IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK FIGUERADO; AND PATRICIA BURKE,
Appellants,
vs.
AARON CRAWFORD; AND KEOLIS TRANSIT SERVICES, LLC, D/B/A RTC OF SOUTHERN NEVADA,
Respondents.

No. 71632

ORDER OF REVERSAL AND REMAND

Mark Figuerado and Patricia Burke appeal from an order granting summary judgment in favor of Aaron Crawford and Keolis Transit Services, LLC.[1] Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Appellants sued respondents for negligence after they were rear-ended by a bus Crawford was driving while working for Keolis Transit Services.[2] Appellants disclosed their treating physicians and medical records during discovery. After the close of discovery, respondents moved for summary judgment on the grounds that appellants' NRCP 16.1(a)(2)(B) expert witnesses disclosures were insufficient and should be excluded under NRCP 37(c), thus making summary judgment appropriate.

The district court agreed with respondents and concluded that the disclosures were insufficient under NRCP 16.1(a)(2)(B) and excluded

[1]Respondents stated in their answer to appellants' complaint that they do not do business as Regional Transportation Commission of Southern Nevada.

[2]The facts are not recounted except as necessary to the disposition.

them under NRCP 37(c) and granted summary judgment. In the alternative, the court concluded that even if the disclosures were sufficient, appellants provided no evidence of causation and granted summary judgment based on NRCP 56(e).[3]

The district court erred in excluding appellants' expert witnesses under NRCP 37(c)(1)

The district court concluded that appellants' expert witness disclosures were insufficient and that the "failure to disclose" was not "substantially justified or harmless." It then concluded that appellants could not present expert witnesses at trial and consequently granted summary judgment based, in part, on NRCP 37(c)(1). Appellants argue the court erred because its disclosures were sufficient and, further, respondents never met and conferred about the disclosures as mandated by EDCR 2.34. Respondents do not appear to dispute that they did not meet and confer. Rather, respondents contend that puts the burden on the wrong party to identify problems with disclosures and file a motion to compel.

"Court rules, when not inconsistent with the Constitution or certain laws of the state, have the effect of statutes." *Margold v. Eighth Judicial Dist. Court*, 109 Nev. 804, 806, 858 P.2d 33, 35 (1993). EDCR 2.34(a) states that "[u]nless otherwise ordered, all discovery disputes (except disputes presented at a pretrial conference or at trial) must first be heard by the discovery commissioner." NRCP 16.1(d)(1) has a nearly

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[3]Appellants filed a motion for reconsideration of the district court's order granting summary judgment. Appellants filed their appeal before the district court entered its order denying appellants' reconsideration motion and, accordingly, the motion for reconsideration is not reviewable on appeal. NRAP 4(a)(1); *cf. Arnold v. Kip*, 123 Nev. 410, 416-17, 168 P.3d 1050, 1054 (2007).

identical mandate: "[w]here available or unless otherwise ordered by the court, all discovery disputes (except those presented at the pretrial conference or trial) must first be heard by the discovery commissioner." NRCP 37(a)(2)(A) states that "[i]f a party fails to make a disclosure required by Rule 16.1(a) . . . , any other party may move to compel disclosure and for appropriate sanctions." However, "[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." *Id.*

Under NRCP 37(c)(1)—which the district court relied on its in order granting summary judgment—evidence can be excluded "at a trial, at a hearing, or on a motion" when a party fails to make the required NRCP 16.1 disclosures. Yet, NRCP 37(c)(1) should not be applied in a vacuum. *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 534, 245 P.3d 1149, 1153 (2010) ("This court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized . . . In addition, the court will not render any part of the statute meaningless. . . ."). NRCP 37 requires a certification of meet and confer efforts. Here, respondents did not file any discovery related motions or offer any evidence that they met and conferred with appellants before moving for summary judgment based upon NRCP 37. Accordingly, the respondents' claim that appellants' expert disclosures were insufficient was not properly before the district court to review on summary judgment. *See Valley Health Sys. v. Eighth Judicial Dist.*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011) (holding that held "that neither this court nor the district court will consider new arguments . . . that could have been raised before the discovery commissioner but were not."); *see generally MB Am., Inc. v. Alaska*

Pac. Leasing, 132 Nev. ___, ___, 367 P.3d 1286, 1291 (2016) (holding, in context of a contracts case, the case was "not ripe for judicial review" because one party did not follow agreement terms to first submit a dispute to mediation). Thus, there were no legal grounds to exclude appellants' expert testimony under NRCP 37(c)(1).[4]

The district court erred in concluding appellants' NRCP 16.1 disclosures were insufficient

In the alternative, even if the issue was properly before the district court, summary judgement should be reversed. During discovery, appellants disclosed their list of expert witnesses, including their treating physicians, stated that those physicians would rely on their review of appellants' medical records and testify regarding causation, and disclosed their relevant medical records. Respondents argue that the list of expert witnesses did not satisfy NRCP 16.1(a)(2)(B)'s requirements for non-retained experts.

NRCP 16.1(a)(2)(B) generally requires specially retained experts to provide a detailed report. Non-retained experts, like treating physicians, however, are not required to submit a written report. *Khoury v. Seastrand*, 132 Nev. ___, ___, 377 P.3d 81, 90 (2016). Instead, according to NRCP 16.1(a)(2)(B), they must state:

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[4]If respondents had filed a motion under NRCP 37, the district court order would have been a case-ending sanction and the district court would have been required to explain its reasoning according to factors mandated by the Nevada Supreme Court. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92-93, 787 P.2d 777, 779-80 (1990). On appeal, the decision would have been analyzed under a heightened standard of review. *Id.* Yet respondents attempt to avoid the burden of this process by raising an NRCP 37 issue only in a motion for summary judgment, contrary to supreme court policy and the Nevada Rules of Civil procedure. *See* NRCP 1; *Valley Health Sys.*, 127 Nev. at 173, 252 P.3d at 680.

> the subject matter on which the witness is expected to present evidence . . . ; a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness. . . , which may be satisfied by the production of a resume or curriculum vitae; and the compensation of the witness for providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

Statutory construction is reviewed de novo and a statute's plain language is examined first. *Hardy*, 126 Nev. at 533, 245 P.3d at 1153. "[I]f the statutory language . . . fails to address the issue, this court construes the statute according to that which 'reason and public policy would indicate the legislature intended.'" *Id.* (quoting *A.F. Constr. Co. v. Virgin River Casino*, 118 Nev. 699, 703, 56 P.3d 887, 890 (2002).) NRCP 16.1 was amended in 2012. That amendment includes drafter's notes that elaborate on the disclosure requirements for treating physicians that are not explicitly contained within the rule. For "a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider." NRCP 16.1 drafter's notes (2012 amendment). The drafter's note that "any opinions and any facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B)." *Id.*[5]

[5]During public comment on the 2012 amendments, practitioners made comments that suggested a treating physician's medical report could "provid[e] notice" if it included opinions on causation. Letter from Loren S. Young, Esq., on behalf of the Las Vegas Defense Lawyers, to the Nevada Supreme Court, *In the Matter of the Proposed Amendments to NRCP 16.1(a)(2)* 1, 5 (April 13, 2012).

Further, in *FCH1, LLC v. Rodriguez*, the Nevada Supreme Court held that treating physicians can testify as to causation and they are exempt from the general reporting requirements as long as the opinion is based solely on the course of treatment the physician provided to the patient. 130 Nev. 425, 433, 335 P.3d 183, 189 (2014). The *FCH1* court cited to the 2012 amendment drafter's notes for the proposition that the treating physician could only testify as to documents she disclosed. *Id.* at 434-35, 335 P.3d at 190. Thus, *FCH1* supports an interpretation that providing medical charts, records, or other documents relied on[6] satisfies those requirements. The supreme court's affirmance of *FCH1* in *Pizarro-Ortega* provides similar support. There the court emphasized the disclosure of documents and not the expert report requirement. *Pizarro-Ortega*, 133 Nev. at ___, 396 P.3d at 787.

Thus, appellants' disclosure of its treating physicians and the medical reports they relied on was a sufficient disclosure under NRCP 16.1(a)(2)(B).

The record contained evidence to show causation

The district court concluded in the alternative, that even if appellants provided sufficient NRCP 16.1 disclosures, appellants "presented no evidence to the court that, if admissible, would create a genuine issue of material fact as to proximate cause" and granted summary

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[6]Neither *FCH1* nor *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. ___, 396 P.3d 783 (2017), make a distinction between medical charts, records, or documents. *See FCH1*, 130 Nev. at 434-35, 335 P.3d at 190 (noting the doctor "reviewed records" and focusing on the "documents" disclosed); *Pizarro-Ortega*, 133 Nev. at ___, 396 P.3d at 787 (requiring disclosure of "any documents the treating physician reviewed in forming his or her opinion.")

judgment on the basis of NRCP 56(e). The transcript from the hearing on respondents' motion for summary judgment demonstrates that the district court determined there was no evidence because of a lack of affidavits or sworn testimony.

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court. Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original) (quoting NRCP 56(c)). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* If the moving party satisfies its burden, then the burden shifts to the nonmoving party. *Maine v. Stewart*, 109 Nev. 721, 727, 857 P.2d 755, 759 (1993). "[T]he non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Wood*, 121 Nev. at 731, 121 P.3d at 1030-31; *see also* NRCP 56(e).

"NRCP 56(e) does not mandate that all evidence accompanying a motion for summary judgment be in affidavit form." *Chambers by Cochran v. Sanderson*, 107 Nev. 846, 849, 822 P.2d 657, 659 (1991). "NRCP 56(e) permits a court, *when appropriate*, to enter summary judgment against an adverse party who fails to respond to such motion by going beyond the pleadings and supplying the court with documentation setting forth specific facts of a genuine triable issue." *Jordan v. State ex rel. Dept. of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 70, n.64, 110 P.3d 30, 48-49,

n.64 (2005) *abrogated on other grounds by Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, n.6, 181 P.3d 670, 672, n.6 (2008).

In *Jordan*, the appellant "attached police reports to his complaint" and "later submitted" a letter from a grounds division. *Id.* Those documents, "although not by affidavit, sufficiently demonstrate[d] triable issues of fact" and summary judgment was not appropriate based on NRCP 56(e). *Id.* Like in *Jordan*, appellants here disclosed medical records to support their expert witness list, those records were attached to the respondents' motion for summary judgment, and appellants' opposition included additional disclosures not already provided in respondents' attachments. The medical records included reports from appellants' treating physicians that contain opinions as to causation.[7] Accordingly, there was evidence available to satisfy NRCP 56 and the burden never shifted to the appellants. But even if it did, the documents they submitted were sufficient to defeat the motion for summary judgment. Accordingly,

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[7]Respondents argue that appellants did not disclose the fee schedule and credentials for some of the experts until appellants filed their opposition to respondents' motion for summary judgment. Appellants admit they did not initially disclose the CVs and fee schedules for Dr. Burkhead and Dr. Fazzini, but said this was an "unintentional oversight" and disclosed them in their opposition to respondents' motion for summary judgment. As the evidence was available for the district court to review at the summary judgment stage, the other doctors, in addition to Dr. Kaplan, were reviewable as experts under NRCP 16.1 at summary judgment and are properly on appeal. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. As at least one of appellants' experts provided a causation opinion, any other issues need not be addressed.

the order granting summary judgment is reversed and the case is remanded for proceedings consistent with this order.[8]

_____, J.
Gibbons

SILVER, C.J., concurring:

I concur in the result only.

_____, C. J.
Silver

TAO, J., concurring:

I concur in the result only. There's an unanswered question under *Valley Health Systems* regarding whether, and how, a district court should handle a motion for summary judgment that also includes inside of it a request for a ruling on a discovery matter when discovery matters should be heard by the discovery commissioner, but motions for summary judgment judgement can only be heard by the district court.

_____, J.
Tao

[8]Appellants also raised on appeal that the district court erred by relying on federal law. The district court's order only cited to Nevada rules so this argument need not be addressed.

cc: Hon. Richard Scotti, District Judge
Eva Garcia-Mendoza, Settlement Judge
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Eighth District Court Clerk