

1 About ten weeks later, the Plaintiff returned to Dr. Dolan complaining of pain in his right
2 leg. (Mot. Summ. J. Ex. M. at 1.) According to his report, Dr. Dolan found that there was a delayed
3 union of the bones and that the device was broken, because the Plaintiff was weight bearing. (*Id.*)
4 The Plaintiff maintains that he followed the instructions and did not bear weight on his leg. (Opp'n
5 Mot. Summ. J. Ex. 2 at ¶ 8, ECF No. 63.) In an affidavit, the Plaintiff's supervisor contends that
6 he routinely witnessed the Plaintiff use a knee scooter. (Opp'n Mot. Summ. J. Ex. 3 at ¶¶ 6-7.)

7 Over the next year, the Plaintiff's condition worsened, and Dr. Dolan transferred him to an
8 associate, Dr. Aaron Dickens. (Mot. Summ. J. Ex. X at 1-2.) In another surgery, Dr. Dickens
9 replaced the original implant with another Synthes Locking System, which had a more robust plate.
10 (Mot. Summ. J. Ex. Z.) The second device also broke four months later. (Mot. Summ. J. Ex. VV.)

11 **II. PROCEDURAL HISTORY**

12 The Plaintiff sues contending that a design and manufacturing defect¹ in the initial implant
13 caused his medical complications. Under Nevada law, the Plaintiff claims that this defect gives
14 rise to liability under strict and negligent products liability and breaches of an implied warranty of
15 merchantability, an implied warranty of fitness for a particular purpose, and an express warranty.
16 The Plaintiff retained an expert metallurgist, and the Defendant called the treating physicians to
17 testify as non-retained experts. Each party has filed a motion in limine to exclude the other's
18 experts, and the Defendant filed a motion for summary judgment.

19 **III. PLAINTIFF'S MOTION IN LIMINE**

20 The Court preliminarily addresses the Plaintiff's motion as this affects the universe of
21 evidence for summary judgment. The Plaintiff argues that his treating physicians should be
22 excluded from testifying about the cause of the device's failure, because they are retained experts
23 without the necessary disclosures. The Court disagrees; the physicians are non-retained experts.

24 **A. Legal Standard**

25 Whether a witness qualifies as an expert, is a question left to a court's discretion. *Kumho*
26 *Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Under Federal Rule of Evidence 702, expertise

27 ¹ The Plaintiff alleges a "design, manufacturing, and/or material defect" in paragraph 19 of his operative complaint. However, Nevada does not recognize a "material defect."

1 must be helpful and based on “scientific, technical, or other specialized knowledge.” Medical
2 expert opinion testimony is based on specialized knowledge, and “a trial court should admit
3 medical expert testimony if physicians would accept it as useful and reliable.” *United States v.*
4 *Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006).

5 When a party calls a witness, the party must make the necessary disclosures under Federal
6 Rule of Civil Procedure 26(a); if a party fails to properly disclose, then a court must exclude the
7 testimony “unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).
8 Under Rule 26(a)(2)(B), a party who “retain[s] or specially employ[s] [a witness] to provide expert
9 testimony” must provide, among other things, a “complete statement of all opinions the witness
10 will express and the basis and reasons for them.” However, when a party calls an expert as a
11 percipient witness, then the party need only provide the subject matter and a summary of the
12 testimony. Fed. R. Civ. P. 26(a)(2)(C). The Ninth Circuit held that a treating physician is not a
13 retained expert but rather qualifies as a percipient witness when “his opinions were formed during
14 the course of treatment.” *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 826 (9th
15 Cir. 2011). However, if the physician reviews material outside the scope of his treatment to form
16 the basis of his testimony, then the physician must provide a report under Rule 26(a)(2)(B). *Id.*

17 **A. Analysis**

18 The Court holds that Drs. Dolan and Dickens are non-retained experts. They are both
19 experts because of their degrees, training, experience, and their expertise using the Synthes
20 Locking System. Dr. Dolan has more than fifteen years of experience in orthopedic surgery and is
21 “very comfortable” using the device. (Opp’n Mot. Lim. Ex. C at 82:12–19, 19:24–20:7, ECF No.
22 61.) Similarly, Dr. Dickens has over ten years of experience and has used the device “dozens of
23 times.” (Opp’n Mot. Lim. Ex. F at 125:14–23.) Thus, they are experts.

24 The Court also holds that the Defendant did not retain Drs. Dolan and Dickens. The
25 Plaintiff relies on *Goodman* to say that the Ninth Circuit held that treating physicians should be
26 considered retained experts whenever they rely on their expertise. However, this is a misreading
27 of the opinion. There, the court of appeals only held that treating physicians should be considered

1 retained or specially employed to provide expert testimony when they created their views after
2 their courses of treatment. *Goodman*, 644 F.3d at 826. The Ninth Circuit affirmed the district
3 court’s conclusion that detailed reports were required when a party’s attorney provided physicians
4 with materials that helped to form the basis of their testimonies for the purposes of litigation. *Id.*

5 Here, Dr. Dolan formed his opinion about the cause of the Plaintiff’s medical complications
6 during his treatment. In a report from the appointment where he found that the device had failed,
7 he noted that the break was “secondary to weight bearing.” (Opp’n Mot. Lim. Ex. D at 2.) The
8 Plaintiff corroborated this report in his deposition. After being asked whether Dr. Dolan stated
9 why the implant broke during the appointment, the Plaintiff testified that Dr. Dolan “looked at me
10 like I had been walking on [my leg].” (Opp’n Mot. Lim. Ex. E at 59:11–20.)

11 Likewise, Dr. Dickens also formed his beliefs over the course of his treatment. Dr. Dickens
12 reviewed the notes from Dr. Dolan that indicated the system failed because of the Plaintiff’s
13 noncompliance, and he suspected, at that time, that the break “might have had something to do
14 with [the Plaintiff’s] weight bearing status early on in the treatment process.” (Opp’n Mot. Lim.
15 Ex. F at 12:8–15.) Additionally, Dr. Dickens’ medical records state that the device broke because
16 the Plaintiff “had walked on [his leg] against recommendations.” (Opp’n Mot. Lim. Ex. G at 1.)

17 This Court finds that there is no indication in the record that either physician formed his
18 opinion on the basis of information *after* treatment. Rather, the evidence indicates that they formed
19 their opinions while treating the Plaintiff. Thus, the testimonies are admissible evidence.

20 **IV. DEFENDANT’S MOTIONS IN LIMINE AND FOR SUMMARY JUDGMENT**

21 Next, the Court considers the Defendant’s motions. The Defendant argues that there are no
22 material facts in genuine dispute that would entitle the Plaintiff to recovery. The Court agrees and
23 grants summary judgment on all claims and denies the Defendant’s motion in limine as moot.

24 **A. Summary Judgment Standard**

25 A court should grant summary judgment when “the movant shows that there is no genuine
26 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
27 Civ. P. 56(a). A factual dispute is genuine when “the evidence is such that a reasonable jury could

1 return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
2 (1986). Only facts that affect the outcome are material. *Id.*

3 To determine when summary judgment is appropriate, courts use a burden-shifting
4 analysis. When the party seeking summary judgment would not bear the burden of proof at trial,
5 it satisfies its burden by demonstrating that the other party failed to establish an essential element
6 of the claim or by presenting evidence that negates such an element. *Celotex Corp. v. Catrett*, 477
7 U.S. 317, 330 (1986) (Brennan J., concurring). Summary judgment should be denied if either the
8 initial burden is not met, or, if after that burden is met, the other party establishes a genuine dispute
9 of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986).

10 **B. Analysis**

11 Applying this standard, the Court holds that the Defendant has satisfied its burden for each
12 claim. Thus, the Court grants summary judgment for the Defendant in full.

13 *I. Strict Products Liability*

14 The Plaintiff raises a claim of strict products liability arguing that a design defect and
15 manufacturing defect in the first Synthes Locking System caused his injuries. For a claim of strict
16 products liability to prevail under Nevada law, a plaintiff must prove that (1) the defendant placed
17 a defective product in the market and (2) the plaintiff suffered an injury which was caused by the
18 defect. *Allison v. Merck & Co., Inc.*, 878 P.2d 948, 952 (Nev. 1994).

19 The Defendant argues for summary judgment on four grounds: (1) the Plaintiff failed to
20 show a defect; (2) the Plaintiff’s misuse caused his injuries; (3) the Plaintiff failed to produce a
21 medical expert for causation; and (4) the learned intermediary doctrines shields the Defendant
22 from liability. The Court agrees with the Defendant’s initial argument.

23 First, the Plaintiff failed to show that the device is defective, since it worked as reasonably
24 expected and the Plaintiff has no commercially feasible alternative. For design and manufacturing
25 defects, Nevada applies the consumer expectation test, which states that a product is defective
26 when it “fail[s] to perform in the manner reasonably to be expected in light of its nature and
27 intended function and was more dangerous than would be contemplated by the ordinary user.”

1 *Ford Motor Co. v. Trejo*, 402 P.3d 649, 650 (Nev. 2017) (quoting *Ginnis v. Mapes Hotel Corp.*,
2 470 P.2d 135, 138 (Nev. 1970)). The reasonable expectation may be influenced by warnings that
3 accompany a product. *Id.* at 656. Accordingly, “warnings should shield manufacturers from
4 liability *unless* the defect could have been avoided by a commercially feasible change in design.”
5 *Robinson v. G.G.C., Inc.*, 808 P.2d 522, 525 (Nev. 1991).

6 Courts have routinely held that the duty to warn of risks associated with prescription
7 medical devices runs only to the physician—not to consumers directly. *See, e.g., Ellis v. C.R. Bard,*
8 *Inc.*, 311 F.3d 1272, 1279 (11th Cir. 2002). For the manufacturer’s liability, it is immaterial
9 whether the physician relays the warnings to the consumer. *Id.* at 1283. While generally a question
10 of fact, a warning is adequate as a matter of law when it “is accurate, clear, and unambiguous.”
11 *Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102, 105 (Fla. 1989) (collecting cases). The Tenth
12 Circuit has enumerated a nonexclusive list of factors to consider in determining the adequacy of a
13 warning: (1) whether the warning conveyed the scope of danger, (2) whether the warning conveyed
14 seriousness of the possible harm, (3) whether physical aspects of the warning would alert a
15 reasonably prudent person, and (4) whether the means by which the warning was conveyed were
16 adequate. *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 853 (10th Cir. 2003) (citing *Pittman*
17 *v. Upjohn Co.*, 890 S.W.2d 425, 429 (Tenn. 1994)); *accord Yamaha Motor Co., U.S.A. v. Arnoult,*
18 955 P.2d 661, 665 (Nev. 1998).

19 In this case, the Defendant provided a warning insert to the treating physicians. (Mot.
20 Summ. J. Ex. D at 21:8–9.) The Plaintiff does not challenge the sufficiency of the Defendant’s
21 warning, but if he had, such a challenge would fail. Applying these factors to this warning shows
22 that a physician should have been apprised of the dangers associated with use of the device. The
23 warning stated, in bold and underlined font, that the device can break when the bones fail to
24 unionize. The warning continued, in regular font, that “If healing is delayed . . . the implant will
25 eventually break due to metal fatigue.” (Mot. Summ. J. Ex. J at 1.) Additionally, the warning
26 unambiguously cautioned: “In the absence of solid bony union, the weight of the limb alone,
27 muscular forces associated with moving a limb, or repeated stresses of apparent relatively small

1 magnitude, can result in failure of the implant.” (*Id.*) Furthermore, the warning listed the injuries
2 that could result under an enlarged, bold, and underlined heading: breakage of the implant,
3 nonunion of the bone, and pain. (*Id.* at 2.)

4 Both treating physicians showed a strong command of these dangers. Dr. Dolan understood
5 that the device could fail from weight bearing, (Mot. Summ. J. Ex. H 45:17–22), from the bones
6 not healing fast enough, (*Id.* at 78:5–9), or from normal stresses and forces, (*Id.* at 79:25–80:7). It
7 is only material whether Dr. Dolan was adequately warned, because he was the physician who
8 prescribed the first device. Nevertheless, Dr. Dickens’ knowledge of the warning is evidence that
9 reasonable physicians would have seen and understood the warning. Dr. Dickens knew that the
10 device could fail from bearing weight, (Def. Opp’n Mot. Limine Ex. F 12:10–13), or from a
11 delayed bony union, (Mot. Summ. J. Ex. GG 22:22–23). Whether the Plaintiff saw, read, or
12 understood the warning is irrelevant. *See Ellis*, 311 F.3d at 1283. Thus, the warning is adequate as
13 a matter of law, and the reasonable expectation must encompass this warning.

14 The earliest evidence that the device failed was an x-ray that Dr. Dolan took ten weeks
15 after the surgery that showed a delayed union of the bones. The Plaintiff has no evidence to suggest
16 that the device failed prior to the delayed union. The warning noted that the device could fail if the
17 bones did not heal properly. And the Plaintiff offers no alternative; even if he pointed to the second
18 more robust device, such an argument would be in vain. No one disputes that the second device
19 failed, and the Plaintiff now claims that device is also defective. (Opp’n Mot. Summ. J. 12:3–4.)
20 Critically, adequate warnings negate liability absent a showing of a commercially feasible, safer
21 alternative. *Robinson*, 808 P.2d at 525. Thus, the Plaintiff’s cannot show a defect.

22 The Plaintiff makes two additional arguments in response. He argues first, “The mere
23 evidence of a malfunction is sufficient evidence of a defect.” (*Id.* at 14:9.) The Plaintiff does not
24 provide where he acquired this conclusory assertion. The closest statement from the Nevada
25 Supreme Court is “that proof of an unexpected, dangerous malfunction may suffice to establish a
26 prima facie case for the plaintiff of the existence of a product defect.” *Stackiewicz v. Nissan Motor*
27 *Corp. in U.S.A.*, 686 P.2d 925, 928 (Nev. 1984). In that case, the steering wheel of a car suddenly

1 locked, causing a crash, and there was no warning of this possibility. Here, the malfunction could
2 not have been “unexpected” since the Plaintiff was warned that the device could break.

3 Next, the Plaintiff posits a defect by stating that the device was not sufficiently strong in
4 the abstract without providing a practical alternative. According to him, the Synthes Locking
5 System should never break absent abuse. However, a reasonable consumer could not expect the
6 Plaintiff’s idealized product, since the warning alerts consumers that the device could break from
7 prolonged healing, moving a limb, or other repeated stresses of small magnitude. The Plaintiff
8 does not show the device departed from its warning. The Plaintiff has no evidence that the device
9 failed before there was a delayed union of the bones, no evidence that there is a safer and
10 commercially feasible alternative, and no evidence that shows when or why the device failed. The
11 Plaintiff was entitled to a reasonable product—not a perfect, unbreakable one. Thus, neither of the
12 Plaintiff’s arguments survive judicial scrutiny, and no reasonable juror could find a defect.

13 Second, turning to Defendant’s other arguments, the Defendant makes a compelling case
14 that the Plaintiff misused the product by failing to comply with medical advice. Facebook pictures,
15 medical reports, and the physicians’ testimonies all evidence noncompliance. If the Plaintiff did
16 misuse the product and that misuse was the cause of the product’s failure, then the Plaintiff’s case
17 must fail. *See Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092, 1095 (Nev. 1990). However,
18 whether the Plaintiff complied with medical advice is subject to a genuine dispute, because the
19 Plaintiff and his supervisor swear that he complied with the physicians’ instructions. A reasonable
20 juror could believe these testimonies; thus, summary judgment is inappropriate on this basis.

21 Third, the Defendant is not entitled to summary judgment based on the Plaintiff’s failure
22 to provide a medical expert. Under Nevada law, a plaintiff must produce medical expert testimony
23 to establish causation, when “the cause of [the injury] is not immediately apparent.” *Neal-Lomax*
24 *v. Las Vegas Metro. Police Dep’t*, 574 F. Supp. 2d 1193, 1199 (D. Nev. 2008), *aff’d*, 371 F. App’x
25 752 (9th Cir. 2010) (citing *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 851 P.2d 423, 425
26 (Nev. 1993)). In order to prove causation here, the Plaintiff must show (1) that the device failed
27 because of a defect and (2) that this failure caused the Plaintiff’s medical complications.

1 Nevada law does not require a medical expert to show that the device failed because of a
2 defect—this is not a medical injury. On the other hand, the law does require a medical expert to
3 opine that the failure of the device caused the medical complications. Nevertheless, the Plaintiff
4 can rely on the treating physicians for this conclusion. Even though they believe that the device
5 failed because of alleged abuse, they do not dispute that the device failed and that this failure
6 harmed the Plaintiff.

7 Lastly, the Defendant relies on the learned intermediary doctrine. However, Nevada has
8 only applied the doctrine in cases based on failure to warn defects. *Kwasniewski v. Sanofi-Aventis*
9 *U.S., LLC*, No. 2:12-cv-515, 2012 WL 6589250, at *2 (D. Nev. Dec. 17, 2012), *aff'd*, 637 F. App'x
10 405 (9th Cir. 2016); *Moses v. Danek Med., Inc.*, No. cv-s-95-512, 1998 WL 34024164, at *4 (D.
11 Nev. Nov. 30, 1998); *Klasch v. Walgreen Co.*, 264 P.3d 1155, 1158 (Nev. 2011). The Plaintiff
12 does not offer any argument to rebut the application of the doctrine here. Nonetheless, the Court
13 declines to speculate whether Nevada would extend this protection to other defects, especially
14 when the Court has another adequate basis for granting summary judgment. In sum, the Court
15 grants summary judgment on this cause of action, because the Plaintiff cannot show a defect.

16 2. *Negligent Products Liability*

17 The Plaintiff also argues that the Defendant was negligent. For this cause of action, the
18 Plaintiff must prove: “(1) an existing duty of care, (2) breach, (3) legal causation, and (4)
19 damages.” *Turner v. Mandalay Sports Entm’t, LLC*, 180 P.3d 1172, 1175 (Nev. 2008). In order to
20 prove breach here, the Plaintiff would need to show that the device was defective and that the
21 Defendant acted unreasonably. *See Papike v. Tambrands Inc.*, 107 F.3d 737, 744 (9th Cir. 1997).
22 However, as discussed above, the Plaintiff cannot meet the less onerous standard of merely
23 showing a defect. Thus, the Court grants summary judgment on this claim.

24 3. *Breach of an Implied Warranty of Merchantability*

25 The Plaintiff initially raised a breach of an implied warranty of merchantability but now,
26 in the Plaintiff’s Correction (ECF No. 67), concedes that this warranty “is clearly not an issue in
27 this case.” Consequently, this Court grants summary judgment in the Defendant’s favor.

1 4. *Breach of an Implied Warranty of Fitness for a Particular Purpose*

2 According to the Plaintiff, the Defendant breached an implied warranty of fitness for a
3 particular purpose. Nevada Revised Statutes 104.2315 provides for an implied warranty for a
4 particular purpose when: (1) the seller has reason to know of a particular purpose and (2) that the
5 buyer relies on the seller's skill or judgment to furnish a good that is fit for such a purpose. The
6 Plaintiff fails to prove either of these essential elements. First, there is no particular purpose on
7 which the Plaintiff could conceivably rely—his use was ordinary. Second, there is no evidence
8 that the Plaintiff relied on the Defendant's judgment in determining how to treat his leg. Therefore,
9 the Court holds that summary judgment for the Defendant is proper on this claim.

10 5. *Breach of an Express Warranty*

11 Lastly, the Plaintiff alleged a breach of an express warranty but now admits in his
12 oppositional brief that he has no basis in the record for this claim. The Court agrees. Therefore,
13 the Court grants summary judgment in favor of the Defendant on all of the Plaintiff's causes of
14 action and need not consider the Defendant's motion in limine.

15 **CONCLUSION**

16 IT IS HEREBY ORDERED that the Defendant's Motion for Summary Judgment (ECF
17 No. 54) is GRANTED.

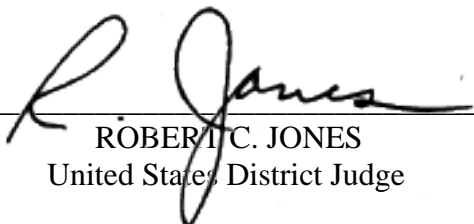
18 IT IS FURTHER ORDERED that the Plaintiff's Motion in Limine (ECF No. 60) is
19 DENIED.

20 IT IS FURTHER ORDERED that the Defendant's Motion in Limine (ECF No. 71) is
21 DENIED AS MOOT.

22 IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

23 IT IS SO ORDERED.

24 Dated this 26th day of August, 2019.

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27 _____
 ROBERT C. JONES
 United States District Judge