

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF
NEVADA, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
CLARK COUNTY; AND THE
HONORABLE JOANNA S. KISHNER,
DISTRICT JUDGE,

Respondents,

and

TITINA FARRIS and PATRICK FARRIS,

Real Parties in Interest.

Case No.

Electronically Filed
Aug 10 2022 11:31 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETITION FOR WRIT OF MANDAMUS
VOLUME 1

ROBERT L. EISENBERG (SBN 950)
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868 (telephone)
rle@lge.net

ATTORNEYS FOR PETITIONERS

CHRONOLOGICAL INDEX TO PETITIONERS' APPENDIX

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
1.	Complaint (Arbitration Exemption Claimed: Medical Malpractice)	7/1/16	1	1-8
	<u>Exhibit 1</u> : Affidavit of Vincent E. Pesiri, M.D.		1	9-12
	<u>Exhibit 2</u> : CV of Vincent E. Pesiri, M.D.		1	13-15
	Initial Appearance Fee Disclosure (NRS Chapter 19)		1	16-17
2.	Appellants' Opening Brief {Supreme Court of the State of Nevada Case No. 80271}	10/13/20	1	18-113
3.	Opinion Reversing District Court Decision Remanding Case Back to District Court of Clark County {Supreme Court of the State of Nevada Case No. 80271}	3/31/22	1	114-131
4.	Notice of Order Setting Hearing	5/4/22	1	132-136
5.	Minutes Re: Notice of Hearing to Set New Trial Date	6/7/22	1	137
6.	Defendants' Motion to Reopen Limited Discovery and to Set Pretrial Scheduling Order on an Order Shortening Time	7/7/22	1	138-151
	<u>Exhibit A</u> : Defendants' Written Correspondence Dated 6/8/22 to Plaintiffs Requesting Meet and Confer Re: Issues Addressed in Motion		1	152-154
	<u>Exhibit B</u> : Defendants' Follow-up Correspondence Dated 6/30/22 to Plaintiffs' Again to Request Meet and Confer Re: Matters in Motion		1	155-158

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
7.	Amended Order Setting Civil Jury Trial, Pre-Trial / Trial Setting Conference and Calendar Call / Final Pre-Trial Conference	7/7/22	1	159-164
8.	Plaintiffs' Opposition to Defendants' Motion to Reopen Limited Discovery and Set Pretrial Scheduling Order on Order Shortening Time	7/11/22	1	165-177
	<u>Exhibit 1</u> : Letter from Thomas Doyle, Esq. Dated 6/8/22		1	178-180
	<u>Exhibit 2</u> : Excerpt of Table of Contents from Defendants' Supreme Court Opening Brief in Case Nos. 80271 and 81052 {Filed 10/13/20}		1	181-183
	<u>Exhibit 3</u> : Transcription of Voice Mail from Bridget Foley, Esq. to Micah Echols Dated 6/30/22		1	184-185
	<u>Exhibit 4</u> : Email to Chambers from Defendants' Counsel Asking for an Order Shortening Time Dated 6/30/22		1	186-187
	<u>Exhibit 5</u> : Court Minutes Dated 6/7/22		1	188-189
	<u>Exhibit 6</u> : Amended Order Setting Civil Jury Trial, Pre-Trial / Trial Setting Conference, and Calendar Call / Final Pre-Trial Conference {Filed 7/7/22}		1	190-196
	<u>Exhibit 7</u> : Amended Order Setting Civil Jury Trial, Pre-Trial / Trial Setting Conference, Calendar Call, and Status Check {Filed 1/22/19}		1	197-201

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 8)	<u>Exhibit 8</u> : Stipulation and Order to Extend Discovery Deadlines (Seventh Request) {Dated 5/16/19}		1	202-209
	<u>Exhibit 9</u> : Court Minutes Dated 9/5/19		1	210-211
	<u>Exhibit 10</u> : Declaration of Patrick Farris Dated 7/11/22		1	212-213
	<u>Exhibit 11</u> : Declaration of Titina Farris Dated 7/11/22		1	214-215
	<u>Exhibit 12</u> : MGM Resorts Health and Welfare Benefit Plan		2	216-257
9.	Defendants' Reply in Support of Motion to Reopen Limited Discovery and Set Pretrial Scheduling Order on an Order Shortening Time	7/12/22	2	258-264
10.	Minutes Re: Motion to Reopen Limited Discovery and to Set Pretrial Scheduling Order on an Order Shortening Time	7/14/22	2	265
11.	Defendants' Motion in Limine No. 1 to Prohibit Evidence of and Reference to the <i>Center</i> Case, Which is Irrelevant, Highly Inflammatory, and Prejudicial to Defendants	7/22/22	2	266-295
12.	Defendants' Motion in Limine No. 2 to Prohibit Plaintiffs' and Their Counsel's Use of "Reptile Tactics"	7/22/22	2	296-320
13.	Defendants' Motion in Limine No. 3 to Permit Defendants to Introduce Evidence of Plaintiffs' Collateral Source Benefits, Pursuant To NRS 42.021(1)	7/22/22	2	321-346

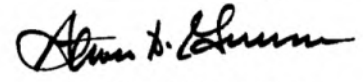
<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
14.	Defendants' Motion in Limine No. 4 to Permit Defendants' Expert Witnesses – Dr. Adornato, Dr. Stone, Sarah Larsen, and Eric Volk – to Testify in an Unrestricted Manner Consistent with Their Expert Reports and Depositions	7/22/22	2	347-375
15.	Defendants' Motion in Limine No. 5 to Permit Defendants to Introduce the Entire St. Rose San Martin Chart into Evidence	7/22/22	2	376-399
16.	Defendants' Motion in Limine No. 6 to Permit Defendants to Lodge Dr. Hurwitz's Original Deposition Transcript for use at Trial	7/22/22	2	400-423
17.	Defendants' Motion in Limine No. 7 to Exclude Evidence of and References to Expert Witnesses' and Parties' Involvement in Other Malpractice Actions	7/22/22	2	424-447
18.	Defendants' Motion in Limine No. 8 to Permit Defendants to Use Demonstrative Exhibits at Trial	7/22/22	3	448-467
19.	Defendants' Motion in Limine No. 9-11 to Prohibit References to Irrelevant and Prejudicial Issues at Trial, Including the Fact that this is a Retrial, the Non-Economic Damages Cap, and Existence of Defendants' Malpractice Insurance	7/22/22	3	468-488
20.	Defendants' Motion in Limine No. 12 to Prohibit Plaintiffs' from Questioning Dr. Rives About the Status of His Board Certification and Whether He Returned Fees for Care and Treatment Provided to Titina Farris	7/22/22	3	489-509

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
21.	Defendants' Motion in Limine No. 13 to Permit Defendants to Call Dr. Carter Instead of Dr. Juell at Trial	7/22/22	3	510-530
22.	Defendants' Errata to Their Motions in Limine Nos. 1-13	7/27/22	3	531-534
23.	Plaintiffs' Motion to Strike Defendants' Motions in Limine on Order Shortening Time	7/28/22	3	535-543
	Exhibit 1: Amended Order Setting Civil Jury Trial, Pre-Trial / Trial Setting Conference, and Calendar Call / Final Pre-Trial Conference {Filed 7/7/22}		3	544-552
24.	Defendants' Opposition to Plaintiffs' Motion to Strike Defendants' Motions in Limine on Order Shortening Time	7/28/22	3	553-571
25.	Plaintiffs' Reply in Support of Plaintiffs' Motion to Strike Defendants' Motions in Limine on Order Shortening Time	8/1/22	3	572-578
	Exhibit 1: Letter from Thomas Dolye, Esq. to Plaintiffs' Counsel Requesting Meet and Confer		3	579-581
	Exhibit 2: Amended Order Setting Civil Jury Trial, Pre-Trial / Trial Setting Conference, and Calendar Call / Final Pre-Trial Conference {Filed 7/7/22}		3	582-588

TRANSCRIPTIONS

26.	Recorder's Transcript of Hearing on July 14, 2022 Re: Motion to Reopen Limited Discovery and to Set Pretrial Scheduling Order on an Order Shortening Time	7/26/22	3	589-656
-----	---	---------	---	---------

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
27.	Recorder's Transcript of Hearing on August 2, 2022 Re: Plaintiffs' Motion to Strike Defendants' Motion in Limine on Order Shortening Time	8/3/22	3	657-686


CLERK OF THE COURT

COMP

George F. Hand, Esq.
Nevada State Bar No. 8483
gband@handsullivan.com
Michael E. Bowman, Esq.
Nevada State Bar No. 13833
HAND & SULLIVAN, LLC
hsadmin@handsullivan.com
3442 North Buffalo Drive
Las Vegas, Nevada 89129
Telephone: (702) 656-5814
Facsimile: (702) 656-9820

Attorneys for Plaintiffs
TITINA FARRIS and PATRICK FARRIS

DISTRICT COURT
CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS,

Plaintiffs,

vs.

BARRY RIVES, M.D., LAPAROSCOPIC
SURGERY OF NEVADA LLC; DOES I-V,
inclusive; and ROE CORPORATIONS I-V,
inclusive,

Defendants.

Case No.: A- 16 - 739464 - C

Dept No.: XX I I

COMPLAINT

Arbitration Exemption Claimed:
MEDICAL MALPRACTICE

Plaintiffs, TITINA FARRIS and PATRICK FARRIS, by and through their attorneys,
George F. Hand, Esq. and Michael E. Bowman, Esq. of Hand & Sullivan, LLC, complains of
Defendants, and each of them, and alleges as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to NRS 4.370 and Nevada
Constitution, Art. VI, § 6.

2. This Court is the proper venue pursuant to NRS 13.040.

///

///

///

4 4. Plaintiff TITINA FARRIS is and was at all times relevant hereto a resident of the
5 County of Clark, State of Nevada.

6 5. Plaintiff, PATRICK FARRIS, is and was at all times relevant hereto a resident of
7 the County of Clark, State of Nevada.

8 6. That TITINA FARRIS and PATRICK FARRIS are, and at all times relevant herein
9 were, duly married and living together in the County of Clark, State of Nevada.

10 7. Defendant BARRY RIVES, M.D. (hereinafter sometimes referred to as ("DR.
11 RIVES")), is and was at all relevant times a physician licensed to practice medicine within the State
12 of Nevada, as defined by N.R.S. Chapter 630, et seq.

13 8. Upon information and belief, it is alleged that at all times relevant hereto Defendant
14 LAPAROSCOPIC SURGERY OF NEVADA LLC was, and still is, a domestic Limited Liability
15 Company regularly doing business in the County of Clark, State of Nevada.

9. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants DOES I through V, inclusive, and ROE CORPORATIONS I through V, inclusive, are unknown to the Plaintiff, who therefore sues these Defendants by such fictitious names. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as a Does I through V, inclusive, and/or Roe Corporations I through V, inclusive, is responsible in some manner for the events and happenings herein referred to and caused injury and damages proximately thereby to Plaintiff as herein alleged, and Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of Defendants DOE and/or ROE CORPORATION when the same have been ascertained by Plaintiff, together with appropriate charging allegations, and adjoin such Defendants in this action.

26 |||

27 |||

28 |||

8 11. Plaintiff incorporates by reference the above paragraphs as though set forth fully
9 hereunder.

12 13. That the Defendants, their agents and/or employees, represented themselves to be
13 competent to perform all professional services, treatments and tests that were to be rendered to the
14 **Plaintiff.** .

15 14. That at all times herein mentioned, Defendant BARRY RIVES, M.D. was employed
16 by co-defendant LAPAROSCOPIC SURGERY OF NEVADA LLC and acting within the scope of
17 his employment.

(Medical Malpractice)

16. That at all times pertinent hereto, Defendants had a duty to adequately and properly evaluate, diagnose and/or otherwise provide competent medical care within the accepted standard of care to TITINA FARRIS, as well as properly supervise, monitor, communicate with others, and otherwise ensure her health and safety while this patient was under their care.

26 17. Defendants, each individually, breached the standard of care they owed to Plaintiff
27 TITINA FARRIS by failing to provide reasonable and competent medical treatment and
28 monitoring.

18. In support of the allegations contained within this Complaint, Plaintiff has attached as Exhibit 1 the *Affidavit of Vincent E. Pesiri, M.D.* and as Exhibit 2, his *Curriculum Vitae*. Dr. Pesiri was at the time of the events alleged herein, and still is, Board Certified in Surgery. Dr. Pesiri has reviewed the relevant medical records. Based upon his training, background, knowledge and experience, he is familiar with the applicable standards of care for the treatment of individuals demonstrating the symptoms and conditions presented by Plaintiff TITINA FARRIS. Further, he is qualified on the basis of his training, background, knowledge, and experience to offer an expert medical opinion regarding those accepted standards of medical care, the breaches thereof in this case, and any resulting injuries and damages arising therefrom.

19. Dr. Pesiri has opined in the attached Exhibit 1 that, to a reasonable degree of medical probability, Defendants fell below the accepted standard of care in their treatment of Plaintiff. On July 3, 2015, Barry Rives, M.D. of Laparoscopic Surgery of Nevada performed a laparoscopic reduction and repair of incarcerated incisional hernia on Titina Farris at St. Rose Dominican Hospital – San Martin Campus. Post-operatively, the patient, Titina Farris became septic as a result of a perforated colon. Dr. Pesiri opined that Dr. Rives deviated from the accepted standard of care in his treatment of Titina Farris. The records indicate Titina Farris was a type 2 diabetic, obese and had a history of c-sections. On August 7, 2014, Dr. Rives performed an excision of abdominal wall lipoma with repair of ventral hernia with mesh on Titina Farris. After the August, 2014 surgery, Titina Farris indicated that she thought there was a recurrence of the hernia. After a CT scan in June, 2015, it was determined by Dr. Rives that there was a recurrent abdominal wall hernia. Dr. Rives recommended laparoscopic ventral hernia repair with mesh.

20. On July 3, 2015, Dr. Rives performed “1. Laparoscopic reduction and repair of incarcerated incisional hernia with mesh; and 2. Colonorrhaphy x2.” on Titina Farris, a 52 year old female. The operative report of Dr. Rives indicates that the transverse colon was severely stuck and adhered to prior mesh repair. The mesh would not come free from the skin. A small tear was created in the colon using a Endo-GIA blue load. Dr. Rives stapled across the small colotomy. A second small colotomy was also noticeable and was repaired. Dr. Rives noted that after successive firings, the staple lines appeared to be intact. He noted no further serosal or full-thickness injuries

1 to the colon. A piece of mesh was placed in the intrabdominal cavity. The colon was noted to be
2 healthy, viable with no further injuries or tears. The patient was extubated in the OR and noted to
3 be in stable condition.

4 21. After the July 3, 2015 surgery, Titina Farris was noted to have an extremely high
5 WBC. Titina Farris was transferred to the ICU on July 4, 2015. Titina Farris continued to
6 deteriorate. She was noted to have respiratory failure, atrial fibrillation, fever, leukocytosis and
7 ileus. There was evidence of sepsis. Dr. Rives did not determine the cause of the infection post-
8 operatively and Titina Farris did not improve. Titina Farris was placed on a ventilator and received
9 a tracheostomy. Dr. Elizabeth Hamilton was called in for a second opinion.

10 22. On July 16, 2015, Dr. Hamilton operated on Titina Farris. The procedure performed
11 was: 1. Exploratory laparotomy; 2. Removal of prosthetic mesh and washout of abdomen; 3.
12 Partial colectomy and right ascending colon end ileostomy; 4. Extensive lysis of adhesions over 30
13 minutes; 5. Retention suture placement; 6. Decompression of the stool from the right colon into
14 the ostomy; The postoperative diagnosis was: 1. Perforated viscus with free intra-abdominal air;
15 2. Sepsis; 3. Respiratory failure; 4. Anasarca; 5. Fever; 6. Leukocytosis; 7. Fecal disimpaction
16 of the rectum. Of significance, the operative report states: "Decision was made that she had
17 evidence of perforation and likely perforation of the colon from the previous colon injuries. A
18 decision was made that it would be in her best interest to take her to the operating room to evaluate
19 this and try to get rid of the source of continued sepsis in this patient, who is failing". The
20 transverse colon was visualized and there was an approximately quarter-size or 2.5 to 3 cm hole.
21 Around it was an active leak of green feculent material and free air. Feculent material was noted
22 on the mesh with 3 cm colotomy in the transverse colon at the staple line. Titina Farris currently
23 has bilateral foot drop as well as a colostomy. Dr. Pesiri opined that Dr. Rives fell beneath the
24 accepted standard of care as follows: a. Intraoperative technique; b. Failure to adequately repair
25 bowel perforations at the time of July 3, 2015 surgery; c. Poor post-operative management of
26 perforated bowel and resultant sepsis.

27

28

25. That as a direct and proximate result of the medical negligence and failures to meet the standard of care by Defendants, it has been necessary for Plaintiff to retain the law firm of HAND & SULLIVAN, LLC, to prosecute this action, and Plaintiff is therefore entitled to recover reasonable attorney's fees and costs.

(Corporate Negligence/Vicarious Liability)

28 / / /

1 31. As a proximate result of these actions and/or omissions, TITINA FARRIS has had
2 to endure extreme pain and suffering.

3 32. As a proximate result of these actions and/or omissions, TITINA FARRIS will incur
4 future medical and other special expense, in an amount to be determined at trial.

5 33. As a result of these actions and/or omissions, TITINA FARRIS is entitled to be
6 compensated in an amount to be determined at the time of trial of this matter, but which is in excess
7 of TEN THOUSAND DOLLARS (\$10,000.00).

8 34. That as a direct result of these actions and/or omissions, TITINA FARRIS
9 was required to retain the services of an attorney and seeks reimbursement for attorney's fees and
10 costs.

11 **THIRD CAUSE OF ACTION**

12 **(Loss of Consortium)**

13 35. Plaintiff incorporates by reference the above paragraphs as though set forth fully
14 hereunder.

15 36. That TITINA FARRIS suffered injuries as a direct result of Defendants actions as
16 alleged herein.

17 37. At the time of the events complained of in the Plaintiffs' Complaint, the Plaintiffs
18 were married and that the Plaintiffs continue to be married.

19 38. That as a result of the wrongful and negligent acts of the Defendants, and each of
20 them, the Plaintiffs were caused to suffer, and will continue to suffer in the future, loss of
21 consortium, loss of society, affection, assistance, and conjugal fellowship, all to the detriment of
22 their marital relationship.

23 39. That all the aforesaid injuries and damages were caused solely and proximately by
24 the negligence of the Defendants.

25 WHEREFORE, Plaintiffs prays for judgment against the Defendants, and each of them, as
26 follows:

27 1. For general damages and loss in an amount in excess of TEN THOUSAND
28 DOLLARS (\$10,000);

2. For special damages in an amount to be determined at time of trial;
3. For reasonable attorneys fees, pre and post-judgment interest, and costs of suit; and
4. For such other and further relief as the Court may deem just and proper.

Dated: July / , 2016

HAND & SULLIVAN, LLC

By: _____

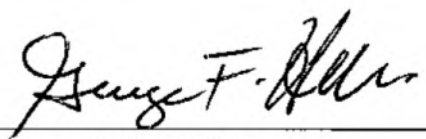

George F. Hand, Esq.
Nevada State Bar No. 8483
Michael E. Bowman, Esq.
Nevada State Bar No. 13833
3442 North Buffalo Drive
Las Vegas, Nevada 89129
Attorneys for Plaintiffs
TITINA FARRIS and PATRICK
FARRIS

EXHIBIT 1

AFFIDAVIT OF VINCENT E. PESIRI, M.D.

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

Vincent E. Pesiri, M.D. being duly sworn, deposes and says:

1. Affiant is over the age of 18, has personal knowledge of the facts set forth herein, and is competent to testify thereto, except as to those matters stated upon information and belief, and as to those matters, I believe them to be true.

2. I am a Board Certified Surgeon. A copy of my curriculum vitae is attached hereto. I am qualified on the basis of my training, background, knowledge and experience to offer expert medical opinions in this matter.

3. I have reviewed the relevant medical records of Titina Farris and my opinions are to a reasonable degree of medical probability.

4. During the course of my career, I have performed a significant amount of hernia surgeries, including repairs of incisional hernias.

5. On July 3, 2015, Barry Rives, M.D. of Laparoscopic Surgery of Nevada performed a laparoscopic reduction and repair of incarcerated incisional hernia on Titina Farris at St. Rose Dominican Hospital – San Martin Campus. Post-operatively, the patient, Titina Farris became septic as a result of a perforated colon.

6. It is my professional opinion, to a reasonable degree of medical probability, that Dr. Rives deviated from the accepted standard of care in his treatment of Titina Farris.

7. The records indicate Titina Farris was a type 2 diabetic, obese and had a history of c-sections. On August 7, 2014, Dr. Rives performed an excision of abdominal wall lipoma with repair of ventral hernia with mesh on Titina Farris. After the August, 2014 surgery, Titina Farris indicated that she thought there was a recurrence of the hernia.

8. After a CT scan in June, 2015, it was determined by Dr. Rives that there was a recurrent abdominal wall hernia. Dr. Rives recommended laparoscopic ventral hernia repair with mesh.

9. On July 3, 2015, Dr. Rives performed "1. Laparoscopic reduction and repair of incarcerated incisional hernia with mesh; and 2. Colonorrhaphy x2." on Titina Farris, a 52 year old female.

10. The operative report of Dr. Rives indicates that the transverse colon was severely stuck and adhered to prior mesh repair. The mesh would not come free from the skin. A small tear was created in the colon using a Endo-GIA blue load. Dr. Rives stapled across the small colotomy. A second small colotomy was also noticeable and was repaired. Dr. Rives noted that after successive firings, the staple lines appeared to be intact. He noted no further serosal or full-thickness injuries to the colon. A piece of mesh was placed in the intrabdominal cavity. The colon was noted to be healthy, viable with no further injuries or tears. The patient was extubated in the OR and noted to be in stable condition.

11. After the July 3, 2015 surgery, Titina Farris was noted to have an extremely high WBC. Titina Farris was transferred to the ICU on July 4, 2015. Titina Farris continued to deteriorate. She was noted to have respiratory failure, atrial fibrillation, fever, leukocytosis and ileus. There was evidence of sepsis. Dr. Rives did not determine the cause of the infection post-operatively and Titina Farris did not improve. Titina Farris was placed on a ventilator and received a tracheostomy.

12. Dr. Elizabeth Hamilton was called in for a second opinion.

13. On July 16, 2015, Dr. Hamilton operated on Titina Farris. The procedure performed was: 1. Exploratory laparotomy; 2. Removal of prosthetic mesh and washout of abdomen; 3. Partial colectomy and right ascending colon end ileostomy; 4. Extensive lysis of adhesions over 30 minutes; 5. Retention suture placement; 6. Decompression of the stool from the right colon into the ostomy; The postoperative diagnosis was: 1. Perforated viscus with free intra-abdominal air; 2. Sepsis; 3. Respiratory failure; 4. Anasarca; 5. Fever; 6. Leukocytosis; 7. Fecal disimpaction of the rectum.

14. Of significance, the operative report states: "Decision was made that she had evidence of perforation and likely perforation of the colon from the previous colon injuries. A

decision was made that it would be in her best interest to take her to the operating room to evaluate this and try to get rid of the source of continued sepsis in this patient, who is failing". The transverse colon was visualized and there was an approximately quarter-size or 2.5 to 3 cm hole. Around it was an active leak of green feculent material and free air. Feculent material was noted on the mesh with 3 cm colotomy in the transverse colon at the staple line.

15. Titina Farris currently has bilateral foot drop as well as a colostomy.

16. In this case, to a reasonable degree of medical probability, Dr. Rives fell beneath the accepted standard of care as follows:

- a. Intraoperative technique;
- b. Failure to adequately repair bowel perforations at the time of July 3, 2015

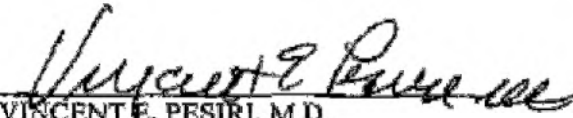
surgery;

- c. Poor post-operative management of perforated bowel and resultant sepsis.

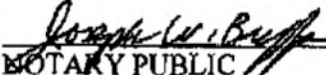
17. It is my opinion to a reasonable degree of medical probability that the aforesaid breaches of the standard of care by Dr. Rives caused damage to the Plaintiff resulting in the injuries noted above.

18. I declare that the foregoing is true and correct to the best of my knowledge, that all opinions are stated to a reasonable degree of medical probability, and that this declaration was executed by me. My opinion may be supplemented as more information becomes available.

FURTHER, Affiant sayeth naught.


VINCENT E. PESIRI, M.D.

SUBSCRIBED AND SWORN to before me
this 1st day of July, 2016.


NOTARY PUBLIC

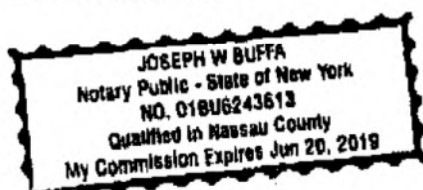


EXHIBIT 2

VINCENT E. PESIRI, MD

93 Fordham Street
Williston Park, NY 11596

Direct: 516-976-4466

Email: DBLME018@gmail.com

EDUCATION:

Fellowship:	Vascular Surgery, State University of New York Lutheran Medical Center, Brooklyn, New York	1983 - 1984
Chief Resident Surgery:	State University of New York, Downstate Medical Center, Kings County Hospital Center	1982 - 1983
Resident Surgery:	State University of New York, Downstate Medical Center, Kings County Hospital Center	1979 - 1982
Internship:	State University of New York, Downstate Medical Center, King County Hospital Center	1978 - 1979
Medical Doctor:	State University of New York, Downstate Medical Center, Brooklyn, New York	1974 - 1978
B.S.	St. John's University, Queens, New York	1971 - 1974

STATE LICENSES: New York and Michigan

**BOARD
CERTIFICATIONS:** AMERICAN BOARD OF SURGERY
AMERICAN BOARD OF QUALITY ASSURANCE
CWS: CERTIFIED WOUND CARE SPECIALIST
CERTIFIED HYPERBARIC MEDICINE

**PROFESSIONAL
SOCIETIES:** FELLOW OF THE AMERICAN COLLEGE OF SURGEONS, AMERICAN
COLLEGE OF HYPERBARIC MEDICINE, UNDERSEAS HYPERBARIC
SOCIETY, STATE OF MICHIGAN MEDICAL SOCIETY, JACKSON
SOCIETY

<u>EMPLOYMENT:</u>	MOBILE HYPERBARICS, Binghamton, NY and Jackson, MI	08/11- 09/14
	NORTH SHORE LI WOUND CARE CENTER Lake Success, NY	01/01- 05/11
	DR. VINCENT PESIRI, PRIVATE SURGICAL PRACTICE Glen Cove, NY	1986- 07/09

VINCENT E. PESIRI, MD

CV Pg. 2

HOSPITAL AFFILIATIONS:

North Shore University Hospital, Glen Cove, NY	1986 - 2009
Woodhull Medical Center, Brooklyn, NY	1984 - 1987

HOSPITAL POSITIONS AND ACTIVITIES HELD:

(All North Shore University Hospital, Glen Cove, NY)	
Vice President of Medical Board	2008 - 2009
Secretary - Treasurer of Medical Board	2007 - 2008
Chairman of Tissue Committee	2005 - 2009
Member of Tissue Committee	1992 - 2005
Member of House Staff Committee	1986 - 1992
Member of Nurse-Physician Liaison Committee	1991 - 2009
Member of Ambulatory Care Committee	1990 - 1996
Member of Ambulatory Care Committee	1990 - 1996
Member of Utilization Review Committee	1986 - 2009
Quality Assurance Reviewer of Surgery	1986 - 2009
Secretary of Surgery Department	1986 - 1991

AWARDS:

Outstanding Surgical Teacher in Family Practice Residency	06/2005
Outstanding Surgical Teacher in Family Practice Residency	06/2001
Outstanding Surgical Teacher in Family Practice Residency	06/1988

POST GRADUATE COURSES:

Advanced Cardiac Life Support	06/2010
Primary - Hyperbaric Medicine NBS	09/2010
SWAC	04/2010
Advanced Hernia	10/2008
Sentinel Lymph node Dissection	01/2000
Laparoscopic Surgery	05/1997
Laparoscopic Hernia Repair	09/1994
Advance Laparoscopic Surgery	10/1993
KTP-YAG Laser Surgery	09/1990
F.A.C.S.	10/1989
American College of Surgeons Post Graduate Vascular Surgery	01/1989

1 **IAFD**

George F. Hand, Esq.

2 Nevada State Bar No. 8483

ghand@handsullivan.com

3 Michael E. Bowman, Esq.

Nevada State Bar No. 13833

4 **HAND & SULLIVAN, LLC**hsadmin@handsullivan.com

5 3442 North Buffalo Drive

Las Vegas, Nevada 89129

6 Telephone: (702) 656-5814

Facsimile: (702) 656-9820

7 Attorneys for Plaintiffs

8 TITINA FARRIS and PATRICK FARRIS

9 **DISTRICT COURT**10 **CLARK COUNTY, NEVADA**

11 TITINA FARRIS and PATRICK FARRIS,

12 Plaintiffs,

13 vs.

14 BARRY RIVES, M.D., LAPAROSCOPIC
15 SURGERY OF NEVADA LLC; DOES I-V,
16 inclusive; and ROE CORPORATIONS I-V,
17 inclusive,

18 Defendants.

) Case No.:

) Dept No.:

) **INITIAL APPEARANCE FEE**
) **DISCLOSURE (NRS CHAPTER 19)**19 Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees were previously
20 submitted for parties appearing in the above entitled action as indicated below:

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

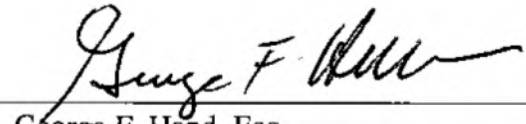
28

1	Plaintiffs, Titina Farris and Patrick Farris	\$270.00
2		
3	TOTAL REMITTED:	\$270.00

4
5 Dated: July / , 2016

HAND & SULLIVAN, LLC

6
7
8 By:



George F. Hand, Esq.
Nevada State Bar No. 8483
Michael E. Bowman, Esq.
Nevada State Bar No. 13833
3442 North Buffalo Drive
Las Vegas, Nevada 89129
Attorneys for Plaintiffs
TITINA FARRIS and PATRICK
FARRIS

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF NEVADA,
LLC,

Appellants/Cross-Respondents,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents/Cross-Appellants.

Case No. 80271

Electronically Filed
Oct 13 2020 10:29 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

BARRY JAMES RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF NEVADA,
LLC,

Appellants,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents.

Case No. 81052

APPEAL FROM JUDGMENT

EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JOANNA S. KISHNER, DISTRICT JUDGE

APPELLANTS' OPENING BRIEF

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
775-786-9716 fax
rle@lge.net

ATTORNEYS FOR APPELLANTS

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

BARRY RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF
NEVADA, LLC,

Case No. 80271

Appellants/Cross-Respondents,

vs.

TITINA FARRIS and PATRICK FARRIS,
Respondents/Cross-Appellants.

BARRY RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF
NEVADA, LLC,

Case No. 81052

Appellants,

vs.

TITINA FARRIS and PATRICK FARRIS,
Respondents.

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; appellant is an individual.

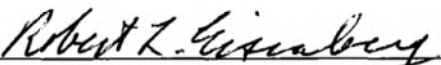
2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an

administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg
Schuering Zimmerman & Doyle, LLP
Mandelbaum Ellerton & Associates

3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED: Oct. 13, 2020



ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
(775) 786-6868
(775) 786-9716 fax
rle@lge.net

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
I. Substantive appealability	1
II. Timeliness.....	1
ROUTING STATEMENT.....	1
STATEMENT OF ISSUES	1
1. Whether the district court erred by allowing Plaintiffs to use the reptile theory	1
2. Whether the district court erred by allowing evidence of the Vickie Center case	1
3. Whether the district court erred by giving an adverse inference instruction ..	1
4. Whether the district court erred regarding ERISA preemption	1
5. Whether the district court erred by limiting and excluding defense experts ..	2
6. Whether the district court erred by granting JMOL.....	2
7. Whether the district court erred regarding hospital records.....	2
8. Whether the district court erred regarding the Hurwitz deposition.....	2
9. Whether the district erred regarding cross-examination of Dr. Juell	2
10. Whether the district court erred by awarding attorneys' fees	2
STATEMENT OF CASE	2
STATEMENT OF FACTS	2
ARGUMENTS.....	4
SUMMARY OF ARGUMENTS.....	4
CUMULATIVE ERROR.....	5

TABLE OF CONTENTS (Continued)

	Page(s)
I. The district court erred by allowing Plaintiffs to use the reptile theory.....	6
A. The reptile theory is improper.....	6
B. The district court improperly allowed the tactic	9
II. The district court erred regarding the Vickie Center case.....	11
A. Evidence of the Center case was irrelevant and prejudicial	12
B. NRS 48.035 precluded the Center evidence	14
C. Other cases support exclusion of the evidence	15
III. The district court erred by giving an adverse inference instruction.....	19
A. Background regarding discovery sanction.....	20
B. Argument regarding sanctions instruction	27
IV. The district court erred regarding ERISA preemption	29
A. Background	29
B. The ERISA plan in this case	31
C. The district court's ERISA ruling was erroneous	33
V. The district court erred by limiting and excluding defense experts	35
A. Background information	35
B. Plaintiffs failed to make mandatory disclosures of damages.....	37
C. Legal requirements for rebuttal experts	40
(1) Dr. Adornato	41
(2) Dr. Stone	43
(3) Sarah Larsen, RN.....	45
VI. The district court erred by granting Plaintiffs' NRCP 50(a) motion	46
A. Factual background	46
B. The Rule 50 motion should have been denied	50

TABLE OF CONTENTS (Continued)

	Page(s)
VII. The district court erred regarding hospital records	52
VIII. The district court erred regarding Dr. Hurwitz's deposition transcript	59
IX. The district court erred regarding cross-examination of Dr. Juell	65
A. Dr. Juell's testimony	65
B. The district court erred by allowing the cross-examination.....	66
X. The district court erred by awarding attorneys' fees.....	69
A. The fee award was not justified under NRCP 68.....	70
B. The alternative ground for the fee award is unfounded	73
(1) and (2) Discovery violations	74
(3) The word "insurance"	75
(4) Affidavits	76
(5) Offers of proof	76
(6) Miscellaneous violations.....	79
CONCLUSION.....	80
CERTIFICATE OF COMPLIANCE [<u>NRAP 32(a)(7)(D)(ii)</u>].....	81

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>APCO v. Zitting Bros.</i> , 136 Nev. Adv. Op. 64 (October 8, 2020)	70
<i>Banks v. Sunrise Hosp.</i> , 120 Nev. 822, 102 P.3d 52 (2004)	27
<i>Bass-Davis v. Davis</i> , 122 Nev. 442, 134 P.3d 103 (2006)	19, 27
<i>Beattie v. Thomas</i> , 99 Nev. 579, 668 P.2d 268 (1983)	73
<i>Biglow v. Eidenberg</i> , 424 P.3d 515 (Kan. 2018)	8
<i>Boyack v. Dist. Ct.</i> , 2019 WL 1877402 (Nev. 2019; No. 75522; unpublished)	10, 57
<i>BMW v. Roth</i> , 127 Nev. 122, 252 P.3d 649 (2011)	12, 65
<i>Braunstein v. State</i> , 118 Nev. 68, 40 P.3d 413 (2002)	13
<i>Bryson v. Genesys Regional Medical Center</i> , 2018 WL 1611438, *18 (Mich. App. 2018; unpublished)	7
<i>Buford v. Howe</i> , 10 F.3d 1184 (5th Cir. 1994)	16
<i>Capanna v. Orth</i> , 134 Nev. 888, 432 P.3d 726 (2018)	39, 65

TABLE OF AUTHORITIES (Continued)

Cases	Page(s)
<i>Cardinal v. Zonneveld</i> ,.....	64
89 Nev. 403, 514 P.2d 204 (1973)	
<i>Carr v. Paredes</i> ,.....	40
2017 WL 176591, *1 (Nev. 2017; No. 60318; unpublished)	
<i>Cerniglia v. French</i> ,.....	17
816 So. 2d 319 (La. App. 2002)	
<i>Cook v. Wadlington</i> ,.....	52
821 S.W.2d 864 (Mo. App. 1991)	
<i>Cripps v. DiGregorio</i> ,.....	71
824 A.2d 1104 (N.J. Super. 2003)	
<i>Davis v. Beling</i> ,.....	12
128 Nev. 301, 278 P.3d 501 (2012)	
<i>D'Onofrio v. SFX Sports Group, Inc.</i> ,	28
2010 WL 3324964, *10 (D.C.D.C. 2010)	
<i>Ellis v. Carucci</i> ,	58, 64
123 Nev. 145, 161 P.3d 239 (2007)	
<i>Ferris v. Tennessee Log Homes, Inc.</i> ,.....	67
2010 WL 1049852, *1 (W.D. Ken., 2010; unpublished)	
<i>FMC Corp. v. Holliday</i> ,	30-31
498 U.S. 52 (1990)	
<i>Foster v. Dingwall</i> ,	73
126 Nev. 56, 227 P.3d 1042 (2010)	
<i>Franchise Tax Board v. Hyatt</i> ,.....	27
133 Nev. 826, 407 P.3d 717 (2017)	

TABLE OF AUTHORITIES (Continued)

<u>Cases</u>	<u>Page(s)</u>
<i>Franchise Tax Board v. Hyatt</i> ,.....	27
139 S. Ct. 1485 (2019)	
<i>Funderburk v. State</i> ,.....	20
125 Nev. 260, 212 P.3d 337 (2009)	
<i>Gittings v. Hartz</i> ,.....	52
116 Nev. 386, 996 P.2d 898 (2000)	
<i>GNLV Corp. v. Serv. Control Corp.</i> ,.....	74
111 Nev. 866, 900 P.2d 323 (1995)	
<i>Grant v. Cruz</i> ,	52
406 S.W.3d 358 (Tex. App. 2013)	
<i>Hallmark v. Eldridge</i> ,	44
124 Nev. 492, 189 P.3d 646 (2008)	
<i>Hansen v. Universal Health Servs.</i> ,	14, 52, 59
115 Nev. 24, 974 P.2d 1158 (1999)	
<i>Heshelman v. Lombardi</i> ,.....	67
454 N.W. 2d 603 (Mich. App. 1990)	
<i>Holderer v. Aetna Casualty & Surety Co.</i> ,	5
114 Nev. 845, 963 P.2d 459 (1998)	
<i>Hubbard v. State</i> ,	13
134 Nev. 450, 422 P.3d 1260 (2018)	
<i>Jitnan v. Oliver</i> ,.....	79-80
127 Nev. 424, 254 P.3d 623 (2011)	
<i>Johnson v. National Sea Products, Ltd.</i> ,.....	8
35 F.3d 626 (1st Cir. 1994)	

TABLE OF AUTHORITIES (Continued)

Cases	Page(s)
<i>Kunnanz v. Edge</i> , 515 N.W. 2d 167 (N.D. 1994)	15-16
<i>Lanam v. Promise Regional Medical Center</i> ,..... 2016 WL 105046 (Kan. App. 2016; unpublished)	8
<i>Lioce v. Cohen</i> , 124 Nev. 1, 174 P.3d 970 (2008)	6
<i>Locke v. Vanderark</i> , 843 P.2d 27 (Colo. App. 1992)	67
<i>Lund v. McEnerney</i> 495 N.W. 2d 730 (Iowa 1993)	16-17
<i>Manhardt v. Tamton</i> ,..... 832 So. 2d 129 (Fla. App. 2002)	68
<i>Mathews v. State</i> , 134 Nev. 512, 424 P.3d 634 (2018)	40
<i>McCleod v. Parsons Corp.</i> ,..... 2003 WL 22097841 (6th Cir. 2003; unpublished)	13
<i>McCrosky v. Carson Tahoe Regional Medical Center</i> , 133 Nev. 930, 408 P.3d 149 (2017)	29, 30
<i>Mischler v. McNally</i> , 102 Nev. 625, 730 P.2d 432 (1986).....	14-15
<i>Mitchell v. Eighth Judicial Dist. Court</i> ,..... 131 Nev. 163, 359 P.3d 1096 (2015)	12
<i>Perez v. Ramos</i> ,..... 2018 WL 5305614 (Kan. App. 2018; unpublished)	6

TABLE OF AUTHORITIES (Continued)

Cases	Page(s)
<i>Piroozi v. Eighth Jud. Dist. Ct.</i> , 131 Nev. 1004, 363 P.3d 1168 (2015)	30
<i>Pizarro-Ortega v. Cervantes-Lopez</i> ,..... 133 Nev. 261, 396 P.3d 783 (2017)	37, 38-39
<i>Quintero v. McDonald</i> , 116 Nev. 1181, 14 P.3d 522 (2000)	51, 52
<i>Randolph v. QuikTrip Corp.</i> , 2017 WL 2214932, *4 (D. Kan. 2017; unpublished)	7
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	34
<i>Rish v. Simao</i> ,..... 132 Nev. 189, 368 P.3d 1203 (2016)	57, 73, 75
<i>Roever v. State</i> , 114 Nev. 867, 963 P.2d 503 (1998)	13
<i>Rust v. Clark Cty. Sch. Dist.</i> , 103 Nev. 686, 747 P.2d 1380 (1987)	57
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984)	35
<i>Skender v. Brunsonbuilt Const.</i> ,..... 122 Nev. 1430, 148 P.3d 710 (2006)	58, 64
<i>Staccato v. Valley Hosp.</i> , 123 Nev. 526, 170 P.3d 503 (2007)	35

TABLE OF AUTHORITIES (Continued)

Cases	Page(s)
<i>Stanojev v. Ebasco Servs., Inc.</i> , 643 F.2d 914 (2d Cir. 1981)	29
<i>Stottlemeyer v. Ghramm</i> , 597 S.E. 2d 191 (Va. 2004)	17-18
<i>System Fuels, Inc. v. United States</i> , 117 Fed. Cl. 362 (2014)	41
<i>Szymborski v. Spring Mountain Treatment Center</i> , 133 Nev. 638, 403 P.3d 1280 (2017)	7
<i>Taylor v. Kilroy</i> , 2019 W.L. 3195458, *3 (Nev. 2019; No. 75131: unpublished)	71
<i>Thomas v. City of N. Las Vegas</i> , 122 Nev. 82, 127 P.3d 1057 (2006)	69
<i>United States v. Ahmed</i> , 2016 WL 3647686 (E.D.N.Y. 2016; unpublished)	67-68
<i>Welsh v. Bulger</i> , 698 A.2d. 581 (Pa. 1997)	51
<i>Winchell v. Schiff</i> , 124 Nev. 938, 193 P.3d 946 (2008)	46
<i>Wood v. McCullough</i> , 45 F.R.D. 41 (S.D.N.Y. 1968)	13
<i>Yamaha Motor Co., USA v. Arnoult</i> , 114 Nev. 233, 955 P.2d 661 (1998)	70-71, 73

TABLE OF AUTHORITIES (Continued)

<u>Rules and Statutes</u>	<u>Page(s)</u>
EDCR 2.67	22
NRAP 3A(b)(1).....	1
NRAP 3A(b)(8).....	1
NRAP 17(b)(5)	1
NRCP 11	77
NRCP 16.1	36, 37, 39, 43
NRCP 16.1(a)(1)	37
NRCP 16.1(a)(2)(E)(i)(b)	40
NRCP 37(b)(3).....	74
NRCP 50	49, 50, 52
NRCP 50(a).....	46, 48
NRCP 68	69, 70, 71, 73, 74
NRS 7.095.....	69-70
NRS 41A.015.....	7
NRS 42.021.....	30, 31, 32, 33, 75
NRS 42.021(1).....	29, 75
NRS 48.015.....	66
NRS 48.035.....	14
NRS 48.035(1)	14, 66
NRS 48.045(2).....	13

JURISDICTIONAL STATEMENT

I. Substantive appealability.

This is an appeal from a final judgment and a post-judgment order awarding attorneys' fees and costs. 12 A.App. 2479; 31 A.App. 6802. Both are appealable. NRAP 3A(b)(1) [final judgment] and (8) [special order after final judgment].

II. Timeliness.

Notice of entry of the judgment was served electronically on November 19, 2019. 12 A.App. 2483. A notice of appeal was filed on December 18, 2019 (30 A.App. 6665). Notice of entry of the post-judgment order was served electronically on March 31, 2020. 31 A.App. 6816. An amended notice of appeal was filed on April 13, 2020. 31 A.App. 6835.

ROUTING STATEMENT

This case should be retained by the Supreme Court, because it involves a tort judgment of more than \$6 million. NRAP 17(b)(5).

STATEMENT OF ISSUES

1. Whether the district court erred by allowing Plaintiffs to use the reptile theory.
2. Whether the district court erred by allowing evidence of the Vickie Center case.
3. Whether the district court erred by giving an adverse inference instruction.
4. Whether the district court erred regarding ERISA preemption.

5. Whether the district court erred by limiting and excluding defense experts.
6. Whether the district court erred by granting JMOL.
7. Whether the district court erred regarding hospital records.
8. Whether the district court erred regarding the Hurwitz deposition.
9. Whether the district erred regarding cross-examination of Dr. Juell.
10. Whether the district court erred by awarding attorneys' fees.

STATEMENT OF CASE

Plaintiffs filed their complaint on July 1, 2016. 1 A.App. 1. The trial was held in October 2019, with a verdict for Plaintiffs; judgment was entered on November 14, 2019. 12 A.App. 2475, 2479. The district court granted attorneys' fees and costs to Plaintiffs. 31 A.App. 6802. Appellants appealed from the judgment and the post-judgment order. 30 A.App. 6665; 31 A.App. 6835.

STATEMENT OF FACTS

Plaintiff Titina Farris was a patient of Dr. Naomi Chaney, who was treating Farris for diabetes (among other things). 27 A.App. 6001. Farris was having back pain, with pain and burning in her feet; and her diabetes was uncontrolled, despite her use of medications. 27 A.App. 6000-06. Dr. Chaney diagnosed Farris as having uncontrolled diabetes, causing neuropathy (consistent with pain/burning in her feet and lower legs). 27 A.App. 6004-6, 6012.

In 2014, Dr. Chaney referred Farris to Dr. Rives for swelling in her upper abdomen. 27 A.App. 6039. He found a hernia, which he repaired surgically. 27 A.App. 6039-41. Farris returned to Dr. Rives in 2015 with another hernia, which he surgically repaired on July 3, 2015. 27 A.App. 6041-43—28 A.App. 6046. Dr. Rives found part of the colon had become stuck to mesh from the prior surgery, and in freeing the colon from the mesh, he inadvertently caused two small holes in the colon, which he repaired using a stapling device. 28 A.App. 6055-59.

Farris developed problems after the surgery, including sepsis (an infection). 23 A.App. 5023. She had a CT scan on July 5, 2015, showing no evidence of a leak anywhere in her colon. 23 A.App. 5021.

On July 12, there was a plain film of the abdomen, again showing no evidence of a leak. 24 A.App. 5203. But another CT scan on July 15 did show evidence of a leak in the colon. 24 A.App. 5203-06. Farris underwent surgery to repair the leak (with another surgeon). 28 A.App. 6207. Her sepsis continued, and she eventually developed foot-drop in both feet. 30 A.App. 6531:4. The extent to which the foot-drop was caused by the sepsis was a disputed issue at trial, with defense expert testimony establishing that the foot-drop was largely caused by the preexisting diabetic neuropathy.

Farris sued Dr. Rives for malpractice, contending that Dr. Rives caused a hole in the colon during surgery, and that fecal material leaked from the hole into Farris's

abdomen, causing the sepsis and the subsequent foot-drop. The jury found for Farris. This appeal followed.

Additional facts will be provided below.

ARUMENTS

SUMMARY OF ARGUMENTS

The district court committed multiple errors, which combined to create an unfair trial. First, the district court allowed Plaintiffs to use a “reptile” strategy, which improperly inflates verdicts by appealing to jurors’ primal instincts. The district court then allowed Plaintiffs to introduce significant evidence regarding another patient who suffered complications from surgery by Dr. Rives, including amputation of both feet. This evidence was not only irrelevant, it was highly inflammatory and prejudicial. The other case—including the fact that there was a pending lawsuit—was mentioned at least 180 times in the presence of the jury.

The district court also erroneously gave an adverse inference jury instruction, based upon a faulty analysis of facts and law.

Next, the district court committed multiple evidentiary errors, including exclusion of defense expert witnesses, exclusion of a key deposition transcript, and exclusion of hundreds of pages of relevant medical records. These rulings failed to comply with evidence law, resulting in prejudice to the defense.

The district court also granted judgment as a matter of law regarding two elements of damages. This ruling ignored the correct standard of review for a JMOL motion. As a result of the ruling, the district court filled in two lines on the jury verdict form, thereby awarding nearly \$6 million on these items, instead of allowing the jury to make the decision.

The district court also failed to apply federal preemption correctly regarding important statutory protections for doctors in medical malpractice cases. Finally, the district court erroneously awarded more than \$800,000.00 in attorneys' fees, without any proper legal basis.

CUMULATIVE ERROR

Any one of the errors in this case can justify reversal. But when the combined errors are considered together, reversal is even more compelling. Cumulative error applies when there are numerous errors found to be prejudicial, even if a single error alone might not be sufficient for a reversal. Although the doctrine has been recognized in criminal cases, the case of *Holderer v. Aetna Casualty & Surety Co.*, 114 Nev. 845, 853, 963 P.2d 459, 465 (1998) seems to have impliedly adopted the doctrine. *Holderer* was a civil case, where this court held that although certain errors did not rise to the level of reversible error, reversal was required when those errors were coupled with other errors at trial.

In the present case, the district court's erroneous rulings permeated the trial, from beginning to end. Any objective reading of the trial transcript leads to the conclusion that the cumulative errors resulted in an unfair trial, and a new trial should be ordered.

I. The district court erred by allowing Plaintiffs to use the reptile theory.

Whether an attorney's comments at trial constitute misconduct is a question of law, reviewed *de novo*. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

A. The reptile theory is improper.

The reptile theory is a "jury influence tactic" used by plaintiffs' attorneys to motivate juries to award larger verdicts. *Perez v. Ramos*, 2018 WL 5305614, *9 (Kan. App. 2018; unpublished) (affirming defense verdict where trial court granted anti-reptile order in limine). The tactic appeals to jurors' basic survival instincts (their "reptilian brains") by persuading them that their own safety is at risk and that a larger plaintiff's verdict will make them safer by making their community safer. *Id.* To use the tactic, a plaintiff's attorney tries to establish generic "safety rules," which may or may not have anything to do with specific facts and duties in the case. *Id.* "Reliance on these safety rules then activates the survival instinct of the jurors and prompts the jury to return a higher verdict." *Id.* The reptile theory encourages a jury decision based upon fear, generated by plaintiff's counsel, that a verdict for the defendant will harm the safety of the community, and thus, the jury's own safety.

See Randolph v. QuikTrip Corp., 2017 WL 2214932, *4 (D. Kan. 2017; unpublished).

In a medical malpractice case, the plaintiff's attorney uses the reptile theory in an effort to activate a jury's reptilian survival mode by suggesting that, regardless of legal standards of care, doctors may not take unnecessary risks and must make safe choices, or the safest choices, for patients. *Bryson v. Genesys Regional Medical Center*, 2018 WL 1611438, *18 (Mich. App. 2018; unpublished). Such arguments are improper because they suggest "a more stringent standard of care" than the correct legal duty in a malpractice case, i.e., a duty to comply with the standard of care in the medical community.¹ *Id.*

Nevada doctors commit negligence (malpractice) by failing to use "the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015. This standard of care is established through expert testimony at trial. *See Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 642, 403 P.3d 1280, 1284-85 (2017). A defendant in a negligence case is not required to act in "the safest possible

¹ *Bryson* found that the plaintiff's "limited and fleeting" improper references were harmless in that case. *Id.* Here, Plaintiffs' references to safety as a substitute for the actual legal standard of care permeated the trial, starting with voir dire, continuing throughout witness testimony, and finally ending with closing arguments.

way,” but is only required to act reasonably under the circumstances. *See Johnson v. National Sea Products, Ltd.*, 35 F.3d 626, 632 (1st Cir. 1994).

A plaintiff’s use of the reptile theory tactic in a medical malpractice case runs contrary to these standards. The plaintiff’s use of the terms “safety requirements” and “safety rules,” with reference to the medical defendant’s policies and procedures, will “prejudice the jury by conflating the standard of care with the safety rules.” *See Lanam v. Promise Regional Medical Center*, 2016 WL 105046, *9 (Kan. App. 2016; unpublished) (holding that trial court did not abuse its discretion by finding that plaintiff’s counsel violated an order in limine prohibiting reference to “safety” rules and requirements).

Arguments and evidence based on “broad and abstract” concepts of patient safety or needlessly endangering patients—or arguments that a doctor’s job is to “take care of people and help people, but really the safety” of patients—are improper. *See Biglow v. Eidenberg*, 424 P.3d 515, 528-29 (Kan. 2018). Such concepts inappropriately rephrase the legal duty of care for doctors, and the concepts do nothing to establish whether a doctor breached the actual legal standard of care. *Id.* Thus, in addition to prohibiting plaintiff’s counsel from referring to “safety rules,” a trial court appropriately prohibits the plaintiff’s use of the word “safe” or the phrase “needlessly endanger” in a medical malpractice case. *Id.*

B. The district court improperly allowed the tactic.

In the present case, Plaintiffs' reptile tactic permeated the entire trial, starting with voir dire and continuing throughout the trial until closing argument. A trial transcript search shows that Plaintiffs' counsel used the phrase "safety rules" at least 30 times while talking to prospective jurors during jury selection. He talked to jurors about their own personal compliance with safety rules while driving, working, and at home. 18 A.App. 3828-32. He talked to jurors about what happens if people do not follow safety rules, and injuries that can ensue. *Id.* Counsel discussed the distinction between regular "rules" and "safety rules," with emphasis on consequences of "breaking the safety rules," and whether somebody who breaks a safety rule and causes an accident should get "a complete pass" for what happened. 18 A.App. 3838-41.

Plaintiffs' counsel then repeatedly talked to jurors about whether doctors and surgeons must follow "safety rules," and what safety rules jurors thought surgeons should follow. 18 A.App. 3832-33, 3841-51. Counsel asked jurors about what can happen if a doctor violates a safety rule; and, as expected, jurors indicated possible death, loss of function of a person's body, or infection. 18 A.App. 3846.

Defense counsel repeatedly objected on various grounds, including the ground that Plaintiffs' counsel was improperly indoctrinating jurors, reference to safety rules was an incorrect statement of law, and reference to "safety rules" for doctors

was inconsistent with the applicable legal standard in medical malpractice cases. 18 A.App. 3832, 3841, 3846-47, 3851-59. The district court consistently overruled these objections. 18 A.App. 3833-34, 3841, 3853-58. When defense counsel mentioned that Nevada appellate courts had not yet addressed the objectionable reptile theory, the district court disagreed and stated that the Nevada Supreme Court **has** addressed the issue.² 18 A.App. 3855-56.

After voir dire, Plaintiffs' counsel continued his reptile tactic during opening statement, where virtually the first thing he told the jury was: "What brings us to the court today, to the courthouse, this court of law, are safety rules; safety rules that surgeons must follow." 19 A.App. 4247. The district court overruled defense counsel's objection. *Id.* Plaintiffs' counsel mentioned "safety rules" eight times in the first page of the opening statement transcript. *Id.* During cross-examination of Dr. Rives, Plaintiffs' counsel discussed "safety" or "safety rules" at least 15 times; and defense counsel's objection was overruled. 20 A.App. 4300-09; 28 A.App. 6218, 6271. Plaintiffs' counsel continued using the reptile "safety" tactic during

² The district court failed to identify any Nevada cases about which she was referring on the reptile tactic issue. A Westlaw search for this brief revealed no published or unpublished Nevada decision dealing with legitimacy of the reptile theory. The closest thing is *Boyack v. Dist. Ct.*, 2019 WL 1877402 (Nev. 2019; No. 75522; unpublished), where the court dealt with procedural requirements for mistrial sanctions relating to the reptile theory. But the *Boyack* court expressly declined to decide whether the reptile theory is a legitimate trial technique. *Id.* at n.1.

examination of defense witnesses Dr. Juell and Dr. Ardanato.³ 24 A.App. 5267-68; 26 A.App. 5728. And in closing arguments, Plaintiffs' counsel argued about safety rules, including arguments (two times) that a doctor must choose "the safest tool." 29 A.App. 6385.

In other words, Plaintiffs' counsel hammered at his reptile tactic repeatedly and pervasively—dozens of times—from the beginning of trial until the very end, over defense counsel's overruled objections. No amount of debating skill can establish that this would not have impacted the jury's multi-million dollar verdict.

II. The district court erred by allowing evidence of the Vickie Center case.

Admission or exclusion of evidence is generally reviewed for abuse of discretion, but where an evidentiary ruling includes a legal interpretation of the

³ In addition to discussing "safety" during examination of defense medical witnesses, Plaintiffs' counsel used another scare tactic consistent with the reptile theory. On cross-examination of Dr. Juell, counsel asked about estimates of the number of deaths in the United States caused by medical errors on an annual basis. 25 A.App. 5348. A defense objection was overruled, and Dr. Juell noted some literature indicating as many as 400,000 deaths per year. *Id.* Plaintiffs' counsel then emphasized that there have been scientific studies indicating "over 400,000 deaths a year from medical error," which meant that "on a daily basis it's an indication of more than a 1,000 Americans because of medical error that die per day if those estimates were correct." 25 A.App. 5348-49. Counsel then asked whether the high number of deaths caused by medical error is "an okay scenario," and whether "one of the ways that we reduce the error frequency is by holding those who commit errors accountable for their errors." 25 A.App. 5349. Of course, Dr. Juell had to agree. *Id.* These questions were obviously designed to fortify the reptile theory tactic by hammering on broad concepts of patient safety, needlessly endangering patients resulting in numerous deaths, and activating the jury's survival instinct to protect the safety of the community, and the jury's own safety, by rendering a large verdict.

evidence law, the ruling is reviewed *de novo*. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012). A district court necessarily abuses its discretion if it makes an erroneous ruling of law or an erroneous assessment of evidence. *BMW v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011).

A. Evidence of the Center case was irrelevant and prejudicial.

Vicki Center was an unrelated patient who had another unrelated surgery by Dr. Rives; she developed sepsis, eventually leading to amputation of her feet, and she sued Dr. Rives for malpractice. Over defense objections on multiple grounds, the district court admitted evidence regarding the Center case into the Farris trial, allowing Plaintiffs' counsel to bombard the jury with evidence regarding Center throughout the trial. A trial transcript search reveals that **the Center case was mentioned in the Farris trial at least 180 times in the presence of the jury, and the fact of Vickie Center's amputations was also made known to the jury.** *E.g.*, 21 A.App. 4647 (including overruled objection). This trial should have been a Farris trial. Instead, the district court allowed it to become a Farris-Center trial.

The evidence was irrelevant to the fundamental question of whether Dr. Rives's conduct departed from the accepted standard of medical care. *Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. 163, 174, 359 P.3d 1096, 1103 (2015) (discussing requirements for malpractice suits). Inflammatory and speculative evidence involving prior incidents other than the incident at issue serves little

purpose except to inflame the jury, and such evidence should not be admitted. *See Roever v. State*, 114 Nev. 867, 872, 963 P.2d 503, 506 (1998). Evidence of prior incidents can result in a verdict against a defendant because the jury believes the defendant is a bad person, rather than because of the merits of the case. *See e.g., Braunstein v. State*, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002).

With certain exceptions not applicable here, evidence of prior bad acts is not admissible to prove the defendant's character or to show that he acted in conformity therewith. NRS 48.045(2). **"A presumption of inadmissibility attaches to all prior bad act evidence."** *Hubbard v. State*, 134 Nev. 450, 454, 422 P.3d 1260, 1264 (2018) (emphasis added). Evidence of prior bad acts can have minimal probative value and can cause unfair prejudice to the defendant. *Id.* at 457, 422 P.3d at 1266.

Evidence of other claims against a doctor is irrelevant in a medical malpractice action. *See Wood v. McCullough*, 45 F.R.D. 41 (S.D.N.Y. 1968). Evidence concerning other lawsuits against a party is irrelevant unless there is a "clear nexus" and no significant differences between the cases. *McCleod v. Parsons Corp.*, 2003 WL 22097841, *7 (6th Cir. 2003; unpublished) (employment litigation). A potential for prejudice accompanies such evidence, outweighing its probative value and misleading the jury. *Id.*

B. NRS 48.035 precluded the Center evidence.

Even if evidence is relevant, it 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.” NRS 48.035(1).

In *Hansen v. Universal Health Servs.*, 115 Nev. 24, 974 P.2d 1158 (1999), a patient suffered a severe debilitating infection after spine surgery. He sued the doctor and the hospital, contending that the incision became severely infected due to contamination with fecal material. The jury returned a defense verdict. On appeal, the plaintiff contended that the district court erroneously excluded a Nevada state agency’s survey of medical complications experienced by the doctor’s other patients who also had the same surgery. The *Hansen* court affirmed exclusion of the evidence under NRS 48.035(1), because the probative value was substantially outweighed by the danger of confusing the issues and misleading the jury. *Id.* at 27, 974 P.2d at 1160. Injecting evidence of other cases into the trial at hand would prolong trial, confuse the issues, and divert the jury from the case at hand to collateral matters. *Id.* The evidence was properly excluded. *Id.*

In *Mischler v. McNally*, 102 Nev. 625, 730 P.2d 432 (1986), a surgeon was sued for malpractice. At trial, the district court admitted a memorandum contained in a hospital personnel file for the surgeon, in which another doctor said “I wouldn’t let him treat my dog.” *Id.* at 628, n.1, 730 P.2d at 434, n.1. Admissibility of the

memorandum was the only issue addressed in *Mischler*. This court reversed and remanded for a new trial. In addition to hearsay and foundational problems, the *Mischler* court held that the memorandum was irrelevant and inadmissible. *Id.* at 628-29, 730 P.2d at 435. The memorandum “was an emotional statement of opinion as to the doctor’s capabilities and character,” and the comment “had a high potential for prejudicially arousing the jury’s hostility against Dr. Mischler.” *Id.* at 629, 730 P.2d at 435. The court also held that the memorandum “distracted the jury from the issue of the reasonableness of Dr. Mischler’s conduct during the [surgery], and interjected a strong potential, if not probability, of jury confusion based upon the highly deprecatory characterization of Dr. Mischler’s professional history.” *Id.*

The plaintiff in *Mischler* had suffered severe complications and injuries resulting from the alleged malpractice, and the jury awarded more than \$1.1 million. Nevertheless, this court reversed and remanded for a new trial, all based upon a seven-word sentence stated in another doctor’s memorandum. The prejudicial impact—and the likelihood of unfairly inflaming the jury’s emotions—called for a new trial.

C. Other cases support exclusion of the evidence.

Exclusion of similar evidence was required in *Kunnanz v. Edge*, 515 N.W. 2d 167 (N.D. 1994), where a surgeon performed a ureteroscopy, causing damage to the ureter, requiring removal of a kidney. Only one week earlier, the same surgeon had

performed a ureter procedure on another patient, injuring her ureter and leading to a kidney loss. The trial court refused to allow the plaintiff to introduce evidence of the failed surgery that occurred one week before the surgery at issue, as well as the doctor's deposition (offered to establish his complication rate).

On appeal, the plaintiff argued that the excluded evidence was offered to show the doctor's complication rate for ureteroscopy procedures, and the evidence was highly probative of his lack of skill. The *Kunnanz* court upheld the exclusionary rulings. The court first held that negligence cannot be proven by showing the commission of similar prior acts by the same person. *Id.* at 171. Evidence of the surgery one week earlier was not admissible to show the doctor's negligence, and in any event, its introduction "would have injected a collateral matter into this trial and confused the jury." *Id.*

In *Buford v. Howe*, 10 F.3d 1184 (5th Cir. 1994), the plaintiff had a hysterectomy, and her lawsuit contended that the surgery was unnecessary and fraudulently induced. The trial court excluded evidence of other hysterectomies the doctor performed on other patients. This evidence was offered to prove that the doctor fraudulently induced women to submit to unnecessary surgeries for financial gain. The *Buford* court upheld the exclusion of this evidence, in light of the marginal relevance and the fact that the probative value was outweighed by the prejudicial effect. *Id.* at 1188-89. See also *Lund v. McEnerney*, 495 N.W. 2d 730, 734 (Iowa

1993) (affirming refusal to admit evidence of injuries caused to other patients in other surgeries by same doctor).

Another court dealt with this issue in *Cerniglia v. French*, 816 So. 2d 319 (La. App. 2002), where the plaintiff suffered severe complications from sinus surgery. After a plaintiff's verdict, the doctor contended on appeal that the trial court erred by admitting testimony from two other patients who suffered similar injuries in similar surgeries by the doctor. The appellate court reversed, holding that the evidence was not admissible. In addition to being irrelevant, any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury.⁴ *Id.* at 323-24.

A persuasive opinion was issued in *Stottlemeyer v. Ghramm*, 597 S.E. 2d 191 (Va. 2004), which was a medical malpractice case arising out of botched surgery. The plaintiff appealed from a defense judgement, contending that the trial court erred by denying cross-examination of the doctor regarding prior acts of misconduct and negligence relating to former patients. The *Stottlemeyer* court found no error in the exclusion of this evidence. The testimony was collateral, and it "would have certainly injected non-probative prejudicial evidence before the jury." *Id.* at 194.

⁴ The *Cerniglia* court rejected the idea that evidence of the doctor's treatment of other patients was admissible to prove the doctor's knowledge or lack of knowledge regarding proper surgical procedures obtained through training. *Id.* at 324-25. This was Plaintiffs' primary argument in the present case.

The collateral evidence “would have distracted the jurors from the issues of Dr. Ghramm’s alleged negligence, and such evidence would have excited prejudice and misled the jurors.” *Id.*

The *Stottlemeyer* court also held that prior malpractice is not relevant or admissible to show that a defendant was negligent. *Id.* at 194. “Evidence that a defendant was negligent on a prior occasion simply has no relevance or bearing upon whether the defendant was negligent during the occasion that is the subject of the litigation.” *Id.* The primary issue before the jury was whether the defendant doctor performed the surgery in accordance with applicable standards of care, and “alleged prior bad acts and his alleged prior acts of negligence related to other patients simply had no relevance to the issues that were before the jury for its consideration.” *Id.*

In the present case, Plaintiffs’ counsel Jones argued that the fact of Center having her feet amputated as a result of sepsis before Farris’s surgery was relevant to establish foreseeability, i.e., to show that, from the Center situation, Dr. Rives knew the consequences of his conduct. 14 A.App. 2986-89. The theory was, in essence, that Dr. Rives should have learned a lesson from his experience with sepsis after Center’s surgery. As defense counsel aptly observed, however, Plaintiffs’ argument was a red herring. 14 A.App. 2995. There was no question that an experienced surgeon is aware of dangers associated with sepsis. *Id.* There was no legitimacy to Plaintiffs’ contention that Dr. Rives may have been unaware of risks

involved with sepsis when he operated on Farris, and that he should have learned a lesson from the Center surgery complications a few months earlier.⁵ 14 A.App. 2995-97.

Dr. Rives was essentially forced to defend both cases in the same trial, with jurors being constantly bombarded with information from the Center case—including the overwhelmingly sympathetic fact that Mrs. Center had both feet amputated as a result of her sepsis. Evidence and arguments involving the Center case would have evoked the jurors' strongest emotions imaginable. Plaintiffs cannot in good conscience assert otherwise. Common sense revolts at the idea that this was a fair trial.

III. The district court erred by giving an adverse inference instruction.

A trial court's decision on whether to impose sanctions, including an adverse inference instruction, is reviewed for abuse of discretion. *Bass-Davis v. Davis*, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006). Affirmance is only appropriate if a district court examines relevant facts, applies a proper standard of law, and utilizes a demonstrably rational process. *Id.* at 447-48, 134 P.3d at 106. This court conducts

⁵ As noted, Jones had argued that Center's surgery complications were relevant to show Dr. Rives's knowledge of the consequences of sepsis before he operated on Farris. Yet at trial, when Dr. Rives attempted to tell the jury about his prior knowledge of sepsis and what he has known about sepsis since medical school, Jones objected on the ground that Dr. Rives was improperly testifying as an expert. 27 A.App. 5879-80. The district court sustained the objections. *Id.*

de novo review of whether a jury instruction was an accurate statement of law. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009).

A. Background regarding discovery sanction.

This issue is related to the Center lawsuit in Clark County, in which Dr. Rives was a defendant. The same defense firm represented Dr. Rives in both cases. 2 A.App. 382. One of the attorneys in the firm was Chad Couchot, who prepared responses to interrogatories for Dr. Rives in the Center case. *Id.* An interrogatory asked about other malpractice suits against Dr. Rives. 2 A.App. 388-89. The response prepared by counsel Couchot in the Center case provided information concerning other suits, including the Farris case. 2 A.App. 389.

About one month later, Couchot prepared interrogatory responses for Dr. Rives in the Farris case, and just like the interrogatories in the Center case, one of the interrogatories asked about other lawsuits. 2 A.App. 394. Couchot knew he had recently answered a similar interrogatory in the Center case, and he therefore transferred information from the Center responses to responses in the Farris case. 2 A.App. 382. Unfortunately, when transferring the information from the Center responses to the Farris responses, Couchot neglected to add the Center case to the list of prior suits. *Id.* This was simply an oversight. *Id.*

In October 2018, Plaintiffs' counsel in the Farris case, George Hand, took Dr. Rives's deposition. 2 A.App. 399. During the deposition, Hand drew Dr. Rives's

attention to Interrogatory 3, involving other suits. Hand asked questions regarding each of the cases disclosed in the response. 2 A.App. 401-02. Hand then asked about an interrogatory response dealing with Dr. Rives's prior depositions, "such as an expert for patient or for defendant doctor." 2 A.App. 402:22-24. When Dr. Rives responded, referring to information in his response to Interrogatory 5, he did not mention the Center case, because he had not been deposed in that case when the answers to interrogatories were prepared in the Farris case. 2 A.App. 403-04. At that point defense counsel Couchot informed Hand about the Center case. *Id.* Hand asked all the questions he wanted to ask regarding the Center case, and Dr. Rives answered his questions.⁶ *Id.*

⁶ Unfortunately, the transcript has the name "Sinner" instead of "Center." 2 A.App. 403-04. This was obviously a mistake by the court reporter. Nearly a year later, Plaintiffs' new attorneys suggested that Couchot and Dr. Rives provided the incorrect name "Sinner," essentially contending that this was somehow part of a devious scheme to prevent Hand from finding out about the Center case. 1 A.App. 93. This was ridiculous. If Couchot and Dr. Rives did not want the Center case to be disclosed, they would not have mentioned it at all. The case was in the public record; Hand could have asked for other information at the deposition; and he could have made follow-up discovery requests after the deposition if he had difficulty obtaining information about the case. Plaintiffs' new attorneys eventually conceded that Couchot "likely was intending to say Center but that wasn't picked up [by the court reporter] because of the—it came up [as] Sinner." 14 A.App. 2981:18-25.

Plaintiffs' new attorneys also accused Couchot of "improperly coaching the witness" regarding the Center case. 1 A.App. 92:23-24. Hand did not object to alleged improper coaching at the deposition. Regardless, Couchot absolutely did the right thing by providing additional information when he realized there was an omission.

Information regarding the Center case was always available to Hand on the district court's Odyssey website, and Plaintiffs' new attorneys eventually conceded this. 1 A.App. 90:25-26; 2 A.App. 383. Hand took Dr. Rives's deposition in October 2018; discovery closed in June 2019; and Plaintiffs associated their new attorneys into the case in July 2019. 2 A.App. 382-83. Then, the attorneys from both sides attended a meeting in September 2019, pursuant to EDCR 2.67. *Id.* Plaintiffs' counsel did not notify defense counsel of any alleged concealment regarding the Center case at that time. *Id.* In fact, during the entire time from Dr. Rives's deposition until Plaintiffs filed their motion for sanctions nearly a year later, none of Plaintiffs' attorneys asked for additional information regarding the Center case. *Id.* As it turned out, Hand had contacted Center's counsel, attorney Brenske, "weeks to months" before the trial in the Center case started on April 1, 2019. 4 A.App. 757.

Nearly a year after the deposition, and months after Hand discussed the Center case with Center's counsel, Plaintiffs filed a motion for sanctions against Dr. Rives, alleging intentional concealment of the Center case. 1 App. 87. Plaintiffs contended that Dr. Rives and his attorneys "sought to hide" the Center case and committed "deliberate obfuscation." 1 A.App. 95:14, 28. Plaintiffs' new attorneys contended that Plaintiffs "only found out about the Center case by a search through Odyssey." 1 A.App. 96:10. This was false, because the Center case had been disclosed in

October 2018 at Dr. Rives's deposition, and Hand had discussed the Center case with Center's counsel "weeks to months" before the April 2019 trial in the Center case.

Unburdened by evidence, Plaintiffs' attorneys asserted that they "had no reasonable opportunity to further investigate this critical and admissible information." 1 A.App. 99:15-16. With Rambo-style bravado, Plaintiffs' new attorneys requested the court to order a "case terminating sanction" by striking Dr. Rives's answer. 1 A.App. 98:24-25.

Dr. Rives filed an opposition. 2 A.App. 358. Couchot provided uncontroverted explanations about preparing the interrogatory responses in the Center case; preparing the responses in the Farris case a month later; using information from the Center responses for the nearly identical interrogatory in the Farris case; inadvertently failing to add the Center case to the Farris responses; and subsequently disclosing the Center case (not Sinner) at Dr. Rives's deposition. 2 A.App. 361-71, 382-83.

The opposition also established that the mistake caused no prejudice to Plaintiffs, because they were not prevented from inquiring as to Dr. Rives's knowledge of the dangers of organ perforation, sepsis, and the need for urgent surgery. 2 A.App. 372:1-2. Plaintiffs were wrong in their contention that they were unable to investigate these issues due to their alleged lack of knowledge regarding

the Center case. 2 A.App. 372. The opposition also established that any evidence pertaining to the Center case was inadmissible anyway, for a variety of reasons. 2 A.App. 373-75.

The district court held a hearing on the motion, including an evidentiary hearing with testimony by Dr. Rives regarding the process for responding to interrogatories. He explained that he relied on defense counsel to prepare the interrogatory responses and to provide the information contained in their responses. 14 A.App. 3075. He conceded that he did not read the responses before he signed them, because the responses looked like legalese, and he assumed the information was the same as his earlier responses. 14 A.App. 3075:8-18. He did not believe the questions by attorney Hand at his deposition included questions for which the answer would have needed discussion of the Center case.⁷ 14 A.App. 3081, 3103-05.

The district court failed to enter a written order, but the court issued an oral ruling indicating the court was “inclined to” give a jury instruction and impose a monetary sanction. 15 A.App. 3223:18-20, 3226:16-17. The court found that Dr. Rives had not given appropriate responses in discovery. 15 A.App. 3219-30. Later,

⁷ Near the beginning of the evidentiary hearing on October 7, 2019, defense counsel Doyle requested permission to make a closing argument after Dr. Rives’s testimony at the hearing. 14 A.App. 3069:16-17. The district court refused the request, because defense counsel had not made the request before the hearing. 14 A.App. 3069:18-23. Thus, the district court rendered her ruling without the benefit of argument by counsel regarding Dr. Rives’s testimony.

during the trial, the court stated that Dr. Rives's conduct was intentional. 19 A.App. 4218-19. The court noted that Dr. Rives had "relied on counsel," and he had an "intent not to read the interrogatories," which the court found was "intentional conduct." 19 A.App. 4218-19. The court decided to give an instruction allowing the jury to draw an adverse inference against Dr. Rives. 19 A.App. 4220-25.

Of course, defense counsel had consistently opposed the imposition of any sanctions, because no sanctionable conduct had occurred. 2 A.App. 358-84, 30 A.App. 6494-6505. Defense counsel opposed sanctions at every hearing on the issue. 14 A.App. 2971 (September 26, 2019), 14 A.App. 3043 (October 7, 2019), 15 A.App. 3163 (October 10, 2019), 19 A.App. 4212 (trial, October 16, 2019). When the district court announced the decision to give a sanction jury instruction, the court told Plaintiffs' counsel to prepare the instruction, with defense counsel having an opportunity to review it. 15 A.App. 3223:16-25. Defense counsel received Plaintiffs' instruction three days later, on a Sunday afternoon. 19 A.App. 4215:7-13. He sent his own proposed instruction to Plaintiffs' counsel Monday morning. 19 A.App. 4215:14-19.

The wording of the jury instruction was argued on the third trial day. 19 A.App. 4211-45. Defense counsel indicated he objected to "any sort of instruction along these lines," i.e., a sanctions instruction. 19 A.App. 4214:5. The district court ruled that the objection was waived, because defense counsel did not make an

objection at an earlier hearing on October 7, 2019. 19 A.App. 4214:7-11. There was no basis for this ruling. As noted above, Dr. Rives's attorneys had consistently opposed any sanctions. Additionally, the hearing on October 7, 2019, to which the district court referred, was the evidentiary hearing. The district court did not make a ruling at that time, and in fact, the court did not rule until October 10, 2019. 15 A.App. 3223:16-23 (announcing the court's inclination to give jury instruction). That was the hearing at which the district court instructed Plaintiffs' counsel to draft the proposed instruction.

Regardless of all this procedural wrangling, the district court ultimately read an instruction to the jury before opening statements. The instruction read as follows:

Members of the jury, Dr. Barry Rives was sued in a medical malpractice case in the case *Vickie Center v. Barry James Rives, M.D., et al.* Dr. Barry Rives was asked about the Vickie Center case under oath and he did not disclose the case in his interrogatories or at his deposition. You may infer that the failure to timely disclose evidence of a prior medical malpractice lawsuit against Dr. Barry Rives is unfavorable to him. You may infer that the evidence of the other medical malpractice lawsuit would be adverse to him in this lawsuit had he disclosed it. This instruction is given pursuant to a prior Court ruling.

19 A.App. 4246:16-24. The district court gave essentially the same instruction at the end of the trial. 30 A.App. 6651.

B. Argument regarding sanctions instruction.

A district court may give an adverse inference instruction where evidence has been lost or destroyed. *See Bass-Davis v. Davis*, 122 Nev. at 447, 134 P.3d at 106. An adverse inference is essentially a gap-filler that serves the remedial function of restoring parties to the same position they would have been in absent the loss or destruction of the evidence. *Id.* at 449, 134 P.3d at 107. It allows the jury to infer that the lost or destroyed evidence would have been unfavorable to the party who lost or destroyed it, and favorable to the other party. *Id.* at 449-50, 134 P.3d at 107-08. The inference is not imposed because of any moral culpability, but rather, because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss. *Id.*

Nevada cases applying adverse inferences have primarily dealt with evidence that was actually lost or destroyed, without the ability to retrieve it. *E.g.*, *Banks v. Sunrise Hosp.*, 120 Nev. 822, 102 P.3d 52 (2004) (equipment sold); *Bass-Davis, supra* (videotape lost); *Franchise Tax Board v. Hyatt*, 133 Nev. 826, 407 P.3d 717 (2017) (computer tapes destroyed), reversed on other grounds by *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019). On the other hand, where evidence has not actually been lost or destroyed, it makes no sense to impose an adverse inference. The inference allows a jury to fill an evidentiary gap by inferring (or speculating) about what the lost or destroyed evidence would have been. Where the party

asserting the inference has gained possession of the evidence, even if somewhat late, the evidence is known, and there is no evidentiary gap. There is simply no need for a jury to draw an adverse inference, one way or the other, regarding the evidence, and it makes no sense to give an instruction allowing the jury to draw an inference regarding what the evidence would have been. *Cf. D'Onofrio v. SFX Sports Group, Inc.*, 2010 WL 3324964, *10 (D.C.D.C. 2010) (where lost computer evidence was partially recovered, adverse inference instruction would have been “half true”).

In the present case, the adverse inference instruction informed the jury that Dr. Rives did not disclose the Center case in his interrogatories or his deposition; that the jury could infer that the failure to disclose evidence “is unfavorable to him”; and the jury may infer that the evidence of the Center lawsuit would be adverse to Dr. Rives. But Plaintiffs’ attorneys had already obtained all the evidence they wanted regarding the Center case, and they discussed the Center case more than 180 times in the presence of the jury. There was no evidentiary gap to fill with the adverse inference instruction. The instruction—which was given at the beginning of the trial and a second time at the end of the trial—allowed the jury to speculate that there might have been more evidence regarding the Center case, and allowed the jury to fill gaps that simply did not exist.

Equally egregious, however, was the district court’s decision to give an adverse inference instruction for evidence that should not even have been admitted

in the first place. Evidence of Center's case was irrelevant, inflammatory, and unduly prejudicial. The adverse inference instruction was error because the Center evidence had no relation to Plaintiffs' malpractice claim. *See Stanojev v. Ebasco Servs., Inc.*, 643 F.2d 914, 924 (2d Cir. 1981) (adverse inference instruction error where the inference "could not serve to supply the missing element of a prima facie case.").

Plaintiffs' counsel emphasized the adverse inference instruction during his closing argument, essentially asking the jury to speculate about what Dr. Rives was "hiding" in the Center case. 29 A.App. 6387, 6389. The adverse inference instruction was clear error, resulting in an unfair trial that requires reversal.

IV. The district court erred regarding ERISA preemption.

Issues involving ERISA preemption in medical malpractice cases are reviewed *de novo*. *E.g., McCrosky v. Carson Tahoe Regional Medical Center*, 133 Nev. 930, 936-37, 408 P.3d 149, 154-55 (2017).

A. Background.

In a typical personal injury case, the default rule is that collateral source evidence (payment of bills by insurance or a third-party) is inadmissible. *McCrosky*, 133 Nev. at 936, 408 P.3d at 154-55. In a medical malpractice case, however, the default rule is that collateral source evidence **is admissible** under NRS 42.021(1). This statute was adopted in 2004, when voters approved the Keep Our Doctors in

Nevada (KODIN) ballot initiative, which changed Nevada law for medical malpractice litigation, including changes in the collateral source rule. 13 A.App. 2793-94, 2799; *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1005, 363 P.3d 1168, 1169 (2015); *McCrosky*, 133 Nev. at 936-37, 408 P.3d at 154-55.

NRS 42.021 created an exception to the collateral source rule, allowing medical malpractice defendants to introduce evidence of collateral payments that the plaintiffs received from third parties. *Id.* Application of the statute can be preempted by federal law in limited circumstances. For example, medical bills in *McCrosky* were paid by Medicaid. A federal statute gives the United States a right to reimbursement from a third-party tortfeasor. *McCrosky* held that federal law preempted NRS 42.021 in this regard. *Id.* at 937, 408 P.3d at 155. *McCrosky* noted, however, that NRS 42.021 remains intact regarding private collateral source payments. *Id.* at n.2.

Because the present case does not involve direct federal collateral source payments, *McCrosky* does not apply. Nonetheless, preemption can apply under the Employee Retirement Income Security Act (ERISA), which governs employee benefit plans. *FMC Corp. v. Holliday*, 498 U.S. 52, 54 (1990). There are two types of ERISA plans. Some plans are self-funded, where the employer pays medical benefits directly, without an insurance company. If the plan is not self-funded, the employer purchases a health insurance policy, and the insurance company pays

medical expenses. *Id.* at 54, 61-62. If a plan is self-funded, federal preemption applies, and the plan is exempt from state regulations relating to the plan. *Id.* If the plan is not self-funded—and an insurance company pays benefits—federal preemption does not apply, and state laws such as NRS 42.021 apply. *Id.*

B. The ERISA plan in this case.

Titina Farris's medical bills were paid through her husband's coverage as an MGM employee. 21 A.App. 4720-22. Plaintiffs never filed a motion in limine to preclude evidence of medical insurance payments, or to preclude anyone from mentioning insurance at trial. On the first trial day, Dr. Rives filed a trial brief explaining the ERISA issue, and pointing out that Plaintiffs had not shown evidence that Farris's bills were paid by a self-funded ERISA plan. 4 A.App. 798-801. Dr. Rives argued that he was therefore permitted to introduce evidence of the medical benefits paid. 4 A.App. 802:15-16.

On the sixth trial day, during cross-examination of Dr. Rives, Plaintiffs' counsel Jones asked about Dr. Rives's surgery billings: "Doctor, did you give the money back in this case or did you choose to keep that?" 21 A.App. 4716:15-4717:1. This was obviously designed to make Dr. Rives look greedy, with no relevance whatsoever to the question of whether Dr. Rives committed malpractice. Yet the district court overruled a relevance objection. 21 A.App. 4717:2-3.

Dr. Rives responded: "I don't think legally we can give the money back." 21 A.App. 4717:4-5. Instead of dropping the matter, Jones persisted by asking a follow-up question: "Did you try?" 21 A.App. 4717:7. In attempting to answer the question, Dr. Rives explained: "Well, the insurance company is the one who pays me so--" 21 A.App. 4717:8. The district court interrupted the answer and had a discussion outside the jury's presence. 21 A.App. 4717:9-18. Jones argued that "insurance is prohibited," and insurance was "not to be discussed in this case." 21 A.App. 4720:1-2. Actually, the district court had never issued an order prohibiting mention of insurance or ruling that NRS 42.021 was inapplicable. Thus, defense counsel argued that Dr. Rives's answer to Jones's question was not improper. 21 A.App. 4720-46.

The parties made arguments regarding whether the plan was a self-funded ERISA plan, and whether federal preemption applied. 21 A.App. 4719-46. The next day, Dr. Rives filed another trial brief on the ERISA issue, and he provided a copy of the MGM plan. 5 A.App. 995-1002, 1006-44.

Plaintiffs filed a document asserting that Dr. Rives was guilty of "violating the Court's strict prohibition against referencing insurance payments in this matter." 7 A.App. 1345:20-21. Plaintiffs did not identify when the court ordered such a prohibition, and in fact, no such prohibition had been ordered. Plaintiffs also argued that NRS 42.021 was preempted by ERISA. 7 A.App. 1346-50.

At another hearing, when the parties were arguing about whether the plan was self-funded, the district court indicated that “the Court actually knows the answer to the question,” based upon independent knowledge that the court “gained prior to being on the bench.” 22 A.App. 4931:18-20. The court subsequently repeated the fact that she had “independent knowledge of whether MGM is or is not self-funded,” and that she “did know the answer independently.”⁸ 26 A.App. 5594:2-5. Doyle observed that MGM has multiple health plans, including separate plans for executives, and the insurance card does not say it is a self-funded plan. 26 A.App. 5597.

The district court ruled that the MGM was self-funded. 26 A.App. 5594:10-12. Therefore, the court ruled that “there will be no collateral source, okay.” 26 A.App. 5598:13. The impact of this ruling was twofold. First, the defense was prohibited from offering evidence showing that Farris’s bills were paid by insurance, as allowed by NRS 42.021; and second, Dr. Rives’s use of the word “insurance” was deemed improper.

C. The district court’s ERISA ruling was erroneous.

The MGM plan is located at 5 A.App. 1006. Several provisions indicate that the plan is **not self-funded**, because the plan uses insurance for the medical benefits.

⁸ Despite indicating twice that she had independent knowledge, the court indicated that she would not utilize this information. 22 A.App. 4931:19; 26 A.App. 5594:2-6. In other words, she would ignore what she knew.

For example, the plan discusses benefits “provided under a group **insurance** contract,” in which “the **insurance company** shall be the Claims Administrator” for the group insurance benefits. 5 A.App. 1011 (emphasis added). A provision dealing with the source of benefits discusses benefits “that are fully **insured**,” and such benefits will be paid “solely by **the insurance company** or other entity contractually responsible to pay for or to provide such benefits.” 5 A.App. 1042 (§ 20.17 (a))(emphasis added). A “funding” provision allows benefits to be provided by “one or more **insurance contracts**.” 5 A.App. 1042 (§ 20.14)(emphasis added). The plan recites multiple “incorporated documents,” including contracts with insurance companies such as Blue Cross Blue Shield, CIGNA, Harmony Healthcare, and Health Plan of Nevada, Inc. 5 A.App. 1045.

These provisions show that the plan uses insurance companies, and the plan is not self-funded. Plaintiffs offered no testimony establishing that Farris’s bills were paid by the MGM rather than by an insurance company.

In determining whether state statutes are preempted, the United States Supreme Court ruled that **courts must presume state police powers are not superseded by federal law**. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). The Supreme Court has also mandated that **the burden**

of establishing federal preemption of a state law is on the party asserting preemption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (emphasis added).

Nevada's important medical malpractice statute should have been given full dignity and effect, absent a clear factual showing by Plaintiffs that preemption applied. Plaintiffs made no such showing. Consequently, the district court erred by deeming the plan self-funded and ruling that the statute was preempted, by excluding evidence of collateral source medical payments, and by determining that Dr. Rives improperly used the word "insurance."

V. The district court erred by limiting and excluding defense experts.

Admissibility of expert testimony is reviewed for abuse of discretion, but *de novo* review is implicated on whether the district court applied a correct legal standard. *See Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 505-06 (2007).

A. Background information.

Expert disclosures with reports were made on November 15, 2018. 26 A.App. 5622:20-22. Plaintiffs disclosed Dr. Alex Barchuk, who is a physical medicine and rehabilitation doctor, and who prepared a life care plan evaluation. 4 A.App. 719. His 31-page evaluation was undated, but Dr. Barchuk had evaluated Titina Farris in March 2018, eight months before the disclosure. 26 A.App. 5622:15-16. His life

care evaluation included opinions regarding Farris's need for extensive future care, which had not been previously disclosed in a life care plan. 4 A.App. 719-50. When Plaintiffs made their expert disclosures in November 2018, they also disclosed Dr. Willer, a neurologist. 26 A.App. 5622-23. When the disclosures were made in November 2018, Plaintiffs had not complied with NRCP 16.1's mandatory requirement for disclosure of medical expenses. That disclosure was not made until April 2019. 26 A.App. 5623.

With Plaintiffs' expert disclosures in November 2018, defense counsel learned for the first time that Dr. Willer and Dr. Barchuk were opining that all of Farris's current and ongoing complaints, problems, and disabilities were caused by the critical illness neuropathy/polyneuropathy (complications from surgery), with no attribution to Farris's longstanding preexisting diabetic neuropathy. 26 A.App. 5622-24.

Defense counsel Doyle was surprised by the opinions that essentially ignored the long-term preexisting diabetic problems, and Doyle therefore retained Dr. Adornato to rebut Dr. Willer; Dr. Stone to rebut Dr. Barchuk; Ms. Larsen to rebut Ms. Cook (Plaintiffs' life care cost analyst); and Eric Volk to rebut Mr. Clauretie (Plaintiffs' economist). 26 A.App. 5623-24. Despite the amount of work involved, Doyle was able to disclose rebuttal reports from these experts approximately one month after receiving Plaintiffs' disclosures. 26 A.App. 5623:7-8 (rebuttal

disclosures on December 19, 2018). Plaintiffs did not object at that time. 26 A.App. 5623:7-11.

Plaintiffs did not file motions in limine challenging the defense experts. Plaintiffs did, however, file a motion to strike alleged improper rebuttal opinions less than a month before trial, and they filed a trial brief regarding rebuttal experts on the ninth trial day. 1 A.App. 199; 27 A.App. 1420. The district court struck or severely limited the defense experts, as described below.

B. Plaintiffs failed to make mandatory disclosures of damages.

Under NRCP 16.1(a)(1), a plaintiff's initial disclosures (due 14 days after the Rule 16.1 conference) "must" provide a computation of each category of damages claimed, including future medical expenses. *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 264-65, 396 P.3d 783, 786-87 (2017).

In the present case, the Rule 16.1 conference was in October 2016. 26 A.App. 5627:7-8. Plaintiffs failed to provide the medical expense computations, and even when the parties disclosed experts two years later in November 2018, Plaintiffs still did not provide the computations. 26 A.App. 5623:12-22. Plaintiffs finally provided the mandatory computations two and one-half years late in April 2019. 26 A.App. 5623. Plaintiffs disclosed \$4.2 million on April 5 (7 A.App. 1366:9), then \$5.2 million a few weeks later. 3 A.App. 637. Counsel Doyle argued this late-disclosure

point in explaining why he needed rebuttal expert opinions after Plaintiffs disclosed their experts in November 2018, and why he did not anticipate the need for such rebuttal experts earlier. 26 A.App. 5623-25.

Throughout the trial, the district court ardently held defense counsel to strict compliance with virtually every obscure procedural requirement. Yet when it came to Plaintiffs' failure to comply with the mandatory disclosure rule for damages, the district court gave Plaintiffs' attorneys a free pass. The court seemed to believe that prior to *Pizarro-Ortega*, Clark County attorneys could ignore the rule, due to a general practice in that county. 26 A.App. 5629, 5641.⁹ The court failed to enforce the rule against Plaintiffs, because Plaintiffs' attorneys did not have a "crystal ball," and Plaintiffs' attorneys did not have notice in October 2016 that *Pizarro-Ortega* would be issued in June 2017. 26 A.App. 5641:12-16.

Although *Pizarro-Ortega* acknowledged an understanding among some Clark County attorneys to ignore the rule, this was "not a valid basis for disregarding" the rule. *Pizarro-Ortega*, 133 Nev. at 265, 396 P.3d at 787. The 2017 *Pizarro-Ortega* opinion put every attorney in Clark County—including Farris's attorneys—on notice that plaintiffs "are not free to disregard" the disclosure requirement. *Id.* at 264 n.6,

⁹ Page 5629 from the trial transcript contains a lengthy paragraph attributed to Doyle. 26 A.App. 5629:10-24. From the contents of the paragraph, attribution to Doyle was obviously another typographical error by the court reporter/recorder. The paragraph was clearly spoken by the judge.

396 P.3d at 787 n.6. In allowing Plaintiffs' attorneys to get away with violating the mandatory rule—because they did not have a crystal ball regarding the June 2017 *Pizarro-Ortega* opinion—the district court completely ignored the fact that Plaintiffs never provided the mandatory damages disclosure until April 2019, **nearly two years after this court published *Pizarro-Ortega*.**

Thus, Plaintiffs were guilty of two serious rule violations. First, they failed to comply with Rule 16.1's mandatory requirement for a damages disclosure. Second, they failed to comply with the mandatory requirement for timely supplementing discovery responses (for two years after this court gave notice to Clark County attorneys in *Pizarro-Ortega*). *See Capanna v. Orth*, 134 Nev. 888, 894, 432 P.3d 726, 733 (2018) (supplement disclosures are required upon learning that information previously disclosed is incomplete). Plaintiffs' attorneys did not need a crystal ball to know of their supplemental disclosure obligation during this time frame.

The prejudice to Dr. Rives was manifest. Doyle explained that, as a practical matter, he was blindsided by Plaintiffs' late damages disclosure, and by other surprising opinions by Plaintiffs' experts; thus, Doyle's supplemental expert disclosures were fair responses to Plaintiffs' new information. Yet the district court excluded defense experts, including experts who would have rebutted Plaintiffs' life care plan (with its \$4.6 million in future damages). Plaintiffs then seized on the **exclusion of defense experts and moved for JMOL**, asserting an alleged lack of

defense evidence, as explained in great detail below. The district court granted the motion and inserted the number \$4,663,473 into the verdict form before giving it to the jury. 12 A.App. 2475. This was grossly unfair and an abuse of discretion.

C. Legal requirements for rebuttal experts.

A party may disclose a rebuttal expert to contradict or rebut evidence on the same subject matter identified by the opposing party. NRCP 16.1(a)(2)(E)(i)(b). Rebuttal testimony contradicts the opposing party's expert or furnishes a reasonable alternative to the other expert. *Mathews v. State*, 134 Nev. 512, 515, 424 P.3d 634, 638 (2018). Expert rebuttal witnesses are proper if they contradict or rebut the subject matter of the original expert witness. *Carr v. Paredes*, 2017 WL 176591, *1 (Nev. 2017; No. 60318; unpublished).

Plaintiffs argued that rebuttal expert testimony is not appropriate to contradict an expected and anticipated disclosure by the opposing party. 1 A.App. 206-07. The district court seemed to agree, noting that the "idea of diabetes was known before the initial expert deadline." 26 A.App. 5697:8.

As noted above, the district court previously ruled that Plaintiffs' attorneys were not expected to have a crystal ball, to anticipate future developments. Similarly, defense counsel should not have been expected to have a crystal ball, to predict opinions that Plaintiffs' experts would render in their initial expert

disclosures. *See System Fuels, Inc. v. United States*, 117 Fed. Cl. 362, 365 (2014) (a party cannot be charged with being clairvoyant regarding anticipation of opponent's expert report).

(1) Dr. Adornato.

One of Plaintiffs' experts was Dr. Justin Willer, a neurologist. 7 A.App. 1488. He opined, in essence, that virtually all of Titina Farris's problems were a result of critical illness polyneuropathy (surgery complications). 7 A.App. 1489-95. When defense counsel Doyle received the report, he was surprised, because Dr. Willer had received reports from Farris's doctors regarding serious preexisting diabetic problems, yet Dr. Willer attributed 100 percent of Farris's problems to the surgery complications. 26 A.App. 5622:22-25, 5623:1-4, 5676-77, 5680.

Because this was the first time Plaintiffs' expert had failed to attribute any percentage whatsoever to the preexisting diabetic neuropathy, Doyle retained Dr. Bruce Adornato, a board-certified neurologist. 2 A.App. 292-308. He prepared a report which he stated was intended "to rebut the opinions of Dr. Justin Willer and to comment on the cause of Titina Farris' injuries." 2 A.App. 292. He noted his review of extensive medical records, including records showing that Farris had longstanding diabetes, which was poorly controlled, and that Farris had a history of diabetic neuropathy and nerve pain so severe she was treated with "substantial amounts of oral narcotics." 2 A.App. 293. Dr. Adornato further rebutted Dr.

Willer's report by indicating that Dr. Willer failed to acknowledge the preexisting diabetic neuropathy as a significant factor in her current disability; Dr. Willer's report acknowledged the history of diabetic neuropathy, but did not comment on the severity of the problem; and Dr. Willer's report did not mention relevant information. *Id.* Dr. Adornato opined that Farris would continue to have painful diabetic neuropathy, worsening with time in terms of disability, pain, weakness, impaired sensation and gait imbalance, and: "None of these facts were considered by Dr. Willer in his report." 2 A.App. 294.

As defense counsel Doyle explained, there had been no foreseen need to disclose someone like Dr. Adornato until the defense received Dr. Willer's report. 26 A.App. 5697:24-25. The district court ruled, however, that Dr. Adornato was barred from offering any opinions regarding Farris's loss of sensation caused by diabetic neuropathy, and Dr. Adornato could not opine regarding the cause of Farris's injury. 26 A.App. 5698-99. His testimony was limited to explaining his disagreement with Dr. Willer's percentage allocations. 26 A.App. 5698:22-24.

This ruling was clearly wrong. With Farris's extensive history of diabetic neuropathy, with pain and physical disabilities, Dr. Willer's report came as a complete surprise to counsel Doyle. The district court's hyper-technical and extremely limited view of the scope of rebuttal testimony was an abuse of discretion.

(2) Dr. Stone.

Dr. Lance Stone is a board-certified physical medicine and rehabilitation doctor. 2 A.App. 311. He was retained to review the life care plan authored by Plaintiffs' expert Dr. Barchuk, and to "attest to any separate and divergent opinions" regarding Dr. Barchuk's plan. 2 A.App. 311. Dr. Stone reviewed extensive records for Farris, and he specifically provided opinions regarding the list of diagnoses that Dr. Barchuk had documented. 2 A.App. 312. Dr. Stone expressed agreement, in general, with some of Dr. Barchuk's diagnoses, with different conclusions regarding Farris's preexisting conditions or problems unrelated to surgery. 2 A.App. 313-14. Additionally, Dr. Stone reported that he "formed conclusions that both share and differ from Dr. Barchuk's future recommendations." 2 A.App. 314. He identified 19 such opinions. 2 A.App. 315-16.

Dawn Cook is a registered nurse, who came up with the monetary numbers for the life care plan expenses, based upon Dr. Barchuk's medical recommendations. 22 A.App. 4849, 4854. Dr. Barchuk and Ms. Cook had created the life care plan in March and June of 2018, but it was not disclosed by Plaintiffs' attorneys until November 15, 2018. 26 A.App. 5622:15-22. This was the first disclosure of a life care plan. And because Plaintiffs had not complied with the damages disclosure requirement of NRCP 16.1, this was the first disclosure of more than \$4 million in claimed future damages in the life care plan. 22 A.App. 4891; 26 A.App. 5622-24.

When Doyle reviewed the newly-disclosed life care plan and its economic analysis, he observed that the plan was “very extensive, very expensive, and very unexpected, and unanticipated, given the fact that we had no prior computation of damages.” 26 A.App. 5624:7-10. Consequently, Dr. Stone was retained to rebut Dr. Barchuk’s life care plan recommendations, and a nurse, Ms. Larsen, was retained to rebut nurse Cook’s part of Plaintiffs’ life care plan. 26 A.App. 5624:10-11. Doyle explained that these experts “were properly disclosed as rebuttal expert witnesses, given the fact that the opinions expressed by Plaintiffs’ damages experts was [sic] unexpected and unanticipated.” 26 A.App. 5625:19-21.

The district court conceded that some aspects of Stone’s report “could be considered proper rebuttal.” 26 A.App. 5642:24. Yet the district court excluded Stone, primarily on the ground that his rebuttal report was “really an initial expert’s opinion and should have been designated” as such.¹⁰ 26 A.App. 5642:14-16. This ruling was erroneous and should be reversed.

¹⁰ The district court gave two other reasons for excluding Stone. First, he had not disclosed his involvement as an expert in the Center case. 26 A.App. 5637. But he had never been deposed in that case, and his testimony at the Center trial was **after** disclosure of Farris defense experts, and he would not have appeared on a case list for trial testimony. 26 A.App. 5634:14-19. The other reason was that he failed to satisfy *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). 26 A.App. 5636, 5644. The court said Dr. Stone had no “data,” and no “peer reviewed” opinions (26 A.App. 5644:8-11), but Plaintiffs’ *Hallmark* argument was raised for the very first time on trial day 11. 26 A.App. 5575, 5643:24-25. In any event, Dr. Stone’s report gave his extensive qualifications, with detailed explanations about the records he studied and medical bases for his opinions. 2 A.App. 311-23.

(3) Sarah Larsen, RN.

Plaintiffs had disclosed Dawn Cook, a life care planner, who used Dr. Barchuk's medical recommendations and then came up with a \$4.6 million life care plan for future expenses (present value). 3 A.App. 637:17; 7 A.App. 1557. Defense counsel retained Sarah Larsen, a registered nurse, who prepared a life care plan to rebut Cook's plan. 2 A.App. 227-250 (report). Her plan was based upon recommendations of Dr. Stone. *Id.* Unlike Dawn Cook's \$4.6 million life care plan, Larsen's life care plan was only \$507,000.00 to \$549,000.00 (present value). 8 A.App. 1824-25. When the district court refused to allow Dr. Stone to testify, Larsen's life care plan pricing (which was derivative from Dr. Stone) became moot, and she was therefore not called as a trial witness. 16 A.App. 3413:8-14; 26 A.App. 5572:18-19. As such, exclusion of Stone's opinion had a \$4 million impact (the difference between the two life care plan values).¹¹

In conclusion on this issue, the district court erred by excluding key defense expert testimony. The error resulted in an unfair trial, with a potentially huge impact on the verdict. A new trial should be ordered.

¹¹ Larsen's name is sometimes misspelled in the trial transcript as "Larson." Indeed, hearing transcripts have Dr. Rives's name misspelled as "Reeves" a few times. 5 A.App. 976:22; 16 A.App. 3513:3, 6. These are additional examples of court reporter errors, similar to the "Sinner" mistake.

VI. The district court erred by granting Plaintiffs' NRCP 50(a) motion.

In ruling on a motion for judgment as a matter of law under NRCP 50(a), the district court must view the evidence and all inferences in favor of the non-moving party. *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008). This court applies that same standard on appeal, performing *de novo* review of the district court's ruling. *Id.*

A. Factual background.

When the defense rested, Plaintiffs moved for a "directed verdict" under NRCP 50(a) [motion for judgment as a matter of law]. 29 A.App. 6305. Plaintiffs contended that past medical bills were undisputed in the amount of \$1,063,006.94 (29 A.App. 6305-06), and that the life care plan was undisputed in the amount of \$4,663,473.00. 29 A.App. 6306-08.

In opposition, defense counsel pointed out that there was evidence from which the jury could infer that the full amount of the hospital bill was not reasonable, given expert testimony. 29 A.App. 6310:20-23. For example, the hospital bill included care on July 3, 2015, which was the date of Farris's hernia surgery. 29 A.App. 6310:23-24. Expenses for that surgery were not caused by any alleged negligence, and the jury could have drawn an inference that the expense for the hernia surgery would have been incurred even in the absence of any negligence.

Defense counsel also noted that Plaintiffs had two theories of negligence in two time frames: negligence during the hernia surgery, and negligence after the surgery (not returning Farris to a second surgery on July 9). 29 A.App. 6311. If the jury were to find that Dr. Rives was not negligent in the hernia surgery, but that he was negligent by not returning Farris to surgery on July 9, then a substantial amount of medical expenses would have been incurred anyway, even if the surgery had been done before July 9, and these expenses were not recoverable. 29 A.App. 6311.

The district court seemed to acknowledge this medical testimony, but she questioned whether the medical experts testified that the hospital bill could be broken down and reduced by a certain amount. 29 A.App. 6314:17-25. Defense counsel informed the court that there was testimony that some percentage of medical bills would have been incurred anyway (i.e., in the absence of malpractice), depending on how the jury decided the standard of care issue. 29 A.App. 6315:2-4. The district court again wanted to know whether the medical experts said they could “parse out” portions of the hospital bill. 29 A.App. 6315:8-10. Defense counsel observed that although no experts explicitly parsed out the bill, this was a reasonable inference that could be drawn from testimony of Dr. Hurwitz and Dr. Juell. 29 A.App. 6315:11-13.

In rebuttal, Plaintiffs' counsel conceded that his medical billing expert, Dawn Cook, did not break out the hospital bill, and counsel argued that this was the **defendant's** burden.¹² 29 A.App. 6316:6-10.

Regarding the life care plan, the district court seemed to acknowledge defense expert Dr. Adornato's opinion that Farris's lack of mobility could be apportioned 50/50 between neuropathy caused by surgery complications and the preexisting diabetic neuropathy. 29 A.App. 6311-13. Thus, the jury could infer that only 50 percent of the life care plan was due to the surgery. 29 A.App. 6313:4-7.

The district court seemed to focus on the absence of magic words, asking whether Dr. Adornato ever mentioned the phrase "life care plan" in his testimony, and defense counsel answered that the doctor "did not use those words." 29 A.App. 6313:21-24. Counsel pointed out that Dr. Adornato testified "about her [Farris's] mobility which is part of the life care plan," and that "a reasonable inference can be drawn from his testimony that half the life care plan is attributable to the preexisting diabetic neuropathy." 29 A.App. 6314:1-11. But again, the district court argued: "But he never tied it to the life care plan." 29 A.App. 6314:5. The district court

¹² Plaintiffs' counsel argued that this was the defendant's burden, despite the fact that the dispute involved a Rule 50(a) motion, where the evidence and all inferences must be drawn in favor of the non-moving party.

asked: “Did he ever state the words ‘life care plan’ anywhere in his testimony?” 29 A.App. 6314:12-13. Defense counsel responded that the doctor “did not use those words.” 29 A.App. 6314:14.

The district court granted the Rule 50 motion, determining as a matter of law that the recoverable amount of the life care plan was \$4,663,473.00, because there was no “alternative testimony that that amount is incorrect.” 29 A.App. 6318:13-17.

As a result of these rulings, the district court gave the jury a verdict form with two answers already typed in and provided by the court. 12 A.App. 2475.

21	3. What are Titina Farris' economic damages:	
22	a. Past medical and related expenses:	<u>\$1,063,006.94</u>
23	b. Present Value of Life Care Plan:	<u>\$4,663,473.00</u>

Thus, the jury was given a verdict form with damages answers totaling \$5,726,479.94 already provided by the court.¹³

¹³ The verdict form's two lines mandating more than \$5.7 million for damages were directly below the form's two yes-or-no questions regarding liability. 12 A.App. 2475. As such, the form would have strongly suggested to the jury that the judge already decided Plaintiffs should receive at least \$5.7 million. This would almost certainly have influenced the jury's answers to the liability questions.

B. The Rule 50 motion should have been denied.

Applying the correct standard for a JMOL motion, the evidence justified an inference that would have allowed the jury to reduce the amount of recoverable medical bills and the life care plan. Dawn Cook was extensively cross-examined. The life care plan she prepared—and the future expenses in the plan—were based primarily, if not entirely, upon Farris's foot drop in both feet, which affected her mobility. 22 A.App. 4855; 4861-81; 4908. Cook conceded it is important to consider whether a patient has preexisting medical conditions when preparing a life care plan. 22 A.App. 4898:24-4899:2. She was provided with no medical records regarding Farris's preexisting medical conditions during the time prior to the surgery in question. 22 A.App. 4899:3-10. When Farris was interviewed by Cook, Farris did not share her history of diabetes and the fact that it was uncontrolled, or the fact that there were complications associated with diabetes prior to the surgery. 22 A.App. 4902:1-16. Cross-examination brought out other weaknesses in Cook's testimony. 22 A.App. 4901-06.

Defense witness Dr. Adornato, a board-certified neurologist, has treated thousands of patients diagnosed with diabetic peripheral neuropathy. 26 A.App. 5705-5707. He reviewed medical records and opined that half of Farris's mobility problem was due to the critical care (i.e., surgery-related) neuropathy, and the other half due to her other (preexisting) neuropathies. 26 A.App. 5716:25-5717:1.

Cook's \$4.6 million life care plan was based on Farris's loss of mobility caused by the foot drop; and Dr. Adornato attributed only half to the surgical complications. Although he did not utter the phrase "life care plan" in his testimony—and although he did not do the math (50 percent of \$4.6 million)—his opinions supported a strong inference that Cook's life care plan should be reduced by half. His testimony undermined the life care plan, and it was for the jury, not the judge, to determine whether the \$4.6 million life care plan should be reduced. The district court erred by looking for magic words or talismanic phrases in Dr. Adornato's testimony. *See Welsh v. Bulger*, 698 A.2d 581, 585-86 (Pa. 1997) (experts are not required to use magic words when expressing their opinions; instead, courts look at the substance of the testimony).

Although the defense was precluded from presenting its own separate witnesses to testify about the dollar amounts for which recovery of Plaintiffs' medical bills and life care expenses could be reduced, the district court still should not have resolved those factual issues in Plaintiffs' favor. Plaintiffs' expert witnesses were cross-examined, and cross-examination of a plaintiff's witnesses can be sufficient to controvert the extent of a plaintiff's damages. *See Quintero v. McDonald*, 116 Nev. 1181, 1184, 14 P.3d 522, 523 (2000).

Further, Dr. Adornato's testimony provided an evidentiary basis for reducing the life care plan by at least half. But even if there had been no defense witness

controverting plaintiff's damages evidence, the jury was still not bound to assign any particular probative value to Cook's testimony. *Id.* A jury may decide to disbelieve a plaintiff's witness, even if the witness's testimony is uncontradicted. *See Grant v. Cruz*, 406 S.W.3d 358, 364 (Tex. App. 2013); *Cook v. Wadlington*, 821 S.W.2d 864, 865 (Mo. App. 1991) (a jury is free to **disbelieve plaintiff's expert testimony**); *Gittings v. Hartz*, 116 Nev. 386, 392, 996 P.2d 898, 902 (2000) (effective cross-examination may be sufficient to point out discrepancies in an injury claim, without defense expert testimony and without countervailing medical evidence).

Here, Cook was effectively cross-examined, and Dr. Adornato's opinions undermined the life care plan. This was sufficient for the defense to survive a Rule 50 motion. Instead of using the very narrow legal standard for granting JMOL, the district court assumed the role of a fact-finder, weighed the evidence, and rejected inferences favoring the non-moving defendants. This was error. The district court provided answers on the verdict form's questions—more than \$5.7 million. Requiring the jury to award this amount as part of the special damages award was erroneous and highly prejudicial. A new trial must be ordered.

VII. The district court erred regarding hospital records.

Evidence rulings are generally reviewed for abuse of discretion. *See Hansen*, 115 Nev. at 27, 974 P.2d at 1160.

The surgery in question was performed at St. Rose Dominican Hospital. Plaintiffs' pretrial memorandum identified 8,505 pages of St. Rose medical records Plaintiffs would use at trial. 3 A.App. 519:8. Defense counsel's pretrial memorandum also disclosed that St. Rose records would be used at trial. 3 A.App. 499:18-19. The parties agreed to present a single exhibit with St. Rose records, but at a meeting with all attorneys the day before the calendar call hearing, Plaintiffs' attorneys did not provide an exhibit binder with the records; they said they would bring the binder to court the next day. 15 A.App. 3277.

Plaintiffs provided the binder to defense counsel 45 minutes before the calendar call hearing; but Exhibit 1 (St. Rose records) did not include all the pages, and it only had 613 pages of the 8,505 pages of St. Rose records. 14 A.App. 3129:2-5; 3142:14; 15 A.App. 3277. Defense counsel Aimee Clark Newberry informed the court she had anticipated that the complete exhibit would be ready to present to the court that morning, but she was "just made aware" of Plaintiffs' changes in the stipulated exhibit. 14 A.App. 3135:11-16. She observed that Plaintiffs had eliminated "essential records" the defense was requesting. 14 A.App. 3133:5-14. She requested an opportunity to add additional pages into the Exhibit 1 binder. 14 A.App. 3133:5-14; 3142:18. In response, Plaintiffs' counsel indicated he was "happy to add them into ours." 14 A.App. 3133:18-21. Plaintiffs agreed that the

exhibit, with the defense's additional pages, would be stipulated "in all regards" as admissible into evidence.¹⁴ 14 A.App. 3134:1-18.

At a hearing two days later, defense counsel Doyle attempted to add the additional documents to Exhibit 1. 15 A.App. 3275. Doyle explained that when he received Exhibit 1 from Plaintiffs' counsel the morning of the Tuesday calendar call hearing, he realized it did not contain all the records. 15 A.App. 3277. With approximately 7,900 pages of missing records, it was impossible at that time for him to figure out what additional records needed to be added back. 15 A.App. 3279. He explained that he spent significant time the next day (Wednesday) compiling the additional records, and he presented them to the court the next day (Thursday), to be added at the end of Exhibit 1—as the parties had agreed at the calendar call. *Id.*

When Doyle attempted to present the additional pages, the district court said: "No, no, no, no, you're not." 15 A.App. 3279:19. The judge *sua sponte* ruled that the documents should have been provided by the end of the business day on Tuesday. 15 A.App. 3279:19-23. The judge ruled: "It was Tuesday, end of day. You are out of luck." 15 A.App. 3280:12; *see also*, 15 A.App. 3164:23-3165:1-15. The judge

¹⁴ The additional pages only needed redactions for insurance references. 14 A.App. 3135-36. Issues regarding the exhibit were resolved during a recess, after which the parties informed the court that the pages would be combined into Exhibit 1 for a "fully stipulated" exhibit. 14 A.App. 3138:6-10; 3141:3-7.

repeated that she had imposed a Tuesday deadline, and: “If you choose not to comply, then you lose out.” 15 A.App. 3282:20.

Counsel Doyle then asked to have his additional pages marked as a clerk’s exhibit, to preserve the record on appeal. 15 A.App. 3282:24-3283:3. The court denied the request, saying “there’s no record on appeal.” 15 A.App. 3283:4. Doyle then requested permission to submit a declaration explaining the circumstances, “for purposes of the record on appeal.” 15 A.App. 3283:6-9. He wanted to explain in more detail his reliance on Plaintiffs’ counsel’s representations regarding the records; his reasons for not providing the additional pages earlier; and “a lot more detail” regarding the circumstances. 15 A.App. 3283-88. The district court ruled that there was no reason for the declaration. 15 A.App. 3288-90.

Doyle again attempted to explain the circumstances, noting that he had approximately 400 additional pages [out of the nearly 7,900 pages removed by Plaintiffs]. 15 A.App. 3290-93. He argued that there was no prejudice to Plaintiffs by including the additional records; the court responded, not by identifying any prejudice to Plaintiffs, but instead by noting that the court clerk would need to deal with the records. 15 A.App. 3297:22-3298:3. When Doyle again attempted to argue about prejudice to the parties, the court abruptly ended the hearing. 15 A.App. 3300 (“We’re done.”).

The district court's refusal to give Doyle a full opportunity to make a record was consistent with a similar refusal earlier in the hearing, when the judge would not hear Doyle's argument regarding the exclusion, at which time he could have described the St. Rose records and explained the importance of the additional records.

MR. DOYLE: If I -- if I may be heard at least --

THE COURT: No, you may not.

MR. DOYLE: -- to make a --

THE COURT: This is done.

MR. DOYLE: -- at least to make a --

THE COURT: This is done. No.

MR. DOYLE: -- record.

THE COURT: Counsel, you may not. The record is done.

15 A.App. 3168:2-9.

Therefore, the district court excluded the additional medical records that Doyle attempted to provide on Thursday, all based on the district court's belief that she had imposed a clear Tuesday deadline (two days earlier) for the documents. In fact, the calendar call transcript does not contain a close-of-business deadline for defense counsel to add back missing pages of St. Rose records Plaintiffs' counsel

had removed.¹⁵ 14 A.App. 3125. There was no basis for the district court's conclusion that the perceived two-day delay violated some type of binding deadline and therefore foreclosed defense counsel from being able to admit additional stipulated pages into evidence. *Cf. Rish v. Simao*, 132 Nev. 189, 198-200, 368 P.3d 1203, 1210-11 (2016) (for sanctions, order allegedly violated must have been clear and specific); *Boyack, supra*, 2019 WL 1877402 at *3 (admonition to counsel not specific enough to justify sanctions); *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (district court's oral pronouncement from the bench is "ineffective for any purpose").

Moreover, even if the hearing transcript can be interpreted to impose an end-of-day deadline for the additional St. Rose records, there was no prejudice to Plaintiffs from the short delay. *Cf. Rish*, 132 Nev. at 198, 201, 368 P.3d at 1211-12 (for violation of order in limine to justify sanction, prejudice must be shown). After all, Plaintiffs' own pretrial memorandum identified the 8,505 pages of St. Rose medical records Plaintiffs planned to use at trial. 3 A.App. 519:8. Further, Plaintiffs had **stipulated** to the St. Rose records, and when defense counsel requested an opportunity to add the missing records to Plaintiffs' drastically shortened exhibit,

¹⁵ The district court requested two things **unrelated** to Exhibit 1 to be provided by the end of the day. 14 A.App. 3145:9-19; 3147:8-25 (submissions regarding imaging studies and photographs).

Plaintiffs' counsel indicated that he would be "happy to add them into ours." 14 A.App. 3133:18-21.

As a result of the district court's draconian ruling, only about seven percent of the 8,505 pages of St. Rose records were admitted into evidence. Defendants' 400 additional pages would have presumably included various time frames of treatment as well as physician progress notes, medical orders, lab reports, nursing notes, and myriad other records relevant to the case.

A district court's decision must have appropriate reasons. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007). Abuse of discretion occurs if a decision is arbitrary or capricious, or exceeds the bounds of reason. *Skender v. Brunsonbuilt Const.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006).

Here, the district court refused to allow defense counsel to add essential records back into an exhibit from which Plaintiffs' counsel had removed the pages. The refusal was based upon the court's perception that there was a time deadline imposed two days earlier. But the deadline had never actually been imposed, and there was not even a molecule of prejudice to Plaintiffs. Then, the court exacerbated the error by not allowing defense counsel to make a complete record, to argue fully, to describe the records and explain their importance, to mark the records as an exhibit, or to submit a declaration with additional information for the record. The district court's ruling lacked appropriate reason; it was arbitrary; it was overly

severe; and it exceeded the bounds of reason. Accordingly, the district court erred by excluding relevant stipulated medical records, and a new trial should be ordered.

VIII. The district court erred regarding Dr. Hurwitz's deposition transcript.

Evidentiary rulings are reviewed for abuse of discretion. *See Hansen*, 115 Nev. at 27, 974 P.2d at 1160.

Dr. Hurwitz is a general surgeon, who was called by Plaintiffs as a key medical expert. 20 A.App. 4440. He opined that Dr. Rives's treatment was below the standard of care. 20 A.App. 4443-55. His deposition was taken in September 2019, and it was disclosed to the court in various motions. 4 A.App. 774:5-6, 15-16. Before trial, Dr. Rives filed a Pretrial Memorandum disclosing: "Deposition transcript of Dr. Michael Hurwitz, including exhibits." 3 A.App. 500:14. At a calendar call on October 8, 2019, the trial attorneys lodged deposition transcripts. 14 A.App. 3152-53. Defense counsel did not lodge the transcript for Dr. Hurwitz's recent deposition, because the transcript was not yet available. 18 A.App. 3864-65. The next week, on the first trial day, defense counsel indicated that he had the original deposition transcript, which had not been available at the calendar call. 18 A.App. 3864:16-22. Plaintiffs' counsel objected because the transcript had not been lodged earlier. 18 A.App. 3865. The district court did not rule at that time regarding the transcript. 18 A.App. 3865.

Dr. Hurwitz's testified at trial a few days later. On direct examination, Plaintiffs' counsel Leavitt asked a question disclosing to the jury that Dr. Hurwitz was "deposed by Mr. Doyle." 20 A.App. 4443:20. Shortly thereafter, Leavitt again (in the presence of the jury) referred to "your deposition in this case." 20 A.App. 4465:8.

Later, defense counsel objected because some of Dr. Hurwitz's opinions had not been previously disclosed. 20 A.App. 4490-91. The district court held proceedings outside the jury's presence. 20 A.App. 4497-98. The district court acknowledged that she "asked the parties to also provide the [court with the] deposition of Dr. Hurwitz." 20 A.App. 4498:20-21. The judge also acknowledged that she "asked to look at the deposition," and that "**I was provided with the deposition of Dr. Hurwitz.**" 20 A.App. 4499:4-5, 16 (emphasis added). The judge then read into the record extensive portions of Dr. Hurwitz's deposition transcript, even providing page and line numbers. 20 A.App. 4499-4501.

Dr. Hurwitz's trial testimony resumed. During cross-examination, defense counsel attempted to impeach Dr. Hurwitz with his inconsistent deposition testimony. 20 A.App. 4522. Plaintiffs' counsel objected, because defense counsel was not using the deposition transcript during the impeaching cross-examination. 20 A.App. 4522. Defense counsel offered to lodge the original deposition, indicating he had copies available. *Id.* The district court sustained Plaintiffs' objection,

because the transcript had not been lodged with the court a few days earlier at the calendar call. *Id.* When defense counsel again referred to the deposition, Plaintiffs' counsel objected on the ground that a deposition transcript "doesn't exist," and the district court sustained the objection. 20 A.App. 4523:8-11. The district court's ruling ignored the fact that everyone was aware of the transcript, and in fact, the judge herself read from the transcript, on the record, when ruling on whether Dr. Hurwitz's opinions had been previously disclosed.

Shortly thereafter, without specifically referring to the deposition transcript, defense counsel attempted to cross-examine the doctor regarding deposition testimony that contradicted his trial testimony. 20 A.App. 4525:3-4. Although there was no objection, the district court interrupted and held proceedings outside the presence of the jury. 20 A.App. 4525, 4527. The district court admonished defense counsel for cross-examining the doctor using phrases from the doctor's deposition testimony. 20 A.App. 4528-29. The court ruled that the transcript could not be used in any manner, because it had not been lodged with the court at the calendar call. 20 A.App. 4529-30. Amazingly, the district court stated, on the record: **"As of today, there was no transcript, or any portion provided to the Court."** 20 A.App. 4531:20-21 (emphasis added). The court made this statement despite the fact that barely one hour earlier she had been handed the transcript (at her own request) and she read the transcript into the record. 20 A.App. 4498-4501.

Dr. Hurwitz's cross-examination resumed later in the trial. 23 A.App. 5036. Without mentioning a "deposition" or "transcript," defense counsel asked about the doctor's testimony "when we were together on September 18, 2019" (which was the date of the deposition). 23 A.App. 5037:19-22. Plaintiffs did not object, and the doctor answered the questions. 23 A.App. 5037-38. Defense counsel then asked whether the doctor recalled "telling me on September 18, 2019" about the standard of care. 23 A.App. 5038:13-15. Again, defense counsel did not indicate anything about the doctor's "deposition" or the "transcript," and again, Plaintiffs did not object. *Id.* The doctor answered defense counsel's questions. 23 A.App. 5038-39.

With no objections to defense counsel's two references to what the doctor told counsel on September 18, 2019 (the deposition date), defense counsel asked a third question about whether the doctor recalled telling counsel on September 18, 2019, about the standard of care, but this time Plaintiffs objected. 23 A.App. 5039:18-22. The district court held proceedings outside the presence of the jury. Plaintiffs' counsel argued two times: "There is no deposition." 23 A.App. 5043:14, 25. Plaintiffs' counsel argued that, without a properly lodged deposition transcript, the witness could not be impeached. 23 A.App. 5046:3-5, 17-19. And Plaintiff's counsel ignored the fact that he had referred to the doctor's deposition **twice** during his direct examination of the doctor, as noted above.

Defense counsel informed the district court that if the witness gave trial testimony that was materially different from his deposition testimony, defense counsel would renew the request to lodge the transcript, to demonstrate to the jury that the witness changed his testimony and perhaps committed perjury. 23 A.App. 5048:23-5049:3. The district court refused to allow cross-examination based upon deposition testimony, without a properly lodged transcript. 23 A.App. 5051:11-14, 5052:22-24.

The refusal to allow this cross-examination was highly prejudicial. At his deposition, Dr. Hurwitz testified that he reviewed Dr. Rives's deposition transcript from the Center case, and he found no important similarities between the cases. 10 A.App. 2106:4-5 (gray highlighting on this page is on original); 20 A.App. 4500. At trial, however, Dr. Hurwitz essentially testified that the Center case showed Dr. Rives should have known about potential problems for the Farris surgery, based on Dr. Rives's experience in the Center case. 20 A.App. 4465:10-20. Dr. Hurwitz's opinions at trial specifically referenced "[t]he fact that a very similar circumstance occurred just five months—" 20 A.App. 4491:15-16 (referring to the Center case). He then extensively referred to what he perceived as important similarities between the Center and Farris cases. *E.g.* 20 A.App. 4492:12—4493:7. Thus, Dr. Hurwitz's deposition testimony (there were no significant similarities) and his trial testimony

(there were important very similar circumstances) were drastically contradictory—and the jury had the right to consider this fact in evaluating Dr. Hurwitz's credibility.

In short, defense counsel was prohibited from presenting the jury with the fact that a key medical expert for the Plaintiffs had given testimony at his deposition that was contrary to his trial testimony; and this prohibition was a result of the fact that the transcript was not available at the calendar call and was offered to the court just a few days later when the trial started.

Although judges may enforce local procedural rules, enforcement should not be so onerous that it results in an unfair trial. Even if a district court has discretion on a matter, the court must reach its conclusions for an appropriate reason. *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42. Abuse of discretion occurs if a decision is arbitrary or capricious or exceeds the bounds of reason. *Skender*, 122 Nev. at 1435, 148 P.3d at 714.

A trial is a search for the truth. *Cardinal v. Zonneveld*, 89 Nev. 403, 407, 514 P.2d 204, 206 (1973). Allowing an expert witness to get away with contradictory sworn testimony (perhaps amounting to perjury)—all in the name of enforcing an obscure rule governing when deposition transcripts must be lodged with the court—is the epitome of extreme and unfair enforcement of a procedural rule. This is particularly true in the present case—where Plaintiffs' attorneys attended the deposition, mentioned the deposition twice during direct examination, possessed the

transcript in court, and never articulated prejudice resulting from the short delay in lodging the transcript—and where the judge herself even read parts of the transcript into the record. The district court's ruling was an abuse of discretion, resulting in an unfair trial.

IX. The district court erred regarding cross-examination of Dr. Juell.

The scope of cross-examination is generally reviewed for abuse of discretion. *See Capanna*, 134 Nev. at 892, 432 P.3d at 732. A district court necessarily abuses its discretion if a ruling is based upon an erroneous view of the law or a clearly erroneous assessment of evidence. *BMW*, 127 Nev. at 133, 252 P.3d at 657.

A. Dr. Juell's testimony.

Defense witness Dr. Juell is a surgeon who has performed several thousand hernia repairs in 40 years of practice. 23 A.App. 4971-72, 4979. He opined that Dr. Rives's care for Farris in 2015 complied with the standard of care. 23 A.App. 5020-22.

At Dr. Juell's deposition, Plaintiffs' counsel asked whether the doctor had ever been a defendant in a malpractice case. 4 A.App. 793. Dr. Juell answered that he had been sued four times. *Id.* Once, when he was a resident, the attending physician made the medical decision in question, and the university settled. 4 A.App. 793-94. He was also sued in a case where a nurse made a medication error; he was dropped from the lawsuit. 4 A.App. 794. He was sued in another case in

which he did not do anything wrong, but his insurance company settled the case. 4 A.App. 794-95. Finally, he was sued in a case that the judge dismissed with prejudice. 4 A.App. 795.

Before Dr. Juell testified at trial, defense counsel filed a trial brief objecting to anticipated cross-examination regarding the prior medical malpractice cases. 4 A.App. 777-84. At trial, defense counsel objected when Plaintiffs' counsel cross-examined Dr. Juell regarding his malpractice history, and the district court immediately overruled the objection. 24 A.App. 5290. The issue was discussed again, and the district court repeatedly relied upon "the general practice" and "general conceptual framework" in the Eighth Judicial District. 25 A.App. 5388-90, 5422-36. Thus, the court allowed the cross-examination.

B. The district court erred by allowing the cross-examination.

Defense counsel's objections included relevance, improper character evidence, and NRS 48.035(1) (probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury). 4 A.App. 779-82. All these grounds were correct.

Evidence that Dr. Juell had been sued was irrelevant because it did not tend to prove or disprove any disputed material fact. NRS 48.015. Even on his qualification or credibility, the fact that he had been sued in the past did not prove

anything. Some lawsuits have merit, while others are frivolous. The fact that a doctor has been sued, without more, is irrelevant.

In *Heshelman v. Lombardi*, 454 N.W. 2d 603 (Mich. App. 1990), the court found error when the Plaintiff's expert was cross-examined regarding an unrelated medical malpractice suit brought against him. The malpractice suit was "in no way probative of his truthfulness." *Id.* at 609. "Highly competent and knowledgeable physicians have been sued for malpractice." *Id.* Unproven accusations of malpractice cannot be a basis for attacking an expert physician's knowledge and credibility. *Id.* "Similarly, the mere fact that someone has been named as a defendant in a malpractice lawsuit may not be used to impeach his credibility as an expert witness." *Id.*

Evidence about prior litigation history of expert witnesses should be excluded. See *Ferris v. Tennessee Log Homes, Inc.*, 2010 WL 1049852, *1 (W.D. Ken., 2010; unpublished). In *Locke v. Vanderark*, 843 P.2d 27 (Colo. App. 1992), the trial court permitted cross-examination of an expert medical witness concerning six prior suits for malpractice. The court held that inquiry into such unrelated litigation is irrelevant to the expert's credibility, diverts a jury's attention from dispositive issues in the case, and the "sideshow would take over the circus." *Id.* at 31.

In *United States v. Ahmed*, 2016 WL 3647686 (E.D.N.Y. 2016; unpublished), the court excluded evidence that a medical expert had been named in malpractice

lawsuits, because the allegations in the other suits were not probative of the witness' truthfulness, and the suits were too remote in time to have any significance. *Id.* at *3. Further, any probative value of the lawsuits was substantially outweighed by the potential for unfair prejudice. *Id.*; see also *Manhardt v. Tamton*, 832 So. 2d 129, 131-32 (Fla. App. 2002) (questions dealing with expert's prior lawsuit were irrelevant to his expertise and constituted improper attack on credibility).

Dr. Juell has been practicing medicine for 40 years, and the first malpractice suit against him, when he was a resident at the beginning of his career, involved a medical decision by another doctor; and the case settled. Thus, the old lawsuit was irrelevant. 25 A.App. 5423. The second lawsuit was more than ten years old, and his insurance company settled the case against his wishes. 25 A.App. 5424-25. The other two cases were either dismissed or dropped. 25 A.App. 5426.

Yet the district court allowed inquiry into suits against Dr. Juell, based upon the district court's perception of a "general practice" in Clark County. Legal authority for the "general practice" was never identified. The mere fact that some judges in a district have a general practice on an issue does not give legitimacy to the practice.

Plaintiffs' counsel made sure the jury was fully aware Dr. Juell had been sued for malpractice. Late in counsel's cross-examination, he told Dr. Juell he wanted to "chat a little bit about your malpractice history." 24 A.App. 5290. Defense counsel

objected, and the district court overruled the objection. *Id.* But the district court declared an evening recess before cross-examination resumed after the objection. Thus, the last thing the jury heard at the end of the trial day was counsel's statement about Dr. Juell's "malpractice history."

The next day Plaintiffs' counsel resumed the cross-examination, asking: "Doctor, do you have any bitterness about or bias towards patients that bring medical malpractice lawsuits, **because of the fact that you've been sued in the past.**" 25 A.App. 5443 (emphasis added). Although Dr. Juell answered in the negative, the damage was done, because Plaintiffs' counsel had informed the jury, for a second time, that Dr. Juell had been sued for malpractice.

Accordingly, the district court erred by allowing the jury to know that Dr. Juell had a "malpractice history" and had been "sued in the past," considering the remote and irrelevant nature of the doctor's malpractice litigation history.

X. The district court erred by awarding attorneys' fees.

Although attorneys' fee decisions are generally reviewed for abuse of discretion, review is *de novo* when the matter implicates questions of law. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006).

On June 5, 2019, Plaintiffs served an offer of judgment in the amount of \$1 million. 12 A.App. 2513-14. After trial, Plaintiffs moved for attorneys' fees, pursuant to NRCP 68. 12 A.App. 2489. Under NRS 7.095, there is a strict limit on

contingency fee agreements in medical malpractice cases. This statute, which protects medical malpractice plaintiffs **and** defendants, states that an attorney “shall not contract for or collect a fee” in a contingency fee agreement beyond percentage limits in the statute.

Plaintiffs’ motion acknowledged this statute, but Plaintiffs’ attorneys contended that their clients (Plaintiffs) waived the statutory protection and agreed to pay 40 percent. 12 A.App. 2500. Plaintiffs’ attorneys calculated the statutory allowable fees as approximately \$1 million, but the attorneys were claiming approximately \$2.5 million as a result of the alleged waiver.¹⁶ 12 A.App. 2502.

Dr. Rives opposed the motion, and Plaintiffs filed a reply. 12 A.App. 2551; 13 A.App. 2878. At a hearing on the motion, the district court awarded \$821,468.66, using the statutory formula. 31 A.App. 6739, 6809.

A. The fee award was not justified under NRCP 68.

An award of fees to a plaintiff based on an offer of judgment requires careful evaluation of four factors. *Yamaha Motor Co., USA v. Arnoult*, 114 Nev. 233, 251-52, 955 P.2d 661, 672-73 (1998). These factors are: (1) whether the defense was

¹⁶ At the hearing on the motion, attorney Jones indicated that, regardless of the district court’s decision, “our client is going to pay the contingency fee that she’s going to pay based on the contract that we have in this case.” 31 A.App. 6720:12-14. In other words, Plaintiffs’ attorneys plan to collect 40 percent from Plaintiffs, despite the statutory limit or the judge’s decision. *Cf. APCO v. Zitting Bros.*, 136 Nev. Adv. Op. 64 (October 8, 2020) (contract provisions that violate public policy statutory protections are void and unenforceable).

litigated in good faith; (2) whether the offer of judgment was reasonable and in good faith in its timing and amount; (3) whether the defendant's decision to reject the offer was grossly unreasonable or in bad faith; and (4) whether the fees sought are reasonable and justified in amount. *Id.* Even if a plaintiff's injuries are severe, and even if the verdict exceeds the offer by a significant amount, the court must consider whether liability issues were intricate. *Id.* at 252, 955 P.2d at 673 (verdict was \$1.1 million more than offer, and liability issues were quite intricate; fee award reversed and remanded).

In evaluating a defendant's decision to reject an offer of judgment, the court should not apply a hindsight rule. The court should consider information known to the defendant at the time the offer was made. *See Taylor v. Kilroy*, 2019 WL 3195458, *3 (Nev. 2019; No. 75131: unpublished) (consideration of defendant's rejection of offer was "based on the information known to the parties at the time the offer was made"); *Cripps v. DiGregorio*, 824 A.2d 1104, 1108 (N.J. Super. 2003) (court cannot evaluate offer of judgment "through the eyes of 20/20 hindsight"). Rule 68 should not have the effect of unfairly forcing defendants to forego legitimate defenses. *See Yamaha*, 114 Nev. at 252, 955 P.2d at 673.

In the present case, Plaintiffs made no showing that Dr. Rives lacked a legitimate defense, or that Dr. Rives knew there was no legitimate defense at the time of the offer. The defendants had obtained opinions from highly-qualified

medical experts on liability and damages, including two general surgeons, an infectious disease specialist, a neurologist, an economist, and a life care planner. 12 A.App. 2579-13 A.App. 2766. Additionally, the jury's verdict was not unanimous. 29 A.App. 6485.

There was also no showing that the decision to reject the \$1 million offer of judgment was grossly unreasonable or in bad faith. At the time of the offer—not in hindsight—Dr. Rives had strong expert witnesses supporting his case. There had been no motions for summary judgment or motions in limine attacking the defense case. Also, at that time “there was not even an inkling the Center case would become part of this case.” 12 A.App. 2565:21-22. At the time of the offer of judgment, Plaintiffs' counsel had never asserted any impropriety regarding disclosure of the Center case; Plaintiffs had not requested any sanctions relating to Dr. Rives's discovery disclosures; and the defense team had no reason to imagine that, months later at the start of trial, the district court would decide to instruct the jury regarding an adverse inference relating to discovery disclosures involving the Center case.

Accordingly, there were legitimate defenses, and the decision to reject the offer was not grossly unreasonable or in bad faith **at that time**. The award of attorneys' fees had the effect of retroactively requiring Dr. Rives to forego legitimate

defenses, contrary to the public policy articulated in *Yamaha* and *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983). Rule 68 fees were not supportable and should be reversed.

B. The alternative ground for the fee award is unfounded.

The district court awarded attorneys' fees under NRCP 68, but the written order found "there was significant inappropriate conducted [sic] by Defendants and Defense Counsel," which was an independent basis for awarding attorneys' fees. 31 A.App. 6810:3-4, 18-20. The district court's so-called independent grounds for fees cannot be upheld.

The district court's order does not contain a sufficient analysis justifying an award of more than \$800,000 as a sanction. The order contains only a conclusory list of "sanctionable conduct," consisting of eight lines in the order, with six vague and broad categories of alleged misconduct. 31 A.App. 6810:8-15. The order should be deemed legally insufficient to support the \$800,000 sanction award. *Cf. Foster v. Dingwall*, 126 Nev. 56, 65-66, 227 P.3d 1042, 1048-49 (2010) (careful written analysis required for sanction of dismissal). For sanctions to be awarded based on attorney misconduct, the order allegedly violated "must be specific, the violation must be clear, and unfair prejudice must be shown." *Rish*, 132 Nev. at 200, 368 P.3d at 1211.

Fairness and due process require that discovery sanctions be just and related to the specific conduct at issue. *GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 870, 900 P.2d 323, 325 (1995). An award of attorney's fees under NRCP 37(b)(3) requires the district court to determine the amount of fees "**caused by the failure**" to comply with a court order (emphasis added). Here, the attorneys' fee order did not identify specific orders that were allegedly violated, and the fee order gave no explanation regarding how more than \$800,000 in attorneys' fees—the same amount awarded under NRCP 68—might have been "caused by" any sanctionable conduct.

The six categories of alleged misconduct [31 A.App. 6810] are as follows.

(1) and (2) Discovery violations.

The first two categories indicate withholding evidence and omitting evidence during discovery. The grounds appear to be referring to the interrogatory answers and deposition testimony relating to the Center case. These circumstances are thoroughly discussed earlier in this brief. In short, the Center case **was** disclosed; Plaintiffs never raised any question about it until months after the deposition; Plaintiffs never articulated prejudice regarding the discovery mistake; and the district court gave an adverse inference instruction. Sanctions in the form of attorneys' fees were neither justified nor appropriate.

(3) The word “insurance.”

The third category of alleged misconduct was Dr. Rives “blurting out that Plaintiff’s bills were paid through medical insurance.” 31 A.App. 6810:10-11. The circumstances involving this matter are discussed in detail above. Dr. Rives gave a fair response to Jones’s cross-examination question. There was no order prohibiting the mention of insurance, and there had been no prior ruling that NRS 42.021 was inapplicable. 21 A.App. 4720:23-4721:14. Dr. Rives’s answer was not improper.¹⁷

The district court erroneously determined that the statute was not applicable. Even if the ruling was correct, neither defense counsel nor Dr. Rives had been given any prior notice that the statute was inapplicable and that the word “insurance” was forbidden. The jury was instructed not to consider whether “Plaintiff was carrying insurance to cover medical bills” [30 A.App. 6655:3], and the one word “insurance” in Dr. Rives’s testimony, during the 14-day trial, obviously caused no prejudice, because Plaintiffs obtained a \$13 million verdict. That one word did not support an \$800,000 attorneys’ fee sanction.

¹⁷ The court was highly critical of Doyle for failing to advise Dr. Rives not to use the word “insurance” at trial. 21 A.App. 4732-33. The court referred to this as “Law School 101” and a “general witness practice.” 21 A.App. 4732:23, 4733:3. The court was wrong. No law authorizes sanctions for violating a “general practice.” *Cf. Rish*, 132 Nev. at 198-200, 368 P.3d at 1210-11 (as prerequisite to sanctions, order allegedly violated must be clear and specific). And “Law School 101” **in a Nevada medical malpractice case** includes NRS 42.021(1), which expressly provides that “the defendant may introduce evidence” of medical insurance payments.

(4) Affidavits.

The fee order next criticizes defense counsel's "signing affidavits" containing false information prior to trial. 31 A.App. 6810:11-13. The order contains no information about the affidavits to which the court was referring. Presumably the court was referring to information provided regarding the Center discovery issue discussed above, which was not a basis for additional sanctions.

(5) Offers of proof.

The order next attempts to justify \$800,000 in sanctions based upon alleged improper filing of offers of proof without leave of court. 31 A.App. 6810:13-14. Defense counsel Doyle filed seven offers of proof on the last day of trial. 9 A.App. 1840, 1974; 10 A.App. 2089; 11 A.App. 2262, 2315, 2347, 2437.

The district court seemed to become incensed by the fact that Doyle filed offers of proof without first obtaining permission. The court issued an order requiring Doyle to show cause why he filed the documents. 12 A.App. 2477. The order did not identify any alleged legal violation by Doyle. *Id.*

At the show-cause hearing, the district court demanded to know the identity of every other attorney who participated regarding the offers of proof. 16 A.App. 3368:22-24, 3371:12-14. Doyle identified Robert Eisenberg. 16 A.App. 3371:17-18. Doyle explained that he kept notes during trial about potential offers of proof, for an adequate record for appeal; and he made the decision to file the offers of proof

after court on Thursday, October 31, 2019. 16 A.App. 3372:17-3373:14. He did not give the court advance notice because he did not believe it was necessary. 16 A.App. 3374:7-11.

The court was also critical of the fact that Doyle filed the offers of proof after the court had indicated “there were no further outstanding issues to be addressed” near the end of the trial. 12 A.App. 2477:19-20. Doyle explained that the offers of proof did not deal with “outstanding issues” to be addressed, and they did not ask the court to take any action. 16 A.App. 3376:20-25, 3377:1. Doyle explained that he had not found authority discussing when offers of proof could be filed, and he relied on Eisenberg’s advice.¹⁸ 16 A.App. 3379:5-7; 3381:11-14.

The district court criticized the individual offers of proof, eventually stating that they were NRCP 11 violations, because they were filed without giving the court any advance notice. 16 A.App. 3410:25-3411:1. Rule 11 contains no such requirement. The district court’s severe criticisms and berating Doyle continued throughout almost the entire hearing. 16 A.App. 3365-3432.

As noted above, Doyle had relied on advice from Robert Eisenberg, who was appellate counsel working with Doyle during the trial. Eisenberg submitted a declaration describing his appellate experience, including work at the Nevada

¹⁸ The hearing transcript refers to Doyle saying “offers of judgment” instead of “offers of proof.” 16 A.App. 3381:21-24. This is obviously a mistake.

Supreme Court. 12 A.App. 2558. He explained that he had never seen or heard any criticism of attorneys who filed offers of proof to preserve the record. 12 A.App. 2560:13-19.

Eisenberg also described a trial in which he was the defendant's appellate consultant. The defense team filed approximately 15 offers of proof shortly before the end of trial, without seeking prior permission. 12 A.App. 2559:8-19. The offers of proof were included in the appeal appendix and cited in briefs. 12 A.App. 2560:1-4. Neither the district judge, opposing counsel, nor the Nevada Supreme Court itself ever suggested it was improper to file the offers of proof without first obtaining permission. 12 A.App. 2559:20-26, 2560:1-12.

Eisenberg's declaration also indicated that he discussed potential offers of proof with Doyle; and he informed Doyle of his experience with offers of proof in the case mentioned above, his 40 years of appellate experience, and his opinion that there was nothing improper about filing the offers of proof. 12 A.App. 2560: 20-26, 2561:1-7. Doyle relied on Eisenberg's advice. 16 A.App. 3381:21-24.

As part of her scathing criticism of the offers of proof, which the district court referred to as egregious and rogue [16 A.App. 3557:13-17], the district court attempted to distinguish the Farris case from the prior case Eisenberg's declaration had described, on the ground that offers of proof were filed one or two days before the end of trial in that case, but the offers of proof were filed on the last day of trial

in the Farris case. 31 A.App. 6745:22-25, 6746:1-13. But the district court missed the entire point of Eisenberg's reference to the prior case. Regardless of whether the prior case was distinguishable, or whether Eisenberg should have relied upon his experience in that case, the important point was that **Doyle** relied upon the advice of an experienced appellate attorney, and this provided a legitimate good faith basis for Doyle filing the offers of proof. Whether Eisenberg's advice was right or wrong, Doyle was not in bad faith by relying on it. Filing the offers of proof—which did not cause even an iota of prejudice to anyone—cannot be considered a legitimate ground for awarding more than \$800,000 in attorneys' fees sanctions.

(6) Miscellaneous violations.

The final conclusory ground for the award of attorneys' fees as a sanction was "violating Court orders during the course of trial on numerous occasions, including during the cross-examination of Dr. Michael Hurwitz." 31 A.App. 6810:14-15. The order fails to identify any of the prior orders to which the district court was referring. Such a vague, conclusory and non-specific order does not satisfy *Rish* and precludes this court's meaningful review. *Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011) ("without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because

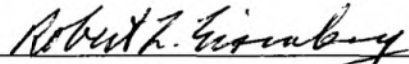
we are left to mere speculation"). This ground simply cannot provide a basis for awarding more than \$800,000 in attorneys' fees sanctions.¹⁹

In conclusion on this point, the huge award of attorneys' fees cannot be sustained as a sanction alternative basis for the fee award.

CONCLUSION

The district court committed multiple errors, any one of which justifies reversal. The cumulative impact of the errors also justifies reversal. The judgment should be reversed, and a new trial should be ordered.

DATED: Oct. 13, 2020.


 ROBERT L. EISENBERG (SBN 950)
 LEMONS, GRUNDY & EISENBERG
 6005 Plumas Street, Third Floor
 Reno, NV 89519
 775-786-6868
rle@lge.net
 ATTORNEYS FOR APPELLANTS

¹⁹ The issue regarding cross-examination of Dr. Hurwitz is discussed earlier in this brief.

CERTIFICATE OF COMPLIANCE [NRAP 32(a)(7)(D)(ii)]

This certificate of compliance is being submitted with appellants' motion requesting enlargement of the word-count limit for the opening brief, as required by NRAP 32(a)(7)(D)(ii). The certificate is also attached to the proposed brief being submitted with the motion.

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

2. I further certify that **I have filed a motion for permission to exceed the word-count limit for this brief.** If the motion is granted, this brief will comply with Rule 32 because the brief will contain the number of words allowed by the court (18,619), using the computation guidelines in NRAP 32(a)(7)(C).

3. 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where

the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: Oct. 13, 2020.

Robert L. Eisenberg
ROBERT L. EISENBERG

CERTIFICATE OF SERVICE

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date the foregoing **Appellant's Opening Brief** and **Appendix** 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:

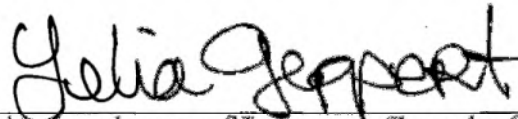
George Hand
Tara Clark Newberry
Kimball Jones
Jacob Leavitt
Micah Echols
Thomas Doyle

I further certify that on this date I served a copy of the foregoing by depositing a true and correct copy, postage prepaid via U.S. mail to:

Aimee Clark Newberry
810 Durango Drive, Suite 102
Las Vegas, NV 8145
(702) 608-4232
al@szs.com

Dated this 13 day of October, 2020.

LEMONS, GRUNDY & EISENBERG



An employee of Lemons, Grundy & Eisenberg

138 Nov. Advance Opinion 17

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D.,
LAPAROSCOPIC SURGERY OF
NEVADA, LLC,

Appellants/Cross Respondents,

BARRY JAMES RIVES, M.D., AND
LAPAROSCOPIC SURGERY OF
NEVADA, LLC,

Respondents.

No. 81052

Consolidated appeal from the judgment in a medical malpractice proceeding awarding attorney fees and costs.

Reversed in part, and remanded.

Lemone Grundy & Eisenberg and Robert L. Eisenberg, Attorneys,
for Appellants/Cross Respondents,

Cingett & Sykes Law Firm and Sullivan, LLC, and George F. Hargrett, Attorneys,
for Respondents/Cross Appellants.

BEFORE THE SUPREME COURT, EN BANC.

OPINION

Appellants appeal from a \$6 million judgment, challenging several evidentiary rulings they claim warrant reversal and remand for a new trial. Respondents assert that because appellants did not move for a new trial in district court, they waived the issues, such that their assignments of error on appeal cannot provide the basis for a new trial. Respondents fail to present a convincing argument that the procedural bars they claim prohibit our review on the merits apply here. The plain language of our jurisdictional rules confirms that appellants are not required to file a motion for a new trial in district court to preserve their ability to request a new trial on appeal. As to the merits of appellants' claims, we conclude that the district court abused its discretion by admitting evidence of another [REDACTED] at appellant Barry James Rives, M.D., as [REDACTED] for an admissible purpose, and any potential relevance was substantially outweighed by the evidence's fairly obvious prejudicial effect. As this evidentiary ruling was harmful, we reverse the judgment, vacate the attorney fees and costs order, and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

Respondent Titina Farris suffered from back pain with pain and burning in her feet. She was diagnosed with uncontrolled diabetes causing neuropathy. In 2014, Farris was referred to appellant Barry James Rives, M.D., for swelling in her upper abdomen. Rives diagnosed Farris with a hernia, which he surgically repaired on two occasions, first in 2014

and second in 2015. During the second surgery, Rives noticed that part of Farris's colon was stuck in the mesh from the 2014 surgery. Rives freed the colon from the mesh; however, he [REDACTED] the colon was repaired with a stapling device [REDACTED] the 2015 surgery, including [REDACTED] of a leak in Farris's colon, a CT scan on [REDACTED] another surgeon corrected. But Farris's sepsis continued, and she eventually developed drop foot in both feet, hindering her ability to walk unassisted. Farris and her husband, respondent Patrick Farris (collectively "respondents"), filed this medical malpractice lawsuit [REDACTED] Laparoscopic Surgery of Nevada LLC [REDACTED] that Rives fell below the standard of care [REDACTED] monitoring Farris after, that Laparoscopic [REDACTED] variously liable for Rives's actions, and for [REDACTED]

In an unrelated matter, another patient, Vickie Center, sued Rives for malpractice related to her hernia surgery, which took place five months before Farris's surgery. The same defense firm represented Rives in both the *Farris* and *Center* cases. In the *Center* case, Rives responded to an interrogatory that asked him to provide information concerning other lawsuits in which he was involved. One month later, Rives responded to a similar interrogatory request in the *Farris* case, and his attorney copied the interrogatory responses from the *Center* case without adding the *Center* case to the list of other suits.

Respondents' counsel deposed Rives. At the deposition, counsel [REDACTED] the other cases Rives disclosed in his responses did not mention the *Center* case,

but defense counsel interjected with information about that case. Rives was then asked several questions regarding the *Center* case, and respondents' counsel discussed the *Center* case with Center's counsel "weeks to months before the trial in" the *Center* case started.

Before the trial in this matter, respondents filed a pretrial motion for sanctions, contending that Rives intentionally concealed the *Center* case. Respondents asserted that they "had no reasonable opportunity to further investigate this critical and admissible information" and requested that the district court strike appellants' answer. Appellants opposed, arguing that the omission was accidental and there was no prejudice to respondents. They also argued that the *Center* case was not admissible, as it was irrelevant, unduly prejudicial, misleading to the jury, and improper character evidence.

The district court held an evidentiary hearing on the motion, at which Rives testified that he relied on his counsel to prepare the interrogatory responses in the *Farris* case and conceded that he did not read them. The district court concluded that Rives "relied on counsel" to prepare the interrogatory responses and, thus, had "an intent not to read the interrogatories," which the court considered "intentional conduct" warranting an adverse-inference instruction.¹ While the district court

¹Ultimately, the district court read the following adverse-inference instruction before the opening statements and at the end of trial:

Members of the jury, Dr. Barry Rives was sued in a medical malpractice case in case *Vickie Center v. Barry James Rives, M.D., et al.* Dr. Barry Rives was asked about the *Vickie Center* case under oath, and he did not disclose the case in his interrogatories or at his deposition. You may infer

permitted respondents to introduce evidence of the *Center* case, it did not make an express ruling on its admissibility until trial.

At trial, respondents mentioned the *Center* case roughly 180 times in front of the jury. Appellants objected several times, on various grounds, including that the evidence was irrelevant and that the danger of unfair prejudice, confusion of the issues, or misleading the jury substantially outweighed the probative value of the *Center* case. While the district court sustained some objections, it often allowed respondents to point to the *Center* case in making arguments or questioning witnesses. Respondents used the *Center* case to imply that Rives should have known his behavior was negligent and hinted that Rives had a propensity to commit malpractice. Respondents elicited that Vickie Center lost her legs because of Rives's actions. The district court allowed an extended examination of Rives regarding whether he informed Center's counsel of the specifics of the *Farris* case and the extent of Vickie Center's similar injuries. Respondents also mentioned the *Center* case in their closing argument.

The jury returned its verdict, concluding that Rives negligently treated Farris, causing her injuries, and awarding respondents \$13,640,479.90 in total damages. The district court reduced the jury's award of noneconomic damages to \$350,000 pursuant to NRS 41A.035 and entered a judgment for a total of \$6,367,805.52. The district court granted in part respondents' motion for attorney fees and costs, awarding

that the failure to timely disclose evidence of a prior medical malpractice lawsuit against Dr. Barry Rives is unfavorable to him. You may infer that the evidence of the other medical malpractice lawsuit would be adverse to him in this lawsuit had he disclosed it. This instruction is given pursuant to a prior [c]ourt ruling.

\$821,468.66 consistent with NRCP 68 and NRS 7.095, or alternatively, as a sanction for Rives's discovery behavior. Appellants appeal from the judgment and the attorney fees and costs award, while respondents cross-appeal from the judgment to contest the district court's application of NRS 41A.035.

DISCUSSION

Appellants did not waive their right to seek reversal and remand for a new trial on appeal by not filing a motion for a new trial in district court

Appellants assert that the district court committed evidentiary errors warranting reversal and remand for a new trial. Respondents argue that by failing to file a motion for a new trial in district court, appellants waived their ability to request a new trial on appeal. Respondents contend that the failure to seek a new trial in district court deprives the court of the chance to consider and correct any errors and prevents this court from "conduct[ing] a proper review of whether the [d]istrict [c]ourt properly or improperly granted a new trial because there is no appealable order to review." They further argue that appellants "ask this Court to review, in the first instance, their arguments for a new trial, which contain factual issues and would convert this Court into a factfinder." We disagree.²

²Relying on *Rust v. Clark County School District*, 103 Nev. 686, 747 P.2d 1380 (1987), respondents also argue that we lack jurisdiction to consider appellants' challenges to the district court's oral evidentiary rulings made at trial. In *Rust*, we held the following:

An oral pronouncement of judgment is not valid for any purpose, therefore, only a written judgment has any effect, and only a written judgment may be appealed. The district court's oral pronouncement from the bench, the clerk's minute order, and even

While we have not explicitly addressed whether a party must both object to trial rulings and file a motion for a new trial to preserve the party's ability to request a new trial on appeal, the plain language of our jurisdictional rule and the preserved error rule make it clear that a party is not required to file a motion for a new trial to preserve the party's ability to request such a remedy on appeal for harmful error to which the party objected. First, NRAP 3A(a) expressly provides that "[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial." The rule thus contemplates this very situation. Second, it is well-established that a timely objection alone is sufficient to raise and preserve an issue for appellate review. See *Thomas v. Hardwick*, 126 Nev. 142, 155, 231 P.3d 1111, 1130 (2010) (concluding that when a trial court properly declines to

an untiled written order are ineffective for any purpose and cannot be appealed.

Id. at 689, 747 P.2d at 1382 (internal citations omitted). However, *Rust* dealt with a premature notice of appeal filed prior to the district court entering a written, final judgment and is plainly inapplicable here, where appellants are appealing from a final, written judgment. Cf. *Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (explaining that this court will review interlocutory decisions that "are not independently appealable" in an appeal from a final judgment). Moreover, NRS 47.040 provides both the authority and framework for addressing alleged error in evidentiary rulings, depending on whether a party preserved error through objection, as we have recognized in various cases. See, e.g., *Rimer v. State*, 131 Nev. 307, 332, 351 P.3d 697, 715 (2015) (explaining that a party preserves a claim of error by objecting and stating the grounds for the objection at trial); *In re J.D.N.*, 128 Nev. 462, 468-69, 283 P.3d 842, 846-47 (2012) (observing that the scope of review depends on whether a party preserved error by objecting to the admission of evidence). Thus, we have the ability to review appellants' evidentiary challenges, and nothing in *Rust* precludes our review.

give a definitive ruling on a pretrial motion, the contemporaneous objection rule requires the party to object at trial in order to preserve its argument on appeal); *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988) (“[F]ailure to object to a ruling or order of the court results in waiver of the objection and such objection may not be considered on appeal.”); see also NRS 47.040(1)(a) (requiring “a timely objection or motion to strike . . . stating the specific ground of objection” to preserve the issue for appeal); cf. *In re J.D.N.*, 128 Nev. 462, 468, 283 P.3d 842, 846 (2012) (explaining that a party preserves a claim of error by objecting and stating the grounds for the objection at trial). Taken together, these authorities make clear that a party need not file a motion for a new trial to raise a preserved issue on appeal or request a new trial as a remedy for alleged errors below. Such a holding is consistent with both the federal approach and our past decisions considering a preserved error without the appellant having moved for a new trial below.³ See, e.g., *Richardson v. Oldham*, 12 F.3d 1373, 1377 (5th Cir. 1994) (“Filing a Rule 59 motion is not a prerequisite to taking an appeal . . .”); *Floyd v. Laws*, 929 F.2d 1390, 1400-01 (9th Cir. 1991) (“A question raised and ruled upon need not be raised again on a motion for a new trial to preserve it for review.”);

³While NRAP 3A(a) does not require a party move for a new trial prior to bringing an appeal, we note that there are several practical benefits to doing so. First, it allows the district court to correct alleged errors, which allows for the prompt resolution of a case without potentially unnecessary appellate litigation. Second, it develops a better record for appellate review as the parties crystalize their arguments while giving the district court an opportunity to fully articulate the reasoning for its evidentiary rulings. Thus, while not required, moving for a new trial prior to pursuing an appeal provides distinct benefits that litigants should consider prior to bringing an appeal.

LaBarbera v. Wynn Las Vegas, LLC, 134 Nev. 393, 398, 422 P.3d 138, 142 (2018) (concluding the district court abused its discretion by excluding certain pieces of evidence and remanding for a new trial without mentioning whether the appellant filed a motion for a new trial before pursuing the appeal).

Respondents' contrary arguments are not persuasive, as the Nevada cases on which they rely are either inapposite or distinguishable. Neither *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d 981 (1981); nor *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 245 P.3d 542 (2010), require a motion for a new trial as a prerequisite to filing an appeal regarding an otherwise preserved error. In *Old Aztec*, this court declined to consider the appellant's argument regarding its counterclaim because it failed "to direct the trial court's attention to its asserted omission to mention the counterclaim expressly in its judgment." 97 Nev. at 52-53, 623 P.2d at 983-84. It thus determined that the waiver doctrine rendered the claim of unpreserved error unreviewable. In *Schuck*, the appellant challenged summary judgment by raising several new legal arguments, which this court refused to consider for the first time on appeal. 126 Nev. at 436-38, 245 P.3d at 544-45. Neither case addressed whether a motion for a new trial is required to preserve a claim of error for appellate review. Further, the cases from other jurisdictions to which respondents point are factually dissimilar in that the appellants either failed to preserve their appellate arguments with timely objections at trial or the jurisdictions, unlike Nevada, have procedural rules requiring a new trial motion before appealing. See, e.g., *State v. Davis*, 250 P.2d 548, 549 (Wash. 1952) (concluding that the appellant, who failed to object at the time the prejudicial conduct occurred or to preserve the issue raised on appeal in any

way, waived his argument, while observing that a new trial motion gives "the trial court an opportunity to pass upon questions not before submitted for its ruling" without addressing whether the appellant would be required to seek a new trial if he had objected to the prejudicial conduct during trial); *Spotts v. Spotts*, 55 S.W.2d 977, 980 (Mo. 1932) (applying a Missouri statute in concluding that appellant must object and file a new trial motion to preserve a "writ of error" challenge to a jury verdict). Accordingly, appellants did not need to move for a new trial below to raise preserved issues on appeal or to request a new trial as an appellate remedy for those alleged errors.⁴

The district court abused its discretion by allowing evidence of the Center malpractice case, and the error is not harmless

Appellants argue that the district court abused its discretion in admitting evidence of the *Center* case because that evidence is irrelevant, since an unrelated, prior medical malpractice suit does not address whether Rives's conduct in this specific case fell below the applicable standard of care. They further contend that the *Center* case evidence, even if relevant,

⁴Respondents' remaining arguments on this issue are without merit. They conflate the abuse-of-discretion standard of review that applies to an order granting or denying a motion for a new trial with the appellate remedy of a new trial for harmful error. See NRCP 61 (addressing correction of errors that affect the party's substantial rights at all stages of the proceeding). Although they point out that there is no "order to review," appellants did not file a motion for a new trial, and thus, this court is not tasked with determining whether the district court abused its discretion by denying a motion for a new trial. Instead, appellants seek our review in evaluating whether the district court erred by admitting or excluding several pieces of evidence and whether those errors, preserved by timely objections, are harmful. Similarly, respondents' argument that appellants seek to "convert this Court into a factfinder" is misplaced, as this court is merely conducting routine error analysis of several evidentiary rulings.

is inadmissible because the danger of unfair prejudice, confusing the issues, or misleading the jury substantially outweighs its probative value. We

... evidence is admissible, while irrelevant evidence is inadmissible. NRS 48.025. Evidence is relevant if it "ha[s] any tendency to make the existence of any fact . . . of consequence . . . more or less probable than it would be without the evidence." NRS 48.015. However, 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." NRS 48.035(1). While evidence of a doctor's other acts is inadmissible to show propensity, such evidence "may . . . be admissible for other purposes," such as to show "absence of mistake or accident." NRS 48.045(2).

... abuse of discretion, *Hansen v. Universal*, 121 Nev. 24, 27, 974 P.2d 1158, 1160 (1999), we conclude that respondents did not present evidence regarding the *Center* case for an admissible, relevant purpose, and thus it should have been excluded. While respondents argue that the case is relevant to establish that Rives's actions would cause foreseeable harm, the fact that Rives was sued or acted inconsistently with the standard of care in a prior case does not make it more or less probable that he acted below the standard of care in this case. See *Stottlemeyer v. Ghramm*, 597 S.E.2d 191, 194 (Va. 2004) (affirming district court's exclusion of evidence of the doctor-defendant's past medical malpractice suits because "[e]vidence that a defendant was negligent on a prior occasion simply has no relevance or bearing upon whether the defendant was negligent during the occasion that is the subject of the litigation"); cf. *Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. 163,

the probative value of that evidence. The court in *Hansen* is factually similar to this case, but it arises from a different surgery on a different patient on a different day with different consequences. Introduction of such evidence injects a collateral matter into appellant's trial that would likely confuse the jury. See *Hansen*, 115 Nev. at 27-28, 974 P.2d at 1160 (affirming a district court's exclusion of a report containing brief descriptions of medical complications experienced by the doctor-defendant's patients who underwent the same surgery as the plaintiff because "injecting these other aspects into the plaintiff's trial would prolong the trial, confuse the issues and divert the jury from the central issue to collateral matters"); see also *State v. Smith*, 115 Nev. at 21-22.

~~the purpose of the~~ [plaintiffs] proffered evidence was to show that ~~the defendant was negligent in~~ treating [a third party]. However, that evidence was not admissible to show that [defendant] was negligent in treating [plaintiff], and its introduction would have injected a collateral matter into this trial and confused the jury.”). Further, in addressing whether appellants should be sanctioned for intentional concealment of the *Center* case, respondents acknowledged that they thought the case was useful to show propensity when they stated that appellants “didn’t want us to know what [Rives] knew, what his knowledge level was. [Appellants] didn’t want us to know that he had gone through this exact same thing, had ~~the same opportunity to make~~ good decisions and protect this patient but ~~failed to do so.~~” Nevada law precludes admitting evidence for propensity purposes.⁵ NRS 48.045(2) (prohibiting use of other wrongs or acts to prove a person’s character or to show the person acted in conformity therewith); *Bonghout v. Sullivan*, 122 Nev. 556, 574, 138 P.3d 433, 447 (2006) (holding that prior bad-acts evidence is inadmissible to prove propensity); *see also* *Bair v. Callahan*, 664 F.3d 1225, 1229 (8th Cir. 2012) (concluding that evidence of prior malpractice is inadmissible under Federal Rule of Evidence (FRE) 404, which prohibits evidence of a person’s character to prove that on a particular occasion the person acted in accordance therewith, because it allows the jury to infer the doctor has a propensity for

⁵This opinion does not concern the exception to this rule in NRS 48.045(3), which “permits the district court to admit evidence of a separate sexual offense for purposes of proving propensity in a sexual offense prosecution” so long as that evidence is relevant, proven by a preponderance of the evidence, and the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *Franks v. State*, 135 Nev. 1, 2, 432 P.3d 752, 754 (2019).

...should be excluded to prevent a jury from concluding that a doctor has a propensity to commit medical malpractice.

Respondents' arguments to the contrary are unavailing. First, they argue that this is a relevant inquiry into the Center case but fail to explain—here or below—how this inquiry would show that the doctor-defendant is biased. This we need not consider this morning. Respondents also argue that this case will not consider prior malpractice or other evidence and relevant authority. Again, they argue that the Center case is inadmissible under Rule 403 as being more prejudicial than probative. However, the modus operandi exception typically applied in criminal cases where there is a question regarding the defendant's identity and a defendant has committed prior offenses in the same or same way that would establish he is the offender in the present case. The Center case, 121 Cal. App. 3d 197, 197 Cal. App. 3d 197 (2000), holding that the Center case is inadmissible by evidence of the defendant's prior malpractice as being more prejudicial than probative because the defendant's identity was not at issue during the trial. Here, it appears respondents argue that the modus operandi exception applies to show Hives's negligent surgical techniques, which is a proper use of the evidence, as it encourages the jury to consider evidence that Hives has a propensity to commit medical malpractice. There was no question about Hives's identity.

At oral argument before this court, respondents argued that the evidence of the Center case was admissible for its probative value. But we need not consider this argument because the Center case is

oral argument. See *Sisto et al. v. American Telephone & Telegraph Co.*, 350 U.S. 101, 64-11943. The parties, in oral arguments, are confined to issues or matters proper before the court, and we can consider nothing else. Even if we consider this argument, however, the numerous times respondents mentioned the *Center* case and the scope of what was mentioned far exceeded what would be proper for respondents' purposes.

malpractice suits do not fall within the knowledge exception, and we find their reasoning persuasive. *See, e.g., Bair*, 664 F.3d at 1229 (rejecting the appellant's argument that the doctor's past treatment of other patients is admissible to show the doctor did not know how to properly carry out the surgery because that "is not the kind of 'knowledge' Rule 404(b) contemplates," as the doctor "had the knowledge to perform the surgery" due to his training and the appellant's evidence allows the jury to infer the defendant "had a propensity to commit malpractice" (internal quotation marks omitted)).

Because the *Center* case was mentioned over 180 times during trial, including details of how the patient went septic and her legs were amputated, similar to—but worse than—the injuries suffered by Farris, the error in admitting it was not harmless. Rather, the evidence had no probative value, drew the jury's attention to a collateral matter, and likely led to the jury drawing improper conclusions about Rives's propensity to ~~commit malpractice, unfairly~~ prejudicing him.⁷ *See Bongiovi*, 122 Nev. at

~~While the district court~~ may have correctly determined that Rives's discovery behavior warranted sanctions, it nonetheless abused its discretion by giving an adverse-inference instruction. *See Bass-Davis v. Davis*, 122 Nev. 442, 447-48, 134 P.3d 103, 106 (2006) (reviewing a district court's decision to give an adverse-inference instruction for an abuse of discretion). As discussed above, the *Center* case evidence was inadmissible, and a district court may not admit otherwise inadmissible evidence as a discovery sanction. *See* NRS 48.025(2) ("Evidence which is not relevant is not admissible."); NRS 48.035(1) (providing that otherwise relevant evidence is not admissible if the danger of unfair prejudice substantially outweighs the evidence's probative value). Further, an adverse inference instruction is appropriate when evidence is lost or destroyed. *See Bass-Davis*, 122 Nev. at 448-49, 134 P.3d at 106-07. Here, the evidence was not lost or destroyed, and Farris presented details regarding the *Center* case at trial. Accordingly, the adverse inference instruction was improper.

578, 138 P.3d at 447 (explaining that evidence is inadmissible if the danger of unfair prejudice substantially outweighs the evidence's probative value).

Thus, we reverse the district court's judgment and remand for a new trial.⁸

See Kincaid v. Goodland, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) (concluding that an error is prejudicial, and thus reversible, when it affects

CONCLUSION

An appellant who made an evidentiary objection during trial need not move for a new trial in the district court before filing an appeal to preserve the appellate remedy of reversal and remand for a new trial.

Further, an appellate court has jurisdiction to review a district court's oral evidentiary rulings made during the course of trial on appeal from a final judgment. Additionally, evidence of a doctor's prior medical malpractice suits is generally not relevant to whether the doctor met the standard of care in the current malpractice lawsuit. On this record, we conclude the district court abused its discretion by admitting evidence of the Center case and that the error was not harmless due to the evidence's tendency to encourage the jury to reach an improper propensity conclusion, as well as to cause unfair prejudice to Rives due to the severe injuries suffered by that

⁸In light of our conclusion, we need not address appellants' remaining arguments. Similarly, we vacate the district court's order regarding attorney fees and costs. As we are remanding for a new trial, the cross appeal regarding the district court's reduction of the non-economic damages awarded is similarly moot.

patient. Accordingly, we reverse the district court's judgment, vacate the corresponding fees and costs order, and remand for a new trial.

Cadish, J.
Cadish

We concur:

Parsons, J.
Parsons

Hardesty, J.
Hardesty

[Signature], J.
[Signature]

Silver, J.
Silver

Pickering, J.
Pickering

Herndon, J.
Herndon

Alanna S. Kishner
CLERK OF THE COURT

NOH

DISTRICT COURT
CLARK COUNTY, NEVADA

TITINA FARRIS, ET AL;

Case No.: A-16-739464-C

PLAINTIFF(S),

Dept. No.: XXXI

VS.

HEARING DATE: **JUNE 7, 2022**

BARRY RIVES, M.D., ET AL.;

HEARING TIME: **9:00 A.M.**

DEFENDANT(S).

NOTICE OF ORDER SETTING HEARING

PLEASE TAKE NOTICE that the above matter has been placed on calendar for a hearing regarding: Further proceedings and scheduling pursuant to the Supreme Court Order filed March 31, 2022, and the Remittitur filed April 29, 2022.

The hearing will take place on **JUNE 7, 2022, at 9:00 a.m.**, in Department XXXI, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, NV, 16th Floor, **Courtroom 16B**.

Department 31 will be hearing this matter either via remote appearance through Bluejeans **or** parties may appear in-person. If appearing remotely, the Court would **strongly** prefer and encourage that **all** parties appear audiovisually for a better record. However, any/all counsel and/or parties appearing in a **multi-party** case, Construction Defect (CD) case, Business Court (BC) case, **must** appear **audiovisually** or **in person** to better aid the Court with keeping track of connected parties.

Pursuant to the Rules and Administrative Order 22-07 (and previous versions), **all parties** must ensure they are registered for electronic service to

1 ensure every party receives all Notices from the Court. Instructions on how to
2 register for electronic service may be found on the Court's website,
3 www.clarkcountycourts.us.

4 **The Bluejeans connection information is:**

5 **Phone Dial-in**

6 [+1.408.419.1715](tel:+14084191715) (United States(San Jose))

7 [+1.408.915.6290](tel:+14089156290) (United States(San Jose))

8 [\(Global Numbers\)](#)

9 **From internet browser, copy and paste:**

10 <https://bluejeans.com/621838351/1475>

11 **Room System**

12 199.48.152.152 or bjn.vc

13 **Meeting ID: 621 838 351 Participant Passcode: 1475**

14 Failure to appear at the hearing may result in an Order to Show Cause being
15 issued with sanctions, up to and including, dismissal of case for failure to prosecute.

16
17 Dated this 4th day of May, 2022.

18 Dated this 4th day of May, 2022

19 
20 HON. JOANNA S. KISHNER
21 DISTRICT COURT JUDGE

22 C2A F76 B7C1 61C3
23 Joanna S. Kishner
24 District Court Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was electronically submitted for automated Electronic Service by the Court to all counsel/registered parties, pursuant to the Nevada Electronic Filing Rules, unless otherwise noted below.

/s/ Tracy L. Cordoba

TRACY L. CORDOBA-WHEELER
JUDICIAL EXECUTIVE ASSISTANT

1 **CSERV**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5
6 Titina Farris, Plaintiff(s)

CASE NO: A-16-739464-C

7 vs.

DEPT. NO. Department 31

8 Barry Rives, M.D., Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Notice of Hearing was served via the court's electronic eFile system to
13 all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 5/4/2022

15 George Hand

ghand@handsullivan.com

16 Erickson Finch

erickson@bighornlaw.com

17 Kimball Jones

kimball@bighornlaw.com

18 Brittany Morris

brittany@bighornlaw.com

19 Anita Sambuco .

Anita@meklaw.net

20 Calendar .

calendar@szs.com

21 Carrie Perrault .

cap@szs.com

22 Chad Couchot .

ccc@szs.com

23 Filing .

Filing@meklaw.net

24 George Hand .

ghand@handsullivan.com

25 Karen Hamm .

khamm@handsullivan.com

1	Kim Irene Mandelbaum .	Kim@meklaw.net
2	Riesa Rice .	rrr@szs.com
3	Reception E-File	reception@claggettlaw.com
4	Anna Grigoryan	annag@handsullivan.com
5	Thomas Doyle	tjd@szs.com
6	Samantha Herbeck	sherbeck@handsullivan.com
7	Tracey Heinhold Keith	tracey.heinhold@gmail.com
8	Deborah Rocha	Deborah.Rocha@cdiglaw.com
9	Patricia Daehnke	Patricia.Daehnke@cdiglaw.com
10	Linda Rurangirwa	Linda.Rurangirwa@cdiglaw.com
11	Laura Lucero	Laura.Lucero@cdiglaw.com
12	Amanda Rosenthal	Amanda.Rosenthal@cdiglaw.com
13	Lacey Ambro	lacey.ambro@cdiglaw.com
14	Brigette Foley	brigette.foley@cdiglaw.com
15	Alexandra Trejo	alext@handsullivan.com
16	Appeals Team	appeals@claggettlaw.com
17	Robert Eisenberg	Rle@lge.net
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

A-16-739464-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental**COURT MINUTES****June 07, 2022**

A-16-739464-C Titina Farris, Plaintiff(s)
vs.
Barry Rives, M.D., Defendant(s)

June 07, 2022 09:00 AM Pursuant to Notice of Hearing to Set New Trial Date

HEARD BY: Kishner, Joanna S. COURTROOM: RJC Courtroom 16B

COURT CLERK: Rapel, Stephanie

RECORDER: Corcoran, Lara

REPORTER:

PARTIES PRESENT:

George F. Hand	Attorney for Plaintiff
Kimball Jones	Attorney for Plaintiff
Micah S. Echols	Attorney for Plaintiff
Patricia Egan Daehnke	Attorney for Defendant
Robert L. Eisenberg	Attorney for Defendant
Thomas J. Doyle	Attorney for Defendant

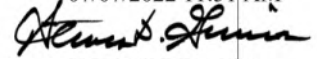
JOURNAL ENTRIES

Upon Court's inquiry, Counsel confirmed the issues regarding costs were resolved. Colloquy regarding trial scheduling and exhibits. Mr. Doyle stated he had firm trials set in California and also scheduled a prepaid vacation for the middle of October through the middle of November. Ms. Daehnke stated she had another case set in Department 11 in September, however, someone else could likely cover that trial in lieu of her. Counsel estimated approximately three (3) weeks for trial. COURT ORDERED, matter SET for trial. Court NOTED discovery and motion matters raised by Defendant's Counsel were not before the Court and needed to be filed accordingly.

8/04/22 10:15 A.M. PRETRIAL CONFERENCE

8/30/22 10:00 A.M. CALENDAR CALL

9/06/22 1:00 P.M. JURY TRIAL 9/06/22 - 9/27/22 (Dark on 9/26/22)



CLERK OF THE COURT

1 **MOT**

2 THOMAS J. DOYLE (SBN 1120)

3 **Schuering Zimmerman & Doyle, LLP**

4 400 University Avenue

5 Sacramento, California 95825-6502

6 Phone: (916) 567-0400

7 Email: calendar@szs.com

8 PATRICIA EGAN DAEHNKE (SBN 4976)

9 BRIGETTE E. FOLEY (SBN 12965)

10 **Collinson, Daehnke, Inlow & Greco**

11 2110 E. Flamingo Road, Ste. 212

12 Las Vegas, Nevada 89119

13 Phone: (702) 979-2132

14 Email: Patricia.Daehnke@cdiglaw.com

Brigette.Foley@cdiglaw.com

15 ROBERT L. EISENBERG (SBN 950)

16 **Lemons, Grundy & Eisenberg**

17 6005 Plumas St., Third Floor

18 Reno, Nevada 89519

19 Phone: (775) 786-6868

20 Email: rle@lge.net

21 *Attorneys for Defendants Barry Rives M.D.*

22 *and Laparoscopic Surgery of Nevada, LLC*

23 **DISTRICT COURT**

24 **CLARK COUNTY, NEVADA**

25 TITINA FARRIS and PATRICK FARRIS;

26 Plaintiffs,

27 vs.

28 BARRY RIVES, M.D.; LAPAROSCOPIC
SURGERY OF NEVADA, LLC, et al.,

Defendants.

CASE NO.: A-16-739464-C

DEPT. NO.: 31

**MOTION TO REOPEN LIMITED
DISCOVERY AND TO SET PRETRIAL
SCHEDULING ORDER ON AN ORDER
SHORTENING TIME**

HEARING REQUESTED

HEARING DATE: JULY 14, 2022

HEARING TIME: 9:00 A.M.

COME NOW Defendants, BARRY RIVES, M.D. ("Dr. Rives") and
LAPAROSCOPIC SURGERY OF NEVADA, LLC ("LSN") by and through their attorneys
of record, and files this MOTION TO REOPEN LIMITED DISCOVERY AND TO SET

1 PRETRIAL SCHEDULING ORDER ON AN ORDER SHORTENING TIME. This Motion
2 is based upon all the points and authorities set forth herein, the pleadings, papers, and records
3 on file, and upon such oral argument as may be permitted at the time of the hearing in this
4 matter. Because the retrial of this action is set to commence on September 6, 2022 - just 68
5 days away – good cause exists for Dr. Rives to respectfully request that this Motion be heard
6 on an Order Shortening Time.

7 DATED: June 30, 2022

8 **COLLINSON, DAEHNKE, INLOW & GRECO**

9
10 BY: /s/ Brigitte E. Foley
11 PATRICIA EGAN DAEHNKE
12 Nevada Bar No. 4976
Patricia.Daehnke@cdiglaw.com
13 BRIGETTE E. FOLEY
14 Bar No. 12965
Brigitte.Foley@cdiglaw.com
15 2110 E. Flamingo Road, Suite 212
16 Las Vegas, Nevada 89119
17 *Attorneys for Defendants*
18
19
20
21
22
23
24
25
26
27
28

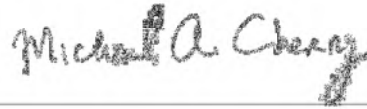
COLLINSON, DAEHNKE, INLOW & GRECO
2110 E. Flamingo Road, Suite 212
LAS VEGAS, NEVADA 89119
TEL. (702) 979-2132 | FAX (702) 979-2133

ORDER SHORTENING TIME

Upon application and good cause appearing therefore:

It is HEREBY ORDERED that the foregoing MOTION FOR DETERMINATION OF ORDER OF DAMAGES EXPERT WITNESS DISCLOSURES AND ORDER OF EXPERT WITNESS DEPOSITIONS ON AN ORDER SHORTENING TIME in the above-entitled action is set for the 14th day of July, 2022, at the hour of 9:00 a.m./~~p.m.~~ in Department 31 of the Eighth Judicial District Court, as soon thereafter as counsel can be heard. Motion must be filed and served by 5:00 p.m. on July 7, 2022; Opposition must be filed and served by 12:00 p.m. on July 11, 2022; Reply must be filed and served by 5:00 p.m. on July 12, 2022.

Dated this 7th day of July, 2022



AC8 3CF D652 5A9E
Michael Cherry
District Court Judge

Respectfully submitted by:

COLLINSON, DAEHNKE, INLOW & GRECO

/s/ Brigitte E. Foley

PATRICIA EGAN DAEHNKE
Nevada Bar No. 4976
BRIGETTE E. FOLEY
Nevada Bar No. 12965
2110 E. Flamingo Road, Suite 212
Las Vegas, Nevada 89119
Tel. (702) 979-2132
Fax (702) 979-2133
Attorneys for Defendants

**DECLARATION OF BRIGETTE E. FOLEY IN SUPPORT OF MOTION AND
ORDER SHORTENING TIME**

STATE OF NEVADA)
).ss
CLARK COUNTY)

I, Brigette E. Foley, depose and state the following under the penalties of perjury of the laws of the State of Nevada:

1. I am over 18 years of age and I have personal knowledge of all facts contained in this declaration and, I would and could competently testify with respect thereto if called so upon.

2. I am an attorney with the law firm of COLLINSON DAEHNKE INLOW AND GRECO, counsel for Dr. Rives in the above-captioned case. I am duly authorized to practice law in the State of Nevada.

3. I make this Declaration in support of Defendants' Motion to Reopen Limited Discovery on an Order Shortening Time.

4. Defendants' counsel have made several attempts to meet and confer with Plaintiffs' counsel before bringing this Motion, to no avail:

5. On June 8, 2022, counsel for Defendants sent written correspondence to counsel for Plaintiffs to request to meet and confer about the issues addressed in this motion. A true and correct copy of this correspondence is attached to this Motion as **Exhibit A**. Plaintiffs' counsel did not respond to this correspondence.

6. Between June 8, 2022, and present, counsel for Defendants has attempted multiple times to reach Kimball Jones, Micah Echols, David Snyder, and George Hand by telephone, all to no avail.

7. On June 30, 2022, counsel for Defendants sent a follow-up correspondence to Plaintiffs' counsel to once again to request to meet and confer about the matters that are the subject of this Motion, and no response was received before this Motion was submitted. A true and correct copy of the follow-up correspondence is attached to this Motion as **Exhibit B**.

Brigette E. Foley

INTRODUCTION

Good cause exists for this Court to GRANT this Motion to reopen limited discovery and enter a pretrial scheduling order. Dr. Rives requests that this Court reopen discovery to complete the following tasks before the retrial of this action starts on September 6, 2022:

1. Plaintiffs to disclose the identities of Titina Patrick Farris' treating providers since the last trial and execute HIPAA releases for Dr. Farris to obtain updated records;
2. Depositions of up to 5 additional treating providers;
3. Dr. Rives to take the Deposition of Dr. Greg Ripplinger;
4. Titina Farris to appear for an Independent Medical Examination;
5. Dr. Rives to take NRCP 30(b)(6) deposition of PMK re: MGM health insurance or disclosure of confirmation of health insurance as non-ERISA plan;
6. Permit Supplemental Expert witness disclosures, including new potential experts;

Because of the very short duration of time before retrial commences (just 68 days from the date of this Motion), Dr. Rives also requests that the Order enter the following pretrial scheduling order:

- Plaintiffs to provide Dr. Rives with additional treating provider information and HIPAA releases by Friday, July 8, 2022;
- Last day for IME to be completed is Monday, August 1, 2022, and Last Day for IME Report to be disclosed is Friday, August 5, 2022,
- All Non-Expert Discovery is to be completed by Friday, August 5, 2022, with exception of supplementing pretrial disclosures;
- Deadline for Initial Expert Witness Disclosures, including disclosure of new experts, is Monday, August 8, 2022;
- Deadline for Rebuttal Expert Witness Disclosures is Friday, August 12, 2022;
- Close of Discovery is Monday, August 15, 2022,
- MILs and Dispositive Motions deadline = Wednesday, August 17, 2022, the following briefing schedule:

1 ▪ Oppositions deadline is Friday, August 19, 2022;

2 ▪ Replies deadline = Monday, August 22, 2022;

3 • The hearing on all pretrial motions set for Thursday, August 25, 2022, or
4 Friday, August 26, 2022.

5 • The Deadline to submit the Pre-Trial memorandum Friday, August 26, 2022.

6 • All exhibits and original depo transcripts must be submitted to Court by time
7 of Calendar Call on Tuesday, August 30, 2022.

8 FACTUAL STATEMENT

9 Plaintiffs initiated this medical malpractice action against Dr. Rives and LSN in 2016,
10 alleging that Dr. Rives fell below the standard of care in performing hernia repair surgery on
11 and monitoring of Plaintiff Titina Farris in 2014 and 2015. *Barry Rives, M.D., et al. v. Titina*
12 *Farris, et al.*, 138 Nev. Adv. Op. 17 (March 31, 2022). Plaintiffs allege that as a result of Dr.
13 Rives' negligent care and treatment, Titina Farris suffered from multiple post-surgical
14 problems, including sepsis, colon leakage requiring surgical repair by another surgeon, and
15 bilateral drop foot that hindered her ability to walk unassisted. *Id.*

16 During the first trial of this action, this Court admitted evidence regarding the *Center*
17 case, a medical malpractice case in which Dr. Rives was a Defendant, and this Court issued an
18 adverse inference instruction to the jury regarding the *Center* case, which unduly prejudiced
19 Dr. Rives and LSC by misleading the jury and confusing the issues. *Id.* As a result, the jury
20 held Dr. Rives liable for Plaintiffs' injuries and damages and awarded Plaintiffs an unjustly
21 excessive sum of \$13,640,479.90, which was later reduced in accordance with NRS 41A.035,
22 and this Court entered judgment for Plaintiffs in the amount of \$6,367,805.52. *Id.* Dr. Rives
23 appealed this Court's judgment. *Id.* The Nevada Supreme Court determined that the Court
24 abused its discretion in admitting evidence of the *Center* case, along with giving the adverse
25 inference instruction to the jury, and that error was not harmless, warranting reversal and
26 remand for a new trial. *Barry Rives, M.D., et al. v. Titina Farris, et al.*, 138 Nev. Adv. Op. 17
27 (March 31, 2022). Nevada Supreme Court's reversal and remand of this medical malpractice
28 and loss of consortium action for a new trial, which is set to commence in just 68 days, on

September 6, 2022. In order to adequately prepare his case for retrial, Dr. Rives requests that the Court reopen this case for limited discovery and issue a detailed pretrial scheduling order to promote judicial economy and fairness to all parties.

LEGAL STANDARD

I. THIS COURT SHOULD FREELY GRANT DR. RIVES' MOTION TO REOPEN DISCOVERY.

"Cases are to be heard on the merits if possible." *Passarelli v. J-Mar Dev.*, 102 Nev. 283, 285-86, 720 P.2d 1221, 1223 (1986); *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963). "***In order that justice be done, district courts should freely grant leave to amend and reopen.***" *Ford v. Ford*, 105 Nev. 672, 676, 782 P.2d 1304, 1307 (1989) (emphasis added). Pursuant to NRCP 52(a)(3), "[t]he court should . . . state on the record the reasons for granting or denying a motion." Pursuant to NRCP 52(a)(3), "[t]he court should . . . state on the record the reasons for granting or denying a motion." Here, good cause exists for the Court to reopen this case for limited discovery and issue a pretrial scheduling order, as outlined herein. Granting this Motion would ensure that the parties have reasonable opportunity to update their pretrial disclosures as necessary and appropriate before trial. Furthermore, granting this Motion would ensure that this case is adjudicated on the merits, which is the ultimate goal.

LEGAL ARGUMENT

"[D]iscovery matters are within the district court's sound discretion," which the appellate courts will not disturb, "unless the court has clearly abused its discretion." *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 240-41, 416 P.3d 249, 255 (2018) (internal quotation marks omitted). "***Where an essential element of a party's case can be easily and readily established by reopening the case, refusal to allow the case to be reopened will most often constitute an abuse of discretion.***" *Andolino v. State*, 99 Nev. 346, 351, 662 P.2d 631, 634 (1983) (emphases added). "An abuse of discretion can [also] occur when the district court bases its decision on a clearly erroneous factual determination, or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016); *see also Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319

P.3d 606, 616 (2014) (noting that the district court abuses its discretion when it “fail[s] to apply the full, applicable legal analysis”). “Where there is no evidence in support of the lower court’s findings, they are clearly erroneous and may be reversed.” *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984). In *Pickett v. McCarran Mansion*, **the district court abused its discretion by failing to allow the expert report to be supplemented**. *Cynthia Pickett, MSW, LCSW, LADC, Inc. v. McCarran Mansion, LLC*, 2019 Nev. App. Unpub. LEXIS 1091, *5, 2019 WL 7410795 (emphasis added).¹ “Pickett moved to reopen discovery specifically so that she could introduce evidence of causation.” *Id.* “To accomplish this, she only needed to supplement the expert report.” *Id.* The Nevada Court of Appeals determined that Pickett could “easily and readily” establish essential elements of her claims by reopening discovery, and it reversed and remanded the district court’s entry of Summary Judgment. *Id.*

Cynthia Pickett was a mental health therapist who brought claims against respondent McCarran Mansion, LLC, for breach of covenant of quiet enjoyment, breach of contract, breach of implied covenant of good faith and fair dealing, and attorney fees. *Id.* Pickett rented an office for her practice in the McCarran Mansion, and as part of the lease, McCarran was required to provide a receptionist for all tenants when the building reached 80 percent occupancy. *Id.* Pickett alleged after the building reached the requisite occupancy level in 2013, McCarran never hired a receptionist. *Id.* Instead, the employee of an attorney—who was a co-tenant—occupied the receptionist area. *Id.* Pickett alleged that this employee was hostile towards her emotionally vulnerable patients, causing Pickett to lose some of them as clients. *Id.* As a result, Pickett contended that her practice suffered economic losses until the attorney and the receptionist vacated the building in December 2014. *Id.*

Pickett filed an amended complaint in March 2015, alleging (1) breach of covenant of quiet enjoyment, (2) breach of contract, (3) breach of covenant of good faith and fair dealing, and (4) attorney fees. *Id.* In February 2016, the district court excluded evidence of Pickett’s damages from 2015, as well as an expert opinion as to her damages. *Id.* In two separate

¹ Pursuant to NRCP 16.1(a)(2)(F)(i), a party “must supplement [an expert] disclosure[] when required under Rule 26(e).” NRCP 26(e)(2) provides that “any additions or other changes to [expert testimony] must be disclosed by the time the party’s disclosures under Rule 16.1(a)(3) . . . are due.” NRCP 16.1(a)(3)(B)(i) requires that, unless the court orders otherwise, “these [expert] disclosures must be made at least 30 days before trial.”

1 orders, the district court granted partial summary judgment and then complete summary
2 judgment in favor of McCarran on all of Pickett's claims. *Id.* Pickett appealed. 17 Nev. App.
3 Unpub. LEXIS 525 (Order Affirming in Part, Reversing in Part and Remanding, Ct. App.,
4 Aug. 8, 2017).

5 The Nevada Court of Appeals affirmed the district court's decision to exclude certain
6 witnesses and emails that Pickett proffered after the discovery deadline. 2017 Nev. App.
7 Unpub. LEXIS 525 at *5. The Nevada Court of Appeals reversed (1) the entry of summary
8 judgment as to Pickett's breach of covenant of quiet enjoyment claim and concluded this issue
9 presented a question of fact that must be decided by a jury, (2) the grant of the motion in
10 limine excluding Pickett's evidence of damages from 2015 because the evidence was relevant
11 and was not excluded under the duty-to-mitigate damages doctrine, (3) the grant of
12 the motion in limine excluding Pickett's economic loss expert because the district court did
13 not consider the proposed testimony by applying the *Hallmark* factors, and (4) the entry of
14 summary judgment on Pickett's other claims. *Pickett*, 2017 Nev. App. Unpub. LEXIS 525 at
15 *2-10.

16 Upon remand, Pickett moved to reopen discovery at a status conference. *Cynthia*
17 *Pickett, MSW, LCSW, LADC, Inc. v. McCarran Mansion, LLC*, 2019 Nev. App. Unpub.
18 LEXIS 1091, *5, 2019 WL 7410795. The district court expressed concern with
19 Pickett's motion on the ground that the parties might incur additional expenses, and that the
20 case was ripe for settlement. *Id.* Also, the district court did not reconsider Pickett's expert
21 testimony under the *Hallmark* factors or allow Pickett to add evidence of her damages from
22 2015. *Id.* McCarran moved for summary judgment, which the district court granted on all of
23 Pickett's claims. *Id.* Pickett appealed, arguing that the district court abused its discretion by
24 denying her motion to reopen discovery, and the Nevada Court of Appeals agreed, reversed
25 and remanded. *Cynthia Pickett, MSW, LCSW, LADC, Inc. v. McCarran Mansion, LLC*, 2019
26 Nev. App. Unpub. LEXIS 1091, *1-3, 2019 WL 7410795.

27 The Nevada Court of Appeals also determined that even if the *Pickett* issue was
28 analyzed as the denial of motion to reopen discovery, the district court abused its discretion.

1 *Id.* The district court's written order gave no reasons for refusing to reopen discovery. *Id.*
2 "Thus, the district court abused its discretion in refusing to reopen discovery or allow the
3 report to be supplemented." *Id.* Even in cases where a party only makes a weak showing of
4 good cause and, if necessary and appropriate, excusable neglect, district courts have
5 recognized that the public policy consideration of adjudicating cases on the merits warrants
6 the deadlines to be reopened. See *Gould v. Trinity Servs. Grp., Inc.*, No. 2:21-cv-00045-CDS-
7 NJK, 2022 U.S. Dist. LEXIS 80774, at *2-3 (D. Nev. May 3, 2022).

8 Here, good cause exists for this Court to reopen this case for limited discovery to
9 obtain additional and updated relevant evidence relating to the issues of causation and
10 damages to ensure that this case is fully adjudicated on the merits. Several years have passed
11 since the first trial of this action, and Titina Farris has continued to seek care and treatment
12 that she relates to the underlying facts of this case. Therefore, justice requires that Dr. Rives
13 be permitted to conduct limited discovery to obtain this additional relevant causation and
14 damages evidence. Also, it is reasonable to assume that this additional limited discovery
15 could impact the parties' evaluations and assessments of the pertinent issues in this case,
16 which would promote settlement discussions and judicial economy with regard to the parties'
17 respective presentation of evidence at the time of trial. For example, granting Dr. Rives leave
18 to take several additional treating provider depositions could aid the parties in further
19 streamlining the list of witnesses who will need to be called to testify during the upcoming
20 retrial of this matter. Supplemental and updated expert witness disclosures would likely
21 further clarify the issues and evidence presented to the jury through expert witness testimony.
22 Permitting this additional discovery will help Dr. Rives "easily and readily" establish essential
23 elements of his defenses. In summary, justice requires that this Court GRANT Dr. Rives'
24 Motion to Reopen Discovery and Issue an accompanying Pretrial Scheduling Order, as
25 follows:

26 Dr. Rives requests that this Court reopen discovery to complete the following tasks
27 before the retrial of this action starts on September 6, 2022:
28

1 7. Plaintiffs to disclose the identities of Titina Patrick Farris' treating providers
2 since the last trial and execute HIPAA releases for Dr. Farris to obtain updated records;

3 8. Depositions of up to 5 additional treating providers;

4 9. Dr. Rives to take the Deposition of Dr. Greg Ripplinger;

5 10. Titina Farris to appear for an Independent Medical Examination;

6 11. Dr. Rives to take NRCP 30(b)(6) deposition of PMK re: MGM health
7 insurance or disclosure of confirmation of health insurance as non-ERISA plan;

8 12. Permit Supplemental Expert witness disclosures, including new potential
9 experts;

10 Because of the very short duration of time before retrial commences (just 68 days
11 from the date of this Motion), Dr. Rives also requests that the Order enter the following
12 pretrial scheduling order:

13 • Plaintiffs to provide Dr. Rives with additional treating provider information
14 and HIPAA releases by Friday, July 8, 2022;

15 • Last day for IME to be completed is Monday, August 1, 2022, and Last Day
16 for IME Report to be disclosed is Friday, August 5, 2022.

17 • All Non-Expert Discovery is to be completed by Friday, August 5, 2022, with
18 exception of supplementing pretrial disclosures;

19 • Deadline for Initial Expert Witness Disclosures, including disclosure of new
20 experts, is Monday, August 8, 2022;

21 • Deadline for Rebuttal Expert Witness Disclosures is Friday, August 12, 2022;

22 • Close of Discovery is Monday, August 15, 2022,

23 • MILs and Dispositive Motions deadline = Wednesday, August 17, 2022, the
24 following briefing schedule:

25 ▪ Oppositions deadline is Friday, August 19, 2022;

26 ▪ Replies deadline = Monday, August 22, 2022;

27 • The hearing on all pretrial motions set for Thursday, August 25, 2022, or
28 Friday, August 26, 2022.

- 1 • The Deadline to submit the Pre-Trial memorandum Friday, August 26, 2022.
- 2 • All exhibits and original depo transcripts must be submitted to Court by time
- 3 of Calendar Call on Tuesday, August 30, 2022.

4 **CONCLUSION**

5 For the reasons stated herein, Defendants respectfully request that the Court grant this

6 motion in its entirety.

7 DATED: June 30, 2022

8 **COLLINSON, DAEHNKE, INLOW & GRECO**

9

10 BY: /s/ Brigitte E. Foley

11 PATRICIA EGAN DAEHNKE

12 Nevada Bar No. 4976

13 Patricia.Daehnke@cdiglaw.com

14 BRIGETTE E. FOLEY

15 Bar No. 12965

16 Brigitte.Foley@cdiglaw.com

17 2110 E. Flamingo Road, Suite 212

18 Las Vegas, Nevada 89119

19 Attorneys for Defendants

20

21

22

23

24

25

26

27

28

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June 2022, a true and correct copy of
MOTION TO REOPEN LIMITED DISCOVERY AND TO SET PRETRIAL
SCHEDULING ORDER ON AN ORDER SHORTENING TIME was served by
 electronically filing with the Clerk of the Court using the Odyssey File & Serve system and
 serving all parties with an email address on record, who have agreed to receive Electronic
 Service in this action.

Kimball J. Jones (SBN 12982)
 Jacob G. Leavitt (SBN 12608)
BIGHORN LAW
 3675 West Cheyenne, Ste. 100
 North Las Vegas, NV 89032
 Phone: (702) 333-1111
kimball@bighornlaw.com
jacob@bighornlaw.com

George F. Hand (SBN 8483)
HAND & SULLIVAN, LLC
 3442 North Buffalo Drive
 Las Vegas, NV 89129
 Phone: (702) 656-5814
GHand@HandSullivan.com

Micah S. Echols (SBN 8437)
 David P. Snyder (SBN 15333)
CLAGGETT & SYKES LAW FIRM
 4101 Meadows Lane, Ste. 100
 Las Vegas, NV 89107
 Phone: (702) 655-2346
micah@claggettlaw.com
david@claggettlaw.com

By /s/ Deborah Rocha

An employee of COLLINSON, DAEHNKE,
 INLOW & GRECO

EXHIBIT “A”

**SCHUERING ZIMMERMAN
& DOYLE, LLP**

Attorneys at Law

400 University Avenue
Sacramento, CA 95825-6502
(916) 567-0400
FAX: 568-0400
Website: www.szs.com

June 8, 2022

Via Electronic Service & E-mail

George F. Hand, Esq.
HAND & SULLIVAN, LLC
3442 North Buffalo Drive
Las Vegas, NV 89129

Kimball Jones, Esq.
Jacob G. Leavitt, Esq.
BIGHORN LAW
716 S. Jones Boulevard
Las Vegas, NV 89107

Re: Farris v. Rives

Gentlemen:

Before filing a motion to reopen discovery, we would like to meet and confer. I am starting a trial on June 13, 2022 so Bridget Foley or Patricia Daehnke will follow up with you next week. We want to do the following discovery: identify Titina Farris' treating healthcare providers and the healthcare facilities she has visited since trial; obtain authorizations for those records and obtain the records; depose one or two key treating physicians; schedule an independent medical examination; schedule a 30(b)(6) deposition of someone at MGM to determine if Ms. Farris' health insurance is provided by a self-funded ERISA plan; and again disclose expert witnesses which might include some new ones. Based on my conversation with Kimball Jones on June 7, 2022 we assume you will not agree to any of this, but we still need to meet and confer.

We are going to ask the Honorable Joanna Kishner to revisit some of her rulings during trial unless we can agree on these issues. Can we lodge and use Dr. Michael Hurwitz' original deposition at trial? Can we include as an exhibit at trial the complete hospital records for Ms. Farris' admission to St. Rose Dominican Hospital-San Martin? Can we use the demonstrative exhibits we prepared? Will you agree not to cross-examine Dr. Brian Juell about his own history as a defendant in medical malpractice cases? Can we call our

Leo H. Schuering, Jr.
Robert H. Zimmerman
Thomas J. Doyle*
Lawrence Scott Giardina*
Keith D. Chidlaw
Kat Todd
Chad C. Couchot*
Sarah C. Gosling
Daniela P. Stoutenburg
Ian A. Scharg
Damon T. Appelblat
Thomas M. Gray
Denise Jarman
Carolyn L. Northrop
Justin W. Powers
David J. Van Dam

Of Counsel:
Theodore D. Poppinga

*Also admitted in Nevada

Steven T. Scully (1948-1994)

George F. Hand/Kimball Jones

Re: Farris v. Rives

June 8, 2022

Page 2

causation and damages expert witnesses without any limitations on their testimony? Will you agree not to use the reptile theory? Finally, if Ms. Farris' health insurance is not provided by a self-funded ERISA plan, can we introduce payments for her hospital and medical expenses as an admissible collateral source?

We look forward to our meet and confer discussion.

Very truly yours,

**SCHUERING ZIMMERMAN
& DOYLE, LLP**

/s/ Thomas J. Doyle

Thomas J. Doyle

TJD:rrr

1737-10881\01463792.WPD

cc: Patricia Daehnke, Esq.
Bridget Foley, Esq.
Robert Eisenberg, Esq.

EXHIBIT “B”

From: [Brigette Foley](#)
To: kimball@bighornlaw.com
Cc: [Patricia Daehnke](#); [Thomas J. Doyle](#); [Riesa R. Rice](#); [Deborah Rocha](#)
Subject: Farris v. Rives/ Case No. A-16-739464-C - Final attempt to reach you for meet and confer
Date: Thursday, June 30, 2022 2:37:00 PM
Attachments: [image001.png](#)

Good Afternoon Kimball –

I have made several attempts to contact your office via phone over the last couple of weeks to discuss limited reopening of discovery in the above-referenced matter to complete the following tasks:

1. Plaintiffs to disclose the identities of Titina Patrick Farris' treating providers since the last trial and execute HIPAA releases for Dr. Farris to obtain updated records;
2. Depositions of up to 5 additional treating providers;
3. Dr. Rives to take the Deposition of Dr. Greg Ripplinger;
4. Titina Farris to appear for an Independent Medical Examination;
5. Dr. Rives to take NRCP 30(b)(6) deposition of PMK re: MGM health insurance or disclosure of confirmation of health insurance as non-ERISA plan;
6. Permit Supplemental Expert witness disclosures, including new potential experts;

Unfortunately, I have been unable to reach an attorney with your office to discuss the same, so we are now preparing a Motion to file with the Court to reopen discovery to complete these tasks. However, we would still like to meet and confer with you before this matter proceeds to hearing, so please contact me at your earliest convenience.

Thanks,

Brigette



Brigette E. Foley | Attorney
 Collinson, Daehnke, Inlow & Greco – Attorneys at Law
 2110 E. Flamingo Road, Suite 212, Las Vegas, NV 89119
 Phone: (702) 979-2132 | Facsimile: (702) 979-2133
brigette.foley@cdiglaw.com | www.cdiglaw.com

This electronic message is intended for the use of the individual or entity to which it is addressed, and may contain information that is privileged and confidential. If you are not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this transmission in error, please notify us immediately by reply e-mail or by telephone at (424) 212-7777, and destroy the original transmission and its attachments without reading or saving them to disk. No waiver of privilege or confidentiality should be inferred from any error in transmittal.

1 **CSERV**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5
6 Titina Farris, Plaintiff(s)

CASE NO: A-16-739464-C

7 vs.

DEPT. NO. Department 31

8 Barry Rives, M.D., Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Shortening Time was served via the court's electronic eFile
13 system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 7/7/2022

15 George Hand

ghand@handsullivan.com

16 Erickson Finch

erickson@bighornlaw.com

17 Kimball Jones

kimball@bighornlaw.com

18 Brittany Morris

brittany@bighornlaw.com

19 Anita Sambuco .

Anita@meklaw.net

20 Calendar .

calendar@szs.com

21 Carrie Perrault .

cap@szs.com

22 Chad Couchot .

ccc@szs.com

23 Filing .

Filing@meklaw.net

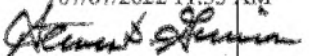
24 George Hand .

ghand@handsullivan.com

25 Karen Hamm .

khamm@handsullivan.com

1	Kim Irene Mandelbaum .	Kim@meklaw.net
2	Tracey Heinhold Keith	tracey.heinhold@gmail.com
3	Riesa Rice .	rrr@szs.com
4	Reception E-File	reception@claggettlaw.com
5	Anna Grigoryan	annag@handsullivan.com
6	Thomas Doyle	tjd@szs.com
7	Samantha Herbeck	sherbeck@handsullivan.com
8	Deborah Rocha	Deborah.Rocha@cdiglaw.com
9	Patricia Daehnke	Patricia.Daehnke@cdiglaw.com
10	Linda Rurangirwa	Linda.Rurangirwa@cdiglaw.com
11	Laura Lucero	Laura.Lucero@cdiglaw.com
12	Amanda Rosenthal	Amanda.Rosenthal@cdiglaw.com
13	Lacey Ambro	lacey.ambro@cdiglaw.com
14	Brigette Foley	brigette.foley@cdiglaw.com
15	Alexandra Trejo	alex@handsullivan.com
16	Appeals Team	appeals@claggettlaw.com
17	Robert Eisenberg	Rle@lge.net
18	Margie Nevin	margien@lge.net
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		


CLERK OF THE COURT

ARJT

DISTRICT COURT
CLARK COUNTY, NEVADA

TITINA FARRIS, ET AL.;

CASE NO. A-16-739464-C

Plaintiff(s),

DEPT NO. XXXI

v.

BARRY RIVES, M.D., ET AL.;

TRIAL STACK: SEPTEMBER 6, 2022

Defendant(s).

**AMENDED ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL/TRIAL SETTING
CONFERENCE, and CALENDAR CALL/FINAL PRE-TRIAL CONFERENCE****IT IS HEREBY ORDERED THAT:**

A. Trial - This matter is set for a **JURY TRIAL** on a **FIRM SETTING**
#1 to begin on **SEPTEMBER 6, 2022**, at **11:00 a.m.**, in Department XXXI,
Courtroom 16B.

B. Pre-Trial/Trial Setting Conference - A Pre-Trial/Trial Setting
Conference will be held on **AUGUST 4, 2022**, beginning at **10:15 a.m.** **The**
designated trial attorney(s) and/or parties in proper person, must be
present, in person, for the Pre-Trial/Trial Setting Conference (subject to any
Administrative Order(s) that provide otherwise) and must be prepared to
state when they are available within the stack to commence trial.

C. Calendar Call/Final Pre-Trial Conference - A Calendar Call/Final
Pre-Trial Conference will be held on **AUGUST 30, 2022**, beginning at **9:00 a.m.**

In accordance with EDCR 2.69, unless otherwise ordered by the Court,

trial counsel and/or parties in proper person must appear - in person - and bring to Calendar Call/Final Pre-Trial Conference the following:

- (1) Typed exhibit lists; with all stipulated exhibits marked;
- (2) All exhibits marked by counsel for identification purposes;¹
- (3) Jury instructions in two groups, unopposed and opposed;
- (4) Proposed forms of Verdict
- (5) Proposed voir dire questions;
- (6) List of depositions and the depositions that each party intends to use;
- (7) List of equipment needed for trial, including audiovisual equipment;² and,
- (8) Courtesy copies of any legal briefs on trial issues.

For the parties' convenience, the Court has summarized provisions of various rules and requirements in its Handout/Procedure Guidelines for Civil Jury Trials and Civil Bench Trials. All counsel and pro se litigants must comply with the provisions of the applicable Handout/Procedure Guidelines for each Jury or Bench trial. The Handout/Procedure Guidelines gives detailed instructions on several topics including: Depositions, Audio Visual Witness Appearances, Jury Notebook, Proposed Voir Dire, Jury Instructions, Verdict Forms, Exhibits, Jury Questionnaires, as well as procedures involving the Court Recorder and Audio Visual Equipment. Copies of the Handout/Procedure Guidelines are located in the Courtroom and can be found on the District Court – Department XXXI – website.

D. Motions in Limine - The Motion in Limine filing date has not been extended. **Omnibus Motions are not accepted. Orders shortening time will not be signed except in extreme emergencies.**

¹ Please ensure to check with the Department regarding the most current electronic exhibit guidelines/protocols.

² If counsel anticipates the need for special electronic equipment during the trial, a request must be submitted to the District Courts Court Help Desk following the Calendar Call. You can reach the Court Help Desk via E-Mail at courthelpdesk@clarkcountycourts.us

1 **E. Discovery Issues** – All discovery deadlines, deadlines for filing
2 dispositive motions, and motions to amend the pleadings or add parties are
3 controlled by the previous Scheduling/Trial Order and have not been extended.

4 **F. Pre-Trial Memorandum** – An Amended Joint/Individual Pre-Trial
5 Memorandum(a) must be filed no later than 4:00 p.m., on **AUGUST 19, 2022**,
6 with a courtesy copy delivered to Department XXXI upon filing. All parties,
7 (attorneys and parties in proper person) **MUST comply** with **All**
8 **REQUIREMENTS** of E.D.C.R. 2.67, 2.68, and 2.69.

9 Counsel must include in the Memorandum(a): an identification of Orders
10 on all Motions in Limine or Motions for Partial Summary Judgment previously
11 made, a summary of any anticipated legal issues remaining, and a brief summary
12 of the opinions to be offered by any witness to be called to offer opinion
13 testimony as well as any objections to the opinion testimony.

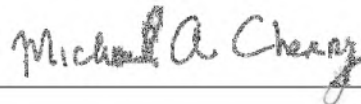
14 **G. Depositions** - In addition to Depositions that are to be lodged with
15 the Court pursuant to EDCR 2.69, if any Party intends to use portions of a
16 Deposition (transcript or video) in lieu of live testimony, the designation
17 (page/line) must be served on all parties two (2) judicial days prior to the
18 Calendar Call. Any objections or counter-designations (page/line) must be
19 served on all parties one (1) judicial day prior to the Calendar Call with courtesy
20 copies being emailed to the JEA at: cordt@clarkcountycourts.us. If this applies
21 to more than one witness and/or designations/objections are extensive, please
22 ensure the Court is notified at the Pre-Trial Conference to schedule time to hear
23 the objections.

24 **Failure of the designated trial counsel, or any party appearing in**
25 **proper person, to appear for any court appearances or to comply with this**
26

1 **Order shall result in any of the following: (1) dismissal of the action; (2)**
2 **default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or**
3 **any other appropriate remedy or sanction.**

4 Counsel is required to advise the Court immediately, in writing, if the case
5 settles or is otherwise resolved prior to trial. A stipulation which terminates a
6 case by dismissal shall indicate any date(s) to be vacated.
7

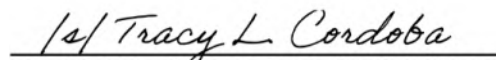
8 Dated this 7th day of July, 2022
9 Dated this 7th day of July, 2022

10 
11

12 **87B 586 6CBA 04CB**
13 **Michael Cherry**
District Court Judge

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on or about the date filed, a copy of this Order was
16 electronically submitted for automated Electronic Service by the Court to all
17 counsel/registered parties, pursuant to the Nevada Electronic Filing Rules,
18 unless otherwise noted below.

19 
20 **TRACY L. CORDOBA-WHEELER**
21 **Judicial Executive Assistant**

1 **CSERV**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5
6 Titina Farris, Plaintiff(s)

CASE NO: A-16-739464-C

7 vs.

DEPT. NO. Department 31

8 Barry Rives, M.D., Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Amended Order Setting Jury Trial was served via the court's electronic
13 eFile system to all recipients registered for e-Service on the above entitled case as listed
below:

14 Service Date: 7/7/2022

15 George Hand

ghand@handsullivan.com

16 Erickson Finch

erickson@bighornlaw.com

17 Kimball Jones

kimball@bighornlaw.com

18 Brittany Morris

brittany@bighornlaw.com

19 Anita Sambuco .

Anita@meklaw.net

20 Calendar .

calendar@szs.com

21 Carrie Perrault .

cap@szs.com

22 Chad Couchot .

ccc@szs.com

23 Filing .

Filing@meklaw.net

24 George Hand .

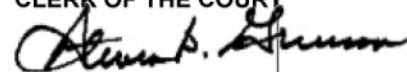
ghand@handsullivan.com

25 Karen Hamm .

khamm@handsullivan.com

1	Kim Irene Mandelbaum .	Kim@meklaw.net
2	Tracey Heinhold Keith	tracey.heinhold@gmail.com
3	Riesa Rice .	rrr@szs.com
4	Reception E-File	reception@claggettlaw.com
5	Anna Grigoryan	annag@handsullivan.com
6	Thomas Doyle	tjd@szs.com
7	Samantha Herbeck	sherbeck@handsullivan.com
8	Deborah Rocha	Deborah.Rocha@cdiglaw.com
9	Patricia Daehnke	Patricia.Daehnke@cdiglaw.com
10	Linda Rurangirwa	Linda.Rurangirwa@cdiglaw.com
11	Laura Lucero	Laura.Lucero@cdiglaw.com
12	Amanda Rosenthal	Amanda.Rosenthal@cdiglaw.com
13	Lacey Ambro	lacey.ambro@cdiglaw.com
14	Brigette Foley	brigette.foley@cdiglaw.com
15	Alexandra Trejo	alex@handsullivan.com
16	Appeals Team	appeals@claggettlaw.com
17	Robert Eisenberg	Rle@lge.net
18	Margie Nevin	margien@lge.net
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

Electronically Filed
7/11/2022 11:36 AM
Steven D. Grierson
CLERK OF THE COURT


OPPM

Kimball Jones, Esq.
Nevada Bar No. 12982
BIGHORN LAW
3675 West Cheyenne Avenue, Ste. 100
North Las Vegas, Nevada 89032
(702) 333-1111 – Telephone
kimball@BighornLaw.com

George F. Hand, Esq.
Nevada Bar No. 8483
HAND & SULLIVAN, LLC
3442 North Buffalo Drive
Las Vegas, Nevada 89129
(702) 656-5814 – Telephone
GHand@HandSullivan.com

Micah S. Echols, Esq.
Nevada Bar No. 8437
David P. Snyder, Esq.
Nevada Bar No. 15333
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Ste. 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
(702) 655-3763 – Facsimile
micah@claggettlaw.com
david@claggettlaw.com

Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS; and PATRICK
FARRIS,

Plaintiffs,

v.

BARRY RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF
NEVADA, LLC,

Defendants.

Case No. A-16-739464-C

Dept. No. 31

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
REOPEN LIMITED DISCOVERY
AND SET PRETRIAL
SCHEDULING ORDER ON
ORDER SHORTENING TIME**

HEARING DATE: July 14, 2022
HEARING TIME: 9:00 a.m.

1
2
3
4 Plaintiffs, TITINA FARRIS and PATRICK FARRIS (collectively
5 "Plaintiffs"), by and through their counsel of record, Bighorn Law; Hand &
6 Sullivan, LLC; and Claggett & Sykes Law Firm, hereby file this Opposition to
7 Defendants' Motion to Reopen Limited Discovery and Set Pretrial Scheduling
8 Order on Order Shortening Time. This opposition is based upon the records and
9 pleadings on file herein, the points and authorities attached hereto, and any oral
10 argument that the Court may allow.

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 INTRODUCTION

13 As the Court is aware, this case has previously been tried to verdict,
14 resulted in a judgment that was appealed to the Nevada Supreme Court where it
15 was reversed and remanded, and is now set for a retrial to begin on September 6,
16 2022. Instead of simply moving toward a retrial on the upcoming date,
17 Defendants ask this Court to allow them to reopen discovery, presumably to
18 bolster their defenses at trial, even though they could have done this discovery
19 prior to the first trial. Some of the discovery they request is on topics that are not
20 at issue in the retrial. Additionally, the related doctrines of law of the case and
21 scope of remand also support the Court's decision to deny Defendants' requested
22 relief. Finally, Plaintiffs would suffer extreme prejudice if discovery were reopen
23 because the completion of several depositions, expert reports, and additional
24 expert depositions would push the current September 6, 2022 trial date. From

1 the prior hearing before this Court, Plaintiffs understand that the Court will be
2 in trial for several months on another case, placing this jury trial into next year
3 sometime. Therefore, Defendants have not satisfied the good cause or excusable
4 neglect standards in EDCR 2.35(a) or NRCP 6(b)(1)(B)(ii), and the Court should
5 deny Defendants' requested relief.

6 RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

7 At the conclusion of the Nevada Supreme Court's opinion in this case
8 (issued on March 31, 2022), the Supreme Court directed this Court to hold a new
9 trial: "Accordingly, we reverse the district court's judgment, vacate the
10 corresponding fees and costs order, and remand for a new trial." *Rives v. Farris*,
11 138 Nev., Adv. Op. 17, at *18, 506 P.3d 1064, 1072 (Nev. 2022). In footnote 8 of
12 this opinion, the Supreme Court explained that it did not reach the remaining
13 arguments raised by Defendants, Barry Rives, M.D. and Laparoscopic Surgery of
14 Nevada, LLC (collectively "Defendants"). *Id.*, 138 Nev., Adv. Op. 17, at *17 n.8,
15 506 P.3d at 1072 n.8. Nevertheless, counsel for Defendants sent counsel for
16 Plaintiffs a letter on June 8, 2022, asking to reopen discovery prior to the retrial
17 and to concede each of the issues Defendants raised in their appeal that were not
18 ruled upon by the Supreme Court. See **Exhibit 1** (letter dated June 8, 2022 from
19 Thomas J. Doyle, Esq.); **Exhibit 2** (excerpt of table of contents from Defendants'
20 Supreme Court opening brief in Case Nos. 80271 and 81052). Page 1 of defense
21 counsel's letter states, "Based on my conversation with Kimball Jones on June 7,
22 2022 we assume you will not agree to any of this, but we still need to meet and
23 confer." **Exhibit 1**, at 1.

1 Plaintiffs are represented by three law firms: Bighorn Law; Hand &
2 Sullivan, LLC; and Claggett & Sykes Law Firm. The first time Bighorn Law
3 heard from Defendants' counsel was by an email on Thursday, June 30, 2022 at
4 2:37 p.m., even though the email states that there were "several attempts to
5 contact your office via phone over the last couple of weeks. . . ." See **Exhibit B**
6 (attached to Defendants' motion). Hand & Sullivan, LLC did not receive any
7 communication from Defendants' counsel. And, Claggett & Sykes received a voice
8 mail on June 30, 2022 at 2:49 p.m. from defense counsel claiming that she was
9 following up on "a few correspondences" that were sent to Plaintiffs' counsel.
10 See **Exhibit 3** (transcription of voice mail Bridget Foley, Esq.). This was the first
11 time that Claggett & Sykes heard from defense counsel. Defendants then
12 submitted their motion to reopen discovery to this Court on June 30, 2022, at 3:48
13 p.m., approximately one hour after Plaintiffs' counsel first heard from Defendants'
14 counsel. See **Exhibit 4** (email to Chambers from Defendants' counsel asking for
15 an order shortening time). The Court later signed the requested order shortening
16 time on July 7, 2022.

17 Defendants' motion to reopen discovery asks this Court to reopen discovery
18 to allow them to complete certain discovery tasks and enter a new pretrial
19 scheduling order.¹ The only two exhibits attached to Defendants' motion are the
20
21

22
23 ¹ To the extent that the Court construes this motion as one that should be heard
24 first by the Discovery Commissioner, the Court should deny the motion on the
basis of EDCR 2.34(a). Yet, even if the Court elects to entertain this motion, there
was not a good faith effort to confer. See EDCR 2.34(d).

1 June 8, 2022, letter from Defendants’ counsel to Plaintiffs’ counsel (*see* **Exhibit**
2 **A**) and the email from Defendants’ counsel to Bighorn Law sent the same day the
3 motion to reopen was submitted to this Court for an order shortening time.
4 *See* **Exhibit B**. Notably, Defendants’ motion asks for relief that is narrower than
5 their June 8, 2022, letter. Thus, some of the contents of the June 8, 2022, letter
6 is not before this Court, including several of Defendants’ asserted issues on
7 appeal that the Supreme Court did not rule upon. *See* **Exhibit 2**.

8 In the June 7, 2022, hearing before this Court, the Court set new jury trial
9 dates of September 6, 2022, through September 27, 2022. *See* **Exhibit 5** (Court
10 minutes dated June 7, 2022). And, on July 7, 2022, this Court issued an
11 “Amended Order Setting Civil Jury Trial, Pre-Trial/Trial Setting Conference, and
12 Calendar Call/Final Pre-Trial Conference” (attached as **Exhibit 6**). Within this
13 July 7, 2022 order, the Court noted that the deadline for motions in limine “has
14 not been extended.” *Id.* at 2. This order also confirms that “[a]ll discovery
15 deadlines . . . have not been extended.” *Id.* at 3.

16 Prior to this July 7, 2022 order, the most recent prior order setting trial
17 was from January 22, 2019. *See* **Exhibit 7**. This January 22, 2019 order noted
18 that the deadline for motions in limine was still open (*id.* at 2), and discovery
19 issues were controlled by the existing scheduling order unless modified by a
20 further stipulation or order of the Court. *Id.* at 2–3. Notably, the Court approved
21 a stipulation filed on June 27, 2019 (attached as **Exhibit 8**) for (1) the depositions
22 of Plaintiffs’ experts; (2) the depositions of Defendants’ experts; and (3) any other
23 necessary depositions. *Id.* at 2. Within this stipulation, the parties (and the
24

1 Court's own interlineations) confirmed that all other discovery deadlines were
2 closed, with the exception of motions in limine. *Id.* at 2–3.

3 Finally, in a status check on September 5, 2019, the Court denied the
4 eighth request to continue the trial date. See **Exhibit 9** (Court minutes dated
5 September 5, 2019). But, the minutes reflect, “Court noted it is not precluding
6 the parties whatsoever from doing their discovery.” *Id.*

7 Upon this procedural posture, Plaintiffs respectfully request that this
8 Court deny Defendants’ motion to reopen discovery.

9 LEGAL ARGUMENT

10 **I. DEFENDANTS HAVE NOT DEMONSTRATED GOOD** 11 **CAUSE OR EXCUSABLE NEGLIGENCE TO REOPEN** 12 **DISCOVERY.**

13 EDCR 2.35(a) requires a “showing of good cause” to “extend any date set
14 by the discovery scheduling order. . . .” This rule further provides that a “request
15 made beyond the period specified above shall not be granted unless the moving
16 party, attorney or other person demonstrates that the failure to act was the result
17 of excusable neglect.” NRCP 6(b) also contains a general rule for extending time
18 and reiterates the excusable neglect standard. See NRCP 6(b)(1)(B)(ii). The
19 Nevada Supreme Court recently elaborated on EDCR 2.35(a), stating “[b]ecause
20 EDCR 2.35(a) is also relevant in the underlying situation, the court must also
21 consider whether the moving party demonstrated that its failure to act was the
22 result of excusable neglect. Excusable neglect is ‘not because of the party’s own
23 carelessness, inattention, or willful disregard of the court’s process, but because
24 of some unexpected or unavoidable hindrance.’ *Torremoro v. Eighth Judicial Dist.*

1 *Court of Nev.*, 138 Nev., Adv. Op. 54, at *7 (Jul. 7, 2022) (citing *Excusable Neglect*,
2 BLACK'S LAW DICTIONARY (11th ed. 2019)).

3 Yet, Defendants' motion to reopen does not identify these standards. In
4 any event, the Nevada Supreme Court has recognized that there is no absolute
5 right to reopen discovery: "We recognize that because there is not an absolute
6 right to reopen discovery in the first instance, denying a request to reopen
7 discovery is arguably not a remedial measure at all." *Francis v. Wynn Las Vegas*,
8 *LLC*, 127 Nev. 657, 666 n.3, 262 P.3d 705, 712 n.3 (2011) (citing *MGM Grand, Inc.*
9 *v. District Court*, 107 Nev. 65, 70, 807 P.2d 201, 204 (1991) (noting that the
10 district court has wide discretion in controlling pretrial discovery)).

11 In their motion, Defendants argue that "[g]ood cause exists" but do not
12 elaborate on the standard beyond asking for the discovery they want. Mot. at 6.
13 But, a mere assertion of counsel falls below the standard without any explanation
14 of how the standard was possibly satisfied. See *Jain v. McFarland*, 109 Nev. 465,
15 475–476, 851 P.2d 450, 457 (1993) ("Arguments of counsel are not evidence and
16 do not establish the facts of the case.") (citations omitted). Defendants rely
17 heavily upon *Cynthia Pickett, MSW, LCSW, LADC, Inc. v. McCarran Mansion*,
18 *LLC*, Dkt. No. 77124-COA, 2019 Nev. App. Unpub. LEXIS 1091, 2019 WL
19 7410795 (Dec. 31, 2019) (unpublished disposition). However, according to NRAP
20 36(c)(3), this unpublished Court of Appeals case cannot be cited: "Except to
21 establish issue or claim preclusion or law of the case as permitted by subsection
22 (2), unpublished dispositions issued by the Court of Appeals may not be cited in
23
24

any Nevada court for any purpose.” Therefore, the Court must ignore Defendants’ citation to *Cynthia Pickett*.²

Defendants also cite to *Andolino v. State*, 99 Nev. 346, 351, 662 P.2d 631, 634 (1983) for the notion that a court should allow a case to be reopened so that a party can prove an essential element of its case. Mot. at 8. However, *Andolino* dealt with reopening a case in chief during trial when a party inadvertently rests but needs to present additional evidence. *Id.* at 352, 662 P.2d at 634. Thus, *Andolino* has no application to this case and cannot justify reopening discovery.

Without any elaboration, Defendants seem to argue that they are entitled to reopen discovery as a matter of right. But, Nevada law holds just the opposite. *See Francis*, 127 Nev. at 666 n.3, 262 P.3d at 712 n.3. Defendants ask the Court for six areas of additional discovery to be completed before trial begins. For the first two areas of requested discovery, Defendants want updated medical records from Titina Farris. Mot. at 6. However, Plaintiffs are not placing any new treatment at issue, as confirmed by their individual declarations. *See Exhibits 10 & 11*. Rather, at trial, Plaintiffs will request compensation for the same past treatment as the first trial. Under these circumstances, Plaintiffs have not placed anything new at issue, meaning that there is no fairness issue in refusing to reopen discovery. *See Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343 (1977) (“The scope of discovery in civil actions is limited to

² In the event that the Court considers the merits of *Cynthia Pickett*, Plaintiffs will address the inapplicability of this case to the instant matter in the next legal argument section.

1 matter, not privileged, ‘which is relevant to the subject matter involved in the
2 pending action,’”) (citing NRCP 26(b)(1)).

3 For their third request, Defendants want to take the deposition of Dr. Greg
4 Ripplinger. But, Defendants could have done this at anytime when discovery was
5 opened. Thus, there is no legal or factual reason for the Court to allow this
6 deposition. The same is also true for Defendants’ fourth request for Titina Farris
7 to appear for an NRCP 35 examination. Such an examination could have been
8 done when discovery was opened. Defendants’ sixth request for potentially
9 multiple unknown supplemental expert reports also falls into this category of
10 failing to demonstrate good cause or excusable neglect. *See Torremoro*, 138 Nev.,
11 Adv. Op. 54, at *7 (“Excusable neglect is ‘not because of the party’s own
12 carelessness, inattention, or willful disregard of the court’s process, but because
13 of some unexpected or unavoidable hindrance.”) (citing *Excusable Neglect*,
14 BLACK’S LAW DICTIONARY (11th ed. 2019).

15 For Defendants’ fifth request, they ask the Court for a deposition to
16 disprove that Titina is covered by an ERISA plan. This request appears to be
17 crafted to disprove the Court’s prior rulings based upon an exception to NRS
18 42.021(2) outlined by the Nevada Supreme Court in *McCrosky v. Carson Tahoe*
19 *Reg’l Med. Ctr.*, 133 Nev. 930, 937, 408 P.3d 149, 155 (2017) (“[B]ecause severing
20 NRS 42.021(2) from the statute would result in the ‘unintended consequence[]’
21 of doubly reducing plaintiffs’ recoveries, we must strike the statute in its entirety
22 as applied to federal collateral source payments.”) (citation omitted). But, the
23
24

1 MGM Plan states that it is an ERISA plan. See **Exhibit 12**, at 1. So, Defendants'
2 fifth request is not well founded.

3 In essence, Defendants have not satisfied the good cause or excusable
4 neglect standards, and the Court should deny their request to reopen discovery.

5 **II. THE LAW OF THE CASE DOCTRINE AND/OR THE**
6 **SCOPE OF REMAND DO NOT ALLOW THE COURT TO**
7 **REOPEN DISCOVERY.**

8 “The law-of-the-case doctrine ‘refers to a family of rules embodying the
9 general concept that a court involved in later phases of a lawsuit should not re-
10 open questions decided (i.e., established as law of the case) by that court or a
11 higher one in earlier phases.’” *Recontrust Co., N.A. v. Zhang*, 130 Nev. 1, 7–8,
12 317 P.3d 814, 818 (2014) (citing *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735,
13 739 (D.C. Cir. 1995)).

14 In *Diversified Capital Corp. v. North Las Vegas*, 95 Nev. 15, 23, 590 P.2d
15 146, 151 (1979), the Nevada Supreme Court upheld a district court’s denial of a
16 motion to conduct additional discovery when the litigant had the opportunity to
17 conduct such discovery at earlier stages of the case but decided not to. The
18 procedural posture of *Diversified Capital* was a remand proceeding following an
19 appeal from the Nevada Supreme Court. But, the Court did not allow the litigant
20 to request vague discovery that was accessible to it at earlier stages of the case.
21 *Id.* at 23, 590 P.2d at 151.

22 As Plaintiffs argued, the Court should reject any reliance upon *Cynthia*
23 *Pickett* because it cannot be cited in this Court according to NRAP 36(c)(3).
24 However, if the Court were to consider the merits of this case, it is distinguishable
from the instant case because the district court never analyzed the good cause or

1 excusable neglect standards. *Id.*, 2019 Nev. App. Unpub. LEXIS 1091, at *5.
2 Instead, the district court only stated that the parties might incur additional
3 expenses. *Id.* But, the written order gave no reasons for the denial. *Id.*
4 Importantly, the prior Court of Appeals decision instructed the district court on
5 remand to consider the admissibility of several items of evidence, including
6 certain expert testimony and new evidence of damages. *Id.* Thus, the district
7 court in *Cynthia Pickett* actually violated the law of the case and scope of remand
8 doctrines. *Id.* Therefore, even if the Court were to consider the merits of *Cynthia*
9 *Pickett*, it is inapposite to the facts and procedural posture of this case.

10
11 **III. A REOPENING OF DISCOVERY WOULD CAUSE
EXTREME PREJUDICE TO PLAINTIFFS.**

12 Plaintiffs would suffer extreme prejudice if discovery were reopen because
13 the completion of several depositions, expert reports, and additional expert
14 depositions would push the current September 6, 2022 trial date. From the prior
15 hearing before this Court, Plaintiffs understand that the Court will be in trial for
16 several months on another case, placing this jury trial into next year sometime.
17 As a matter of law, when parties fail to abide by discovery orders, prejudice from
18 unreasonable delay is presumed. *Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d
19 1042, 1049 (2010) (citing *Phenylpropanolamine (PPA) Products*, 460 F.3d 1217,
20 1236 (9th Cir. 2006)). Therefore, the Court should deny Defendants' motion for
21 this additional reason.
22
23
24

CONCLUSION

In summary, Defendants have not satisfied the good cause or excusable neglect standards in EDCR 2.35(a) or NRCP 6(b)(1)(B)(ii). Additionally, the related doctrines of law of the case and scope of remand also support the Court's decision to deny Defendants' requested relief. Finally, Plaintiffs would suffer extreme prejudice by reopening discovery because it is impractical to complete all the discovery Defendants request prior to the September 6, 2022 trial date. Therefore, Plaintiffs respectfully request that the Court deny Defendants' motion to reopen discovery.

Dated this 11th day of July 2022.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

Micah S. Echols, Esq.
Nevada Bar No. 8437
David P. Snyder, Esq.
Nevada Bar No. 15333

BIGHORN LAW
Kimball Jones, Esq.
Nevada Bar No. 12982

HAND & SULLIVAN, LLC
George F. Hand, Esq.
Nevada Bar No. 8483

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically submitted the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO REOPEN LIMITED DISCOVERY AND SET PRETRIAL SCHEDULING ORDER ON ORDER SHORTENING TIME** for filing and/or service with the Eighth Judicial District Court on the 11th day of July 2022. I made electronic service of the foregoing document in accordance with the E-Service List as follows:

Erickson Finch	erickson@bighornlaw.com
Anna Grigoryan	annag@handsullivan.com
George Hand	ghand@handsullivan.com
Samantha A. Herbeck	sherbeck@handsullivan.com
Kimball Jones	kimball@bighornlaw.com
Brittany Morris	brittany@bighornlaw.com
Alexandra Trejo	alext@handsullivan.com
Lacey Ambro	lacey.ambro@cdiglaw.com
Patricia Egan Daehnke	Patricia.Daehnke@cdiglaw.com
Robert L. Eisenberg	Rle@lge.net
Brigitte E Foley	brigitte.foley@cdiglaw.com
Laura S Lucero	Laura.Lucero@cdiglaw.com
Deborah R Rocha	Deborah.Rocha@cdiglaw.com
Amanda E Rosenthal	Amanda.Rosenthal@cdiglaw.com
Linda R Rurangirwa	Linda.Rurangirwa@cdiglaw.com
Anita Sambuco	Anita@meklaw.net
Calendar	calendar@szs.com
Carrie Perrault	cap@szs.com
Chad Couchot	ccc@szs.com
Filing	Filing@meklaw.net
George Hand	ghand@handsullivan.com
Karen Hamm	khamm@handsullivan.com
Kim Irene Mandelbaum	Kim@meklaw.net
Riesa Rice	rrr@szs.com
Thomas J. Doyle	tjd@szs.com
Tracey L. Heinhold Keith	tracey.heinhold@gmail.com
Margie Nevin	margien@lge.net

/s/ Anna Gresl

Anna Gresl, an employee of
Claggett & Sykes Law Firm

EXHIBIT 1

EXHIBIT 1

**SCHUERING ZIMMERMAN
& DOYLE, LLP**

Attorneys at Law

400 University Avenue
Sacramento, CA 95825-6502
(916) 567-0400
FAX: 568-0400
Website: www.szs.com

June 8, 2022

Via Electronic Service & E-mail

George F. Hand, Esq.
HAND & SULLIVAN, LLC
3442 North Buffalo Drive
Las Vegas, NV 89129

Kimball Jones, Esq.
Jacob G. Leavitt, Esq.
BIGHORN LAW
716 S. Jones Boulevard
Las Vegas, NV 89107

Re: Farris v. Rives

Gentlemen:

Before filing a motion to reopen discovery, we would like to meet and confer. I am starting a trial on June 13, 2022 so Bridget Foley or Patricia Daehnke will follow up with you next week. We want to do the following discovery: identify Titina Farris' treating healthcare providers and the healthcare facilities she has visited since trial; obtain authorizations for those records and obtain the records; depose one or two key treating physicians; schedule an independent medical examination; schedule a 30(b)(6) deposition of someone at MGM to determine if Ms. Farris' health insurance is provided by a self-funded ERISA plan; and again disclose expert witnesses which might include some new ones. Based on my conversation with Kimball Jones on June 7, 2022 we assume you will not agree to any of this, but we still need to meet and confer.

We are going to ask the Honorable Joanna Kishner to revisit some of her rulings during trial unless we can agree on these issues. Can we lodge and use Dr. Michael Hurwitz' original deposition at trial? Can we include as an exhibit at trial the complete hospital records for Ms. Farris' admission to St. Rose Dominican Hospital-San Martin? Can we use the demonstrative exhibits we prepared? Will you agree not to cross-examine Dr. Brian Juell about his own history as a defendant in medical malpractice cases? Can we call our

Leo H. Schuering, Jr.
Robert H. Zimmerman
Thomas J. Doyle*
Lawrence Scott Giardina*
Keith D. Chidlaw
Kat Todd
Chad C. Couchot*
Sarah C. Gosling
Daniela P. Stoutenburg
Ian A. Scharg
Damon T. Appelblatt
Thomas M. Gray
Denise Jarman
Carolyn L. Northrop
Justin W. Powers
David J. Van Dam

Of Counsel:
Theodore D. Poppinga

*Also admitted in Nevada

Steven T. Scully (1948-1994)

George F. Hand/Kimball Jones

Re: Farris v. Rives

June 8, 2022

Page 2

causation and damages expert witnesses without any limitations on their testimony? Will you agree not to use the reptile theory? Finally, if Ms. Farris' health insurance is not provided by a self-funded ERISA plan, can we introduce payments for her hospital and medical expenses as an admissible collateral source?

We look forward to our meet and confer discussion.

Very truly yours,

**SCHUERING ZIMMERMAN
& DOYLE, LLP**

/s/ Thomas J. Doyle

Thomas J. Doyle

TJD:rrr

1737-10881\01463792.WPD

cc: Patricia Daehnke, Esq.
Bridget Foley, Esq.
Robert Eisenberg, Esq.

EXHIBIT 2

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF NEVADA,
LLC,

Appellants/Cross-Respondents,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents/Cross-Appellants.

Case No. 80271

Electronically Filed
Oct 13 2020 10:29 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

BARRY JAMES RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF NEVADA,
LLC,

Appellants,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents.

Case No. 81052

APPEAL FROM JUDGMENT

EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JOANNA S. KISHNER, DISTRICT JUDGE

APPELLANTS' OPENING BRIEF

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
775-786-9716 fax
rle@lge.net

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
I. Substantive appealability	1
II. Timeliness.....	1
ROUTING STATEMENT.....	1
STATEMENT OF ISSUES	1
1. Whether the district court erred by allowing Plaintiffs to use the reptile theory	1
2. Whether the district court erred by allowing evidence of the Vickie Center case	1
3. Whether the district court erred by giving an adverse inference instruction ..	1
4. Whether the district court erred regarding ERISA preemption	1
5. Whether the district court erred by limiting and excluding defense experts ..	2
6. Whether the district court erred by granting JMOL.....	2
7. Whether the district court erred regarding hospital records.....	2
8. Whether the district court erred regarding the Hurwitz deposition.....	2
9. Whether the district erred regarding cross-examination of Dr. Juell	2
10. Whether the district court erred by awarding attorneys' fees	2
STATEMENT OF CASE	2
STATEMENT OF FACTS	2
ARGUMENTS.....	4
SUMMARY OF ARGUMENTS.....	4
CUMULATIVE ERROR.....	5

EXHIBIT 3

EXHIBIT 3

From: [CDIG LAW](#)
To: [Micah Echols](#)
Subject: Voice Mail (44 seconds)
Date: Thursday, June 30, 2022 2:49:45 PM
Attachments: [audio.mp3](#)

Hi, Mr eckles. My name is Bridget Foley. I'm one of the attorneys representing the defendants in the Ferris B Doctor Rivas case. I am calling you to follow up on a few correspondences we've sent to all Plaintiffs Council asking for a time to meet and for about reopening discovery on a limited basis. I'm actually getting ready to file a motion because we haven't heard back. But if you could give me a call back at your earliest convenience, I'd appreciate it. You can reach me on my cell 7025539738 again, 7025539738. And again, this is Bridget Foley. Thank you.

You received a voice mail from [CDIG LAW](#).

Thank you for using Transcription! If you don't see a transcript above, it's because the audio quality was not clear enough to transcribe.

[Set Up Voice Mail](#)

EXHIBIT 4

EXHIBIT 4

From: [Deborah Rocha](#)
To: dc31inbox@clarkcountycourts.us
Cc: [Patricia Daehnke](#); [Brigette Foley](#); [Thomas J. Doyle](#); [Riesa R. Rice](#); rle@lge.net; [Kimball Jones](#); jacob@bighornlaw.com; micah@clagettlaw.com; [ghand](#); [Micah Echols](#); [David Snyder](#)
Subject: A-16-739464-C; Farris v Rives - MOTION TO REOPEN LIMITED DISCOVERY AND TO SET PRETRIAL SCHEDULING ORDER ON AN ORDER SHORTENING TIME
Date: Thursday, June 30, 2022 3:47:42 PM
Attachments: [image001.png](#)
[Farris - Mot. to Reopen Discovery.doc](#)
[Farris - Mot. to Reopen Discovery.pdf](#)

Attached are the Word and pdf versions of Defendants' Motion to Reopen Limited Discovery and to Set Pretrial Scheduling Order on an Order Shortening Time.



Deborah Rocha | Executive Legal Assistant | Senior Paralegal
 Collinson, Daehnke, Inlow & Greco – Attorneys at Law
 2110 E. Flamingo Road, Suite 212, Las Vegas, NV 89119
 Phone: (702) 979-2132 | Facsimile: (702) 979-2133
Deborah.rocha@cdiglaw.com | www.cdiglaw.com

This electronic message is intended for the use of the individual or entity to which it is addressed, and may contain information that is privileged and confidential. If you are not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this transmission in error, please notify us immediately by reply e-mail or by telephone at (424) 212-7777, and destroy the original transmission and its attachments without reading or saving them to disk. No waiver of privilege or confidentiality should be inferred from any error in transmittal.

EXHIBIT 5

EXHIBIT 5

REGISTER OF ACTIONS**CASE NO. A-16-739464-C****Titina Farris, Plaintiff(s) vs. Barry Rives, M.D., Defendant(s)**

Case Type: **Malpractice - Medical/Dental**
 Date Filed: **07/01/2016**
 Location: **Department 31**
 Cross-Reference Case Number: **A739464**
 Supreme Court No.: **80271**
81052

PARTY INFORMATION

Defendant	Laparoscopic Surgery of Nevada LLC	Lead Attorneys Robert L. Eisenberg <i>Retained</i> 775-786-6868(W)
Defendant	Rives, Barry, M.D.	Robert L. Eisenberg <i>Retained</i> 775-786-6868(W)
Plaintiff	Farris, Patrick	Micah S. Echols <i>Retained</i> 702-655-2346(W)
Plaintiff	Farris, Titina	Micah S. Echols <i>Retained</i> 702-655-2346(W)

EVENTS & ORDERS OF THE COURT

06/07/2022 **Hearing** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Pursuant to Notice of Hearing to Set New Trial Date

Minutes

06/07/2022 9:00 AM

- Upon Court's inquiry, Counsel confirmed the issues regarding costs were resolved. Colloquy regarding trial scheduling and exhibits. Mr. Doyle stated he had firm trials set in California and also scheduled a prepaid vacation for the middle of October through the middle of November. Ms. Daehnke stated she had another case set in Department 11 in September, however, someone else could likely cover that trial in lieu of her. Counsel estimated approximately three (3) weeks for trial. COURT ORDERED, matter SET for trial. Court NOTED discovery and motion matters raised by Defendant's Counsel were not before the Court and needed to be filed accordingly. 8/04/22 10:15 A.M. PRETRIAL CONFERENCE 8/30/22 10:00 A.M. CALENDAR CALL 9/06/22 1:00 P.M. JURY TRIAL 9/06/22 - 9/27/22 (Dark on 9/26/22)

[Parties Present](#)[Return to Register of Actions](#)

EXHIBIT 6

EXHIBIT 6

Joanna S. Kishner
CLERK OF THE COURT

ARJT

DISTRICT COURT
CLARK COUNTY, NEVADA

TITINA FARRIS, ET AL.;

CASE NO. A-16-739464-C

Plaintiff(s),

DEPT NO. XXXI

v.

BARRY RIVES, M.D., ET AL.;

TRIAL STACK: SEPTEMBER 6, 2022

Defendant(s).

**AMENDED ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL/TRIAL SETTING
CONFERENCE, and CALENDAR CALL/FINAL PRE-TRIAL CONFERENCE**

IT IS HEREBY ORDERED THAT:

A. Trial - This matter is set for a **JURY TRIAL** on a **FIRM SETTING**
#1 to begin on **SEPTEMBER 6, 2022**, at **11:00 a.m.**, in Department XXXI,
Courtroom 16B.

B. Pre-Trial/Trial Setting Conference - A Pre-Trial/Trial Setting
Conference will be held on **AUGUST 4, 2022**, beginning at **10:15 a.m.** **The**
designated trial attorney(s) and/or parties in proper person, must be
present, in person, for the Pre-Trial/Trial Setting Conference (subject to any
Administrative Order(s) that provide otherwise) and must be prepared to
state when they are available within the stack to commence trial.

C. Calendar Call/Final Pre-Trial Conference - A Calendar Call/Final
Pre-Trial Conference will be held on **AUGUST 30, 2022**, beginning at **9:00 a.m.**

In accordance with EDCR 2.69, **unless otherwise ordered by the Court,**

trial counsel and/or parties in proper person must appear - in person - and bring to Calendar Call/Final Pre-Trial Conference the following:

- (1) Typed exhibit lists; with all stipulated exhibits marked;
- (2) All exhibits marked by counsel for identification purposes;¹
- (3) Jury instructions in two groups, unopposed and opposed;
- (4) Proposed forms of Verdict
- (5) Proposed voir dire questions;
- (6) List of depositions and the depositions that each party intends to use;
- (7) List of equipment needed for trial, including audiovisual equipment;² and,
- (8) Courtesy copies of any legal briefs on trial issues.

For the parties' convenience, the Court has summarized provisions of various rules and requirements in its Handout/Procedure Guidelines for Civil Jury Trials and Civil Bench Trials. All counsel and pro se litigants must comply with the provisions of the applicable Handout/Procedure Guidelines for each Jury or Bench trial. The Handout/Procedure Guidelines gives detailed instructions on several topics including: Depositions, Audio Visual Witness Appearances, Jury Notebook, Proposed Voir Dire, Jury Instructions, Verdict Forms, Exhibits, Jury Questionnaires, as well as procedures involving the Court Recorder and Audio Visual Equipment. Copies of the Handout/Procedure Guidelines are located in the Courtroom and can be found on the District Court – Department XXXI – website.

D. Motions in Limine - The Motion in Limine filing date has not been extended. **Omnibus Motions are not accepted. Orders shortening time will not be signed except in extreme emergencies.**

¹ Please ensure to check with the Department regarding the most current electronic exhibit guidelines/protocols.

² If counsel anticipates the need for special electronic equipment during the trial, a request must be submitted to the District Courts Court Help Desk following the Calendar Call. You can reach the Court Help Desk via E-Mail at courthelpdesk@clarkcountycourts.us

1 **E. Discovery Issues** – All discovery deadlines, deadlines for filing
2 dispositive motions, and motions to amend the pleadings or add parties are
3 controlled by the previous Scheduling/Trial Order and have not been extended.

4 **F. Pre-Trial Memorandum** – An Amended Joint/Individual Pre-Trial
5 Memorandum(a) must be filed no later than 4:00 p.m., on **AUGUST 19, 2022**,
6 with a courtesy copy delivered to Department XXXI upon filing. All parties,
7 (attorneys and parties in proper person) **MUST comply** with **All**
8 **REQUIREMENTS** of E.D.C.R. 2.67, 2.68, and 2.69.

9 Counsel must include in the Memorandum(a): an identification of Orders
10 on all Motions in Limine or Motions for Partial Summary Judgment previously
11 made, a summary of any anticipated legal issues remaining, and a brief summary
12 of the opinions to be offered by any witness to be called to offer opinion
13 testimony as well as any objections to the opinion testimony.

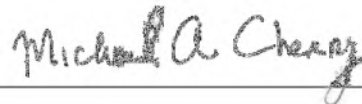
14 **G. Depositions** - In addition to Depositions that are to be lodged with
15 the Court pursuant to EDCR 2.69, if any Party intends to use portions of a
16 Deposition (transcript or video) in lieu of live testimony, the designation
17 (page/line) must be served on all parties two (2) judicial days prior to the
18 Calendar Call. Any objections or counter-designations (page/line) must be
19 served on all parties one (1) judicial day prior to the Calendar Call with courtesy
20 copies being emailed to the JEA at: cordt@clarkcountycourts.us. If this applies
21 to more than one witness and/or designations/objections are extensive, please
22 ensure the Court is notified at the Pre-Trial Conference to schedule time to hear
23 the objections.

24 **Failure of the designated trial counsel, or any party appearing in**
25 **proper person, to appear for any court appearances or to comply with this**
26

1 **Order shall result in any of the following: (1) dismissal of the action; (2)**
2 **default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or**
3 **any other appropriate remedy or sanction.**

4 Counsel is required to advise the Court immediately, in writing, if the case
5 settles or is otherwise resolved prior to trial. A stipulation which terminates a
6 case by dismissal shall indicate any date(s) to be vacated.
7

8 Dated this 7th day of July, 2022
9 Dated this 7th day of July, 2022

10 
11

12 **87B 586 6CBA 04CB**
13 **Michael Cherry**
District Court Judge

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on or about the date filed, a copy of this Order was
16 electronically submitted for automated Electronic Service by the Court to all
17 counsel/registered parties, pursuant to the Nevada Electronic Filing Rules,
18 unless otherwise noted below.

19 
20 **TRACY L. CORDOBA-WHEELER**
21 **Judicial Executive Assistant**
22
23
24
25
26
27
28

1 **CSERV**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5
6 Titina Farris, Plaintiff(s)

CASE NO: A-16-739464-C

7 vs.

DEPT. NO. Department 31

8 Barry Rives, M.D., Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Amended Order Setting Jury Trial was served via the court's electronic
13 eFile system to all recipients registered for e-Service on the above entitled case as listed
below:

14 Service Date: 7/7/2022

15 George Hand

ghand@handsullivan.com

16 Erickson Finch

erickson@bighornlaw.com

17 Kimball Jones

kimball@bighornlaw.com

18 Brittany Morris

brittany@bighornlaw.com

19 Anita Sambuco .

Anita@meklaw.net

20 Calendar .

calendar@szs.com

21 Carrie Perrault .

cap@szs.com

22 Chad Couchot .

ccc@szs.com

23 Filing .

Filing@meklaw.net

24 George Hand .

ghand@handsullivan.com

25 Karen Hamm .

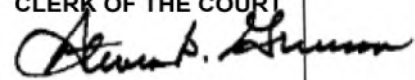
khamm@handsullivan.com

1	Kim Irene Mandelbaum .	Kim@meklaw.net
2	Tracey Heinhold Keith	tracey.heinhold@gmail.com
3	Riesa Rice .	rrr@szs.com
4	Reception E-File	reception@claggettlaw.com
5	Anna Grigoryan	annag@handsullivan.com
6	Thomas Doyle	tjd@szs.com
7	Samantha Herbeck	sherbeck@handsullivan.com
8	Deborah Rocha	Deborah.Rocha@cdiglaw.com
9	Patricia Daehnke	Patricia.Daehnke@cdiglaw.com
10	Linda Rurangirwa	Linda.Rurangirwa@cdiglaw.com
11	Laura Lucero	Laura.Lucero@cdiglaw.com
12	Amanda Rosenthal	Amanda.Rosenthal@cdiglaw.com
13	Lacey Ambro	lacey.ambro@cdiglaw.com
14	Brigette Foley	brigette.foley@cdiglaw.com
15	Alexandra Trejo	alext@handsullivan.com
16	Appeals Team	appeals@claggettlaw.com
17	Robert Eisenberg	Rle@lge.net
18	Margie Nevin	margien@lge.net
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

EXHIBIT 7

EXHIBIT 7

Electronically Filed
1/22/2019 8:29 PM
Steven D. Grierson
CLERK OF THE COURT



DISTRICT COURT
CLARK COUNTY, NEVADA

TITINA FARRIS, ET AL.,

Case No.: A-16-739464-C

PLAINTIFF(S),

Dept. No.: XXXI

VS.

BARRY RIVES, M.D.; ET AL.,

DEFENDANT(S).

**AMENDED ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL
CONFERENCE, CALENDAR CALL, AND STATUS CHECK**

IT IS HEREBY ORDERED that:

A. **Trial** - This matter is set for a **JURY TRIAL** on a **FIRM TRIAL SETTING #1** to begin on **OCTOBER 14, 2019**, at **9:00 a.m.**, in Department XXXI, Courtroom 12B.

B. **Pre-Trial Conference** - A Pre-Trial Conference will be held on **SEPTEMBER 12, 2019**, beginning at **10:15 a.m.** **The designated trial attorney(s), and/or parties in proper person, must be present, in person, for the Pre-Trial Conference.**

C. **Calendar Call** - A Calendar Call will be held on **OCTOBER 8, 2019**, beginning at **9:00 a.m.** **Unless otherwise directed by the Court, the parties must bring to Calendar Call the following:**

- (1) Typed exhibit lists; with all stipulated exhibits marked;
- (2) All exhibits marked by counsel for identification purposes;
- (3) Jury instructions in two groups, unopposed and opposed;

- (4) Proposed voir dire questions;
- (5) List of dispositions;
- (6) List of equipment needed for trial, including individual equipment;
- and
- (7) Courtesy copies of any legal briefs on trial issues.

D. Status Check - Parties are to appear on JULY 19, 2018, beginning at 9:00 a.m., for a Status Check on the matter.

E. Pre-Trial Memorandum - The Pre-Trial Memorandum shall be filed no later than 4:00 p.m. on SEPTEMBER 20, 2018, with a courtesy copy delivered to Department XXXI. All parties, attorneys and parties in proper person MUST comply with ALL recommendations of E.C.L.C. 2.07, 2.08 and 2.09.

Counsel should include in the Memorandum an identification of orders on all Motions in Limine or Motions for Partial Summary Judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

F. Motions in Limine - All Motions in Limine, must be in writing and filed no later than eight (8) weeks before the first day of the Trial stack date.

Orders shortening time will not be signed except in extreme emergencies.

G. Discovery Issues - All discovery deadlines, deadlines for filing dispositive motions, and motions to amend the pleadings or add parties are controlled by the previously issued Scheduling Order unless otherwise

If counsel anticipates the need for special electronic equipment during the trial, a request must be submitted to the District Court Clerk's Office following the Calendar Call. You can reach the Court Clerk's Office at 3-243-3333 or clerk@clarkcountycourts.us.

1 **modified** by a subsequent Stipulation and Order and/or by further Order of the
2 Court. Pursuant to EDCR 2.35, any discovery issues must be heard before the
3 Discovery Commissioner unless the scheduled Trial date is affected.

4 Please comply with the Handout/Procedure for the Civil Jury Trials and
5 Civil Bench Trials, copies of which are located in the Courtroom and on the
6 District Court – Department XXXI webpage.

7
8 **Failure of the designated trial counsel, or any party appearing in**
9 **proper person, to appear for any court appearances or to comply with this**
10 **Order shall result in any of the following: (1) dismissal of the action; (2)**
11 **default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or**
12 **any other appropriate remedy or sanction.**

13
14 Counsel is asked to notify the Court Recorder, 671-0897, at least two
15 weeks in advance if they are going to require a recorder and/or daily copies of
16 the transcripts or CDs of this trial. Failure to do so may result in a delay in the
17 production of the transcripts and/or CDs.

18 Counsel is required to advise the Court immediately if the case settles or
19 is otherwise resolved prior to trial. A stipulation which terminates a case by
20 dismissal shall also indicate whether a Scheduling Order has been filed and, if a
21 trial date has been set, the date of that trial.

22
23 DATED this 22nd day of January, 2019

24
25 
26 JOANNA S. KISHNER
27 DISTRICT COURT JUDGE

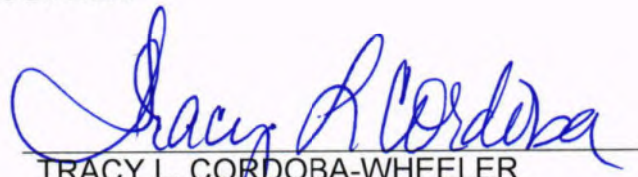
CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was served via Electronic Service to all counsel/registered parties, pursuant to the Nevada Electronic Filing Rules, and/or served via in one or more of the following manners: fax, U.S. mail, or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

GEORGE F. HAND, ESQ.
GERARD DONDERO, ESQ.
HAND & SULLIVAN, LLC.

THOMAS J. DOYLE, ESQ.
CHAD C. COUCHOT, ESQ.
SCHUERING, ZIMMERMAN & DOYLE, LLP.
400 UNIVERSITY AVENUE
SACRAMENTO, CA 95825

KIM MANDELBAUM, ESQ.
MANDELBAUM, ELLERTON & ASSOCIATES



TRACY L. CORDOBA-WHEELER
JUDICIAL EXECUTIVE ASSISTANT

EXHIBIT 8

EXHIBIT 8

1 **[SAO]**
 2 THOMAS J. DOYLE
 Nevada Bar No. 1120
 3 CHAD C. COUCHOT
 Nevada Bar No. 12946
 4 SCHUERING ZIMMERMAN & DOYLE, LLP
 400 University Avenue
 Sacramento, California 95825-6502
 5 (916) 567-0400
 Fax: 568-0400
 6 Email: calendar@szs.com

7 KIM MANDELBAUM
 Nevada Bar No. 318
 8 MANDELBAUM ELLERTON & ASSOCIATES
 2012 Hamilton Lane
 9 Las Vegas, Nevada 89106
 (702) 367-1234
 10 Email: filing@memlaw.net

11 Attorneys for Defendants BARRY RIVES, M.D.;
 12 LAPAROSCOPIC SURGERY OF NEVADA, LLC

13 DISTRICT COURT

14 CLARK COUNTY, NEVADA

15	TITINA FARRIS and PATRICK FARRIS,	)	CASE NO. A-16-739464-C
16	Plaintiffs,	)	DEPT. NO. 31
17	vs.	)	STIPULATION AND ORDER TO EXTEND
18	BARRY RIVES, M.D.; LAPAROSCOPIC	)	DISCOVERY DEADLINES (SEVENTH
19	SURGERY OF NEVADA, LLC, et al.,	)	REQUEST)
20	Defendants.	)	

21
 22 IT IS HEREBY STIPULATED AND AGREED between the Parties, by and through their
 23 undersigned counsel, that pursuant to EDCR 2.35, the discovery deadlines in this matter
 24 shall be extended as follows:

25 **1. DISCOVERY COMPLETED TO DATE.**

- 26 1. The parties exchanged documents pursuant to NRCP 16.1;

Case Name: Farris v. Rives
Case Number: A-16-739464-C
Dept. 31

2. The parties have served and responded to interrogatories and requests for production of documents;

3. The deposition of plaintiff Titnia Farris;

4. The deposition of plaintiff Patrick Farris;

5. The deposition of Dr. Barry Rives;

2. DISCOVERY THAT REMAINS TO BE COMPLETED

The parties anticipate that the following discovery remains to be completed:

1. Depositions of the plaintiff's expert(s);

2. Depositions of defendant's expert(s); and

3. Other depositions as may be necessary.

3. REASONS WHY THE DISCOVERY REMAINING NOT COMPLETED WITHIN THE TIME SET BY THE DISCOVERY ORDER

1. Due to the number of experts, their depositions cannot be completed before the current close of discovery.

4. CURRENT DISCOVERY DEADLINES

1. Close of discovery - June 14, 2019.

2. Filing motions to amend pleadings and add new parties - November 15, 2018 - closed.

3. Initial expert disclosures - November 15, 2018 - closed.

4. Rebuttal expert disclosures - December 19, 2018 - closed.

5. Dispositive Motions - January 25, 2019 - closed.

5. PROPOSED SCHEDULE FOR COMPLETING ALL REMAINING DISCOVERY

1. Close of discovery - July 24, 2019.

///

Case Name: Farris v. Rives
Case Number: A-16-739464-C
Dept. 31

6. CURRENT TRIAL DATE

Trial is currently set to begin on October 14, 2019.

Dated this ___ day of May 2019

Dated this 10 day of May 2019

SCHUERER, ZIMMERMAN & DOYLE, LLP

HAND & SULLIVAN, LLC

By:

THOMAS J. DOYLE, ESQ.
Nevada Bar No. 1120
CHAD C. COUCHOT, ESQ.
Nevada Bar No. 12946
400 University Avenue
Sacramento, CA 95825
Attorneys for Defendants
BARRY JAMES RIVES, M.D.;
LAPAROSCOPIC SURGERY OF
NEVADA, LLC

By:

GEORGE HAND, ESQ.
Nevada Bar No. 8483
3442 N. Buffalo Drive
Las Vegas, NV 89129
Attorney for Plaintiffs
TITINA FARRIS and PATRICK
FARRIS

and

KIM MANDELBAUM
Nevada Bar No. 318
MANDELBAUM ELLERTON & ASSOCIATES
2012 Hamilton Lane
Las Vegas, Nevada 89106

ORDER

Based upon the foregoing stipulation of the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the discovery deadlines

and schedule be extended as follows:

1. The trial date of October 14, 2019 stands.

2. Close of discovery - July 24, 2019.

[] No new scheduling order will issue. [] New scheduling order will

Dated this 15 day of May 2019

JOANNA S. KISHNER

DISCOVERY COMMISSIONER

Case Name: Farris v. Rives
Case Number: A-16-739464-C
Dept. 31

6. CURRENT TRIAL DATE

Trial is currently set to begin on October 14, 2019.

Dated this ____ day of May 2019 Dated this 10 day of May 2019

SCHUERING, ZIMMERMAN & DOYLE, LLP HAND & SULLIVAN, LLC

By: H. a. Doyle *New Bar No 14469*
THOMAS J. DOYLE, ESQ.
Nevada Bar No. 1120
CHAD C. COUCHOT, ESQ.
Nevada Bar No. 12946
400 University Avenue
Sacramento, CA 95825
Attorneys for Defendants
BARRY JAMES RIVES, M.D.;
LAPAROSCOPIC SURGERY OF
NEVADA, LLC

By: George Hand
GEORGE HAND, ESQ.
Nevada Bar No. 8483
3442 N. Buffalo Drive
Las Vegas, NV 89129
Attorney for Plaintiffs
TITINA FARRIS and PATRICK
FARRIS

and

KIM MANDELBAUM
Nevada Bar No. 318
MANDELBAUM ELLERTON & ASSOCIATES
2012 Hamilton Lane
Las Vegas, Nevada 89106

ORDER

Based upon the foregoing stipulation of the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the discovery deadlines
and schedule be extended as follows:

1. The trial date of October 14, 2019 stands.
2. Close of discovery - July 24, 2019.

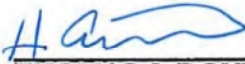
[] No new scheduling order will issue. [] New scheduling order will

Dated this 14 day of May 2019

~~DISCOVERY COMMISSIONER~~
District Court Judge

Case Name: Farris v. Rives
Case Number: A-16-739464-C
Dept. 31

Submitted by:
SCHUERING, ZIMMERMAN & DOYLE, LLP

By:  New Bar No 14469

THOMAS J. DOYLE, ESQ.

Nevada Bar No. 1120

CHAD C. COUCHOT, ESQ.

Nevada Bar No. 12946

400 University Avenue

Sacramento, CA 95825

Attorneys for Defendants

BARRY JAMES RIVES, M.D.;

LAPAROSCOPIC SURGERY OF

NEVADA, LLC

and

KIM MANDELBAUM

Nevada Bar No. 318

MANDELBAUM ELLERTON & ASSOCIATES

2012 Hamilton Lane

Las Vegas, Nevada 89106

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on the 21st day of June, 2019, service of a true and correct copy of the foregoing:

NOTICE OF ENTRY OF STIPULATION AND ORDER TO EXTEND DISCOVERY DEADLINES (SEVENTH REQUEST)

was served as indicated below:

- ☒ served on all parties electronically pursuant to mandatory NEFCR 4(b);
- ☐ served on all parties electronically pursuant to mandatory NEFCR 4(b) , exhibits to follow by U.S. Mail;
- ☐ by depositing in the United States Mail, first-class postage prepaid, enclosed ;
- ☐ by facsimile transmission; or
- ☐ by personal service as indicated.

Attorney

Representing

Phone/Fax/E-Mail

George F. Hand, Esq.
HAND & SULLIVAN, LLC
3442 North Buffalo Drive
Las Vegas, NV 89129

Plaintiff

702/656-5814
Fax: 702/656-9820
hsadmin@handsullivan.co
m

C. Schuering

An employee of Schuering Zimmerman &
Doyle, LLP
1737-10881

EXHIBIT 9

EXHIBIT 9

Skip to Main Content Logout My Account Search Menu New District Civil/Criminal Search Refine Search Close

Location : District Court Civil/Criminal Help

REGISTER OF ACTIONS

CASE NO. A-16-739464-C

Titina Farris, Plaintiff(s) vs. Barry Rives, M.D., Defendant(s)

§
§
§
§
§
§
§

Case Type: **Malpractice - Medical/Dental**

Date Filed: **07/01/2016**

Location: **Department 31**

Cross-Reference Case Number: **A739464**

PARTY INFORMATION

Defendant	Laparoscopic Surgery of Nevada LLC	Lead Attorneys Thomas J. Doyle <i>Retained</i> 9165670400(W)
Defendant	Rives, Barry, M.D.	Thomas J. Doyle <i>Retained</i> 9165670400(W)
Plaintiff	Farris, Patrick	Kimball Jones <i>Retained</i> 702-333-1111(W)
Plaintiff	Farris, Titina	Kimball Jones <i>Retained</i> 702-333-1111(W)

EVENTS & ORDERS OF THE COURT

09/05/2019 **Status Check** (9:00 AM) (Judicial Officer Kishner, Joanna S.)
Mandatory In-Person Status Check per Court's Memo Dated August 30, 2019

Minutes

09/05/2019 9:00 AM

- Court explained to the parties why the status check hearing was scheduled for today, and noted the Court was inclined to deny the eighth request to continue the trial date. Arguments by counsel. Objections were also made by counsel, which were noted by Court. COURT ORDERED, trial date STANDS, as there has been no good cause shown to continue the trial date. Court noted it is not precluding the parties whatsoever from doing their discovery.

[Parties Present](#)

[Return to Register of Actions](#)

EXHIBIT 10

EXHIBIT 10

DECLARATION OF PATRICK FARRIS

PATRICK FARRIS, being first duly sworn under oath and under penalty of perjury under the laws of the State of Nevada, declares:

1. I am a client of BIGHORN LAW, HAND & SULLIVAN, and CLAGGETT & SYKES.
2. I am represented by these firms in a medical malpractice lawsuit, A-16-739464-C.
3. I have personal knowledge of the facts and circumstances herein and could testify to the same.
4. My wife's condition and disabilities from injuries caused by the subject medical malpractice are generally the same today as they were in 2019.
5. My testimony at trial will be consistent with the testimony I provided in 2019.
6. This Declaration is made in good faith, and not for purposes of delay.
7. I declare under penalty of perjury that the foregoing is true and correct.

/s/ Patrick Farris

07/11/2022

PATRICK FARRIS

Dated

EXHIBIT 11

EXHIBIT 11

DECLARATION OF TITINA FARRIS

TITINA FARRIS., being first duly sworn under oath and under penalty of perjury under the laws of the State of Nevada, declares:

1. I am a client of BIGHORN LAW, HAND & SULLIVAN, and CLAGGETT & SYKES.
2. I am represented by these firms in a medical malpractice lawsuit, A-16-739464-C.
3. I have personal knowledge of the facts and circumstances herein and could testify to the same.
4. My condition and disabilities from injuries caused by the subject medical malpractice are generally the same today as they were in 2019.
5. My testimony at trial will be consistent with the testimony I provided in 2019.
6. This Declaration is made in good faith, and not for purposes of delay.
7. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER DECLARANT SAYETH NAUGHT.

/s/ Titina Farris

07/11/2022

TITINA FARRIS

Dated