

IN THE SUPREME COURT OF THE STATE OF NEVADA

LANDS, INC. dba SPRINGSTONE
LAKES MONTESSORI SCHOOL and
SPRINGLANDS LLC

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA
ex rel. THE COUNTY OF CLARK, AND
THE HONORABLE TARA CLARK
NEWBERRY,

Respondent.

JASMIN LAUDIG, a minor, by and
through her father, JOHN LAUDIG,

Real Party In Interest.

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Supreme Court No. _____
District Court Case No. _____
A-20-808230-C

**LANDS, INC. dba SPRINGSTONE LAKES MONTESSORI SCHOOL AND
SPRINGLANDS LLC'S PETITION FOR WRIT OF MANDAMUS**

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*Attorneys for Petitioners Lands, Inc. dba springstone
Lakes Montessori School and Springlands LLC*

COME NOW Petitioners LANDS, INC. dba SPRINGSTONE LAKES
MONTESSORI SCHOOL and SPRINGLANDS LLC (hereinafter collectively

“Springstone”) and hereby submit this PETITION FOR WRIT OF MANDAMUS (the “Petition”), with the following Memorandum of Points and Authorities. This Petition is brought pursuant to Nevada Rules of Appellate Procedure (“NRAP”) 21(a) for issuance of a writ of mandamus directing the district court, Department XXI of the Eighth Judicial District of Nevada, Respondent Honorable District Judge Tara Clark Newberry presiding, to make a determination that a factual dispute exists as to the causation and reasonableness and necessity of Plaintiff’s past and future medical specials and that Plaintiff’s medical expense are admissible and not unfairly prejudicial to Plaintiff.

The issue presented is whether the lower court was required to deny Plaintiff’s Motion for Summary Judgment pursuant to NRCP 56(c) and Plaintiff’s Motion in *Limine* No. 2 to Exclude Evidence of Any Granted or Waived Past Medical Specials and Medical Bills pursuant to NRS 48.025. NRCP 56(c) states that summary judgment is only appropriate when, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine dispute as to any material fact. *See also Wood v. Safeway*, 121 Nev. 724, 731 (2005). When viewing the facts in the light most favorable to Petitioners, a genuine issue of material fact exists as to the causation and reasonableness of Plaintiff’s past and future medical specials which necessitates a denial of Plaintiff’s Motion for Partial Summary Judgment. NRS 48.025 states that all relevant evidence, or evidence which has

any tendency to make the existence of a material fact of the action more or less probable, is admissible unless prohibited by law. *See also* NRS 48.015. While relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, evidence of Plaintiff's medical bills has significant probative value that is not outweighed by the danger of unfair prejudice.

Plaintiff Jasmin Lauding alleged in her Complaint that she was injured while on Petitioners' premises. Plaintiff disclosed past and future medical expenses through the course of discovery. Petitioners did not disclose a an expert witness to rebut Plaintiff's claims but obtained the deposition Plaintiff's treating physician John Kim, MD and intended to use his testimony to address the causation and reasonableness of Plaintiff's past and future medical treatment at trial. There is a genuine issue of material fact as to the reasonableness and causation of Plaintiff's alleged past and future medical expenses. Evidence of Plaintiff's past and future medical expenses is relevant to an essential element of Plaintiff's claim, specifically Plaintiff's claim for past and future pain and suffering.

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The relief sought herein is this Court's intervention by way of extraordinary writ, requiring the district court to deny Plaintiff's Motion for Summary Judgment and Motion in *Limine* No. 2 to Exclude Evidence of Any Granted or Waived Past Medical Specials and Medical Bills.

Dated this 24th day of May 2022.

ALVERSON TAYLOR & SANDERS



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ROUTING STATEMENT

Pursuant to NRAP 17(a)(12), this Petition raises as a principal issue a question of statewide public importance. As such, jurisdiction over this matter is presumptively retained by the Nevada Supreme Court and not with the Nevada Court of Appeals. Likewise, there is no existing authority vested in the Nevada Court of Appeals which would permit the Court of Appeals to address this issue.

This Petition warrants consideration by the Nevada Supreme Court because an important issue of law requires clarification regarding the applicability of *Didier* to pre-trial dispositive motions before a defendant has had the opportunity to present evidence at trial. *See Didier v. Sotolongo*, 76289, 2019 WL 2339970 (Nev. May 31, 2019). This prior Nevada Supreme Court decision has been improperly applied to Plaintiff's Motion for Partial Summary Judgment.

This issue requires clarification regarding whether a defendant should be permitted to present evidence and elicit testimony from witnesses to dispute a plaintiff's medical damages. Resolution of this issue will promote judicial economy. *See State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002). Additionally, an eventual appeal following trial will

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not afford an adequate remedy. NRS 34.170. Therefore, consideration of this Petition is proper.

Dated this 24th day of May 2022.

ALVERSON TAYLOR & SANDERS



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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 Judges of this Court may evaluate possible disqualification or recusal.

Petitioners SPRINGSTONE LAKES MONTESSORI SCHOOL and Springlands LLC, educational institutions, are represented by the law firm ALVERSON TAYLOR & SANDERS. Springstone Lakes Montessori School is a wholly owned subsidiary of Petitioner Springlands, LLC, a Nevada domestic limited liability company. Other than Springlands, LLC, no corporation owns 10% or more of the membership interest. The following attorneys have appeared on behalf of Appellants: Karie N. Wilson, Esq. and Tiffanie Bittle, Esq.

Dated this 24th day of May 2022.

ALVERSON TAYLOR & SANDERS



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**AFFIDAVIT OF KARIE N. WILSON, ESQ., IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

KARIE N. WILSON, ESQ., being first duly sworn, on oath, deposes and says:

1. I am licensed to practice law in this court, and I am a Partner with the law firm of ALVERSON TAYLOR & SANDERS, attorneys for Petitioners Lands, Inc. dba Springstone Lakes Montessori School and Springlands LLC, in support of their PETITION FOR WRIT OF MANDAMUS.

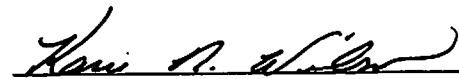
2. I certify that I have read this Petition, and to the best of my knowledge, information and belief, this Petition complies with the form requirements of Rule 21(d), and that it is not frivolous or interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

3. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the appendix where the matter relied upon 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 requirements of the Nevada Rules of Appellate Procedure.

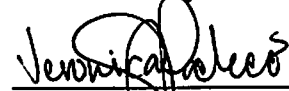
4. I have discussed the PETITION FOR WRIT OF MANDAMUS with the appropriate persons at Lands, Inc. dba Springstone Lakes Montessori School and have obtained authorization to file this Petition.

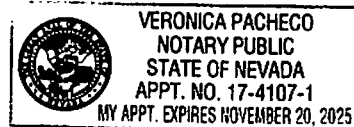
5. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of May 2022.


Karie N. Wilson, Esq.

SUBSCRIBED AND SWORN to before me
this 24th day of May 2022.


NOTARY PUBLIC in and
For said County and State



MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This matter arises from an alleged trip and fall that occurred while Plaintiff Jasmin Laudig was playing tag with her friends outside at Springstone Lakes Montessori School in Las Vegas, Nevada on February 13, 2017. Plaintiff has alleged that as a result of this fall, she injured the right side of her face, and is seeking special and general damages related to these alleged injuries.

Plaintiff has alleged past medical specials of \$2,054 and future medical specials of \$13,800.¹ Plaintiff filed a Motion for Partial Summary Judgment requesting that these damages be determined as a matter of law.² This motion was granted in error as these damages are an issue of fact that must be determined by a jury. Plaintiff also filed a Motion in *Limine* to exclude evidence of Plaintiff's medical bills. This motion was also granted in error on the basis that this evidence was unfairly prejudicial to Plaintiff. This evidence is relevant to Plaintiff's claims for damages, is not unfairly prejudicial, and should be admitted.

¹ See App. Ex. A, Plaintiff's Twelfth Supplement to her Early Case Conference Disclosures.

² See App. Ex. B, Plaintiff's Motion for Partial Summary Judgment.

II.

PETITION FOR WRIT OF MANDAMUS

A. RELIEF SOUGHT

This Court has original jurisdiction to issue a writ of mandamus under the Nevada Constitution.³ Plaintiff filed her Motion for Partial Summary Judgment on February 23, 2022, and her Motion in *Limine* No. 2 on March 4, 2022.⁴ At a hearing on April 27, 2022, the district court granted Plaintiff's Motion for Partial Summary Judgment and Motion in *Limine* No. 2.⁵ The district court's orders granting these motions were entered on May 16, 2022, and notice of entry of the orders were filed on May 17, 2022.⁶

The relief sought through this Petition is for this Court to issue, via alternative writ of mandamus, an order directing the district court to set aside its order granting Plaintiff's Motion for Partial Summary Judgment and Motion in *Limine* No. 2, and a new order denying Plaintiff's Motion for Partial Summary Judgment and Motion in *Limine* No. 2.

³ NEV. CONST. ART. 6, § 4.

⁴ See App. Ex. C, Register of Actions for Case No. A-20-808230-C.

⁵ See *Id.*

⁶ See App. Ex. D, Order Granting Plaintiff's Motion for Partial Summary Judgment, filed May 16, 2022, App. Ex. E, Order Granting Plaintiff's Motion in *Limine* No. 2.

B. ISSUE PRESENTED

The issue presented is whether it was legal error for the district court to grant Plaintiff's Motion for Partial Summary Judgment to decide Plaintiff's damages as a matter of law and Motion in *Limine* No. 2 to exclude evidence of Plaintiff's medical expenses.

C. STATEMENT OF RELEVANT FACTS

This litigation arises from an alleged incident at Springstone Lakes Montessori School (hereinafter "the premises") on February 13, 2017, when Plaintiff Jasmin Laudig, a then four-year-old student, was reportedly playing a game of tag in the outdoor area of the premises, when she was pushed by a friend and inadvertently fell onto an object that injured her right cheek.⁷ Plaintiff did not recall, specifically, the identity of the object she fell on and which allegedly caused her injury but claimed it was a sharp metal object on the left bottom portion of the surrounding fence.⁸ Michelle DeSoto, a teacher employed by Petitioners, was unable to identify any sharp metal object present at or near the subject fencing.⁹ Petitioners dispute liability.

Plaintiff has alleged past medical specials of \$2,054 and future medical

⁷ See App. Ex. F, Deposition of Plaintiff Jasmin Laudig, at 8:20.

⁸ *Id.* at 10:7–19.

⁹ See App. Ex. G, Deposition of Michele DeSoto, at 25:12–25.

specials of \$13,800.¹⁰ However, no admissible evidence has been produced by Plaintiff to verify, support, or prove her claim of injury or that these alleged damages are reasonable, necessary, and causally related to the accident or that the claimed charges are customary in the Las Vegas community. Plaintiff did not disclose an expert medical witness and has only disclosed Plaintiff's treating physicians as non-retained experts. Those physicians have not specifically addressed these issues in their treatment records. Plaintiff has also made a claim for past and future pain and suffering.

Petitioners deposed Plaintiff's treating physician John Kim regarding the injuries he observed when he treated Plaintiff at the emergency room.¹¹ Dr. Kim testified that Plaintiff's wound was shallow, meaning it was a single layer injury, not reaching the muscular layer.¹² Dr. Kim did not understand how Dr. Tracy Hankins, the treating provider who provided the future surgical cost, could opine that Plaintiff's wound was deep or needed future treatment, as the wound he observed should have been "completely healed" one year following the injury.¹³ Although Dr. Kim testified that his treatment at the emergency room was related to the subject incident, Dr. Kim did not discuss the cost of past and future medical expenses and that information was not included in the treatment records. Dr.

¹⁰ See App. Ex. A.

¹¹ See App. Ex. H, Deposition of John Kim, MD.

¹² See *id.* at 8:20–9:8.

¹³ See *id.* at 5:20–24; 7:1–4.

Hankins’ records also did not discuss the reasonableness of Plaintiff’s past and future medical expenses.

D. LEGAL STANDARD FOR OBTAINING A WRIT OF MANDAMUS

A writ of mandamus may be issued by this Court “to compel the performance of an act” of an inferior state tribunal, corporation, board or person.¹⁴ Such a writ enjoins the inferior body or person to affirmatively act in a manner which the law already compels the body or person to act.¹⁵ NRAP 21 states that an “application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition thereof with the clerk of the Supreme Court with proof of service on the respondent judge or judges and on all parties to the action in the trial court.”¹⁶ A writ “shall be issued in all causes where there is not a plain, speedy and adequate remedy in the ordinary course of law.”¹⁷

Furthermore, the “mere existence of other possible remedies does not necessarily precede mandamus.”¹⁸ Indeed, “while the availability of a remedy by appeal may be taken into consideration in determining the propriety of granting a writ of mandamus, it is not jurisdictional. As in cases involving applications for a

¹⁴ NRS 34.160.

¹⁵ *See Willmes v. Reno Mun. Court*, 118 Nev. 831, 59 P.3d 1197, 1200 (2002).

¹⁶ NRAP 21(a).

¹⁷ NRS 34.170.

¹⁸ *State ex rel. List v. Douglas County*, 90 Nev. 272, 277, 524 P.2d 1271, 1274 (1974).

writ of prohibition, remedy by appeal is not always speedy or adequate.”¹⁹ As this Court noted, “each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted.”²⁰ Writ relief is also available when, “sound judicial economy and administration militate in favor of granting the petition.”²¹

E. REASONS TO GRANT THE WRIT OF MANDAMUS

As noted, the relief sought by Petitioners is this Court’s intervention by way of extraordinary writ requiring the district court to deny Plaintiff’s Motion for Partial Summary Judgment and Motion in *Limine* No. 2 upon the uncontroverted evidence and argument demonstrating a question of fact for the jury regarding the causation, reasonableness and customary nature of these damages. As discussed below, the district court erred by granting Plaintiff’s Motion for Partial Summary Judgment because a question of fact remains for the jury to determine Plaintiff’s damages. The district court also erred by granting Motion in *Limine* No. 2 to Exclude Evidence of Any Granted or Waived Past Medical Specials and Medical Bills because these medical specials and bills are relevant to Plaintiff’s claims for

¹⁹ *La Gue v. Second Judicial Dist. Court, Washoe County, Dept. No. 1*, 68 Nev. 131, 133, 229 P.2d 162, 163 (1951).

²⁰ *Jeep Corp. v. Second Judicial Dist. Court of State of Nev. In and For Washoe County*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

²¹ *Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Court ex rel. County of Clark*, 120 Nev. 575, 578–79, 97 P.3d 1132, 1135 (2004) (citations and quotations removed).

past and future damages, specifically Plaintiff's claims for pain and suffering, which are expected to comprise the majority if not the totality of Plaintiff's claimed damages at trial.

1. THE DISTRICT COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO PLAINTIFF'S PAST AND FUTURE MEDICAL DAMAGES

Summary judgment is only appropriate when, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine dispute as to any material fact.²² “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”²³ The very mission and purpose of summary judgment is to consider the pleadings and to assess the proof to see whether there is a genuine need for trial.²⁴ This allows parties to avoid an unnecessary and needless trial when it would serve no useful purpose, as there is no real dispute about the facts of the case.²⁵ Where issues of material fact exist, summary judgment should not be entered.²⁶

To defeat a motion for summary judgment, it is sufficient for the nonmoving

²² NRCP 56(c); *Wood v. Safeway*, 121 Nev. 724, 731 (2005).

²³ NRCP 56(a).

²⁴ *See Nw. Motorcycle Assoc. v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994); *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 214, 984 P.2d 164, 165 (1999).

²⁵ *Sahara Gaming Corp.*, 115 Nev. at 214, 984 P.2d at 165.

²⁶ *Shepard v. Harrison*, 100 Nev. 178, 179–80, 678 P.2d 670, 672 (1984).

party to show that the issues sought to be adjudicated by summary judgment require a jury or judge to resolve the parties' differing versions of the truth at trial.²⁷ Plaintiff did not assert any undisputed facts demonstrating that the causation of Plaintiff's injuries and the associated damages are *not* a genuine issue for trial, and thus have not met her burden of proof for a successful motion for partial summary judgment. The *Didier* case is not applicable to Plaintiff's motion because liability is still in dispute and Petitioners have not had an opportunity to present evidence and elicit testimony at trial to dispute Plaintiff's damages.²⁸ Therefore a determination of damages as a matter of law is premature.

a. Plaintiff Prematurely Asserts That Her Injuries and Damages Have Been Proven as A Matter of Law

By asserting that the causation of Plaintiff's injuries and the reasonableness of Plaintiff's damages have been established as a matter of law, Plaintiff's Motion for Partial Summary Judgment ignores the matter of liability. The alleged negligence of Petitioners is still in dispute and it would be premature to find that Plaintiff proved her injuries and damages as a matter of law without first determining whether Petitioners were liable for negligence.²⁹ Plaintiff had the burden to prove that Petitioners owed a duty of reasonable care to Plaintiff,

²⁷ See *T.W. Elec. Serv., Inc. v. Pac Elec. Contractors Ass'n*, 809 F. 2d 626, 631 (9th Cir. 1987).

²⁸ *Didier*, 2019 WL 2339970.

²⁹ See App. Ex. G at 25:12–25.

breached that duty, and that the breach caused Plaintiff's injuries resulting in damages.³⁰

While it is true that Petitioners likely owed a duty of reasonable care to Plaintiff, Petitioners dispute the allegation that they breached that duty.³¹ As such, it would be illogical for the court to determine that Plaintiff established causation and damages as a matter of law without first determining whether Petitioners breached their duty of reasonable care, a question normally left to the finder of fact and part of a jury's deliberation regarding alleged damages.³² In addition, standard Nevada Jury Instructions regarding negligence instruct the jury to apply the standard of reasonable care but inform the jury that "[t]he law does not say how a reasonably careful person would act under those circumstances. That is for *you* to decide."³³ Nevada law requires that the jury consider both causation and damages

³⁰ *Butler v. Bayer*, 123 Nev. 450, 464, 168 P.3d 1055, 1065 (2007).

³¹ All owners or occupants of land must exercise ordinary care and prudence to render the premises reasonably safe for the visit of a person invited on his premises for business purposes. *Galloway v. McDonalds Restaurants*, 102 Nev. 534, 537 (1986). The owner or occupant of property is not an insurer of the safety of an invitee thereon, and in the absence of negligence, there is no liability. *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 185 (1962).

³² *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1104, 864 P.2d 796, 801 (1993) ("The determination of whether there has been a breach of duty is generally a question for the jury"); *White v. Demetelin*, 84 Nev. 430, 433, 442 P.2d 914, 915 (1968) ("it was also for the jury to determine the question of proximate cause between the breach of duty, if any, and the damages").

³³ Negligence Instruction 4NG.12 (emphasis added).

in reaching its verdict and both of these issues are still in dispute.³⁴ Therefore, it would be premature for the court to determine that as a matter of law, the cause of Plaintiff's alleged injuries, certain injuries, and reasonableness of damages have been proven.

It is well settled that the questions of breach and causation are generally left for the jury to determine and are part of a jury's determination as to the damages a plaintiff is entitled. It is also well settled that if the jury determines that Petitioners did not breach their duty of reasonable care, the jury has no need to determine whether Plaintiff's injuries were caused by the subject accident, nor would it be necessary to determine the reasonableness of the damages incurred. Plaintiff's motion is premature because liability is still in dispute.

b. Causation of Plaintiff's Injuries and the Associated Damages Are Genuine Issues For The Finder of Fact at Trial

Plaintiff has not presented undisputed facts sufficient to allow this Court to determine that Plaintiff's injuries and limited treatment, and the cause of those injuries, are proven as a matter of law. Plaintiff asserts that this Court can determine, based on *Didier*, that Plaintiff's injuries, the cause of those injuries, and certain associated treatment, can be established as a matter of law.³⁵ However *Didier* is not applicable here. In *Didier*, the defendant had conceded liability and

³⁴ *White*, 84 Nev. at 433, 442 P.2d at 914.

³⁵ *Didier*, 2019 WL 2339970.

the matter of damages was to be determined at a short trial following non-binding arbitration.³⁶ No live testimony was presented, and the only evidence presented at trial regarding the plaintiff's medical treatment was the plaintiff's expert's written opinion.³⁷ The plaintiff's Motion for Judgement as a Matter of Law was granted because the defendant had not presented any evidence *at trial* to rebut the plaintiff's medical expenses.³⁸ *Didier* did not involve a summary judgment motion decided before the defendant had the opportunity to present its evidence at trial. Moreover, under Nevada law, an expert witness' *testimony*, not an expert's report, is meant to *assist* the trier of fact in determining questions left to the jury.³⁹

The district court in the instant case concluded that, because Dr. Kim did not expressly state that he was refuting Dr. Hankins' opinions, this was not sufficient evidence to create a question of fact. However, when viewing the evidence in the light most favorable to Petitioners, Dr. Kim's testimony that the wound was shallow and only affected a single layer of Plaintiff's skin and did not require

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Williams v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 518, 529, 262 P.3d 360, 367 (2011) ("to *assist* the trier of fact, medical expert *testimony* regarding causation must be made to a reasonable degree of medical probability") (emphasis added); NRS 50.275 ("[i]f scientific, technical or other specialized knowledge will *assist* the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training, or education may *testify* to matters within the scope of such knowledge.") (emphasis added).

closure in layers is contradictory to Dr. Hankins' records that state the wound was "quite deep" and should have been closed in layers.⁴⁰ Dr. Kim's testimony is sufficient to create a question of fact for trial and the jury should be permitted to hear and consider. Even if Dr. Kim's deposition testimony was not sufficient to create a question of fact, which Petitioners dispute, Petitioners are not limited to this deposition testimony at trial. Petitioners may elicit testimony from both Dr. Hankins and Dr. Kim at trial to rebut Plaintiff's damages. Therefore, deciding Plaintiff's damages as a matter of law before Petitioners have had the opportunity to present these facts at trial is premature.

This Court clarified in *Manhas v. Tinker* that *Didier* does not require that one medical opinion be directly rebutted by another medical opinion.⁴¹ Petitioners must only produce some testimony to rebut the medical opinion.⁴² Plaintiff Laudig did not disclose a retained expert, only non-retained treating physicians.⁴³ Petitioners intend to use the testimony of these treating physicians to rebut Plaintiff's medical damages at trial. Just because Petitioners did not retain a separate expert to provide medical testimony does not mean they should be precluded from producing any evidence at trial to dispute causation of Plaintiff's

⁴⁰ See App. Ex. I, Records of Dr. John Kim, MD and App. Ex. J, Records of Dr. Tracy Hankins.

⁴¹ *Manhas v. Tinker*, 488 P.3d 578 (Nev. 2021).

⁴² *Id.*

⁴³ App. Ex. K, Plaintiff's Initial Disclosure of Expert Witnesses.

damages. This is an issue of fact that should be left for a jury.⁴⁴

Plaintiff's assertion that her expert disclosures provided sufficient factual basis for a motion for summary judgment is without merit. Plaintiff did not disclose any expert reports that concerned the causation of Plaintiff's past medical specials, the reasonableness of Plaintiff's past medical specials, or the reasonableness of Plaintiff's future medical specials.⁴⁵ Additionally, expert witness testimony is only meant to *assist* the finder of fact, it does not establish undisputed facts. Causation of a plaintiff's injuries should be determined by a jury, not determined as a matter of law by the court, whether that be with an expert report or otherwise.

c. Plaintiff Did Not Disclose Expert Witness Testimony Regarding Her Alleged Damages and Reasonableness of Damages in Accordance With NRCP 16.1

NRCP 16.1(2)(B) provides that when an expert is retained or specially employed to provide expert testimony, the expert must be disclosed and provide a written report containing a complete statement of the witness' opinions, facts or data considered, and any exhibits that will be used to support the opinion. Here, contrary to Plaintiff's argument within her Motion for Partial Summary Judgment, Plaintiff did not produce any admissible evidence to verify, support, or prove her

⁴⁴ *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981) ("issues of negligence and proximate cause are considered issues of fact and not of law, and thus they are for the jury to resolve").

⁴⁵ See App Ex. K, App Ex. K, Plaintiff's Rebuttal Expert Disclosure.

past and future medical expenses. Plaintiff's only retained expert was Randle P. Phelps who specializes in general construction.⁴⁶ Mr. Phelps is not qualified in, nor testified to, the causation or reasonableness of Plaintiff's past and future medical expenses.⁴⁷

Plaintiff disclosed four treating physicians as non-retained experts: John J. Kim, MD, Rachel D. Lovera, RN, Corrie Rocco, RN, and W. Tracey Hankins, MD.⁴⁸ None of these providers prepared a written expert report.⁴⁹ If Plaintiff intended these physicians to provide testimony regarding causation and the reasonableness of Plaintiff's past and future medical costs, that information should have been provided in an appropriate expert witness report that complied with NRCP 16.1(a)(2)(B).⁵⁰ A general description of potential testimony by Plaintiff's treating physicians in her expert disclosures is not sufficient as to Plaintiff's alleged damages.⁵¹

While a treating physician is generally exempt from the report requirement, this exemption only extends to "opinions [that] were formed during the course of treatment."⁵² Where a treating physician's testimony exceeds that scope, he or she

⁴⁶ See App. Ex. K.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 433 (2014).

⁵¹ *Id.*

⁵² *FCH1*, 130 Nev. at 433 (2014) (citing *Goodman v. Staples the Office*

testifies as an expert and is subject to the relevant requirements.⁵³ Plaintiff's medical records only discuss the treatment provided to Plaintiff and do not provide any testimony as to causation and reasonableness of any past and future medical expenses.⁵⁴ As such, these treating physicians, if expected to be called as expert witnesses, were required to provide an expert report in accordance with NRCP 16.1(a)(2)(B).

While Plaintiff relied on *Didier* to support her Motion for Partial Summary Judgement, she disregarded the court's actual holding in that case, which states "that where a plaintiff presents an expert opinion establishing causation and damages for a subjective injury to a reasonable degree of medical probability, the defendant must thereafter provide an expert opinion that would tend to rebut the plaintiff's position."⁵⁵ Since Plaintiff did not provide any expert opinion establishing causation and reasonableness of damages for her purported injury, Defendant was not required to produce a separate, retained expert.

In accordance with the Nevada Rules of Civil Procedure and relevant caselaw, Plaintiff is required to prove the reasonableness of her past medical specials and future medical specials.⁵⁶ Plaintiff has not yet proved these genuine

Superstore, L.L.C., 644 F.3d 817, 826 (9th Cir.2011)).

⁵³ *Id.*

⁵⁴ *See* App. Ex. I, J

⁵⁵ *Didier*, 2019 WL 2339970, at *2.

⁵⁶ NRCP 16.1(a)(2)(B); NRCP 26(b)(4); *FCHI*, 130 Nev. at 433 (2014).

issues of fact at this juncture and still possesses the burden of proof at trial. Therefore Plaintiff's Motion for Partial Summary Judgment should have been denied as Plaintiff did not provide any undisputed facts to support her motion, and the facts as currently known present issues of breach, causation, and reasonableness of damages that must be left for the jury to determine. As such, summary judgment on Plaintiff's causation of injury, and reasonableness of Plaintiff's past and future medical costs was therefore unwarranted at this juncture.

2. THE DISTRICT COURT ERRED IN GRANTING PLAINTIFF'S MOTION IN LIMINE NO. 2 BECAUSE PLAINTIFF'S MEDICAL DAMAGES ARE RELEVANT AND NOT UNFAIRLY PREJUDICIAL

Plaintiff's Motion *in Limine* No. 2 sought to exclude mention of Plaintiff's past medical expenses from trial, arguing that those past medical expenses are prejudicial to Plaintiff's case and that these medical specials have no tendency to prove the general damages of pain and suffering that Plaintiff will be pursuing.⁵⁷ Petitioners maintain, however, that Plaintiff's medical specials and associated damages are a genuine issue for trial, and the admission of Plaintiff's computation of damages should be admissible at trial as it is an essential element of Plaintiff's claim. Further, evidence of Plaintiff's past medical expenses is relevant to Petitioners' defense against any claim for damages, including pain and suffering.

Under Nevada law, all relevant evidence, or evidence which has any

⁵⁷ See App Ex. M, Plaintiff's Motion in *Limine* No. 2.

tendency to make the existence of a material fact of the action more or less probable, is admissible unless prohibited by law.⁵⁸ Relevant evidence is that “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.”⁵⁹ “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.”⁶⁰ It is within the trial court's discretion to decide whether to admit or exclude evidence after balancing its prejudicial effect against its probative value.⁶¹

Here, Plaintiff seeks to exclude relevant evidence regarding her past medical expenses because she believes it is inadmissible under NRS 48.035(1).⁶² However, to merit exclusion under NRS 48.035, evidence must unfairly prejudice the Plaintiff.⁶³ All evidence against Plaintiff is prejudicial to some level. To rise to the level of *unfair* prejudice, the evidence must appeal *only* to “the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to

⁵⁸ See NRS 48.025.

⁵⁹ NRS 48.015.

⁶⁰ NRS 48.035(1).

⁶¹ *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978).

⁶² See App Ex. M at 4:18.

⁶³ See NRS 48.035(1); *Schlotfeldt v. Charter Hosp. of Las Vegas*, 112 Nev. 42, 45–46, 910 P.2d 271, 273 (1996).

evaluate evidence.”⁶⁴ Where the probative value of the evidence outweighs the alleged risk of prejudice, the evidence should not be excluded as the law favors admissibility.⁶⁵ Moreover, the Nevada Supreme Court clearly stated that “a limiting instruction or other alternative method of introduction should be utilized before highly probative evidence is excluded.”⁶⁶

In the present case, evidence of Plaintiff’s past medical expenses is relevant and highly probative as it speaks to Plaintiff’s damages claims, specifically her claim of past and future injury and purported pain and suffering. As such, the evidence in question is necessary to the jury’s intellectual ability to evaluate Plaintiff’s claim and no danger of *unfair* prejudice exists. Plaintiff has alleged past medical specials of \$2,054 and future medical specials of \$13,800 but did not disclose an expert witness to testify as to the reasonableness of Plaintiff’s claimed damages and has only disclosed Plaintiff’s treating physicians as non-retained experts and those physicians have not specifically addressed these issues in their treatment records.

Nevada courts have held that recovery for future pain and suffering arising from subjective physical injury must be *substantially* supported by expert testimony stating that future pain and suffering is a *probable* consequence rather

⁶⁴ *Id.* at 46.

⁶⁵ *Id.*

⁶⁶ *Id.*

than a mere possibility.⁶⁷ Here, Plaintiff's treating physicians and Plaintiff herself may discuss her alleged injuries and impact on her life. Petitioners, in turn, are entitled to present evidence to counter or contradict such testimony including evidence regarding Plaintiff's actual medical treatment and expenses.

Although these facts may be prejudicial to Plaintiff, as any evidence contrary to Plaintiff's assertions is by its very nature prejudicial, none of these facts are unfairly prejudicial. They appeal to the jury's intellectual ability to weigh the facts and determine the outcome of this case as the trier of fact. Evidence that speaks to Plaintiff's damages is highly probative and is not substantially outweighed by the risk of unfair prejudice. Alternatively, the court could offer a jury instruction regarding this evidence. The jurors in *Hilao* were instructed to use "calm and reasonable judgment" and fix damages that would be "just and reasonable in light of the evidence and your experience."⁶⁸ There is no risk of unfair prejudice that cannot be properly rectified through the imposition of a relevant jury instruction. Evidence of Plaintiff's medical specials, therefore, should not be excluded.

Moreover, the granting of this Motion in *Limine* in conjunction with the granting of Plaintiff's Motion for Partial Summary Judgment creates an extrement

⁶⁷ *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1196, 866 P.2d 274, 285 (1993).

⁶⁸ *See Hilao v. Estate of Marcos*, 103 F.3d 789, 793 (9th Cir. 1996), *as modified*, 103 F.3d 767 (9th Cir. 1996).

prejudicial situation where the trial court has not only established damages as a matter of law against Petitioners, but also precluded Petitioners from even discussing those damages as a means of disputing Plaintiff's other damages claims, specifically past and future pain and suffering. These decisions, both individually and collectively, are untenable and would severely prejudice Petitioners at trial.

III.

CONCLUSION

Accordingly, for the reasons cited above, Petitioners respectfully request for this Honorable Court to grant the requested relief.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Writ of Mandamus (the “Petition”) 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 Petition has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

2. I hereby certify that this Petition complies with the page- or type-volume limitations of NRAP 21(D) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), this Petition is 5437 words and therefore does not exceed 7,000 words.


3. I hereby certify that I have read this Petition, 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, particularly NRAP 28(e)(1), which requires every assertion in a brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

...

4. I make this verification on behalf of Petitioner.

Dated this 24th day of May 2022.

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VERIFICATION

The undersigned is counsel for Petitioner LANDS, INC. dba SPRINGSTONE LAKES MONTESSORI SCHOOL and SPRINGLANDS LLC. She has read and authored the forgoing Petition for Writ of Mandamus, and all factual statements in the Petition are within the affiant's personal knowledge and are true and correct or are supported by citations to the Appendix accompanying the Petition. The Exhibits in the Appendix are true and correct copies of the documents of record in the proceedings in the district court.

Dated this 24th day of May, 2022.

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CERTIFICATE OF SERVICE VIA CM/ECF

I hereby certify that on this 24th day of May 2022, I did serve, via Case Management/Electronic Case Filing, a copy of the above and foregoing **PETITION FOR WRIT OF MANDAMUS** addressed to:

Judge Tara Clark Newberry
Eighth Judicial District Court, Department 21
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