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. 85143

Electronically Filed
Aug 30 2022 10:21 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supplement to Emergency Motion for Stay (trial date September 6, 2022)

(based upon document filed by Plaintiffs in district court this morning)

This court's unanimous en banc opinion in the first appeal (*Rives v. Farris*, 138 Nev. Adv. Op. 17; March 31, 2022) held that evidence of the *Center* case is irrelevant. The court rejected every argument proffered by plaintiffs in support of relevance and admissibility. The court also determined that any relevance of the evidence was substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury.

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Petitioners' emergency motion for a stay noted Plaintiffs' pretrial filings "suggest" Plaintiffs will be attempting to get the *Center* case back into evidence at the second trial, which is scheduled for next Tuesday, September 6, 2022. (Mot. p. 9, fn. 2) This morning, Plaintiffs filed a so-called "trial brief." It is actually a motion in limine seeking a determination that evidence of the *Center* case will, in fact, be admissible at the second trial, for certain purposes.[1] (Exhibit 1)

Accordingly, the emergency stay motion is now incorrect in its statement that Plaintiffs merely "suggest" they will be attempting to admit *Center* evidence at the upcoming trial. Based on their trial brief filed this morning, it is more accurate to say that Plaintiffs will **definitely** be seeking admissibility of *Center* evidence. Petitioners therefore supplement their emergency motion by making this correction.

Dated: August 30, 2022

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[1] For example, Plaintiffs' trial brief argues that *Center* evidence is admissible to show Dr. Rives's "habit" regarding surgeries. The brief asserts that this court's opinion "makes no mention of habit evidence." Trial Br. at 4. Although the opinion did not use the word "habit," the court flatly rejected Plaintiffs' "modus operandi" argument, holding that Plaintiffs appeared to be arguing for admissibility "to show Rives's negligent surgical techniques, which is an **inadmissible propensity use of the evidence**, as it encourages the jury to infer from Rives's prior act that Rives has a propensity to commit medical malpractice; …" (Op. at 14; emphasis added).

CERTIFICATE OF SERVICE

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date, the foregoing ***Supplement to Emergency Motion for Stay*** was filed electronically with the Clerk of the Nevada Supreme Court, and service was made in accordance with the master service list as follows:

A Maupin
George F. Hand
Kimball J. Jones
Jacob G. Leavitt
Micah S. Echols
Brigette Foley-Peak
Patricia Daehnke
Thomas Doyle

I further certify that I served the within document by placing said document, postage prepaid, in the U.S. mail to the following:

Hon. Joanna Kishner
Eighth Judicial District Court, Dept. 31
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
Respondent

Dated: August 30, 2022

/s/ Margie Nevin
Margie Nevin

EXHIBIT LIST

Exhibit	**Description**
1	Plaintiffs' Trial Brief on the Law of the Case Doctrine and the Vickie Center Case, filed August 30, 2022 in the District Court, Clark County, Nevada, Case No. A-16-739464-C

EXHIBIT 1

Plaintiffs' Trial Brief on the Law of the Case Doctrine and the Vickie Center Case, filed August 30, 2022 in the District Court, Clark County, Nevada, Case No. A-16-739464-C

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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' TRIAL BRIEF ON THE LAW OF THE CASE DOCTRINE AND THE VICKIE CENTER CASE** HEARING DATE: HEARING TIME:

Plaintiffs, TITINA FARRIS and PATRICK FARRIS (collectively "Plaintiffs"), by and through their counsel of record, Bighorn Law; Hand & Sullivan, LLC; and Claggett & Sykes Law Firm, hereby file this Plaintiffs' Trial Brief on the Law of the Case Doctrine and the Vickie Center case pursuant to EDCR 7.27. This trial brief is based upon the records and pleadings on file herein, the points and authorities attached hereto, and any oral argument that the Court may allow.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In the several hearings the Court has held since the remand from the Nevada Supreme Court, the Court has made it abundantly clear that everyone involved in this retrial intends to follow the Supreme Court's opinion with regard to the exclusion of the Vickie Center case. Indeed, Plaintiffs likewise intend to follow the Supreme Court's opinion regarding Vickie Center during the retrial. However, if Defendants open the door to either impeachment or habit evidence, Plaintiffs cannot allow Defendants to mislead the jury. It is Plaintiffs' sincere hope that the Vickie Center case can be excluded from this retrial. But, Plaintiffs will not be prejudiced by improper arguments from the defense that attempt to use the Vickie Center case as both a shield and a sword. Importantly, the Supreme Court's opinion does not substantively address either impeachment evidence or habit evidence, such that the law of the case doctrine would not apply to such issues if they come up at trial. *See Wheeler Springs Plaza, L.L.C. v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) ("The [law of the case] doctrine only applies to issues previously determined, not to matters left open by the appellate court."). Thus, Plaintiffs provide this Court with relevant points and authorities if the Vickie Center case becomes relevant due to the defense raising issues that give rise to impeachment and/or habit evidence.

LEGAL ARGUMENT

I. THE CONTOURS OF THE LAW OF THE CASE DOCTRINE.

The law-of-the-case doctrine "refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as law of the case) by that court or a higher one in earlier phases." *Recontrust Co., N.A. v. Zhang*, 130 Nev. 1, 7–8, 317 P.3d 814, 818 (2014) (citing *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995)). Normally, "for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication." *Dictor v. Creative Mgmt. Servs., L.L.C.*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010); *see Wheeler Springs Plaza, L.L.C. v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) ("The doctrine only applies to issues previously determined, not to matters left open by the appellate court."). "Subjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default." *Zhang*, 130 Nev. at 7–8, 317 P.3d at 818 (citing *Bone v. City of Lafayette, Ind.*, 919 F.2d 64, 66 (7th Cir. 1990), *quoted with approval in Dictor*, 126 Nev. at 45, 223 P.3d at 334).

In *Rives v. Farris*, 506 P.3d 1064, 1072 (Nev. 2022), the Supreme Court, commenting on NRS 48.045, concluded that "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 patient." (emphasis added). In footnote 6 of the opinion, the Supreme Court noted that its conclusion on the inadmissibility of the Vickie Center case did not consider impeachment evidence. *Id.* at 1071 n.6. The opinion also makes no mention of habit evidence. Therefore, if the defense chooses to invoke evidence or theories that draw into question Dr. Rives' negligence, habits, or representations from the Vickie Center case, the law of the case doctrine does not prohibit Plaintiffs from providing the jury with the truth about the Vickie Center case.

II. IMPEACHMENT EVIDENCE AS AN EXCEPTION.

According to NRS 50.075, the "credibility of a witness may be attacked by any party, including the party calling the witness." NRS 50.085 states as follows:

> **NRS 50.085 Evidence of character and conduct of witness.**
> 1. Opinion evidence as to the character of a witness is admissible to attack or support the witness's credibility but subject to these limitations:
> (a) Opinions are limited to truthfulness or untruthfulness; and
> (b) Opinions of truthful character are admissible only after the introduction of opinion evidence of untruthfulness or other evidence impugning the witness's character for truthfulness.
> 2. Evidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible.

> 3. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to an opinion of his or her character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

The Nevada Supreme Court recently commented upon NRS 50.085(3): "This language parallels that in the pre-2003 version of FRE 608(b). Courts addressing the pre-2003 version of Rule 608(b) found that it created 'difficulty in distinguishing between Rule 608 impeachment and impeachment by contradiction.'" *Cox v. Copperfield*, 507 P.3d 1216, 1224 (Nev. 2022) (citations omitted). The Supreme Court went on to adopt the language from these other authorities, stating that "while Rule 608(b) prohibits the use of extrinsic evidence of conduct to impeach a witness's credibility in terms of his general character for truthfulness—or untruthfulness—'the concept of impeachment by contradiction permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence.'"). *Id.* (citing *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999)). Ultimately, the Supreme Court agreed with the authorities explaining that "***<u>the witness should not be permitted to engage in perjury, mislead the trier of fact, and then shield himself from impeachment under Rule 608(b)'s prohibition</u>***. . . ." *Id.* (emphasis added and citations omitted). Thus, if Defendants invoke Dr. Rives' character or otherwise attempt to mislead the jury as to any issues that are contained within the Vickie Center case, Plaintiffs will be entitled to impeach Dr. Rives at trial.

III. HABIT EVIDENCE AS A DISTINCT ANALYSIS.

Plaintiffs expect Defendants to attempt to offer evidence of Dr. Rives' habits to bolster their defenses. The admissibility of habit evidence is set forth in NRS 48.059:

> **NRS 48.059 Habit; routine practice.**
> 1. Evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
> 2. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Plaintiffs believe that Defendants will attempt to bring in Dr. Rives' habit evidence of how he normally does laparoscopic surgeries, similar to what Plaintiff Titina Farris received. Such habit testimony or other evidence should not be allowed because Plaintiffs were not given the opportunity to discover all of Dr. Rives' prior similar surgeries, including Vickie Center. Plaintiffs would, therefore, be disadvantaged by Dr. Rives' representations regarding any prior surgeries not previously disclosed. In any event, Defendants cannot use the Supreme Court's ruling as a shield that evidence of the Vickie Center case is inadmissible, while attempting to mislead the jury by arguing habit evidence as a sword.

The Nevada Supreme Court previously recognized the very close association of habit evidence under NRS 48.059 and prior bad acts under NRS 48.045. "Like many courts, '[w]e are cautious in permitting the admission of habit or pattern-of-conduct evidence under [NRS 48.059 or its federal analogue] Rule 406 because it necessarily engenders the very real possibility that such evidence

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will be used to establish a party's propensity to act in conformity with its general character,' in violation of NRS 48.045, and may involve 'collateral inquiries [that] threaten the orderly conduct of trial while potentially coloring the central inquiry and unfairly prejudicing the party against whom they are directed.'" *Thomas v. Hardwick*, 126 Nev. 142, 150–151, 231 P.3d 1111, 1116–1117 (2010) (citing *Simplex, Inc. v. Diversified Energy Systems, Inc.*, 847 F.2d 1290, 1293 (7th Cir. 1988)). Of course, if Defendants were to introduce habit evidence without an "adequate foundation," (*Thomas*, 126 Nev. at 151, 231 P.3d at 1117), Defendants would be, in effect, offering the very evidence that the Supreme Court prohibited under NRS 48.045. Under such circumstances, Plaintiffs would be entitled to then discuss the Vickie Center case and bring out the impeachment evidence according to NRS 50.085(3), as the Supreme Court outlined in *Cox*, to prevent Dr. Rives from misleading the jury and attempting to shield himself.

CONCLUSION

In conclusion, Plaintiffs provide this Court with relevant authorities that may become relevant at trial. It is Plaintiffs' sincere hope that during the retrial, the Vickie Center case is not mentioned. However, if the defense chooses to portray Dr. Rives in such a way that invokes impeachment evidence or habit evidence, Plaintiffs will be well within their rights to bring in such impeachment and/or habit evidence without violating the law of the case doctrine.

Dated this 30th day of August 2022.

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