: _____

Post Procedure

Recovery from endometrial ablation is rapid, and most women will go home within one or two hours of the procedure. Though you may have some discomfort and cramping following the procedure, it is not necessary for you to plan time off from work or your normal activities beyond the day of surgery. It is normal to have some bleeding and discharge following endometrial ablation. It is suggested that you use menstrual pads to maintain hygiene and protect your clothing. You are instructed to refrain from vaginal intercourse, douching, and tampon use until told you may resume by your doctor.

Medications, such as ibuprofen or naproxen, are usually all that is needed for the cramping you might have after your surgery. Ask your doctor what is recommended or if a prescription for pain medicine will be given. An antibiotic prescription may also be given and should be taken until completion. If any side effects occur, contact our office immediately.

Expectations of Outcome

Endometrial ablation is an alternative to hysterectomy for women with abnormal uterine bleeding. The vast majority of women are pleased with the results of their procedure, though only some will have a complete absence of uterine bleeding after ablation. The success of endometrial ablation varies depending on the method of ablation, the presence of irregularities of the uterine contour, and the goals of the treatment. Following endometrial ablation:

- 90% of women will be pleased with the results
- Between 25% and 60% of women will have complete absence of uterine bleeding
- 40% of women will have decreased uterine bleeding
- One in four women will have hysterectomy within four years of treatment

Possible Complications of the Procedure

All surgical procedures, regardless of complexity or time, can be associated with unforeseen problems. They may be immediate or even quite delayed in presentation. While we have discussed these and possibly others in your consultation, we would like you to have a list so that you may ask questions if you are still concerned. Aside from anesthesia complications, it is important that every patient be made aware of all possible outcomes, which may include, but are not limited to:

- Perforation of the Uterus: The most serious complication of the procedure is the creation of a perforation, or hole, in the wall of the uterus. This occurs when the dilator, hysteroscope, or ablation probe is pushed too far or with too much force. Perforation of the uterus may lead to injury of other structures and organs within the abdomen (blood vessels, nerves, intestines, and bladder), bleeding, or infection. Perforation is not common, however, may require another operation to be treated appropriately
- Bleeding/Discharge: Most women will have watery or bloody discharge for several weeks following ablation. If you develop a foul smelling or greenish vaginal discharge, please contact your doctor.
- Infection: Endometrial ablation involves placing instruments through the vagina and cervix into the uterus. Because of this, it is possible to introduce a microorganism (such as bacteria or yeast) from the vagina into the uterine or abdominal cavity. Many microorganisms are normally present in the vagina and cause no infection or other symptoms. However, when these same microorganisms are present within the pelvis or cavity of the uterus or abdomen, a more serious infection can be the result. Signs of infection that you should be watchful of are: foul-smelling vaginal discharge, tenderness or pain in the vagina and pelvis for more than two days, fevers, shaking chills, nausea, vomiting, weakness, and feeling ill
- Hematometrium: Blood may collect within the uterine cavity if scarring from the procedure prevents its exit. This may lead to cyclic abdominal pain.
- Injury to Abdominal Organs: Risk of injury to abdominal organs is reduced through careful surgical technique and safety systems built into the ablation devices. In spite of this, there is a small risk of internal injury with endometrial ablation.
- Pregnancy: Although the chances of pregnancy are reduced following endometrial ablation, it is still possible to become pregnant. Pregnancy following endometrial ablation is very dangerous to both you and the fetus. You should not have an endometrial ablation

if you plan to become pregnant in the future and should use some form of birth control after endometrial ablation.

- Detection of Malignancy: Another rare, but important, risk of any endometrial ablation procedure is that it may decrease your doctor's ability to make an early diagnosis of cancer of the endometrium. The reason for this is that one of the warning signs of endometrial cancer is bleeding, and endometrial ablation procedures decrease or eliminate bleeding.
- Treatment failure: While endometrial ablation has been shown to be very effective, it will not always "cure" uterine bleeding. One out of 10 women who have endometrial ablation will be dissatisfied with her results. Only half of women will be completely without uterine bleeding. One out of four women will have a hysterectomy in the following four years.
- Fluid Imbalance: In addition to water, fluids used to "inflate" the cavity of the uterus for hysteroscopy contain dissolved sugars, starches, and salts. These substances give the fluids certain desirable properties for visualization of the uterine cavity. When too much fluid flows from the uterus and enters the abdominal cavity or blood stream, an "imbalance" in the water content of the blood may result. Careful choice of fluid and monitoring of fluid delivery make this an uncommon complication
- Deep Vein Thrombosis (DVT)/Pulmonary Embolus (PE): In any operation (especially longer operations), you can develop a clot in a vein of your leg (DVT). Typically, this presents two to seven days (or longer) after the procedure as pain, swelling, and tenderness to touch in the lower leg (calf). Your ankle and foot can become swollen. *If you notice these signs, you should go directly to an emergency room and also call our office.* Although less likely, this blood clot can move through the veins and block off part of the lung (PE). This would present as shortness of breath and possibly chest pain. We may sometimes ask the medical doctors to be involved with the management of either of these problems
- Lower Extremity Weakness/Numbness: This, too, is a rare event that may arise due to your position on the operating table. It is possible in procedures in which you are in the lithotomy (legs up in the air) for a long period. The problem is usually self-limited, with a return to baseline expected
- Chronic Pain: As with any procedure, a patient can develop chronic pain in an area that has undergone surgery. Typically, the pain disappears over time, although some feeling of numbness may persist. If persistent, further evaluation may be necessary

Physician	Date	Witness	Date
Patient	4-21-17	Kimberly Taylor (2/8/96) print patient name	

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PROCEDURE EDUCATION LITERATURE

We recommend that you read this handout carefully in order to prepare yourself or family members for the proposed procedure. In doing so, you will benefit both the outcome and safety of the procedure. ***If you still have any questions or concerns, we strongly encourage you to contact our office prior to your procedure so that we may clarify any pertinent issues. "An educated patient is the best patient."***

MYOMECTOMY

Definition
Leio = denoting smooth
Myoma = benign tumor of muscle
Ectomy = denoting surgical removal of a segment or all of a part or an organ

A leiomyoma is a benign (non-cancerous) tumor made up of smooth muscle and connective tissue and can arise in any part of the body containing smooth muscle. There are numerous terms used to refer to leiomyomas, such as myomas, fibromas and, most frequently *fibroids*, or *fibroid tumors*. The discussion here pertains to leiomyomas of the uterus, the most common tumors of the uterus and female pelvis.

Almost half of all women will have uterine myomas of some size, though most women will not have any symptoms from them. The symptoms of uterine leiomyomas are abnormal uterine bleeding, pelvic and vaginal pressure, pain, abdominal distortion, spontaneous miscarriage and infertility. Risk factors for symptoms are size, location, number, and rapid growth.

Risk factors for the development of fibroids appear to be:

- African American ethnicity (two to three times as frequent as white women)
- Obesity
- First period when younger than age 12

Uterine myomas can be divided into those occurring beneath the lining of the uterus (submucous), within the muscle of the uterus (intramural), and those on the "outside" surface of the uterus (subserous).

Patient Initials: _____

A myomectomy refers to the surgical removal of one or more uterine leiomyoma(s). Myomectomy is intended to remove fibroids from the uterus that are responsible for symptoms such as those listed earlier. This operation can be performed using three different methods:

- Hysteroscopy: operating within the uterine cavity with telescopic vision and small instruments to remove submucous fibroids (see *D&C/Hysteroscopy*)
- Laparoscopy: operating through the abdomen with telescopic vision and small instruments to remove or ablate (destroy) fibroids on the abdominal surface and within the uterine muscle
- Laparotomy: traditional "open" abdominal surgery to remove larger fibroids or many small fibroids.

Leiomyomas do not require treatment. Only when symptoms from fibroids appear will a recommendation for treatment be made. Treatment of fibroids can include observation, myomectomy, hysterectomy, and in recent decades, procedures to destroy (ablate) the tumors or to deprive them of their blood supply to cause them to die (uterine artery embolization). Medications to shrink fibroid tumors can be given for a short period and sometimes are use prior to myomectomy.

The approach to management of your leiomyomas will depend on your symptoms, the size, location and number of fibroids, treatment goals and the preference of you and your doctor. The pros and cons of each will be discussed with you in your consultation.

Preparation

As with all procedures in which general anesthesia is administered, you will be asked not to eat or drink anything after a certain time, usually midnight, on the evening prior to your surgery. You may brush your teeth in the morning but should not swallow the water. If you are on medications that must be taken, you will have discussed this with us and/or the anesthesiologist and instructions will have been given to you. The procedure will not be performed if you are currently taking, or have recently taken any medication that may interfere with your ability to clot your blood ("blood thinners, aspirin, anti-inflammatory medicines, etc..."). The most common of these medications are aspirin and all related pain relievers or anti-inflammatory compounds (whether prescription or over-the-counter). ***Please refer to the attached list and tell us if you took any of these within the past 10 days.*** If your new medication is not on the list, alert us immediately so that we may ensure optimal procedure safety. We will have reviewed all of your current medications with you during the pre-operative/pre-procedure consultation. You are obligated to inform us if anything has changed (medication or otherwise) since your previous visit.

Procedure

For hysteroscopic and laparoscopic surgery you will be lying on your back with your knees and hips bent and heels in stirrups much like you would for a pelvic examination; for abdominal surgery you will be lying on your back with your legs extended. The procedure can take from between 30 minutes and 3 hours depending on the size, number and location of fibroids as well as the type of surgery. General anesthesia is administered, and you will "go to sleep" for the duration of the surgery.

Patient Initials: _____

Hysteroscopy: The procedure begins by gently cleaning the vagina and then placing a speculum in the vagina to hold it open. The cervix is grasped with an instrument to hold it still, while the opening is gradually dilated with surgical instruments until the hysteroscope ("telescope" for the uterine cavity) or resectoscope (hysteroscope for operating) can be inserted without force.

The cavity of the uterus is much like a balloon: when empty it is flat but when inflated space is created inside the balloon where there was none. Performing hysteroscopy involves "inflating" the cavity of the uterus with a liquid or gas (flowing in and out through the "telescope") so that each surface can be seen. Miniaturized instruments can then be placed along with the telescope to remove or destroy the fibroid(s).

Laparoscopy: After cleaning the abdomen, a small incision is made at the belly button and the laparoscope ("telescope" to see in the abdomen) is inserted. Other small incisions are made to allow small surgical instruments to be inserted. Using techniques similar to traditional "open" surgery, the fibroids are removed or destroyed.

Laparotomy: After cleaning the abdomen, an incision large enough to see and reach into the pelvis is made. Large and multiple fibroids can then be removed. Laparotomy permits the easiest access to the uterus, but also requires the longest hospitalization and recovery.

Post Procedure
You will be in the recovery room for a short time before being sent home, in the case of hysteroscopy and sometimes laparoscopy, or to your hospital bed as with laparotomy. Most patients usually will stay one or two nights in the hospital following laparotomy. There may be some discomfort around the incision sites, within the vagina, and on the lower abdomen depending on the procedure you had performed. There will be a small dressing over the abdominal incision site (if one was made), which is to remain until your follow up visit unless otherwise instructed.

There may be small blood staining on the wound dressing. If the dressing becomes soaked, or you see active blood oozing, please contact us immediately. You may shower one day after surgery, but no bathing or swimming (unless otherwise instructed). It is normal to have some bloody discharge from the vagina for a day or two. If you have significant bleeding, you should call our office. We ask that you refrain from any strenuous activity or heavy lifting until your follow up office visit. Every patient has some degree of swelling and bruising, and it is not possible to predict in whom this might be minimal or significant.

Hysteroscopy: Though you may have some discomfort and cramping following the procedure, it is usually not necessary for you to plan time off from work or your normal activities beyond the day of surgery. It is normal to have some bleeding and discharge following hysteroscopy/myomectomy. It is suggested that you use menstrual pads to maintain hygiene and protect your clothing. You are instructed to refrain from vaginal intercourse, douching and tampon use until told you may resume by your doctor

Patient Initials: _____

Laparoscopy: You may have some discomfort and cramping following the procedure, including gas pain and shoulder pain. This discomfort is often due to the gas used to inflate the abdomen for surgery and typically resolves after the first post-operative day. It is not necessary for you to plan an extended time off from work or your normal activities; most women are able to resume activity, other than strenuous activity and lifting, within two to three days. It is normal to have some bleeding and discharge following hysteroscopy/myomectomy. It is suggested that you use menstrual pads to maintain hygiene and protect your clothing. You are instructed to refrain from vaginal intercourse, douching and tampon use until told you may resume by your doctor

Laparotomy: We strongly encourage you to take at least two to three weeks off from work and perhaps more if your occupation requires strenuous activity or heavy lifting. In the first 48 hours, it is to your advantage to minimize activity and to often rest in a lying down position. Periodic walking is encouraged. Some patients have almost no discomfort while others are somewhat uncomfortable for a few days to weeks. Severe pain is unlikely but possible. We may provide you with a prescription for pain medication to alleviate most of the discomfort. Take this medication as prescribed and as needed. An antibiotic prescription may also be given and should be taken until completion. If any side effects occur, contact our office immediately.

**You must refrain from any strenuous activity or heavy lifting until we tell you otherwise. Sexual activity of any sort is absolutely prohibited (usually four to six weeks) until we tell you that you may resume.*

Expectations of Outcome

The goals of myomectomy are the relief of symptoms while keeping the uterus. Many women will notice a reduction in symptoms, while others will not. The success of myomectomy for long-standing infertility depends largely on the age of the patient, the size/number of fibroids, and other factors affecting fertility.
Myomectomy is complicated by bleeding that requires hysterectomy in 10% of cases.
Within 20 years of myomectomy, 25% of women will have hysterectomy for recurrent leiomyomas.

Possible Complications of the Procedure

All surgical procedures, regardless of complexity or time, can be associated with unforeseen problems. They may be immediate or even quite delayed in presentation. While we have discussed these and possibly others in your consultation, we would like you to have a list so that you may ask questions if you are still concerned. Aside from anesthesia complications, it is important that every patient be made aware of all possible outcomes, which may include, but are not limited to:

- Urinary Tract Infection or Sepsis: Although we may give you antibiotics prior to and after the operation, it is possible for you to get an infection. The most common type is a simple bladder infection (after the catheter is removed) that presents with symptoms of burning urination, urinary frequency and a strong urge to urinate. This will usually resolve with a few days of antibiotics. If the infection enters the bloodstream, you might feel very ill. This type of infection can present with both urinary symptoms and any combination of the following: fevers, shaking chills, weakness or dizziness, nausea, and

Patient Initials: _____

vomiting. You may require a short hospitalization for intravenous antibiotics, fluids, and observation. This problem is more common in diabetics, patients on long-term steroids, or in patients with disorders of the immune system.

- Wound Infection: The incision sites can become infected. While it typically resolves with antibiotics and local wound care, occasionally, part or all of the incision may open and require revision.
  If you have symptoms suggesting any of the above after your discharge from the hospital, qyou must contact us immediately or go to the nearest emergency room.

- Scar Tissue Formation: Scar tissue can form within the abdomen (adhesions) or within the cavity of the uterus that can lead to infertility.
- Need for Cesarean Section/Risk of Uterine Rupture: If the incision to remove the fibroid(s) goes from the cavity of the uterus to the abdominal side of the uterus, your doctor might recommend cesarean section without labor for delivery of all future pregnancies.
- Treatment Failure: Many women will see improvement in their symptoms after myomectomy, although these same symptoms can recur at some point in the weeks, months and years after surgery. Twenty-five percent of women will have a hysterectomy for recurrent fibroids.
- Blood Loss/Transfusion: The uterus is quite vascular. Usually blood loss in this procedure is minimal to moderate. In some cases blood loss can be significant enough to necessitate hysterectomy to control bleeding or transfusion to replace blood lost to hemorrhage.
- Deep Vein Thrombosis (DVT)/Pulmonary Embolus (PE): In any operation (especially longer operations), you can develop a clot in a vein of your leg (DVT). Typically, this presents two to seven days (or longer) after the procedure as pain, swelling, and tenderness to touch in the lower leg (calf). Your ankle and foot can become swollen. ***If you notice these signs, you should go directly to an emergency room and also call our office.*** Although less likely, this blood clot can move through the veins and block off part of the lung (PE). This would present as shortness of breath and possibly chest pain. We may sometimes ask the medical doctors to be involved with the management of either of these problems.
- Fluid Imbalance: (applies only with Hysteroscopic myomectomy) In addition to water, fluids used to "inflate" the cavity of the uterus for hysteroscopy contain dissolved sugars, starches and salts. These substances give the fluids certain desirable properties for visualization of the uterine cavity. When too much fluid flows from the uterus and enters the abdominal cavity or blood stream, a serious "imbalance" in the water content of the blood may result. Careful choice of fluid and monitoring of fluid delivery make this an uncommon complication.
- Bleeding/Hematoma: When a small blood vessel continues to ooze or bleed after the procedure is over, the area of collected blood is referred to as a hematoma. The body normally re-absorbs this collection over a short period of time, and surgical drainage is rarely necessary.

Patient Initials: _____

- Lower Extremity Weakness/Numbness: This, too, is a rare event which may arise due to your position on the operating table. It is possible in procedures in which you are in the lithotomy (legs up in the air) for a long period. The problem is usually self-limited, with a return to baseline expected.
- Chronic Pain: As with any procedure, a patient can develop chronic pain in an area that has undergone surgery. Typically, the pain disappears over time, although some feeling of numbness may persist. If persistent, further evaluation may be necessary.

Physician	Date	Witness	Date
Patient	Date	Kimberly Taylor (208186)	

The information contained in this Medical Informed Consent form ("Consent Form") is intended solely to inform and educate and should not be used as a substitute for medical evaluation, advice, diagnosis or treatment by a physician or other healthcare professional. While Oakstone endeavors to ensure the reliability of information contained in its Consent Forms, such information is subject to change as new health information becomes available. Oakstone cannot and does not guaranty the accuracy or completeness of the information contained in this Consent Form, and assumes no liability for its content or for any errors or omissions. Laws vary from state to state regarding the information that must be given to a patient for informed consent. Please be sure to check the laws regarding legal informed consent as they apply within your state. Please call your doctor or other healthcare provider if you have any questions.

EXHIBIT "D"

EXHIBIT "D"

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY TAYLOR,	)	CASE#: A-18-773472-C
Plaintiff,	)	DEPT. III
vs.	)	
KEITH BRILL, M.D., ET AL.,	)	
Defendants.	)	

BEFORE THE HONORABLE MONICA TRUJILLO,
DISTRICT COURT JUDGE

MONDAY, SEPTEMBER 27, 2021

RECORDER'S TRANSCRIPT OF HEARING

DEFENDANTS' MOTION IN LIMINE NO. 1 TO INCLUDE OTHERS ON THE VERDICT FORM

APPEARANCES:

For the Plaintiff: ADAM J. BREEDEN, ESQ.

For the Defendants: HEATHER S. HALL, ESQ.

RECORDED BY: REBECA GOMEZ, COURT RECORDER

GAL FRIDAY REPORTING & TRANSCRIPTION
10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249

RECORDER'S TRANSCRIPT OF HEARING - continued

DEFENDANTS' MOTION IN LIMINE NO. 2 TO ALLOW DEFENDANTS TO INTRODUCE EVIDENCE OF COLLATERAL SOURCES PURSUANT TO NRS 42.021

DEFENDANTS' MOTION IN LIMINE NO. 3 TO EXCLUDE DEFENDANTS' INSURANCE COVERAGE

PLAINTIFF'S MOTION IN LIMINE #1: MOTION TO PERMIT CERTAIN CLOSING ARGUMENT TECHNIQUES OF PLAINTIFF'S COUNSEL

PLAINTIFF'S MOTION IN LIMINE #2: MOTION TO EXCLUDE INFORMED CONSENT FORM AND TERMS AND ARGUMENT REGARDING "RISK" OR "KNOWN COMPLICATION"

PLAINTIFF'S MOTION IN LIMINE #3: MOTION TO EXCLUDE EVIDENCE OF ASSERTED LIABILITY OF OTHER HEALTHCARE PROVIDERS UNDER *PIROOZI*

PLAINTIFF'S MOTION IN LIMINE #4: EXCLUSION OF COLLATERAL SOURCE PAYMENTS

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S NEGLIGENT HIRING, TRAINING AND SUPERVISION CLAIM AGAINST WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA

and asks the jurors to place themselves in the place of the plaintiff. So, that being said, it's going to be denied with that caveat.

MR. BREEDEN: Your Honor, a clarification. Are you saying I'm not permitted to use the phrase send a message at all in closing arguments?

THE COURT: Correct.

MR. BREEDEN: Okay.

THE COURT: All right, on to the next plaintiff's motion in limine number 2, motion to exclude informed consent form and terms or argument regarding risk or known complication. I reviewed that motion, defendants' opposition, as well as the reply, and there was also supplemental briefing on both sides that I reviewed.

Anything further, Mr. Breeden?

MR. BREEDEN: Your Honor, I do think this is the most important motion in limine in front of you today so I do have some additional comments.

I'd like to start by referring to a case called *Andrews versus Harley Davidson*. And this is a 1990 supreme court case from Nevada. And in that case what happened was an intoxicated motorcycle driver rear ended a parked car and he sued and he sued Harley Davison for product defect and he claimed that his injuries were caused by a defectively-designed gas tank which when there was a collision with the motorcycle, a spring clip would fail and it would cause the gas tank to rise above the rider's seat and

therefore in a collision, the rider would hit the gas tank and be more severely injured than they otherwise might have been in a collision.

And what happened was that case went to trial and the district court allowed that evidence of intoxication and the plaintiff lost. And it went up on appeal and what the Nevada Supreme Court said is look, it feels like it ought to be admissible in that case that you had an intoxicated motorcycle drive here. That feels like that ought to be admissible, but it's not probative of any question in the particular case because you have a duty as a motorcycle manufacturer and designer to design a safe product whether or not a person who's riding it is intoxicated or not, so they -- they reversed that.

And I think very similar arguments exist in this case. There is no assumption of risk defense in medical malpractice cases. It does not exist. And actually if it did, Your Honor, as I mentioned in the pleadings, you'd have a case which arguably exist today where doctors just put everything on their consent form or their risk of procedure form and then try to evade liability for negligence, if that occurs, and no patient can consent to a negligent surgery.

The entire defense of this case appears to be premised on them showing the jury this informed consent form, that it does mention perforation to the uterus and small intestine, and instead of arguing the standard of care which is the real issue of fact for the jury to decide, they're just going to argue listen, she was warned

and therefore the doctor shouldn't be responsible.

Courts around the country have found this type of -- of so-called defense in a medical malpractice case to be both irrelevant and prejudicial and I -- I hate to read quotes from other cases, but -- but I would like to in this case because essentially the -- the quote is the argument and this comes from the *Wright versus Kaye* case, which is a recent Virginia Supreme Court, and all the arguments in this case that were accepted by that court are applicable here.

And they stated: Awareness of the general risks of surgery is not a defense available to Dr. Kaye against the claim of deviation from the standard of care. While Wright or any other patient may consent to risks, she does not consent to negligence. Knowledge by the trier of fact of informed consent to risk where lack of informed consent is not an issue does not help the plaintiff prove negligence, nor does it help the defendant show he was not negligent. In such a case, the admission of evidence concerning a plaintiff's consent could only serve to confuse the jury because the jury could conclude contrary to the law and the evidence that consent to the surgery was tantamount to consent to the injury which resulted from that surgery. In effect, the jury could conclude that consent amounted to a waiver which is plainly wrong, end quote.

And this is the exact scenario you have in this case. We've cited numerous court decisions from around the country

stating that this kind of information is -- is inadmissible and certainly more prejudicial than probative.

The parties briefed a supplemental brief on the *Traynor* [ph] case where the Nevada Supreme Court has agreed that a plaintiff cannot consent to negligence through a informed consent form. This is simply the law. And I want to be clear on what we're requesting here.

What we're -- what we're requesting is that these informed consent forms not come into evidence in this case, that the defense and their expert not be able to use the words risks of surgery or complications of surgery. I expect both sides will make proper argument as to the fact that perforations can occur with and without negligence. I don't think that should be barred. And then the experts can detail their reasons why they think this particular injury occurred because of negligent conduct or it occurred without negligence.

But the law on these issues is very clear and we simply ask that you rein in the defense. We cited at least a dozen examples in depositions and expert reports of the defense where this is what they plan on using to defend this case and it is simply an improper defense.

THE COURT: Okay, before I allow Ms. Hall to speak, you mentioned that both parties are going to be discussing that the -- that the -- one second. I guess that the cut so to speak can occur with or without negligence. That's probably not the appropriate

term, but that's what came to mind. So how are you --

MR. BREEDEN: Perforation.

THE COURT: -- how are you differentiating that from it being a known risk and why would that be more prejudicial? If it's possible, then obviously it's a risk, right?

MR. BREEDEN: Yes, but the distinction is that you cannot consent to negligence. They -- you cannot waive the right to sue --

THE COURT: Oh, yeah, I know. I -- I -- but I -- I see that as two different issues. I see the informed consent as one issue and then whether or not it's a known risk that can occur as you just said with or without negligence present, that's a separate issue.

MR. BREEDEN: Well, excluding the informed consent form is going to be meaningless if the Doctor can still get up there and say look, I had this long conversation with Kim and I told her about all the known risks and potential known complications of this procedure and she agreed to it so I shouldn't be held responsible because that's what happened here. That's the inappropriate argument. The appropriate argument that the two parties will make and they disagree on this answer, but the appropriate argument back and forth is was there negligence here, was this an avoidable perforation or was this unavoidable.

THE COURT: All right. Ms. Hall.

MS. HALL: One thing I want to make sure is very clear to the Court and perhaps to opposing counsel is that the defense is not taking the position that Ms. Taylor consented to a negligently

performed surgery. Quite the opposite. You know, one of the -- the defenses that I raise in this case in -- one of the affirmative defenses in our answer to the complaint was assumption of the risk. That is not the same thing as arguing that a consent form somehow inoculates the defendant physician from any negligence if there was some negligence.

The reason that a consent form and there are -- there is more than one consent form. Both I think are very detailed, but the reason that a consent form describes known risk and complications is because those can occur even when the surgery is performed correctly and without negligence. Plaintiff's own expert when I deposed him acknowledged that.

And, you know, I think it's part of the contemporary -- contemporaneous, excuse me, medical record we should --

THE COURT: Oh wait, Ms. Hall, you went out. Ms. Hall?

THE CLERK: Hello?

THE COURT: Ms. Hall?

THE CLERK: She cannot hear us.

THE COURT: Okay.

MR. BREEDEN: I'm still with you, Your Honor, and I cannot hear Ms. Hall either.

THE COURT: Uh-oh.

THE CLERK: Okay, hold on. Let me send her a message.

MS. HALL: Did I cut out?

THE CLERK: Oh, you --

THE COURT: Yes, you were completely out.

MS. HALL: I apologize, Your Honor. I'm on my iPad and I -- I got a phone call so I think that's what happened.

THE COURT: Okay.

MS. HALL: Did you hear any of that or should I just --

THE COURT: I did hear --

MS. HALL: -- wrap this up?

THE COURT: -- I did hear a lot of it. You cut out for about the last minute.

MS. HALL: Okay. I'll -- I'll just really quickly sum it up and -- and say that it's not our intention to argue to the jury that Dr. Brill committed negligence, but Ms. Taylor consented to a negligently performed surgery. Our position is that the reason risk -- known risks and complications are in the consent form is because they can and do occur in the absence of negligence and that is exactly what happened here.

THE COURT: Okay. Mr. Breeden.

MR. BREEDEN: Judge, I -- I don't know -- I -- I -- I agree with Ms. Hall that she's allowed to argue that this type of injury can happen with or without negligence and her expert can say look, this is why we -- we think this particular injury was not caused by negligence. They're free to argue that.

But what they can't do is they can't say hey this is just a risk, we warned her in advance and we're not responsible for this and here's the consent form that she signed and we had a long

conversation with her. They have to focus on what the Doctor did to avoid what happened here within the standard of care, not what my client may have known or been told about potential risks or complications.

And again, if the law were to allow this, you would have a system where doctors simply deemed everything to be an uncontrollable risk or complication of the procedure and therefore you could never sue a doctor. And I would submit to you that that's sort of what's going on in this informed consent form in this case because it mentions extremely rare events.

We have three OBGYNs in this case and none of them have actually seen another case where there was a perforated small intestine from this procedure. It is extremely rare and that is why we're saying that this procedure was not done within the standard of care.

THE COURT: All right. So as to plaintiff's motion in limine number 2, it's going to be granted in part and denied in part.

As to the evidence that Ms. Taylor executed an informed consent form, that's going to be precluded.

As to any verbal discussions between Dr. Brill and Ms. Taylor that she -- that they discussed risks and complications, that's going to be precluded. I think both invite confusion to the jury and are not relevant.

However, I think as acknowledged by both sides, I think it is relevant that perforation is a known risk as long as there's

sufficient foundation for the testimony. So that will be allowed and of course any argument flowing from the evidence thereof.

As to your request for use of a jury instruction advising the jury that it's irrelevant whether perforations in general are a known risk or complication, I'm going to reserve ruling until evidence is presented and we can address that when we settle jury instructions.

MR. BREEDEN: Thank you, Your Honor.

MS. HALL: May I ask a quick I guess point of clarification?

THE COURT: Uh-huh.

MS. HALL: So one of the opinions that's been offered by my expert, Dr. McCarus, he goes into great detail regarding the consent form. Is that ruling also precluding my expert, Dr. McCarus, from discussing his opinions on that subject matter?

THE COURT: If it's about the consent form that was signed by Ms. Taylor, yes, but he can talk about the known risks to the surgery.

MS. HALL: Okay. Thank you.

THE COURT: As to plaintiff's motion in limine number 3, motion to exclude evidence of asserted liability of other healthcare providers under *Piroozi*, I've reviewed that motion, the opposition, as well as the reply and go ahead, Mr. Breeden.

MR. BREEDEN: Your Honor, I -- I won't hide the fact that I do not think the *Piroozi* case was correctly decided. I wonder how much longer we're going to have the *Piroozi* case. There were

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DISTRICT COURT
CLARK COUNTY, NEVADA

Kimberly Taylor, Plaintiff(s)	CASE NO: A-18-773472-C
vs.	DEPT. NO. Department 3
Keith Brill, M.D., Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Motion to Reconsider was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY D. TAYLOR, an Individual,

Plaintiff,

vs.

KEITH BRILL, MD, FACOG, FACS, an Individual; WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA – MARTIN, PLLC, a Nevada Professional Limited Liability Company; TODD W. CHRISTENSEN, MD, an Individual; DOES I through XXX, inclusive; and ROE CORPORATIONS I through XXX, inclusive;

Defendants.

CASE NO.: A-18-773472-C
DEPT: III

ORDER ON DEFENSE MOTIONS IN LIMINE

DATE OF HEARING: 9/27/2021

TIME OF HEARING: 2:00 P.M.

Defendants, Keith Brill, M.D., FACOG and Women's Health Associates of Southern Nevada – Martin, PLLC's Motions in Limine came on for hearing on September 27, 2021. Plaintiff Kimberly Taylor appeared by and through her attorneys of record ADAM BREEDEN, ESQ. of the law firm of BREEDEN & ASSOCIATES. Defendants appeared by and through their attorneys of record ROBERT C. McBRIDE, ESQ. and HEATHER S. HALL, ESQ. of the law firm of McBRIDE HALL. The Court, having reviewed all pleadings and papers on file herein, having

considered the written and oral argument of counsel, and good cause appearing therefor, hereby orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion in Limine No. 1 to Include Others on the Verdict Form is **GRANTED in part, DENIED in part**. Consistent with *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 363 P.3d 1168 (2015), Defendants will be permitted to introduce evidence of asserted liability of other healthcare providers including the opinions of Plaintiff's expert, Dr. Berke. The Motion is denied without prejudice as to the issue of the verdict form and the Court reserves ruling on the verdict form until the presentation of evidence at trial.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion in Limine No. 2 to Allow Defendants to Introduce Collateral Sources Pursuant to NRS 42.021 is **GRANTED**. Defendants will be permitted to introduce evidence of the private insurance payments and contractual write-offs.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion in Limine No. 3 to Exclude Defendants' Insurance Coverage is **Granted in part, DENIED in part**. The Motion is granted to the extent that it seeks to exclude evidence of Defendants' Insurance Coverage.

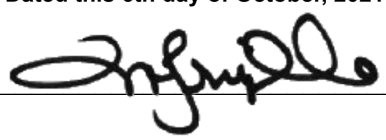
In the Opposition to Defendants' Motion in Limine No. 3 to Exclude Defendants' Insurance Coverage, Plaintiff indicated they wished to ask the following questions during voir dire:

- Do you know what KODIN is?
- If you lived in Clark County in 2004, do you remember how you voted on KODIN?
- Do you think there is a crisis for medical malpractice insurance rates for doctors?
- If you felt a doctor would have to personally pay a large judgment instead of having it covered through insurance, would that affect your verdict?
- Do you feel that if you rule against the Defendant in this case, his malpractice insurance premiums might increase? Would that affect your verdict in this case?

• If the judge instructed you in this case not to consider whether the doctor defendant had medical malpractice insurance, do you think you could follow that instruction?

No questions regarding medical malpractice/professional liability insurance of Defendants will be permitted during voir dire. No questions regarding KODIN or tort reform will be permitted during voir dire. The Court will allow general questions on affiliations with insurance companies but nothing with regard to premiums and payments. The Court will also allow questions about potential verdicts during voir dire, so long as it is not repetitive or indoctrination of the potential jurors. The Court reserves ruling on the issue of whether the jury will be given the portion of jury instruction NEV. J.I. 1.07 requested by Plaintiff: You are not to discuss or even consider whether or not the defendant was carrying insurance that would reimburse him for whatever sum of money he may be called upon to pay to the plaintiff.

IT IS SO ORDERED. **Dated this 6th day of October, 2021**



C8B ADB 6763 26A4
Monica Trujillo
District Court Judge

Respectfully Submitted by:	Approved as to Form and Content by:
DATED this 3rd day of October, 2021.	DATED this 3rd day of October 2021.
McBRIDE HALL	BREEDEN & ASSOCIATES, PLLC
/s/ Heather S. Hall	*/s/Adam J. Breeden*
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Cc: Kristy Johnson; Yianna Reizakis; Robert McBride; Candace P. Cullina; Kristine Herpin
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You may submit this order with my e-signature.

photo

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On Sun, Oct 3, 2021 at 4:30 PM Heather S. Hall <hshall@mcbridehall.com> wrote:

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>
> Attached is a draft Order on Defendants' Motions in Limine. Please advise if you have any changes. I would like to get this submitted prior to jury selection.
>
> Thanks very much,
>
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DISTRICT COURT
CLARK COUNTY, NEVADA

Kimberly Taylor, Plaintiff(s)	CASE NO: A-18-773472-C
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MARTIN, PLLC

DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY D. TAYLOR, an Individual,

Plaintiff,

vs.

KEITH BRILL, MD, FACOG, FACS, an Individual; WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA – MARTIN, PLLC, a Nevada Professional Limited Liability Company; TODD W. CHRISTENSEN, MD, an Individual; DOES I through XXX, inclusive; and ROE CORPORATIONS I through XXX, inclusive;

Defendants.

CASE NO.: A-18-773472-C
DEPT: III

NOTICE OF ENTRY OF ORDER ON DEFENSE MOTIONS IN LIMINE

PLEASE TAKE NOTICE that a NOTICE OF ENTRY OF ORDER ON DEFENSE MOTIONS IN LIMINE was entered and filed on the 6th day of October 2021, a copy of which is

///

///

attached hereto.

DATED this 6th day of October 2021.

McBRIDE HALL

/s/ Heather S. Hall
ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 7082
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Attorneys For Defendants,
Keith Brill, M.D., FACOG and Women's Health Associates of Southern Nevada – Martin, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of October 2021, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER ON DEFENSE MOTIONS IN LIMINE** addressed to the following counsel of record at the following address(es):

☒ **VIA ELECTRONIC SERVICE**: By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

Adam J. Breeden, Esq.
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Attorneys for Plaintiff

/s/ Natalie Jones
An Employee of *McBRIDE HALL*

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DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY D. TAYLOR, an Individual,

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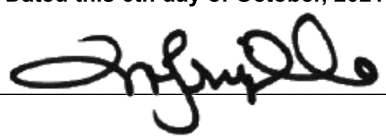
IT IS SO ORDERED. **Dated this 6th day of October, 2021**



C8B ADB 6763 26A4
Monica Trujillo
District Court Judge

Respectfully Submitted by:	Approved as to Form and Content by:
DATED this 3rd day of October, 2021.	DATED this 3rd day of October 2021.
McBRIDE HALL	BREEDEN & ASSOCIATES, PLLC
/s/ Heather S. Hall	*/s/Adam J. Breeden*
Heather S. Hall, Esq. Nevada Bar No. 10608 8329 W. Sunset Road, Suite 260 Las Vegas, Nevada 89113 Attorneys for Defendants *Keith Brill, M.D., FACOG, FACS and Women's Health Associates of Southern Nevada – Martin, PLLC*	Adam J. Breeden, Esq. Nevada Bar No.: 008768 376 E. Warm Springs Road, Suite 120 Las Vegas, Nevada 89119 Attorneys for Plaintiff

From: Adam Breeden
To: Heather S. Hall
Cc: Kristy Johnson; Yianna Reizakis; Robert McBride; Candace P. Cullina; Kristine Herpin
Subject: Re: Taylor v. Brill, MD
Date: Sunday, October 3, 2021 5:07:12 PM
Attachments: image001.png

You may submit this order with my e-signature.

photo

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On Sun, Oct 3, 2021 at 4:30 PM Heather S. Hall <hshall@mcbridehall.com> wrote:

> Adam,
>
> Attached is a draft Order on Defendants' Motions in Limine. Please advise if you have any changes. I would like to get this submitted prior to jury selection.
>
> Thanks very much,
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MCBRIDE HALL

ATTORNEYS AT LAW

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Kimberly Taylor, Plaintiff(s)	CASE NO: A-18-773472-C
vs.	DEPT. NO. Department 3
Keith Brill, M.D., Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 10/6/2021

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY TAYLOR, an individual,

Plaintiff,

v.

KEITH BRILL, M.D., FACOG, FACS, an individual; WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA – MARTIN, PLLC, a Nevada Professional Limited Liability Company; BRUCE HUTCHINS, RN, an individual; HENDERSON HOSPITAL and/or VALLEY HEALTH SYSTEMS, LLC, a Foreign LLC d/b/a HENDERSON HOSPITAL, a subsidiary of UNITED HEALTH SERVICES, a Foreign LLC; TODD W. CHRISTENSEN, M.D., an individual; DIGNITY HEALTH d/b/a ST. ROSE DOMINICAN HOSPITAL; DOES I through XXX, inclusive; and ROE CORPORATIONS I through XXX, inclusive,

Defendants.

CASE NO.: A-18-773472-C

DEPT NO.: III

PLAINTIFF KIMBERLY TAYLOR'S OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER OR CLARIFY ORDER REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 2 TO EXCLUDE INFORMED CONSENT FORM AND TERMS OR ARGUMENT REGARDING "RISK" OR "KNOWN COMPLICATION" ON ORDER SHORTENING TIME

Hearing Date: October 7, 2021

Time of Hearing: In Chambers

Plaintiff, KIMBERLY TAYLOR, by and through her attorney of record, ADAM J. BREEDEN, ESQ. of BREEDEN & ASSOCIATES, PLLC, and hereby submits her Opposition to Defendants' Motion to Reconsider or Clarify Order Regarding Plaintiff's Motion in Limine #2: Motion to Exclude Informed Consent Form and Terms or Argument Regarding "Risk" or "Known Complications" as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this Motion, the Defense seeks a "reconsideration" of a ruling barely a week old citing no significant new case law or intervening developments. The Motion for Reconsideration should be summarily denied as it simply seeks a proverbial second bite at the apple on a legal issue already well briefed and cogently ruled on by the Court.

II. BACKGROUND

This is a medical malpractice action by Plaintiff Kimberly Taylor against her OB/GYN Defendant Keith Brill. On August 18, 2021, Taylor filed her Motion in Limine #2 to address the Defense use of consent forms and claims of known "risks" or "complications." Consent is, in fact, not a defense to a medical malpractice action and not relevant to the standard of care. Therefore, Taylor sought to exclude such evidence and argument at trial as irrelevant and/or more prejudicial than probative.

On September 27, 2021, the Court made an oral ruling on the Motion (the written order is still processing). The Court's oral ruling was that evidence, argument or reference to the informed consent form the Plaintiff signed or discussions about risks and complications had with the Plaintiff are barred. However, the Defense may refer to perforations as known "risks" or "complications" during their defense.

On October 4, 2021, the Defense filed a motion for reconsideration, citing no new case law or intervening authority, nor new evidence. Therefore, Taylor opposes the motion and requests that it be denied.

III. LAW AND ARGUMENT

A. Motions for Reconsideration are Disfavored and Should not Typically be Granted

To prevent ad nauseum litigation of the same issue, EDCR 2.24(a) states "[n]o motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties."

Courts generally recognize three circumstances in which reconsideration is appropriate:

(1) the court is presented with newly discovered evidence, (2) the court has committed clear error or the initial decision was manifestly unjust, or (3) there has been an intervening change in controlling law.[1] The Nevada Supreme Court has denied rehearing or amendment of orders where no clear error was established,[2] and where no new evidence or no new evidence strong enough to yield a different result is put forth.[3] Further, reconsideration should be denied where the allegedly "new" evidence or arguments were available to the moving party at the time the original motion was litigated.[4] On the other hand, a motion for reconsideration is properly denied when the movant fails to establish any reason justifying relief.[5]

Above all else, "a motion for reconsideration is not an avenue to re-litigate the same issues and arguments upon which the court already has ruled."[6] The fact that a litigant disagrees with the court's decision does not entitle the litigant to relief—he or she must present a legitimate basis for the court to reconsider its decision.[7]

The present Motion for Reconsideration before the Court simply falls into the last category—a mere attempt to re-litigate already settled issues. Therefore, it should be denied.

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[1] *Nunes v. Ashcroft*, 375 F.3d 805, 807-08 (9th Cir. 2004) (quoting *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

[2] *Brechan v. Scott*, 92 Nev. 633, 634 (1976) ("when there is substantial evidence to sustain the judgment, it will not be disturbed. An exception to the general rule obtains where, upon all the evidence, it is clear that a wrong conclusion has been reached.").

[3] *Whise v. Whise*, 36 Nev. 16, 24 (1913) (denying new trial for lack of significant new evidence).

[4] *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) "Failure to file documents in an original motion or opposition does not turn the late filed documents into "newly discovered evidence."); *Waltman v. International Paper Co.*, 875 F.2d 468, 473-74 (5th Cir. 1989) (materials available at time of filing opposition to summary judgment would not be considered with motion for reconsideration); *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1557 & n.4 (9th Cir. 1987) (court did not abuse its discretion in refusing to consider affidavits opposing summary judgment filed late); *Frederick S. Wyle Professional Corp. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) (evidence available to party before it filed its opposition was not "newly discovered evidence" warranting reconsideration of summary judgment).

[5] *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

[6] *W. Shoshone Nat. Council v. United States*, 408 F. Supp. 2d 1040, 1053 (D. Nev. 2005) (citation omitted).

[7] *See*, e.g., *Backlund*, 778 F.2d at 1388; *Maraziti v. Thorpe*, 52 F.3d 252, 255 (9th Cir. 1995).

The Defense Motion for Reconsideration cites no intervening case law or facts it could not have originally argued. But even more frustrating is that it fails to challenge the very core of why the Motion in Limine was granted in the first place, i.e., that consent or informed consent forms are irrelevant and prejudicial in a medical malpractice action not based on lack of consent.

B. <u>The Motion for Reconsideration should be Denied</u>

The Court controls what evidence is irrelevant or more prejudicial than probative. NRS Chapter 48 states the following:

> **NRS 48.015 "Relevant evidence" defined.** As used in this chapter, "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.
>
> **NRS 48.025 Relevant evidence generally admissible; irrelevant evidence inadmissible.**
>
> 1. All relevant evidence is admissible, except:
>
> (a) As otherwise provided by this title;
> (b) As limited by the Constitution of the United States or of the State of Nevada; or
> (c) Where a statute limits the review of an administrative determination to the record made or evidence offered before that tribunal.
>
> 2. Evidence which is not relevant is not admissible.
>
> **NRS 48.035 Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time**.
>
> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Taylor's prior motion exhaustively explained the stress the Defense was putting on the issue of informed consent during discovery practice. The Defense obviously wants the jury to confuse or conflate informed consent with assumption of the risk or consent to the injury in this case. Taylor's prior motion also exhaustively cited to many cases explaining that informed consent is an <u>irrelevant</u> issue to most medical malpractice cases because a patient cannot consent to a negligently performed procedure. Introduction of evidence of informed consent only serves to confuse the jury from the

actual factual issue in dispute, the standard of care and whether the doctor abided by it.[8] Therefore, the patient's informed consent form as well as informed consent discussions between the doctor and patient are both irrelevant and substantially outweighed by a risk of prejudice and juror confusion.

The Defense Motion for Reconsideration begins claiming it is erroneous to say there is no assumption of risk or known complication defense in a medical malpractice action. This assertion is incorrect, there is no assumption of risk defense in a medical malpractice action. The Nevada Supreme Court has made this clear. *Busick v. Trainor*, Case # 72966, 2019 WL 1422712 437 P.3d 1050 (Nev. 2019) (unpublished) (acknowledging that informed consent to a surgery does not grant consent to negligently perform the procedure). The Defense boldly asserts that the informed consent evidence is "relevant" even though all the applicable case law and the Court's prior decision found it not to be relevant at all to the standard of care issue or at least more prejudicial than probative.

While the Motion for Reconsideration calls the informed consent evidence "critical evidence" in this case, it is in fact *irrelevant* evidence that is not probative of the real issue in

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[8] E.g., *Wilson v. Patel*, 517 S.W.3d 520 (Mo. 2017), *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004), *Waller v. Aggarwal*, 116 Ohio App. 3d 355, 357-358, 688 N.E.2d 274, 275 (Ohio App. 1996) (trial court erred by allowing evidence of informed consent when malpractice action was based on negligence); *Warren v. Imperia*, 252 Ore. App. 272, 287 P.3d 1128, 1132 (Ore. Ct. App. 2012) ("Evidence of plaintiff's awareness of [information about the nature of the procedure, its inherent risks, or available alternatives] would neither have assisted plaintiff in proving negligence nor have assisted defendant in showing that he was not negligent."); *Brady v. Urbas*, 631 Pa. 329, 340-41, 111 A.3d 1155, 1162 (2015) ("there is no assumption-of-the-risk defense available to a defendant physician which would vitiate his duty to provide treatment according to the ordinary standard of care. The patient's actual, affirmative consent, therefore, is irrelevant to the question of negligence."); *Hayes v. Camel*, 283 Conn. 475, 486, 927 A.2d 880, 889 (2007) ("evidence of informed consent, such as consent forms, is both irrelevant and unduly prejudicial in medical malpractice cases without claims of lack of informed consent"); *Ehrlich v. Sorokin*, 451 N.J. Super. 119, 131, 165 A.3d 812, 819 (Super. Ct. App. Div. 2017) ("Plaintiff's acknowledgment of the risk for perforation had no bearing on this determination [of negligence]…although negligent treatment and informed consent fall under the umbrella of medical negligence, our law clearly distinguishes the two claims…"); *Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696, 705-06 (Cal. 1992) (stating that a patient "by voluntarily encountering" a risk of injury does not "'impliedly consent' to negligently inflicted injury or 'impliedly agree' to excuse the surgeon from a normal duty of care"); *Schwartz v. Johnson*, 206 Md. App. 458, 483, 49 A.3d 359, 373 (2012) (explaining why jurors should not hear evidence of informed consent and risk of surgery in a negligence case not premised on lack of informed consent).

dispute—standard of care—in the least.

The Defense argues that "evidence of known complications associated with surgery is very relevant" but the court did not exclude that evidence. The Court's prior ruling allowed the defense to refer to the injuries caused as risks or complications of surgery. The material excluded was informed consent form and informed consent discussions with Taylor.

There is also important public policy here because if doctors can hold up an informed consent form and claim insulation from malpractice liability, they are likely to put injuries that really do not occur without malpractice on that form. This case is a prime example. It would seem hard for the doctors in this case to seriously allege that it is within the standard of care to burn or push the resectoscope device so far through the uterus that it caused a massive hole in the small intestine. Neither Dr. Brill, Dr. McCarus nor Dr. Berke had ever actually seen such an injury from hysteroscopy and RF ablation before.

If the District Court is concerned about prospects of appeal, it should be noted that if the Court excludes the informed consent evidence (which it currently has), this would be a discretionary ruling on evidence that is well-supported by case law. Thus, the Defense would be very unlikely to prevail on an appeal on this issue, especially since the court will still allow the Defense to talk about known risks and complications. It would be nearly impossible for the Defense to win this issue as "clear error" or abuse of discretion on appeal. Conversely, Plaintiff already has a large body of case law that supports *exclusion* of the informed consent evidence for Taylor. Thus, if the Court were to reconsider and change its ruling on this issue, the issue may be likely to lead to reversal on appeal and the new trial. If the Court seeks the safest course from a grounds to appeal point of view, it is safer to exclude the informed consent evidence.

The Defense selectively cites in its motion portions of the case of *Brady v. Urbas*, 631 Pa. 329, 341-42, 111 A.3d 1155, 1162-63 (2015), but this case again overwhelmingly supports Taylor's position and the Court's original ruling. In *Brady* the Pennsylvania Supreme court plainly held that "assent to treatment does not amount to consent to negligence, regardless of the enumerated risks and complications of which the patient was made aware" and that "in a trial on a malpractice complaint that only asserts negligence, and not lack of informed consent, evidence that a patient

agreed to go forward with the operation in spite of the risks of which she was informed is irrelevant and should be excluded." *Id*. at 1162-63. In ordering a new trial after a medical malpractice case where informed consent evidence had been wrongly admitted, *Brady* explained further that:

> Evidence of the patient's consent also tends to confuse the issue because…the jury might reason that the patient's consent to the procedure implies consent to the resultant injury… and thereby lose sight of the central question pertaining to whether the defendant's actions conformed to the governing standard of care. Indeed, the present case illustrates the point: the defense questioned Appellee at length about her having signed the consent forms, elicited testimony from Dr. Urbas on the topic, and made references to the fact of Appellee's consent during its summation — all in an effort to rebut the allegation of negligence.

It is curious that the Defense would even cite to *Brady* since it is written so compellingly <u>against</u> the position the Defense urges. In *Brady*, the case had to be tried twice due to the error of the lower court in allowing the informed consent evidence and argument Taylor seeks to exclude from this trial. This is the exact reversible error Taylor is trying to prevent in this action.

As for the request for clarification, following the Court's ruling Taylor's counsel also requested that other consent forms in Dr. Brill's records and Henderson Hospital's records that contain similar language be redacted. The Defense would not agree to that, but the legal issue is identical and any informed consent forms should not be referred to or admitted into evidence by the parties.

IV. <u>CLOSING</u>

The Defense Motion for Reconsideration is not based on new evidence or law not available at the time of the original motion hearing. Instead, it seeks only the classic second bite at the apple requesting that the court look again at the issue and reverse its ruling. It alleges "clear error" despite well-briefed case law against its position. Procedurally, this is improper for a Motion for Reconsideration.

Furthermore, looking to the substance of the dispute, these cases cited by Taylor unanimously discuss and agree that in a medical malpractice case not premised on lack of informed consent, evidence of informed consent, consent forms and discussion of risks and complications of the procedure are: (1) irrelevant to the ultimate issue of whether the physician exercised reasonable care, (2) not probative of an assumption of risk defense, which the law does not recognize for

medical malpractice actions and (3) such evidence is highly prejudicial and creates juror confusion.

Respectfully, the informed consent form and discussions had with Taylor should be excluded at trial and the Defense Motion for Reconsideration should be denied.

DATED this 6th day of October, 2021.

BREEDEN & ASSOCIATES, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2021, I served a copy of the foregoing legal document **PLAINTIFF KIMBERLY TAYLOR'S OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER OR CLARIFY ORDER REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 2 TO EXCLUDE INFORMED CONSENT FORM AND TERMS OR ARGUMENT REGARDING "RISK" OR "KNOWN COMPLICATION" ON ORDER SHORTENING TIME** via the method indicated below:

X	Pursuant to NRCP 5 and NEFCR 9, by electronically serving all counsel and e-mails registered to this matter on the Court's official service, Wiznet system.
	Pursuant to NRCP 5, by email using a Dropbox link and/or by placing a copy in the US mail, postage pre-paid to the following counsel of record or parties in proper person: Heather S. Hall, Esq. McBRIDE HALL 8329 W. Sunset Road, Suite 260 Las Vegas, Nevada 89113 *Attorneys for Defendants Keith Brill, M.D. and Women's Health Associates*
	Via receipt of copy (proof of service to follow)

An Attorney or Employee of the following firm:

/s/ Kristy Johnson
BREEDEN & ASSOCIATES, PLLC

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY TAYLOR, an individual,

Plaintiff,

v.

KEITH BRILL, M.D., FACOG, FACS, an individual; WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA – MARTIN, PLLC, a Nevada Professional Limited Liability Company; BRUCE HUTCHINS, RN, an individual; HENDERSON HOSPITAL and/or VALLEY HEALTH SYSTEMS, LLC, a Foreign LLC d/b/a HENDERSON HOSPITAL, a subsidiary of UNITED HEALTH SERVICES, a Foreign LLC; TODD W. CHRISTENSEN, M.D., an individual; DIGNITY HEALTH d/b/a ST. ROSE DOMINICAN HOSPITAL; DOES I through XXX, inclusive; and ROE CORPORATIONS I through XXX, inclusive,

Defendants.

CASE NO.: A-18-773472-C

DEPT NO.: III

PLAINTIFF KIMBERLY TAYLOR'S TRIAL BRIEF

Plaintiff, KIMBERLY TAYLOR, by and through her attorney of record, ADAM J. BREEDEN, ESQ. of BREEDEN & ASSOCIATES, PLLC, and hereby submits her Trial Brief pursuant to EDCR 2.69(a)(7).

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/ / /

I.

FACTUAL BACKGROUND

This is a medical malpractice action by Plaintiff Kimberly Taylor against her OB/GYN Defendant Keith Brill. On April 26, 2017, Dr. Brill performed an intended dilation and curettage with hysteroscopy combined with fibroid tumor removal and hydrothermal ablation procedure on Ms. Taylor. In layman's terms, this meant that a small scope and cutting device called a resectoscope would be inserted through the vagina into the uterus and a fibroid tumor previously identified via ultrasound in the uterus would be removed. This procedure was done with the use of a Symphion system resectoscope device. This is a small, tube-like device of 3 mm in diameter that is inserted into the uterus through an endoscope. The tip has an ablation device which cuts with radiofrequency or heat from electricity. The patient is under complete anesthesia for the procedure.

It is undisputed that during the procedure Dr. Brill caused the resectoscope to **perforate through the wall of the uterus where the instrument then also perforated the small intestine**, **causing free leakage of stool and body waste into the abdomen of Ms. Taylor**. It is also undisputed that Dr. Brill saw the uterine perforation intraoperatively but *failed* to recognize that he had also injured the small bowel. The parties disagree as to what Dr. Brill told Ms. Taylor about the perforation and exactly how and when the perforations occurred and whether the perforations were beneath the standard of care. The resectoscope procedure was terminated but Ms. Taylor had unknown intestinal leakage into her abdomen. After two visits to the emergency room post-operatively, another physician finally diagnosed the injury to the small intestine. A second surgery had to occur wherein a portion of Ms. Taylor's small intestine had to be removed and she had to be hospitalized for over a week. She presents a claim for approximately $225,620.07 in medical special damages and the cap amount of $350,000 for pain and suffering.

The parties do not appear to dispute damages and injury but instead dispute whether Dr. Brill's treatment fell below the standard of care for the procedure. Dr. Brill appears to want to argue that merely because uterine and similar injury is a "risk" of the procedure to which Ms. Taylor consented that he can never be held liable, which is an incorrect statement of the law.

Plaintiff Kimberly Taylor is represented by Adam J. Breeden, Esq. and Yianna Albertson-

Reizakis, Esq. (of counsel) of Breeden & Associates, PLLC.

Defendant Dr. Keith Brill and Women's Health Associates of Southern Nevada are represented by Heather Hall, Esq. and Robert McBride, Esq. of McBride Hall.

II.

DAMAGES ALLEGATIONS

Plaintiff will present a claim for uterine and small intestine injury resulting in abdominal infection which required bowel resection surgery and a nine day hospitalization. She presents a claim for approximately $225,620.07 in medical special damages and the cap amount of $350,000 for pain and suffering.

III.

UNUSUAL LEGAL ISSUES

This is a medical malpractice action with few unsettled or novel legal issues. The parties litigated several motions in limine prior to trial on the most disputed legal issues. Final rulings on jury instructions were deferred. Some further briefing on certain issues is below:

A. Display of Anticipated Evidence During Opening Statements

Plaintiff's counsel intends, in his presentation of opening statements, to show anticipated evidence in the case to the jury, possibly to include photographs, video, depositions, excerpts of medical records, and representations of medical anatomy and medical procedures. At this time, the following is anticipated: (1) detailed illustrations of the procedure and Plaintiff's theory of the case, (2) a video explaining the Symphion resectoscope device at issue in the case, (3) an exemplar actual Symphion resectoscope device of the kind used on Plaintiff, and (4) a copy of Dr. Brill's operative report (medical record).

There is one judge in this District that has a rule to the effect that counsel cannot show the jury *any evidence* in opening statements because it has not yet been formally admitted into evidence. This is an erroneous position. Further, Plaintiff's counsel has observed certain defense counsel objecting when anticipated evidence is shown during opening statements, with the apparent purpose of trying to disrupt opening statements and lessen the effectiveness of the presentation of opening arguments. This is essentially handicapping the presentation and is a view inconsistent with modern

trial practice. It is also generally a one-way handicap because the plaintiff bears the burden of proof so this limitation disproportionately limits the effectiveness of Plaintiff's case if imposed.

"The purpose of the opening statement is to acquaint the jury and the court with the nature of the case." *Garner v. State*, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962). "An opening statement outlines 'what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole…" *Watters v. State,* 313 P.3d 243, 247 (Nev. 2013) citing *United States v. Dinitz,* 424 U.S. 600, 612, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976). During opening statements, counsel is allowed to "outline his theory of the case and to propose those facts he intends to prove." *Garner*, 78 Nev. at 371. While argument is inappropriate during opening statements, counsel may refer to any evidence that counsel "believes in good faith will be available and admissible" during opening statements. *Watters*, 313 P.3d at 247.

If it was *ever* the rule that counsel could not actually show jurors anticipated evidence during opening statements, the rule has been discarded in the present day. "Today, a majority of courts seem to take a liberal approach, allowing litigators to display actual evidence or use demonstrative aids during opening statements." Mindy G. Barfield, *Use of "Evidence" in Opening Statement: The Most Dangerous Weapon in a Litigator's Arsenal*, For The Defense, P. 50 (Defense Research Institute, Spring 2009). Part of the rationale for allowing anticipated evidence to be shown to the jury is that "if the items used are ultimately admitted at trial, any error in allowing their use during opening statements is harmless." *Fisher v. State,* 220 S.W.3d 599, 602 (Tex. App. 2007). Of course, the availability of technology that allows vivid and seamless presentation to the jury has also been a factor.

The Nevada Supreme Court has directly ruled that scene **photographs** and photographs of injuries may be shown to the jury during opening statements. *Vergara-Martinez v. State,* No. 65853, 2016 Nev. Unpub. LEXIS 284, at *9 (Apr. 5, 2016) (trial court did not err in allowing counsel to show the jury scene and gruesome victim photos during opening statements). **PowerPoint slides** are, of course, permissible to show the jury as long as the slide does not express anything that counsel himself/herself would not be able to state. *Watters v. State*, 313 P.3d 243, 247 (Nev. 2013) (analysis of use of Powerpoint). Nevada law also states that the "deposition of a party may be used by an

adverse party for any purpose" not simply impeachment, thereby allowing its use during opening statements as well. Nev. R. Civ. P. 32(a)(2).

Authority from other jurisdictions establishes counsel's right to actually show the jury items that are anticipated to be introduced as evidence during trial as well. **Physical items**, such as weapons or clothing are allowed to be shown to the jury during opening statements. *Commonwealth v. Parker*, 591 Pa. 526, 538, 919 A.2d 943, 951 (2007) (permitting a prosecutor to display a gun during opening statements); *People v. Trent*, 315 Ill. App. 3d 437, 448-49, 734 N.E.2d 1, 9-10 (2000) (victim's clothes shown during opening statements). Video clips of **depositions** or parts of deposition transcripts may be used during opening. *Spence v. Southern Pine Electric Cooperative*, 643 So.2d 970 (S. Ct. Ala. 1994) (trial court did not err in permitting defense counsel to use enlarged copies of the deposition transcripts of two witnesses as demonstrative exhibits in opening statements); *Sadler v. Advanced Bionics, LLC*, 2013 U.S.Dist. LEXIS 46637, 7-9 (W.D. Kentucky 2013) (Court would consider permitting use of excerpts of videotaped depositions during opening statement if they were "otherwise admissible at trial" and "not unnecessarily lengthy"); *Smith v. I-Flow Corp.*, 2011 U.S. Dist. LEXIS 63329, 11-12 (N.D. Ill. 2011) (denying a motion to prohibit use of excerpts of videotaped depositions during opening statements); *Northfield Insurance Co. v. Royal Surplus Linse Ins. Co.*, 2003 U.S. Dist. LEXIS 27959, 8 (Central D. Cal. 2003) (permitting the use of video deposition excerpts and transcripts in opening statement because the deposition of a party may be used "for any purpose"); *MBI Acquisition Partners, L.P. v. The Chronicle Pub. Co.*, 2002 U.S. Dist. LEXIS 28458, 3 (W.D. Wisc. 2002) (permitting use of excerpts from a video deposition during opening statement). Demonstrative exhibits such as summaries, charts, graphs and diagrams can also be shown to the jury. *West v. Martin*, 11 Kan.App.2d 55, 713 P.2d 957, 958-59 (1986) ("We see no reason or need to restrict the use of demonstrative evidence in an opening statement unless a genuine and unresolved question exists as to its admissibility.").

Therefore, to avoid disputes and interruption of counsel's opening statements it is requested that the Court take note of these rules. This is modern civil trial practice and presentation. A strict approach that anticipated evidence can never been shown to the jury during opening statements is simply not modern law. Such an approach has been abandoned by the Nevada Supreme Court and

every modern case addressing the issue. Plaintiff's counsel should not be handicapped during opening statements in this case. Counsel will, of course, abide by his ethical duties not to display evidence that he has no reasonable basis to believe will be admissible at trial.[1] Otherwise, evidence that counsel has a good faith basis to believe is admissible at trial can be displayed during opening statements.

B. Admission of Medical and Billing Records

At trial, Plaintiff will seek to introduce medical and billing records from treating physicians. Defense attorneys in this jurisdiction often raise highly technical objections to the same during trial, which accomplish little but the harassment of opposing counsel and obstruction of evidence to which there is no genuine fault.

At trial, Plaintiff will rely on various statutes to authenticate the medical and billing records and introduce them into evidence. NRS § 51.115 provides that "[s]tatements made for purposes of **medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations**, or the inception or general character of the cause or external source thereof are not inadmissible under the hearsay rule insofar as they were reasonably pertinent to diagnosis or treatment." This generally allows hearsay statements of Plaintiff and her physicians into evidence via medical records.

In addition, NRS § 51.135 states that "[a] memorandum, report, record or compilation of data, in any form, of acts, events, conditions, **opinions or diagnoses**, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." This provides another exception to the hearsay rule in Nevada.

[1] For example, counsel could never show the jury a letter with a settlement offer from opposing counsel or show the jury an insurance policy as the same lack a good faith basis to believe they are admissible.

Lastly, to authenticate the records, Plaintiff relies on NRS § 52.260 which states "The contents of a record made in the course of a regularly conducted activity in accordance with NRS 51.135, if otherwise admissible, may be proved by the original or a copy of the record which is authenticated by a custodian of the record or another qualified person in a signed affidavit."

For the reasons stated above, Plaintiff may rely on certificates of custodians of records to authenticate documents as opposed to calling 10-20 different witnesses for brief testimony.

C. Closing Argument

Counsel is allowed to argue any reasonable inferences from the evidence the parties have presented at trial. *Klein v. State*, 105 Nev. 880, 784 P.2d 970 (1989); *State v. Teeter*, 65 Nev. 584, 642, 200 P.2d 657, 685 (1948). During closing argument, trial counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence. *State v. Teeter*, 65 Nev. 584, 200 P.2d 657 (1948); *Jain v. McFarland*, 109 Nev. 465 (1993).

The phrase "send a message" is not per se impermissible. Defense counsel was allowed to close and argue ""[i]f you want to send a message to the homeowners that their houses are safe, tell them, 'I sat for 12 weeks; I listened to everything; your house is safe.'" *Gunderson v. D.R. Horton, Inc.*, 319 P.3d 606, 613 (Nev. 2014). "Send a message" argument is not improper if focused on the facts of the particular case. *Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 789 (Nev. 2017).

An argument that "You have important power and important duty and a service that you provided here for us today. And you have two options. If your verdict is too low, then that tells people they can get away with breaking the rules." was permissible, it was not a "golden rule" argument. *Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 789 (Nev. 2017)

An argument that "Your verdict might even hit the paper. Verdicts hit the paper. The reason they do that is because people read verdicts. And verdicts shape how people follow the rules. I submit to you the evidence in this case. If you return a verdict that is too low, people don't follow the rules" was allowed, not a "golden rule" violation. *Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 789 (Nev. 2017).

Plaintiff's counsel, however, will abide by pre-trial rulings on these issues.

/ / /

IV.

ANTICIPATED WITNESSES

Plaintiff at this time anticipates the live testimony of thirteen (13) live witnesses. The witnesses will primarily be doctors, relatives and medical billing specialists:

1) Kimberly Taylor (plaintiff)
2) Barbara Olsen (plaintiff's mother)
3) Clyde Olsen (plaintiff's step-father)
4) Dr. Elizabeth Hamilton (treating provider)
5) Elizabeth Laca (plaintiff's co-worker)
6) Bruce Hutchins (treating provider)
7) Billing representative, Dr. Lipman (treating provider)
8) Billing representative City of Henderson (treating provider)
9) Billing representative St. Rose Hospital (treating provider)
10) Billing representative Henderson Hospital (treating provider)
11) Dr. Szu Yeh (treating provider)
12) Dr. David Berke (plaintiff's retained expert)
13) Dr. Keith Brill (Defendant)

While this list appears lengthy, the reality is that several witnesses are anticipated to testify for only approximately 15 minutes.

V.

ANTICIPATED EVIDENCE

The evidence in this case consists of various medical records, photographs, billing records, a resectoscope and related evidence. No usual site visits, recreations or evidence of that kind is anticipated.

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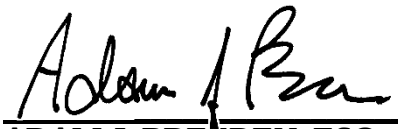
VI.

CLOSING

In closing, this is a medical malpractice action involving injury to the uterus and small intestine during a gynecology procedure.

DATED this 6th day of October, 2021.

BREEDEN & ASSOCIATES, PLLC



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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2021, I served a copy of the foregoing legal document **PLAINTIFF KIMBERLY TAYLOR'S TRIAL BRIEF** via the method indicated below:

X	Pursuant to NRCP 5 and NEFCR 9, by electronically serving all counsel and e-mails registered to this matter on the Court's official service, Wiznet system.
	Pursuant to NRCP 5, by email using a Dropbox link and/or by placing a copy in the US mail, postage pre-paid to the following counsel of record or parties in proper person: Heather S. Hall, Esq. Robert McBride, Esq. McBRIDE HALL 8329 W. Sunset Road, Suite 260 Las Vegas, Nevada 89113 *Attorneys for Defendants Keith Brill, M.D. and Women's Health Associates*
	Via receipt of copy (proof of service to follow)

An Attorney or Employee of the following firm:

/s/ Kristy Johnson
BREEDEN & ASSOCIATES, PLLC

ELECTRONICALLY SERVED
10/7/2021 8:45 AM

Electronically Filed
10/07/2021 8:45 AM
CLERK OF THE COURT

ORDR
ADAM J. BREEDEN, ESQ.
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Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KIMBERLY TAYLOR, an individual,

Plaintiff,

v.

KEITH BRILL, M.D., FACOG, FACS, an individual; WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA – MARTIN, PLLC, a Nevada Professional Limited Liability Company; BRUCE HUTCHINS, RN, an individual; HENDERSON HOSPITAL and/or VALLEY HEALTH SYSTEM, LLC, a Foreign LLC dba HENDERSON HOSPITAL, and/or HENDERSON HOSPITAL, a subsidiary of UNITED HEALTH SERVICES, a Foreign LLC; TODD W. CHRISTENSEN, M.D., an individual; DIGNITY HEALTH d/b/a ST. ROSE DOMINICAN HOSPITAL; DOES I through XXX, inclusive; and ROE CORPORATIONS I through XXX, inclusive,

Defendants.

CASE NO.: A-18-773472-C

DEPT NO.: III

ORDER REGARDING PLAINTIFF'S MOTIONS IN LIMINE

Plaintiff's Motions in Limine #1-4 came for oral argument on September 27, 2021 at 2:00 p.m. Plaintiff, KIMBERLY TAYLOR was represented by her counsel Adam J. Breeden, Esq. of BREEDEN & ASSOCIATES, PLLC. Defendants, KEITH BRILL, M.D. and WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA- MARTIN, PLLC were represented by their counsel Heather Hall, Esq. of McBRIDE HALL. Having reviewed the pleadings and papers on file

and heard oral argument;

IT IS HEREBY ORDERED, ADJUDICATE AND DECREED that Plaintiff's Motion in Limine #1 is DENIED. Plaintiff shall not be permitted to use the phrase "send a message," reference news media, reference the conscience of the community, use the Want Ad technique or make per diem arguments in closing argument.

IT IS FURTHER ORDERED that Plaintiff's Motion in Limine #2 is granted in part and denied in part. Evidence, argument or reference to the informed consent form the Plaintiff signed or discussions about risks and complications had with the Plaintiff are barred. However, the Defense may refer to perforations as known "risks" or "complications" during their defense.

IT IS FURTHER ORDERED that Plaintiff's Motion in Limine #3 is DENIED. Pursuant to the Piroozi case, the Defense will be allowed to question witnesses as to the liability of non-party medical care providers and the jury will be allowed to apportion asserted negligence to those parties. The Court reserves how this will be addressed in jury instructions and the verdict form for trial.

IT IS FURTHER ORDERED that Plaintiff's Motion in Limine #4 is DENIED. The Court finds that NRS § 42.021 is constitutional under the rational basis test to keep doctors in Nevada. The Court further finds that evidence of collateral source payments by Plaintiff's health insurer may be admitted at trial. The Court reserves issues of what instructions on this issue will be provided to the jury for trial.

Dated this 7th day of October, 2021

3BA 13A 903E C193
Monica Trujillo
District Court Judge

Submitted by:

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Approved for Form and Content by:

McBRIDE HALL

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Keith Brill, M.D. and
Women's Health Assoc. of S. Nev.

Kristy Johnson

From: Heather S. Hall <hshall@mcbridehall.com> on behalf of Heather S. Hall
Sent: Tuesday, October 5, 2021 11:37 AM
To: Adam Breeden
Cc: Kristy Johnson; Yianna Reizakis; Robert McBride; Candace P. Cullina; Kristine Herpin
Subject: RE: Taylor v. Brill, M.D.- Plaintiff's MIL order

You may use my e-signature on this Order.

Thank you,

Heather S. Hall, Esq.
hshall@mcbridehall.com | www.mcbridehall.com
8329 West Sunset Road
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MCBRIDE HALL
ATTORNEYS AT LAW

From: Adam Breeden <adam@breedenandassociates.com>
Sent: Tuesday, October 5, 2021 9:29 AM
To: Heather S. Hall <hshall@mcbridehall.com>
Cc: Kristy Johnson <kristy@breedenandassociates.com>; Yianna Reizakis <mail@legalangel.com>; Robert McBride <rcmcbride@mcbridehall.com>; Candace P. Cullina <ccullina@mcbridehall.com>; Kristine Herpin <kherpin@mcbridehall.com>
Subject: Re: Taylor v. Brill, M.D.- Plaintiff's MIL order

Heather,

Please see the attached with your changes and send another "I approve" email. I have had orders kicked back if the approval email says "make changes and we approve" since the court has a hard time knowing if the changes were made.

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Kimberly Taylor, Plaintiff(s)	CASE NO: A-18-773472-C
vs.	DEPT. NO. Department 3
Keith Brill, M.D., Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 10/7/2021

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