In the Supreme Court of Nevada

VALLEY HEALTH SYSTEM, LLC, A NEVADA LIMITED LIABILITY COMPANY d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER,

Appellant,

vs.

DWAYNE ANTHONY MURRAY, individually, and as heir, guardian, and natural parent of BROOKLYN LYSANDRA MURRAY, and as special administrator of the Estate of LAQUINTA ROSETTE WHITLEY-MURRAY,

Respondents.

Supreme Court
Case Nos. 79658, 80113, 80968

District Court Case Nos.
A-14-699586-C & A-14-699612-C
(*Consolidated*)

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Appellant Valley Health System, LLC d/b/a Centennial Hills Hospital Medical Center ("Centennial") is an indirect subsidiary of Universal Health Services, Inc. ("UHS"). UHS is publicly traded on the New York Stock Exchange. No publicly-traded company owns 10% or more of Universal Health Services, Inc. stock.

Appellant has been represented in this litigation by the law firms of Greenberg Traurig, LLP and Hall Prangle & Schoonveld, LLC.

Dated this 23rd day of April, 2021.

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JURISDICTIONAL STATEMENT

Centennial timely appeals from a "Final Judgment" entered July 31, 2020 (35A7091–93), in addition to rulings on various interlocutory orders and special orders issued prior to the Final Judgment's entry. NRAP 3A(b)(1). A notice of entry of the Final Judgment was filed on August 4, 2020, and Centennial timely filed an amended notice of cross-appeal on September 1, 2020. NRAP 4(a)(1), (2). (35A7095, 7102–89.)

Notices of appeal and cross-appeal that preceded the Final Judgment were timely in terms of notices of entry, NRS 4(a)(1)–(3), but premature in terms of appellate jurisdiction. (*See* 30A6237–59; 31A6400–34, 6454–89; 32A6520–26; 33A6752–68; 34A6993–7003.) After the Final Judgment was entered on July 31, 2020, this Court entered an order consolidating the appeals (Nos. 79658, 80113, and 80968), granted Plaintiffs' motion to dismiss their appeal in No. 79658, and realigned the parties to designate Centennial as Appellant.

ROUTING STATEMENT

The Supreme Court should retain this appeal to reject the district court's novel ruling that a hospital owes its patients a separate and heightened fiduciary duty above the standard of care applicable to health care providers. After concluding a heightened fiduciary duty exists, the district court ruled—contrary to this Court's holdings in *Curtis* and *Szymborski*—that Plaintiffs' fiduciary duty claim is not subject to NRS Chapter 41A's noneconomic damages cap and prohibition against joint liability. Recognizing a heightened fiduciary duty and exempting such claims from Chapter 41A—enacted following the KODIN voter initiative for the express purpose of shielding healthcare providers from excessive verdicts—presents an issue of statewide public importance warranting this Court's review. NRAP 17(a)(11)–(12).

The jury returned a $48,630,000 verdict—including $14,500,000 in noneconomic damages and $32,420,000 in punitive damages—for wrongful death claims arising from allegations that Centennial employees improperly administered medication prescribed by treating physicians. The district court entered a Final Judgment awarding the full amount of the verdict and declining to apply Chapter 41A's limits based solely on the jury's finding that Centennial employees intentionally breached a fiduciary

duty owed to Ms. Murray. (19A3709–10; 35A7094.) Because of the size of the judgment and the district court's unprecedented ruling on the fiduciary duty issue, this appeal does not fall within any category for presumptive assignment to the Court of Appeals. *See* NRAP 17(b)(1)–(15).

ISSUES PRESENTED

1. Did the district court err in entering judgment against Centennial on Plaintiffs' claim for intentional breach of fiduciary duty when

   a. Nevada law does not recognize a heightened fiduciary duty owed by a hospital to a patient in the provision of medical services?

   b. Plaintiffs did not plead or present substantial evidence that Centennial's Medication Administration Procedure intentionally exploited Ms. Murray for benefit or gain?

2. Under this Court's "gravamen" analysis in *Curtis* and *Szymborski*, did the district court err in concluding that Chapter 41A's limits on noneconomic damages and joint liability do not apply to a hospital where a patient alleges injuries caused by medication prescribed by physicians and administered by medical staff according to hospital procedure?

3. Should this Court reverse or reduce the $32,4200,000 punitive damage award where

   a. Neither the evidence nor the verdict supports punitive damages against Centennial?

   b. The wrongful death statute allows only the estate to recover punitive damages?

   c. Punitive damages are non-pecuniary damages subject to NRS 41A.035?

4. Alternatively, is Centennial entitled to a new trial or remittitur because of the improper admission of undisclosed expert testimony and excessive damage awards?

5. Did the district court err in awarding prejudgment interest on future damages?

6. Did the district court abuse its discretion in awarding over $700,000 in attorney's fees and costs?

STATEMENT OF THE CASE

This is a wrongful death action against a hospital. LaQuinta Rosette Whitley-Murray ("Ms. Murray") was admitted to Centennial Hills Hospital where, four days later, she died while being treated for a sickle cell crisis. Ms. Murray's heirs and the representative of her estate ("Plaintiffs") claim Ms. Murray's death resulted from complications related to Toradol, a pain medication prescribed by Ms. Murray's physicians (who were not Centennial employees), approved by Centennial's pharmacy, and administered by Centennial nurses. Plaintiffs presented two liability theories to the jury: professional negligence (*i.e.*, medical malpractice), and intentional breach of fiduciary duty.

The Uncapped Damage Awards. The jury rendered a verdict in Plaintiffs' favor on professional negligence and apportioned 65% fault to Centennial employees. (19A3706–08.) The jury returned a verdict for $16,210,000 in past and future damages, including $14,500,000 in noneconomic damages. (19A3709.) The jury found Centennial employees "intentionally breach[ed] their fiduciary duty" to Ms. Murray and proximately caused her death (19A3709) and, in connection with the fiduciary duty finding only, that Centennial employees acted with fraud,

oppression, or malice. (19A3710.) The jury returned a special verdict for $32,420,000 in punitive damages against Centennial. (19A3711).

On December 13, 2019, the district court entered an order concluding (1) a hospital owes a fiduciary duty to patients in its care, and (2) standard-of-care expert testimony from two physicians called by Plaintiffs supported the jury's finding that Centennial's "medication-administration policy" intentionally breached that fiduciary duty by permitting nurses to administer Toradol too frequently. (33A6798–6804.)

After inviting briefing on "whether or not the statutory caps [in NRS Chapter 41A] should be applied, and if so, how it should be apportioned" between the professional negligence and fiduciary duty claims (33A6805), the district court entered the Final Judgment on July 31, 2020 concluding that "the caps in NRS 41A.035 do not apply to Plaintiff's action for breach of fiduciary duty" and ordering "that the damages amounts determined by the jury are the final judgment in this matter." (35A7091–93.) The district court expressly did "not address the calculation of interest on the judgment." (35A709.) In separate special orders, the district court awarded $511,200 in attorney's fees and $207,269.82 in costs. (32A6516–19; 33A6747–50; 34A6988–91.)

Centennial timely appealed the Final Judgment. (25A7095–7105.)

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

Evidence and disputed fact issues are addressed only as necessary for appellate review. The facts described below are undisputed or detailed in the district court's written decisions.

A. Ms. Murray Is Admitted Suffering A Sickle Cell Crisis And Her Doctors Order Toradol For Pain.

Ms. Murray arrived by ambulance at the Centennial emergency room on April 20, 2013 complaining of extreme pain caused by a sickle cell episode. (33A6782.) In addition to opioid pain medications, an ER doctor ordered 30 mg of Toradol—an anti-inflammatory pain reliever—which nursing staff administered at 2:10 p.m. (33A6782–83.) Ms. Murray was admitted to the hospital, and her attending physician (Dr. Mandip Arora) ordered 30 mg of Toradol to be administered every six hours. (33A6783.)

Toradol comes with a "black box" insert that recommends a dosage of 30 mgs every six hours, with a maximum daily dose not to exceed 120 mgs. (33A6783.) The insert warns that "[i]ncreasing the dose … beyond the label recommendations will not provide better efficacy, but will increase the risk of developing serious adverse events," and that complications could include acute renal failure. (*Id.*)

B. Nurses Administer Toradol According To Physician Orders And Hospital Procedure.

The standard administration time for six-hour doses as ordered by Dr. Arora was 6:00 p.m., 12:00 a.m., 6:00 a.m., and 12:00 p.m. (*Id.*; *see also* 12A2222; 16A3101; 38A7806.) According to Centennial "hospital policy"[1]—specifically, the Medication Administration Procedure—Toradol is classified as a "non-time critical" medication, which allowed nurses to administer the drug per doctor orders within a one-hour grace period before and after the designated time. (33A6783.) The initial "loading dose" given at the emergency room is not included when calculating the next dosage time if, as here, the time between the initial dose and the first prescribed dose is more than half the normal scheduled time between doses. (12A2351–52; 16A3222–23; 38A7802.)

Pursuant to Dr. Arora's orders and hospital policy, after the initial loading dose at the emergency room, nurses administered the first prescribed Toradol dose at 6:49 p.m. on April 20, 2013 and thereafter within an hour before or after the assigned time. (33A6783; 37A7618–45.)

Plaintiffs' expert testified that Ms. Murray's doctors should not have ordered Toradol at all. (13A2602–03, 2618–20.) With respect to Centennial

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[1] The district court's description of "hospital policy" refers to Centennial's "Medication Administration Procedure." (38A7799-7810.)

medical staff who carried out those orders, the experts testified that Ms. Murray sometimes received a fifth dose too early, thus exceeding the maximum 120-mg dose in 24 hours. (*See, e.g.*, 13A2498, 2535, 2542.)

C. Ms. Murray Suffers Cardiac Arrest And Dies In The Hospital.

On April 23, Dr. Arora discontinued Toradol due to lab reports indicating kidney complications. (33A6784.) Ms. Murray's condition worsened the next morning, and she was transferred to a higher care unit after her husband expressed concerns about her condition. (33A6785.) A nephrologist examined her and ordered emergency dialysis, but before that order was carried out Ms. Murray suffered a series of cardiac arrests and died in the hospital on April 24, 2013. (*Id.*)

II. PROCEDURAL HISTORY

A. The Complaint.

1. Plaintiffs bring wrongful death and professional negligence claims.

On April 22, 2014, Plaintiffs filed a wrongful death action alleging medical negligence, vicarious liability, negligent hiring, training, and supervision, and other claims against Centennial, its parent company Universal Health Services, Inc. ("UHS"), and Dr. Arora and his physician group. (1A2.) Plaintiffs alleged negligent administration of pain medication but did not state a fiduciary duty claim. (1A7–8; 2A232–33.)

On February 23, 2015, the district court dismissed all claims except wrongful death under NRS 41.085. (1A18–21.) UHS was dismissed with prejudice on November 24, 2015. (1A73–75.) Dr. Arora and Nevada Hospitalist Group, LLP were dismissed per settlement before trial. (6A1317–18.)

2. Plaintiffs add a fiduciary duty claim alleging only intentional understaffing.

On January 12, 2016, over Centennial's objection,[2] the district court (Honorable Rob Bare) permitted Plaintiffs to file an amended complaint adding a fiduciary duty claim based on understaffing. (1A227; 33A6792.) Plaintiffs allege Centennial had a duty "to exercise the utmost good faith in caring for and treating" Ms. Murray, who "placed her confidence and trust in [Centennial] to make appropriate good faith decisions regarding her medical care and treatment." (2A240.) In that complaint, Plaintiffs claim Ms. Murray relied on Centennial "to make appropriate and good faith decisions regarding her medical care and treatment," including "ensuring that sufficient staff was available to provide such care and treatment." (*Id.*) Plaintiffs also generally allege Centennial had a duty to not be influenced by "business goals, desires and/or profit." (2A240–41.)

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[2] October 15, 2015 was the deadline to amend pleadings. (1A118.)

Plaintiffs' amended complaint contains a single paragraph identifying the sole basis of Centennial's alleged breach of fiduciary duty—understaffing:

> 79. Defendant CENTENNIAL breached its fiduciary duties by failing to exercise the utmost good faith in caring for and treating Plaintiff in that Defendant CENTENNIAL failed to properly staff the floor on which LAQUINTA was a patient. As a result of this breach, the nurses failed to be proper advocates for LAQUINTA, and failed to carry out orders in a timely fashion.

(2A241.) Plaintiffs' professional negligence claim asserts this same understaffing allegation, among others. (2A233–34.) The amended complaint does not mention Centennial's Medication Administration Procedure as grounds for breach of fiduciary duty or any other claim. (2A228–43.)

Plaintiffs relied only on their understaffing theory in opposing Centennial's summary judgment motion on the fiduciary duty claim. (9A1611–12; 10A1929, 1936.) At the hearing (and again at the beginning of trial), Plaintiffs' counsel reconfirmed that their fiduciary duty claim turned solely on allegations of understaffing: "It's not a breach of fiduciary duty merely because they gave her Toradol…. The breach of fiduciary duty is having this staffing crisis and doing nothing about it." (10A1929; *see also* 9A1611; 16A3068–71; 33A6792–94.) On the other hand, Plaintiffs alleged

throughout the litigation that the "[a]dministration of … Toradol in an amount which exceeded the physician's order and exceeded the amount set forth in the FDA Black Box Warning" was a breach of the professional standard of care. (*See, e.g.*, 6A1272.)

B. The Trial.

Evidence concerning Centennial's Medication Administration Procedure (38A7799–7810) is central to this appeal because it is the sole basis on which the district court entered judgment on Plaintiffs' fiduciary duty claim. (33A6803–04.) Although Plaintiffs also presented their "intentional understaffing" theory to the jury (33A5–6), the district court rejected that claim as unsupported by the evidence. (33A6794.)

1. Medical experts testified that the Toradol dosage timing breached the professional standard of care.

Consistent with their complaint, Plaintiffs presented expert medical testimony[3] that Centennial—through its medical staff—violated the professional standard of care by allowing Toradol to be administered more frequently than the black box warning recommended. (13A2540–42, 2624; 14A2680–81; *see also* 33A6798–6804.) Both experts opined that Toradol caused injury to Ms. Murray's kidneys and contributed to her death.

[3] Dr. Michael DeBaun (sickle cell specialist) and Dr. Joshua Schwimmer (nephrologist). (14A2847; 15A2914.)

(13A2546, 2577–79; 15A2923, 2930.) This expert medical testimony was offered to establish professional negligence. (*See* 16A3521–30.)

2. Plaintiffs' experts offer undisclosed opinions criticizing the Medication Administration Procedure.

At trial, Plaintiffs for the first time argued that the Medication Administration Procedure was an intentional breach of fiduciary duty. (18A3551–55.) Plaintiffs did not disclose before trial that their experts had any criticisms of the Procedure or its implementation. (13A2539.) Over Centennial's objection (13A2539; 14A2689–90), the court allowed Dr. DeBaun to criticize the Procedure as "flawed," "inadequate," and without "justification." (13A2539–44, 2624; 14A2680–81.) Although the district court ruled Dr. Schwimmer could not give undisclosed opinions criticizing the Procedure (15A2928–29), he did so anyway, criticizing the hospital and its medical staff for administering Toradol pursuant to the Procedure's dosage protocols. (15A2929–30, 2991, 2998.)

3. The Medication Administration Procedure was edited, approved, and executed by medical professionals exercising medical judgment.

In upholding the jury's finding that Centennial intentionally breached its fiduciary duty, the district court cited argument and evidence suggesting Centennial implemented the Procedure with improper financial motives. (33A6798–6804.) The district court noted the Procedure "was drafted by

Universal Health Services, a non-hospital holding company." (33A6783; *see also* 33A6804.) But the Procedure itself articulates "highly recommended guidelines for the safe, accurate and consistent administration of medications." (38A7799.) It was drafted with input from hospital experts, reviewed by Centennial's policy and procedure committees, and edited and approved by the Centennial medical staff, which has the option of adding a medication to the time critical list if it chooses. (13A2339; 16A3234–35, 3237–39, 3255–58.) The Procedure instructs that "Medication Administration Protocols and Guidelines … will be developed by clinicians in their respective disciplines using evidence-based practice principles, and be approved by required hospital committees up to and including the Medical Executive Committee." (38A7802.)

New medication orders are to be written "in accordance with established standard practice" including "dose, frequency, … [q]uantity and/or duration," and "[s]pecific instructions for use, when applicable." (38A7799–7800; *see also id.* ("Medications will be administered on the established scheduled times or based on patient need as specified by the ordering [Licensed Independent Practitioner].").) The Procedure allowed Dr. Arora to specify Toradol for time-critical dosage if he chose. (12A2345–46, 2347–48, 50.) Nurses—who do not necessarily see black box inserts—

are given orders from doctors (*i.e.*, Dr. Arora) and they administer medications according to those orders and the Procedure's guidelines. (12A2202–04, 2235–36, 2346–47, 2350–51.)

Implying a financial motive, the district court noted evidence that "placing Toradol on a time sensitive list or administering the medication according to the black box warning would have required them to hire more nurses, which would in turn increase costs." (33A6804.) This conclusion conflicts with the district court's ruling in the same order finding "no record of any evidence that established … intentional understaffing" and that "no evidence was presented that an actual understaffing occurred, let alone, that one occurred and was done with the goal of increasing Defendant's profits." (33A6794.)

In any event, there was no evidence that adding Toradol to the time-critical list would have required hiring more nurses. There was inconsistent testimony from experts regarding whether Toradol was required to be classified as time-critical. (*See* 13A2636–38; 14A2696–97, 2706–07; 15A2991; 16A3218–20, 3228–29; *see also* 35A7206 (Toradol black box permitting scheduled doses).) But even time-critical medications

have a one-hour window of 30 minutes before or after the scheduled time.[4] (38A7799, 7807.) Plaintiffs themselves conceded they were not contending Toradol had to be given at the exact prescribed time—it could be given later than the prescribed six-hour period (33A6740), which would not require any additional nursing staff.

4. In providing care to Ms. Murray, Centennial medical staff exercised medical judgment in accordance with the Procedure.

Regardless of the Procedure's initial drafting, Centennial's medical staff exercised medical judgment in carrying out their duties with respect to Ms. Murray. The Procedure directs the Centennial pharmacy to "review, approve and profile" each order before a medication is released for administration. (38A7800.) Centennial's head pharmacist, Andrew Jackson, testified the pharmacy scrutinizes every medication order for appropriateness according to drug, dose, route, frequency, black box warning, and other parameters based on patient profile and potential drug

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[4] The Procedure lists nine medications (not Toradol) that were not eligible for scheduled dosing because they require precise timing. (38A7801.) All other medications appropriate for scheduled dosing times are classified as either "time-critical" or "non-time critical." (38A7801-02.) The Procedure lists seven "time-critical" medications (38A7807) that could be administered one half hour before or after the prescribed dosing time. (38A7801.) For non-time-critical medications that were not prescribed more frequently than every four hours, the window was one hour before or after the prescribed time. (38A7799, 7801, 7807.)

interactions. (16A3209–11.) The pharmacy then monitors patient labs to see how medications are tolerated. (16A3209.) Jackson testified the pharmacy engaged in that evaluation and monitoring procedure for Ms. Murray. (12A2273–75; 13A2438; 16A3226–27; 36A7308.)

Ms. Murray was on numerous medications for pain, including potent opioids containing their own black box warnings. (16A3211–12; 35A7190, 7206.) The pharmacy conducted a risk-benefit analysis and determined that while administering Toradol on a non-time-critical basis would not in itself increase its efficacy, it would help with pain while allowing Ms. Murray to take fewer opioid pain medications including Dilaudid, which has black box warnings for respiratory failure and decreased breathing. (16A3210–14, 3226, 3259–60.) Patients with sickle cell disease are at risk for acute chest syndrome, including risk of death precipitated by opioid-related drugs such as Dilaudid—but not by Toradol. (16A3213–14.) The pharmacy concluded that while administering Toradol (which has the strength of an opioid) in accordance with the Procedure might result in Ms. Murray receiving 150 mg of Toradol within a 24-hour period, it would not violate the standard of care. (16A3219–20, 3228–29, 3264, 3271.)

C. The Verdict.

1. $16,210,00 in compensatory damages for professional negligence, for which Centennial is apportioned 65% fault.

At the conclusion of the evidence, Centennial moved under NRCP 50(a) for judgment as a matter of law on the fiduciary duty and punitive damages claims. (18A3477–89.) Judge Bonaventure denied both motions. (18A3486, 3489.) Centennial also requested the jury be given special interrogatories to determine the basis for their finding against Centennial, but that request was denied. (18A3490–91; 26A5243–44.)

With respect to damages, Plaintiffs requested a separate damages question for fiduciary duty. (18A3493–94.) Because Plaintiffs' evidence with respect to professional negligence was coextensive of the fiduciary duty evidence, Centennial objected to a separate damage submission as duplicative. (18A3494–95.) Plaintiffs did not request the damages question be predicated on a finding of both professional negligence and fiduciary duty.

The jury was given the statutory definition of "professional negligence," and instructed that Plaintiffs had the burden to prove the "accepted standard of medical care or practice" from which the hospital staff's conduct departed, causing injury. (19A3678–79.) The jury found in

questions 1 and 2 that Centennial employees breached the standard of care, which proximately caused Ms. Murray's death. (19A3706–07.)

The jury attributed 35% of the fault to Ms. Murray's treating physicians and the remaining 65% fault to Centennial employees. (19A3707–08).

The jury then answered the compensatory damages question:

a.	Loss of companionship, comfort and consortium	$ 5,000,000.00
b.	Past and future grief and sorrow	$ 7,000,000.00
c.	Loss of probable support	$ 1,700,000.00
d.	Funeral expenses	$ 10,000.00
e.	Pain and suffering of LaQuinta Murray related to negligence	$ 2,500,000.00

(19A3709.) The jury's finding of $2,500,000 for "pain and suffering … related to negligence" was over $2,000,000 more than the amount Plaintiffs suggested to the jury. (18A3557.)

2. Intentional breach of fiduciary duty by Centennial employees.

The jury was then asked: "Did the employees of Centennial Hills Hospital intentionally breach their fiduciary duty" to Ms. Murray. (19A3709.) The jury was instructed that "a hospital/patient relationship is fiduciary in nature," meaning it "is based on trust and confidence and a hospital is obligated to exercise utmost good faith toward its patient."

(19A3687.) To find a breach of fiduciary duty, the jury was instructed Plaintiffs must prove "the agents of Centennial Hills Hospital intentionally exploited LaQuinta Murray for its own gain or benefit." (19A3688.)

The jury found in questions 9 and 10 that "employees of Centennial Hills Hospital intentionally breach[ed] their fiduciary duty owed to LaQuinta Murray." (19A3709.)

Because the compensatory damages question (no. 8) was answered before the jury considered fiduciary duty (nos. 9–10), the jury did not make a finding of damages predicated on a breach of fiduciary duty by Centennial employees. (19A3706–09.) The jury form also expressly restricted the pain and suffering award to damages "related to negligence." (19A3709.)

3. $32,420,000 in punitive damages solely in connection with the fiduciary duty finding.

Question 11 asked whether the jury found "by clear and convincing evidence, that the employees of Centennial Hills Hospital engaged in conduct with fraud, oppression, or malice." (19A3710.) The jury was instructed, without Plaintiffs' objection (18A3491–94), that they could answer question 11 only if they found an intentional breach of fiduciary duty in questions 9 and 10. (19A3709–10 ("IF YOUR ANSWER IS 'NO' AS TO QUESTION NO. 10, PLEASE SIGN THE LAST PAGE AND NOTIFY THE MARSHALL").) The jury's finding that Centennial "employees"

engaged in conduct with fraud, oppression, or malice toward Ms. Murray was thus premised solely on the jury's finding that Centennial "employees" intentionally breached their fiduciary duty to Ms. Murray. (19A3709–10.)

The jury returned a separate verdict for $32,420,000 in punitive damages against Centennial—over $7,000,000 more than Plaintiffs requested in closing argument. (19A364, 3711.)

D. The Final Judgment.

1. The district court initially rejects Plaintiffs' fiduciary duty claim and applies Chapter 41A.

On February 21, 2019, the district court entered a Judgment Upon Verdict awarding the full damages assessed by the jury—$48,630,000—without Chapter 41A reductions, and prejudgment interest on all compensatory awards including future damages (the "First Judgment"). (19A3718–20.) Centennial filed motions pursuant to NRCP 50 and 59. (21A4113–16.)

On August 14, 2019, the district court (Honorable Jacqueline Bluth) granted in part Centennial's motion for judgment as a matter of law on the fiduciary duty claim for lack of evidence, applied statutory damages limits in NRS 41A.035, 41A.045, and 42.005(1)(5), and ruled Plaintiffs were entitled to recover $1,339,000 in compensatory damages and $4,017,000 in punitive damages. (30A6217–36.)

2. The district court reinstates the fiduciary duty claim based solely on the Medication Administration Procedure and declines to apply Chapter 41A.

Plaintiffs filed a Rule 59 "motion to alter or amend the judgment," seeking reversal of the August 14 Order and reinstatement of the full jury award. (31A6384–99.) The district court granted Plaintiffs' motion, reinstated the fiduciary duty claim, and requested briefing on "whether or not the statutory cap should be applied, and if so, how it should be apportioned" between the professional negligence and breach of fiduciary duty claims. (33A6781–6806.) The parties briefed the application of NRS 41A.035, 41A.045, and 42.005 (33A6807–22; 34A6823–6953), and the district court orally announced its intention to reinstate the First Judgment. (34A6954–87.)

After competing submissions regarding the form of judgment and whether Plaintiffs were entitled to recover prejudgment interest on future damages (34A7014–28; 35A7029–90), the district court entered the "Final Judgment" on July 31, 2020, concluding that "the caps in NRS 41A.035 do not apply to Plaintiff's action for breach of fiduciary duty" and ordering "that the damages amounts determined by the jury are the final judgment in this matter." (35A7091–94.) The district court declined to "address the calculation of interest on the judgment." (35A709.)

E. The Special Orders.

Before entry of the Final Judgment on July 31, 2020, the district court entered special orders awarding Plaintiffs $511,200 in attorney's fees pursuant to NRCP 68 (32A6516–19); $169,895.61 in expert witness fees, exceeding the $1,500 statutory limit in NRS 18.005(5), for Plaintiffs' nephrology and sickle cell experts (33A6747–50); and an additional $37,374.21 in court costs (34A6988–91). Centennial appealed these orders contemporaneously and in its notice of appeal from Final Judgment. (32A6520; 33A6752; 34A6993, 7001; 35A7095, 7102.)

SUMMARY OF THE ARGUMENT

The district court ruled that a hospital owes its patients a heightened fiduciary duty that exceeds the usual standard of care for healthcare providers. That ruling is unsustainable under this Court's precedent and the KODIN statutes enacted by Nevada voters to protect access to healthcare in the state.

Although the district court's recognition of a new fiduciary duty is novel, the question of whether Chapter 41A applies to limit a hospital's liability in a medical malpractice lawsuit is not. This case is about a patient in a hospital who died after an adverse reaction to a drug prescribed by physicians, approved by a hospital pharmacy, and administered by nurses. Plaintiffs do not claim Ms. Murray received a drug that was not prescribed

for her, or that her injury was sustained by a non-medical event while she happened to be in the hospital. Instead, Plaintiffs presented expert medical testimony that, over the course of four days, Centennial medical staff administered Toradol in accordance with doctor orders, pharmacy approval, and hospital medication administration procedures.

Plaintiffs' medical experts criticized those orders and procedures as negligent, claiming Toradol was administered too frequently. As a result, the physician experts testified, the orders and procedures violated the standard of care for medical professionals. This testimony confirms the gravamen of Plaintiffs' fiduciary duty claim is professional negligence. Under this Court's decisions in *Szymborski* and *Curtis*, application of Chapter 41A's limits on noneconomic damages and joint liability is a straightforward proposition.

Swayed by Plaintiffs' allegation that Centennial's employees were motivated by greed, the district court concluded the jury could find Centennial intentionally adopted and implemented its medication administration procedure to "exploit" Ms. Murray for its own gain. Based on that ruling, the district court concluded that even though the negligent administration of Toradol by medical professionals was an alleged cause of Ms. Murray's death, Centennial's purported business motivations meant

there was no medical judgment at all. That ruling is inconsistent with Nevada law, Chapter 41A and the voter initiative that precipitated it, and the evidence presented at trial.

Ms. Murray's death was tragic. And to the extent hospital medical staff played a role in that event and Plaintiffs' experts testified regarding their standard of care, it is reasonable to conclude the evidence supports the jury's professional negligence finding. But the notion that financial or business considerations in hospital policy-making renders a decision "non-medical" is contrary to Chapter 41A's history and core purpose. KODIN was enacted *specifically* to ensure "greater predictability and reduce costs for health-care insurers and, consequently, providers and patients." *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 798, 358 P.3d 234, 239 (2015).

There is likely no hospital in existence that does not regularly struggle with whether it can afford better pharmaceuticals, more personnel, newer equipment, or higher insurance premiums. Indeed, those are the very considerations that precipitated KODIN in the first place. But those considerations—even if they play some role in hospital policy-making—do not render operational decision-making nefarious, much less actionable as a breach of fiduciary duty premised on exploitation for financial gain. A holding that deems financial considerations as untethered from medical

judgment or treatment is both illogical and inconsistent with public policy as expressed in Chapter 41A and *Tam*.

This Court should confirm that Nevada does not recognize a heightened fiduciary duty owed by hospitals to patients in their care. This Court should reverse the judgment because there is no evidence Centennial or its staff intentionally exploited Ms. Murray for financial gain, and certainly no clear and convincing evidence to support a $32 million punitive damage award based solely on that finding. The Court should reverse the punitive damage award in its entirety and, in accordance with *Szymborski* and *Curtis*, reduce the noneconomic damage award to $350,000, and further reduce all compensatory awards to the 65% fault that the jury apportioned to Centennial. Alternatively, Centennial requests a new trial or remittitur.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ENTERING JUDGMENT AGAINST CENTENNIAL FOR INTENTIONAL BREACH OF FIDUCIARY DUTY.

Whether a defendant owes a duty of care is a question of law. *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 296, 255 P.3d 238, 244 (2011). "[W]hether a jury instruction accurately states Nevada law" is reviewed *de novo*. *D & D Tire v. Ouellette*, 131 Nev. 462, 470, 352 P.3d 32, 37–38 (2015). If the jury was properly instructed on the law, the standard

of review is whether the verdict is supported by substantial evidence, which is "that which a reasonable mind might accept as adequate to support a conclusion." *Taylor v. Thunder*, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000) (internal quotation omitted).

Centennial moved for judgment as a matter of law on Plaintiffs' fiduciary duty claim pursuant to NRCP 50(a) and 50(b) and objected to its submission to the jury. (18A3477–86; 21A4136.)

A. The District Court Erred In Holding Hospitals Owe A Heightened Fiduciary Duty To Patients In The Administration Of Medication.

"In Nevada, a claim for breach of fiduciary duty requires, as a threshold, the existence of a fiduciary duty." *Israyelyan v. Chavez*, Dkt. No. 78415, 2020 WL 3603743, at *4 (Nev. July 1, 2020) (unpublished disposition). The Legislature has codified the scope of a hospital's duty to patients in its care. A provider of health care—including a licensed hospital—has a duty "in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances." *See* NRS 41A.009, Nevada Statutes 1989, p. 425, NRS 41A.015;[5] *see also* NRS 41A.100(1).

[5] Prior to 2015, Chapter 41A contained separate definitions of "professional negligence" and "medical malpractice." In 2015, the Legislature consolidated the two definitions in NRS 41A.015 and eliminated

This is consistent with longstanding authority defining the parameters of a hospital's duties in reference to the medical services it provides. *See, e.g.*, *Wickliffe v. Sunrise Hosp., Inc.*, 101 Nev. 542, 548, 706 P.2d 1383, 1388 (1985) ("[A] hospital is required to employ that degree of skill and care expected of a reasonably competent hospital in the same or similar circumstances."). When a fiduciary duty claim arises from a professional relationship, a claim for a breach of that duty is characterized as a claim for professional malpractice. *Stalk v. Mushkin*, 125 Nev. 21, 29–30, 199 P.3d 838, 843–44 (2009) (plaintiff could not circumvent statute governing limitations in legal malpractice case by asserting breach of fiduciary duty).

Acknowledging that this Court "has not addressed the issue of whether a hospital owes a fiduciary duty to its patients," the district court nonetheless concluded Centennial owes a heightened duty exceeding statutory definitions by virtue of Ms. Murray's status as a "patient" who comes to the hospital "with an expectation of being cared for, treated, and helped; this creates a position of trust." (33A6787–88 (citing *Hoopes v. Hammargren*, 102 Nev. 425, 431, 725 P.2d 238, 242 (1986).)

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references to "professional malpractice." Prior to this amendment, the statutory caps applied to both professional negligence and medical malpractice. *See Tam*, 358 P.3d at 242.

This Court recognized in the unique circumstances of *Hoopes* that "the physician-patient relationship is 'fiduciary in nature'" and actionable as medical malpractice. *Hoopes*, 725 P.2d at 242 (quoting *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983)). In *Hoopes*, the plaintiff alleged her doctor "used the physician-patient relationship to induce her into a sexual relationship." *Id.* This Court held that the patient may establish liability for breach of fiduciary duty if the doctor took "advantage of the patient's vulnerabilities," which "would violate a trust and constitute an abuse of power" and constitute "exploitation." *Id.* The "exploitation" in question was use of the doctor's position to facilitate an event normally foreign to the doctor-patient dynamic: sex. *Id.* (noting the patient alleged her doctor "abused the physician-patient relationship by instigating a sexual relationship."). But a hospital that enacts procedures for inherently medical undertakings within its core purpose as a healthcare facility—here, administering drugs to patients—cannot be construed as exploitative under any reading of *Hoopes*.

Moreover, this Court has never held a hospital or nurse owes a comparable heightened duty—above the professional standard of care—to patients in their care. As other courts have noted, the existence of a

fiduciary duty between doctor and patient does not support the notion that a hospital owes one too:

> [Plaintiff] has cited us no authority for her contention that Palo Verde owed her a fiduciary duty, and we have found none. We find no logic in her contention that because a doctor owes a patient a fiduciary duty and because a hospital is subject to the same standard of care in a malpractice action as a doctor . . . the hospital, therefore, owes a patient a fiduciary duty.

Gonzales v. Palo Verde Mental Health Services, 162 Ariz. 387, 389, 783 P.2d 833, 835 (App. 1989); *see also McCoy v. Wesley Hosp. & Nurse Training Sch.*, 188 Kan. 325, 334, 362 P.2d 841, 848 (1961) ("[T]he relationship between a hospital and its patients is not a *fiduciary* relationship.") (emphasis in original); *Moore v. Regents of the University of California*, 51 Cal.3d 120, 133, 793 P.2d 479, 486 (1990) (defendants who owned and operated UCLA Medical Center did not owe a fiduciary duty to a plaintiff who alleged lack of informed consent against treating physician).

The United States Supreme Court and numerous state courts have held that fiduciary duty claims against a healthcare professional are redundant of malpractice claims and non-actionable. *See, e.g.*, *Pegram v. Herdrich*, 530 U.S. 211, 234–37 (2000); *Neade v. Portes*, 193 Ill.2d 433, 442–46, 739 N.E.2d 496, 502–04 (2000); *Hales v. Pittman*, 118 Ariz. 305, 309, 576 P.2d 493, 497 (1978); *Oehlerich v. Llewellyn*, 285 Ga. App. 738, 740–41, 647 S.E.2d 399, 402 (2007); *D.A.B. v. Brown*, 570 N.W.2d 168, 171

(Minn. App. 1997); *Garcia v. Coffman*, 124 N.M. 12, 19, 946 P.2d 216, 223 (App. 1997); *Awai v. Kotin*, 872 P.2d 1332, 1337 (Colo. App. 1993); *Spoor v. Serota*, 852 P.2d 1292, 1294–95 (Colo. App. 1992).

The district court erred in instructing the jury that Centennial owed a fiduciary duty to Ms. Murray and this Court should still reverse the Final Judgment based on that unsupported finding.

B. Plaintiffs Did Not Plead Or Prove A Claim For Intentional Breach Of Fiduciary Duty Based On The Medication Administration Procedure.

A fiduciary duty claim is subject to NRCP 9(b)'s heightened pleading requirements and must be pleaded with particularity. *Guzman v. Johnson*, 137 Nev. Adv. Op. 13, — P.3d —, 2021 WL 1152875, at *3 (Mar. 25, 2021). Plaintiffs' complaint does not mention the Medication Administration Procedure as a basis for breach of fiduciary duty—it asserts only understaffing. (2A241.) The complaint gave notice that Plaintiffs would argue the administration of Toradol constituted professional negligence—but none that they intended to claim Centennial's Procedure was created to profit at patients' expense. The pleadings do not support judgment on the fiduciary duty claim.

Nor does the evidence described in the Statement of Facts. The jury was required to find Centennial employees "intentionally exploited" Ms.

Murray for "gain or benefit." (19A3688, 3709.) While the evidence may support professional negligence, there is no evidence that any Centennial employee—much less Centennial as an institution—implemented or carried out the Procedure to intentionally "exploit" Ms. Murray for benefit or gain. (*See* 19A3688, 3709.)

If this Court holds a hospital owes fiduciary duties to patients, it should nonetheless reverse the Final Judgment because the fiduciary duty findings are not supported by substantial evidence.

II. CHAPTER 41A APPLIES EVEN IF THE JURY'S FIDUCIARY DUTY FINDING IS UPHELD.

Whether NRS 41A.035 applies and limits a hospital's liability is a question of law and statutory interpretation reviewed *de novo*. *Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct.*, 132 Nev. 544, 547, 376 P.3d 167, 170 (2016); *see also Zhang v. Barnes*, Dkt. No. 67219, 2016 WL 4926325, at *4 (Nev. Sept. 12, 2016) (unpublished disposition) (citing *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014)). Because the gravamen of Plaintiffs' fiduciary duty claim is professional negligence, Court should apply Chapter 41A to cap noneconomic damages at $350,000 and reduce compensatory damage awards by 35% per the jury's allocation of fault. NRS 41A.035, 41A.045.

A. Nevada voters enacted KODIN to protect health care providers from excessive verdicts and ensure the availability of medical services.

This nearly $50 million verdict is precisely the sort of case in which Nevada voters intended to limit noneconomic damages and joint liability to ensure the availability of adequate healthcare to state residents.

In response to a rapidly-mounting health care crisis, the Nevada Legislature enacted a noneconomic damages cap for malpractice cases in 2002. *See Zohar*, 334 P.3d at 405. The 2002 reforms, which contained exceptions allowing plaintiffs to avoid the damage caps, proved insufficient to avert a health care crisis. So, in 2004, Nevada voters passed KODIN, which created a "hard cap limiting potential noneconomic damages arising from an incident of malpractice" in order "to provide greater predictability and reduce costs for health-care insurers and, consequently, providers and patients." *Tam*, 358 P.3d at 239. The ballot initiative also prohibited joint liability for healthcare providers and eliminated a previous exception to the damages cap for "gross malpractice" or where "exceptional circumstances justify an award in excess of the cap." (28A5631, 5637, 5650.)

By recognizing a claim for "intentional breach of fiduciary duty" and declining to apply Chapter 41A, the district court judicially reenacted the same loopholes foreclosed by KODIN. This Court should not allow artful

pleading to circumvent the careful balance between the "needs of injured parties, patients who seek the best medical care available and the doctors who must purchase and carry insurance to protect themselves and their patients." *Zohar*, 334 P.3d at 405 (citation omitted).

B. Under *Szymborski* and *Curtis*, the gravamen of Plaintiffs' claim is professional negligence subject to Chapter 41A.

However Plaintiffs label their claim, the gravamen is professional negligence. *Egan v. Chambers*, 129 Nev. 239, 241 n.2, 299 P.3d 364, 366 n.2 (2013) (court must look to "the nature of the grievance to determine the character of the action, not the form of the pleadings").

"Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice." *Szymborski v. Spring Mtn. Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017) (citation omitted). To determine whether a claim is for professional negligence, courts "must look to the gravamen or 'substantial point or essence'" of the claim to determine whether Chapter 41A applies. *Id.* at 1285 (citation omitted); *see also Dolorfino v. Univ. Med. Ctr. of S. Nev.*, Dkt. No. 72443, 2019 WL 5390460, at *2 (Nev. Oct. 21, 2019) (unpublished disposition) (courts should closely examine each claim, and "where the jury

requires a medical expert's guidance on the professional standard of care" Chapter 41A's affidavit requirement applies).

While some *non*medical decision-making may qualify as ordinary negligence outside the scope of Chapter 41A, if the "underlying negligence" that caused injury is "inextricably" intertwined with medical treatment, then Chapter 41A applies. *Estate of Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263, 1266–68 (2020). By extension, "'if the jury can only evaluate the plaintiffs claim after presentation of the standards of care by a medical expert, then it is a [professional negligence] claim.'" *Id.* at 1267 (quoting *Szymborski*, 403 P.3d at 1284).

In *Curtis*, Chapter 41A applied to claims for wrongful death, elder abuse, tortious bad faith, understaffing, and other claims where they were "inextricably linked" to underlying claims of professional negligence involving "medical diagnosis, judgment, or treatment," the "presentation of the standards of care by a medical expert," and the exercise of "some degree of professional judgment or skill." *Id.* at 1267–71. Here, the record reflects all three: medical diagnosis and treatment, expert medical testimony, and the exercise of professional judgment and skill.

1. Plaintiffs' fiduciary duty claim (based on procedure for Toradol administration) is inextricably intertwined with professional negligence (Toradol administration).

The district court correctly applied *Szymborski* to conclude that alleged failures to "actually administer the medication appropriately," monitor Ms. Murray, timely carry out orders, and properly communicate among medical staff all concern "medical diagnosis, judgment, or treatment" under *Szymborski* and are thus subject to Chapter 41A. (33A6794.)

But under *Szymborski* and *Curtis*, Plaintiffs' fiduciary duty claim based on the Medication Administration Procedure (if viable at all) is also a professional negligence claim involving "medical diagnosis, judgment or treatment" because it is "inextricably linked" to Plaintiffs' underlying professional negligence claims and required medical expert testimony as to the standard of care. *Curtis,* 466 P.3d at 1267; *see also Schwarts v. Univ. Med. Ctr. of S. Nevada*, Dkt. Nos. 77554, 77666, 2020 WL 1531401, at *1–2 (Nev. Mar. 26, 2020) (unpublished disposition) (applying *Szymborski* to hold allegation of conspiracy to falsify medical records was professional negligence subject to Chapter 41A because "[t]o support their unlawful-objective and resulting-damage allegations, the Schwartses would necessarily have to prove the underlying medical malpractice"); *Boone v.*

William W. Backus Hosp., 272 Conn. 551, 564, 864 A.2d 1, 13 (2005) ("Because the administration of prescription medication is of a specialized medical nature and requires the exercise of medical judgment, … plaintiff's claim that the defendant negligently and recklessly administered Rocephin to the decedent sounds in medical malpractice.").

Without expert medical testimony connecting the administration of Toradol to Ms. Murray's injuries, there would be no basis to find Centennial's Medication Administration Procedure had any role in causing her death. *Curtis*, 466 P.3d at 1267 ("[C]ritically, if the underlying negligence did not cause Curtis's death, no other factual basis was alleged for finding LCC liable for negligent staffing, training, and budgeting.").

2. Plaintiffs offered expert medical testimony that the Medication Administration Procedure was "flawed."

This Court recently recognized an "extremely narrow" common-knowledge exception to Chapter 41A's *expert-report* requirement that "only applies in rare situations" where expert medical testimony is unnecessary. *Curtis*, 466 P.3d at 1268–69 (administering wrong drug (morphine) to a patient for whom it was never prescribed did "not raise any questions of medical judgment beyond the realm of common knowledge or experience"). *Curtis* applied this narrow exception only in the context of whether an

expert report was required—and not with respect to liability limits in NRS 41A.035, 41A.045—so it does not apply here.

Toradol was prescribed to Ms. Murray, and it was administered as intended and according to the Procedure. Plaintiffs offered expert medical testimony that the Procedure was "flawed," and the district court relied on expert medical testimony criticizing decisions to release and administer Toradol when it reinstated the fiduciary duty claim. (33A6707-6809.) The necessity of expert testimony to establish the claim confirms it sounds in professional negligence. *Curtis*, 466 P.3d at 1267.

3. Centennial medical staff exercised medical judgment in relation to the Medication Administration Procedure.

Although the Procedure may have originated with UHS, the undisputed evidence is that Centennial medical staff review, approve, and implement the Procedure according to their standard of care. (38A7799-7810.) In filling Dr. Arora's Toradol order for Ms. Murray, the pharmacy exercised medical judgment to conclude filling the order pursuant to physician instructions and as permitted by the Procedure complied with the standard of care. (16A3210-14, 3219-20, 3228-29, 3264, 3271.) Plaintiffs may argue this decision was negligent—but it was medical judgment nonetheless.

Laws regulating hospitals like Centennial confirm that implementing procedures for drug administration involves medical judgment. Federal law requires hospitals to adopt medical administration policies in accordance with "accepted standards of practice." 42 CFR 482.23(c). The Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") requires hospitals have a medication policy and verifies it is followed.[6] (13A2625; 16A3263.) Nevada state law incorporates these rules and requires that hospital committees include physicians and nurses "to ensure the quality of care provided by the hospital." NRS 449.476; *see also, e.g.*, NAC 449.340 (regulations governing hospital pharmaceutical services and the development of policies); NAC 449.349(3) (same for hospital emergency rooms). The Procedure's dosage timing provisions also conform with guidelines promulgated by the ISMP (Institute for Safe Medication Practices) and Medicare/CMS for non-time-critical medications. (12A2224–25, 2227; 16A3265; 17A3354–55.) Whether in the adoption or the implementation, Centennial medical professionals exercised medical judgment with respect to the Procedure.

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[6] JCAHO, also known by the acronym "TJC," "establishes national standards to which all hospitals seeking accreditation must conform." *Wickliffe*, 706 P.2d at 1387 (quotation omitted).

4. Neither motive nor intent exempt a professional negligence claim from Chapter 41A.

The district court erred in exempting Plaintiffs' fiduciary duty claim based on allegations of "financial interests," "intent to cut costs," "financial gain," or "business goals, desires, and/or profit." (33A6786, 93, 96.) Even if substantial evidence (as opposed to argument of counsel) supported such a motive, that would not change the gravamen of Plaintiffs' claims. *See Pegram*, 530 U.S. at 235–37 (affirming dismissal of fiduciary duty claim that "boil[ed] down" to a malpractice claim despite financial motivation); *Neade*, 739 N.E. 2d at 502 (fiduciary duty claim alleging patient's death resulted from refusal to authorize test because of financial incentives was medical malpractice claim); *Palms W. Hosp. Ltd. P'ship v. Burns*, 83 So.3d 785, 788 (Fla. Dist. Ct. App. 2011) ("The failure of the on-call doctors to respond … sounds in medical negligence, even if the doctors' motives were purely economic."); *D.A.B.*, 570 N.W. 2d at 171 ("gravamen" of claim against a physician receiving kickbacks was medical malpractice claim, not breach of fiduciary duty).

Nor do allegations of intentional conduct exempt a claim from Chapter 41A. *See Humboldt Gen. Hosp.*, 376 P.3d at 171. The "plain language of the definition of medical malpractice does not differentiate between negligent and intentional causes of action and, as such, is not

limited to negligence claims." *Fierle v. Perez*, 125 Nev. 728, 739 n.8, 219 P.3d 906, 913 n.8 (2009) (Chapter 41A's affidavit requirement applied to claim for willful failure to provide treatment and constructive fraud), *overruled on other grounds by Egan*, 299 P.3d at 365. The same is true under the current version of Chapter 41A pertaining to "professional negligence" claims.

Characterizing a claim as "intentional" does not change its underlying nature. *See Schwarts*, 2020 WL 1531401, at *1–2.[7] Even in cases where there was alleged intent to exploit a patient in the provider's care, such as in *Hoopes*, a fiduciary duty theory remains "a cause of action grounded upon professional malpractice," 725 P.2d at 242–43, and thus subject to Chapter 41A.

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[7] *See also Stutts v. Cty. of Lyon*, No. 3:19–cv–00552–MMD–CLB, 2020 WL 1904581, at *4 (D. Nev. Apr. 17, 2020) (illegal body cavity search conducted without medical purpose sounded in medical malpractice); *Shorter v. City of Las Vegas*, No. 2:16–cv–00971–KJD–CWH, 2019 WL 266285, at *4 (D. Nev. Jan. 17, 2019) (applying Chapter 41A where plaintiff alleged "deliberate indifference" to burst appendix caused delayed treatment); *O'Neal v. Las Vegas Metro. Police Dep't*, No. 2:17–cv–02765–APG–GWF, 2018 WL 4088002, at *3 (D. Nev. Aug. 27, 2018) (intentional tort claims for refusal to treat subject to Chapter 41A because to "determine whether these decisions were reasonable, expert testimony will be necessary to establish the appropriate standard of care").

C. Chapter 41A requires the noneconomic damages be reduced to $350,000, and all compensatory damages reduced by 35% according to the jury's apportionment of fault.

NRS 41A.035, as it existed in 2013, provided: "In an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed $350,000."[8] NRS 41A.035. "[T]he noneconomic damages cap in NRS 41A.035 applies per incident, regardless of how many plaintiffs, defendants, or claims are involved." *Tam*, 358 P.3d at 240.

The verdict includes three measures of noneconomic damages that, collectively, should be reduced to a total $350,000 award: loss of consortium ($5,000,000); grief and sorrow ($7,000,000); and pain and suffering ($2,500,000). After applying NRS 41A.035, Centennial's 65% apportionment of fault is applied per NRS 41A.045[9] as follows:

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[8] "The 2015 amendments to NRS 41A.035 added the phrase 'regardless of the number of plaintiffs, defendants or theories upon which liability may be based,' to the end of the sentence.... This amendment did not change NRS 41A.035; it clarified it." *Zhang*, 2016 WL 4926325, at *4 n.1 (citing *Tam*, 358 P.3d at 240).

[9] "In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant." NRS 41A.045.

- Noneconomic damages: $227,500
- Loss of support: $1,105,000
- Funeral Expenses: $10,000

Heirs Compensatory Recovery:	$1,332,500
Estate Compensatory Recovery	$6,500

Centennial requests the Court reduce the compensatory damages award to $1,332,500 for the heirs, and $6,500 for the estate.

III. THE COURT SHOULD REVERSE OR REDUCE THE PUNITIVE DAMAGES AWARD.

Centennial moved for judgment as a matter of law on Plaintiffs' punitive damages and fiduciary duty claims. NRCP 50(a), (b). (18A3477–81, 3486–89; 21A4135–56.) These motions were denied. (18A3486, 3489; 33A6804; 35A7093.) Orders denying Rule 50 motions are reviewed *de novo*. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007).

For jury findings, the standard of review is whether the verdict is supported by substantial evidence, *i.e.*, that which a reasonable mind might accept as adequate to support a conclusion. *Taylor*, 13 P.3d at 46. A punitive damage award will be upheld only if it is supported by substantial clear and convincing evidence. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 739–40, 192 P.3d 243, 252 (2008).

A. Neither The Evidence Nor The Jury's Findings Supports An Award Of Punitive Damages.

1. There is no clear and convincing evidence to support punitive damages against Centennial.

The punitive damages award was based solely on Plaintiffs' breach of fiduciary duty claim. (19A3709.) The district court rejected Plaintiffs' breach of fiduciary duty claim based on intentional understaffing (the only breach of fiduciary duty theory pled). (33A6794–97.) Thus, the punitive damage award can stand only if there is substantial evidence Centennial adopted or carried out its Procedure with intent to exploit Ms. Murray, and substantial clear and convincing evidence that in so acting, Centennial was "guilty of oppression, fraud or malice, express or implied." NRS 42.005(1).

There was no evidence, clear and convincing or otherwise, that by adopting the Procedure and administering Toradol in accordance with it and as ordered by Dr. Arora, any Centennial employee acted "with a culpable state of mind," *Thitchener*, 192 P.3d at 255, or was guilty of the fraud, malice, or oppression required for a punitive damages award. NRS 42.005(1).

Rather, the evidence showed the Procedure adopted and implemented with input from medical experts (12A2339; 16A3234–35, 3255–56, 3258), and its express purpose is "to provide highly recommended guidelines for the safe, accurate and consistent

administration of medications." (38A7799.) Its dosage timing recommendations for non-time-critical medications were consistent with CMS and ISMP guidelines. (12A2224–25, 2227; 16A3265–66; 17A3354–55.) Witnesses for both sides agreed these permanent time windows reflect the fact that nurses are responsible for more than one patient, and that it is not efficient, practical, or realistic to require scheduled medications be given to every patient at the exact time specified in a doctor's order. (13A2638–39; 16A3215–16, 3228, 3236, 3260; 17A333–34.) Nevada statutes regulating hospital operations expressly recognize that "efficiency" in the rendering of hospital services is a laudable goal. *See e.g.*, NRS 439B.220(3); NRS 450.715(2).

Plaintiffs' expert Dr. DeBaun gave inconsistent testimony about whether Toradol should have been considered time-critical. (*Compare* 13A2636–38 *with* 14A2696–97.) But even time-critical medications may be given a half hour before or after the prescribed time. (38A7799, 7807.) The district court focused on testimony from various witnesses agreeing with the self-evident truth that if every prescribed medication had to be given to every patient at the exact time scheduled, more nurses would have to be hired. (12A2339–40; 16A3260; 17A333–34.) But no witness claimed that

was required or even standard practice—and the district court concluded there was no evidence Centennial was, in fact, understaffed.

As this Court explained in *Thitchener*, "implied" malice or oppression in a punitive damages case requires clear and convincing evidence of "a culpable state of mind," 192 P.3d at 255, *i.e.*, a "conscious disregard of a person's rights," *id.* at 252, and "denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence." *Id.* at 255. While Plaintiffs' evidence may suffice for professional negligence, it does not reflect clear and convincing evidence of fraudulent, oppressive, or malicious conduct with the intent to exploit Ms. Murray for Centennial's gain and benefit. *See Hoopes*, 735 P.2d at 242–43. The punitive damages award must be set aside in its entirety.

2. Ratification of employee conduct was not proven or found by the jury.

Under Nevada law, "employers are subject to punitive damages only for their own culpable conduct and not for the misconduct of lower level employees." *Thitchener*, 192 P.3d at 257. Thus, by statute, a corporation is not liable for punitive damages based upon the "wrongful act" of its employee unless an officer, director, or managing agent (a) knew an employee who caused harm was unfit but hired that employee anyway with a conscious disregard of the rights or safety of others; (b) expressly

authorized or ratified the wrongful act and was "expressly authorized" to do so; or (c) is personally guilty of oppression, fraud, or malice. NRS 42.007(1)(a)–(c). To establish ratification, an employer must have been aware of the fraudulent, oppressive, or malicious nature of the employee's conduct.[10] *See J.C. Penney Co. v. Gravelle*, 62 Nev. 434, 452–53, 155 P.2d 477, 483 (1945) (ratification not inferable where employer could have concluded employee had not done the wrongs plaintiff urged); *Rhodes v. Sutter Health*, 940 F. Supp. 2d 1258, 1269 (E.D. Cal. 2013) (defendant medical facility was not required to accept plaintiff's interpretation of the incident at issue and could have believed its employee did not intend to harm the patient).

Where the employer is a corporation, the plaintiff must also establish the employer's conduct was undertaken "by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation." NRS 42.007(1). *See also Fraternity Fund, Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 375 (S.D. N.Y. 2007); *Johnson v. ASK Trucking, LLC*, No. 09–4058,

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[10] Nurse Jones she believed none of the attending nurses violated the standard of care in administering Toradol to Ms. Murray. (12A2244, 2249, 2251-52, 2262, 2353, 2401.) Pharmacist Jackson testified to his belief that the administration of Toradol to Ms. Murray complied with the standard of care. (16A3218–20, 3226–29, 3264, 3271.)

2011 WL 1114247, *5–6 (C.D. Ill. Mar. 25, 2011). To qualify as a managing agent for purposes of 42.007, the individual purported to have ratified, approved, or engaged in the offending conduct must possess the authority to deviate from established policies or discretion to make ad hoc policy or corporate decisions. *Nittinger v. Holman*, 119 Nev. 192, 198, 69 P.3d 688, 692 (2003) (reversing punitive damage award where there was no evidence that supervisor had the ability to deviate from the policy).

Although the jury found unidentified Centennial *employees* acted with oppression, fraud, or malice, it made no findings that an officer, director, or managing agent of Centennial who possessed the authority to make corporate decisions engaged in conduct sufficient to justify punitive damages or ratified the conduct of any hospital employee who engaged in such conduct. Nor is there evidence that could have supported such a finding. If the jury is not asked to decide an issue on which a plaintiff needs to prevail in order to recover on a given claim, recovery on that claim is barred. *See Perelman v. State*, 115 Nev. 190, 193, 981 P.2d 1199, 1201 (1999) (defendant's failure to submit factual issue to jury supporting his statute of limitations defense waived the defense); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52–53, 623 P.2d 981, 983–84 (1981) (party's failure to seek the court's decision on its counterclaim constituted a waiver of the

claim). On this ground alone, the punitive damages award against Centennial should be vacated.

3. The sole basis for the punitive damage award is unsupported by the pleadings.

Finally, because the special verdict allowed the jury to award punitive damages only if they found a breach of fiduciary duty (19A3709), the entire $32,420,000 punitive damage award rests on a theory based on the Procedure that was never pleaded. *See supra* Section I(B). As a matter of due process, such a result cannot stand. In *Sprouse*, this Court cited fundamental principles of due process and fairness in reversing a punitive damages award because the underlying counterclaim did not sufficiently plead a claim for punitive damages based on the theory upon which the district court awarded punitive damages, and thus the counter-defendant was never given sufficient notice that punitive damages would be sought on the basis of that theory. *Sprouse v. Wentz*, 105 Nev. 597, 601–04, 781 P.2d 1136, 1138–40 (1989). Reversal is warranted here for the same reason.

B. Alternatively, The Punitive Damage Award Must Be Substantially Reduced Because They Are Recoverable Only By The Estate Under The Wrongful Death Statute.

Nevada law limits punitive damages to three times economic harm "awarded to" the plaintiff or $300,000 if the compensatory award is less than $100,000. NRS 42.005(1). To the extent punitive damages can be

recovered by any "plaintiff," they are capped by NRS 42.005 based on the "amount of compensatory damages awarded" to that plaintiff in the judgment. *See Coughlin v. Hilton Hotels Corp.*, 879 F. Supp. 1047, 1051–52 (D. Nev. 1995) (applying Nevada law to hold that punitive damage cap must be calculated after the application of contributory fault).

Because common law provided no remedy, Nevada's statutory wrongful-death remedy in NRS 41.085 is Plaintiffs' exclusive basis for damages allegedly suffered by the decedent. *See Fernandez v. Kozar*, 107 Nev. 446, 449, 814 P.2d 68, 70 (1991); *Wells, Inc. v. Shoemake*, 64 Nev. 57, 66, 177 P.2d 451, 456 (1947).

The Wrongful Death Act was initially interpreted to preclude any award of punitive damages. *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1065–66, 864 P.2d 285, 287 (1993). The Nevada Legislature responded by amending the statute in 1995 to permit an award of (a) "special damages, such as medical … and funeral expenses;" and (b) "penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if the decedent had lived." NRS 41.085.

The wrongful death statute thus differentiates between who may maintain a wrongful death claim—the heirs and the estate—and specifies what damages each can and cannot recover. NRS 41.085(4), (5). *See*

Alcantara v. Wal-Mart Stores, Inc., 130 Nev. 252, 256, 321 P.3d 912, 914–15 (2014) ("The NRS 41.085 statutory scheme creates two separate wrongful death claims, one belonging to the heirs of the decedent and the other belonging to the personal representative of the decedent, with neither being able to pursue the other's separate claim."); *Coddington v. Clark*, No. 72973, 2018 WL 5617924, *1 (Nev. Oct. 29, 2018) (unpublished disposition) (quoting *Alcantara*).

Under 41.085(4), the heirs have the right to recover only "pecuniary damages for the person's grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent." The heirs cannot recover punitive damages—whether based on their own injuries or those suffered by the decedent. The representative of the estate, in contrast, may recover "special damages, such as medical expenses, which the decedent incurred or sustained before the decedent's death," NRS 41.085(5)(a), and exemplary damages "that the decedent would have recovered if the decedent had lived but do not include damages for pain [and] suffering of the decedent." NRS 41.085(5)(b). If punitive damages can be recovered at all in this case, they can be recovered only by Ms. Murray's Estate, not her

heirs, as the jury was instructed. (18A3514–15; *see also* 18A3489 ("The heirs don't recover it.").)

The compensatory award to the estate—the only plaintiff authorized to recover punitive damages—is $10,000 for funeral expenses, which must be reduced to $6,500 by NRS 41A.045. *See Coughlin*, 879 F. Supp. at 1051–52; *Lira v. Davis*, 832 P.2d 240, 245–46 (Colo. 1992); *Tucker v. Marcus*, 142 Wis.2d 425, 438–40, N.W.2d 818, 823 (1988). At most, based on a $10,000 compensatory award, the estate can recover $300,000 in punitive damages. NRS 42.005(1).

Under the due process "single digit" (10 to 1) ratio for punitive damages-to-compensatory damages endorsed in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425–26 (2003) and *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 580–81 (1996), even a $300,000 award is excessive, and the punitive damages award should be further reduced to $65,000—ten times the $10,000 funeral expense award as reduced to $6,500 by the several liability provisions in NRS 41A.045.

C. Punitive Damages Are Noneconomic Damages Subject To The Cap in NRS 41A.035.

Finally, the punitive damages are themselves includable in NRS 41A.035's noneconomic damages cap. In a wrongful death action against a health care provider, Nevada law unambiguously holds that the "amount of

noneconomic damages awarded in such an action must not exceed $350,000 *regardless of the number of plaintiffs, defendants or theories upon which liability may be based*." NRS 41A.035 (emphasis added). "Noneconomic damages" are defined to include "damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and *other non-pecuniary damages*." NRS 41A.011 (emphasis added).

Punitive damages are by definition "non-pecuniary damages." *See, e.g.*, *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 384 (5th Cir. 2014) ("Because punitive damages are non-pecuniary losses, punitive damages may not be recovered in this case."); *Ho Chan Jung v. Mode Tour Saipan Corp.*, 2017 MP 18, 23 (N. Mar. I. 2017) ("[A]n overwhelming weight of authority has concluded that punitive damages are nonpecuniary in character."); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1997) ("Punitive damages are non-pecuniary damages.").[11]

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[11] *See also, e.g.*, *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Walker v. State Farm Fire & Cas.*, No. 20-CIV-171-RAW, 2020 WL 6205841, at *1 (E.D. Okla. Oct. 22, 2020); *Lesa, LLC v. Fam. Tr. of Kimberley & Alfred Mandel*, No. 15-CV-05574-KAW, 2016 WL 1446770, at *8 n.8 (N.D. Cal. Apr. 13, 2016); *In re Complaint of Brennan Marine, Inc., For Exoneration From, or Limitation of, Liability*, 123 F. Supp. 3d 1134, 1139-40 (D. Minn. 2015) (citing cases); *Walton v. Nova Information Systems*, 514 F. Supp. 2d 1031, 1035 (E.D. Tenn. 2007); *Emmons v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 532 F. Supp. 480, 485 (S.D. Wyo. 1982).

Applying NRS 41A.035 to include punitive damages awards is supported by legislative history. The 2004 KODIN initiative eliminated the original cap exception in Chapter 41A for "gross malpractice" defined as (a) "conscious indifference to the consequences which may result from the gross malpractice; and (b) disregard for and indifference to the safety and welfare of the patient." NRS 41A.031 (repealed). (28A5631, 5637, 5650.) *See also Tam*, 358 P.3d at 239. Allowing uncapped punitive damages would undermine these legislative goals and inject unpredictability into every professional negligence case where a plaintiff seeks punitive damages.

To effectuate the statute's plain meaning and purpose, the noneconomic damages cap in NRS 41A.035 should be applied to include punitive damages as a non-pecuniary damages award subject to the $350,000 cap.

IV. ALTERNATIVELY, CENTENNIAL IS ENTITLED TO A NEW TRIAL OR REMITTITUR.

A. The Erroneous Admission Of Undisclosed And Prejudicial Expert Testimony Warrants A New Trial.

The denial of a new trial and orders allowing expert testimony are reviewed for abuse of discretion. *Nelson*, 163 P.3d at 425; *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

A retained expert's opinions and bases must be disclosed before trial. NRCP 16.1(a)(2). This rule "serves to place all parties on an even playing

field and to prevent trial by ambush or unfair surprise." *Sanders v. Sears-Page*, 131 Nev. 500, 517, 354 P.3d 201, 212 (Nev. App. 2015) (citation omitted). When a party fails to abide this disclosure requirement, per NRCP 37(c)(1), the party cannot rely on that evidence at a trial unless the failure was "substantially justified or harmless." *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265, 396 P.3d 783, 787 (2017). Centennial raised this issue by motion in limine (4A693–703), which was denied (11A2173–74), and objected at trial (13A2539.)

Drs. DeBaun and Schwimmer presented undisclosed testimony criticizing the Procedure and Centennial nurses and pharmacy who following its guidelines. (*See* 13A2540–41, 2624; 14A2680; 15A2929–30, 3025.) There was no justification for Plaintiffs' failure to disclose when the Procedure (38A7799–7810) was provided to Plaintiffs approximately three years before trial. (3A626; 26A5260.)

Furthermore, neither expert demonstrated sufficient qualification to criticize the Procedure or the medical staff's compliance with it. NRS 50.275. (*See* 13A2623; 14A2681, 2692, 2701.) Neither witness claimed familiarity with Medicare and ISMP guidelines permitting non-time-critical medications to be administered one hour before or after scheduled dosing

time and for a shorter interval after first loading dose. (12A2224–25; 13A2227; 16A3265; 17A3354–55.)

The improper admission of this testimony was not "harmless"—the district court relied on it to reinstate the fiduciary duty claim based solely on the Procedure. (33A6798–6800.) A new trial is thus warranted on all liability issues. *See FGA, Inc. v. Giglio*, 128 Nev. 271, 280, 278 P.3d 490, 496 (2012) (error considered to affect whole verdict where it affects one of several negligence theories).

B. The Excessive Verdict, Driven By Passion And Prejudice, Warrants A New Trial Or Remittitur.

On top of $16 million in compensatory damages (mostly noneconomic), the $32,420,000 punitive damages finding—millions more than Plaintiffs requested (19A3640)—manifests a jury acting solely out of passion or prejudice. The same is true of the $2,500,000 pain and suffering award—over $2,000,000 more than requested (18A3558), although no witness attempted to establish Ms. Murray suffered pain caused by Centennial's conduct that was different or worse than the pain that brought her to the hospital. *See Nevada Indep. Broadcasting Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) (83% remittitur of compensatory damages because award was "not supported by the evidence," was "beyond the range of reason," and "must have been given under the influence of

passion or prejudice"); *Guaranty Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206–09, 912 P.2d 267, 273–74 (1996) (reducing $1,000,000 punitive damages award by 75%).

One driver of these excessive awards was Plaintiffs' counsel's improper closing argument. UHS, Centennial's parent company, was dismissed with prejudice more than three years before trial. (1A73–75.) Advancing their intentional "exploitation" theory, Plaintiffs' counsel repeatedly referenced UHS as a foreign, corporate wrongdoer that implemented Centennial's Procedure by fiat or for profit. (*See, e.g.*, 18A3519–20, 3528, 3533, 3553–55, 3619–20; *see also* 3A573, 579; 11A2165; 18A3480–82, 3486.) Counsel also repeatedly urged the jury to act as the "conscience of the community" (18A3519) and return a verdict that would "send a message" to Centennial (18A3563).

These inflammatory arguments designed to stir bias and emotion without supporting evidence led to a grossly excessive verdict warranting a new trial. *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 368–69, 212 P.3d 1068, 1082 (2009); *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008); *see also, e.g.*, *Fidler v. Hollywood Park Operating Co.*, 223 Cal. App. 3d 483, 488–89, 272 Cal. Rptr. 895, 898–99 (1990) (improper emotional distress theory and punitive damages claim could have infected

the jury's compensatory damages determination—new trial ordered); *Orsini v. Larry Moyer Trucking, Inc.*, 833 S.W.2d 366, 368 (Ark. 1992) (erroneous submission of punitive damages claim tainted compensatory damage award—new trial on compensatory damages ordered). The need for reduction is only further supported here by the jury's attribution of 35% of the responsibility for Plaintiffs' damages to doctors. *See White v. Ford Motor Co.*, 500 F.3d 963, 975 (9th Cir. 2007) (applying Nevada law) (apportioned fault should be considered in evaluating the excessiveness of punitive damages).

Finally, Plaintiffs' repeated characterization of UHS as a deep-pocket-New-York-Stock-Exchange-entity that controlled Centennial's actions with respect to patients inflamed the punitive damages verdict and violated due process. *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 353–54 (2007). Under the *de novo* review standard in *Bongiovi* and federal due process standards for excessive punitive damage awards adopted as Nevada law, the $32,420,000 punitive damages assessment and the $2,500,000 pain and suffering finding are grossly excessive and arbitrary, reflect an impassioned jury, and warrant remittitur or new trial. *Bongiovi v. Sullivan*, 122 Nev. 556, 582–83, 138 P.3d 433, 451–52 (2006); *see also Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1267-69, 969 P.2d 949, 962 (1998)

(despite substantial evidence of bad faith and fraud, $7,500,000 and $500,000 punitive damages awards were each excessive and clearly disproportionate to reprehensibility of defendants' conduct and were reduced by 50% and 70% respectively); *Republic Ins. Co. v. Hires*, 107 Nev. 317, 321, 810 P.2d 790, 792–93 (1991) (reducing $22.5 million punitive award to $5 million despite evidence of "conscious wrongdoing," "malicious intent," and "oppressive behavior").

V. TO THE EXTENT THE FINAL JUDGMENT AWARDED PREJUDGMENT INTEREST ON FUTURE DAMAGES, THIS COURT SHOULD REVERSE FOR PLAIN ERROR.

Prejudgment interest awards are reviewed for error. *Torres v. Goodyear Tire & Rubber Co.*, 130 Nev. 22, 25, 317 P.3d 828, 830 (2014). The failure to apply NRS 17.130(2)'s plain language is plain error. *Lee v. Ball*, 116 P.3d 64, 67 (Nev. 2005).

Before the Final Judgment was entered on July 31, 2020, Centennial objected to Plaintiffs' request to recover prejudgment interest on amounts excluded by NRS 17.130(2). (34A7018–28.) Plaintiffs claim entitlement to prejudgment interest on the entire $16,210,000 compensatory award beginning June 23, 2014, including all future damages, based on the First Judgment entered February 21, 2019. (35A7029–39.) The Final Judgment declined "to address the calculation of interest on the judgment," denying

Centennial's request to limit prejudgment interest to past damages as NRS 17.130 requires. (35A7093.)

Prejudgment interest cannot be awarded on future damages as a matter of law. NRS 127.130(2) ("[T]he judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages."). It is error to award prejudgment interest for the entire verdict when it is impossible to determine what part of the verdict represents past damages. *Stickler v. Quilici*, 98 Nev. 595, 597, 655 P.2d 527, 528 (1982); *see also Jacobson v. Manfredi by Manfredi*, 100 Nev. 226, 233, 679 P.2d 251, 255–56 (1984).

The only findings of exclusively past damages are for Ms. Murray's pain and suffering ($2,500,000) and funeral expenses ($10,000). Damages for loss of companionship, comfort, and consortium ($5,000,000), past and future grief and sorrow ($7,000,000), and loss of probable support ($1,700,000) were based on evidence and argument of both past and future damages. (*See, e.g.*, 11A2124–25; 16A3170–77, 3186; 18A3513–15, 3556–60.) The jury was instructed they could award future damages. (10A3692, 3696.)

Plaintiffs had the burden to establish which portion of the compensatory damages were for past harm and therefore subject to

prejudgment interest. *See Stickler*, 655 P.2d at 528. They made no attempt to so do. They are not entitled to a windfall of millions of dollars in interest that is plainly not recoverable under an unambiguous statute. The district court's refusal to address the issue of prejudgment interest constituted plain error. This Court should remand with directions to amend the Final Judgment to clarify that prejudgment interest, if awardable, is limited to past damages proven.

VI. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ANY, OR ALTERNATIVELY, EXCESSIVE ATTORNEY'S FEES AND ADDITIONAL COSTS.

Special orders awarding attorney's fees and costs are generally reviewed for abuse of discretion, *LVMPD v. Yeghiazarian*, 128 Nev. 760, 769, 312 P.3d 503, 510 (2013), but a court may not award attorney's fees absent authority by statute, rule, or contract. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006).

A. The Court Should Set Aside Or Significantly Reduce The $511,200 Attorney's Fee Award.

The district court awarded $511,200 in attorney's fees under NRCP 68, which authorizes recovery of fees under certain circumstances when an offeree rejects an offer of judgment and then fails to obtain a more favorable judgment. (32A6516–19.) Plaintiffs submitted a $300,000 offer

of judgment that Centennial received on July 7, 2016 and did not accept. (22A4441–43; 32A6517.)

Under *Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983), trial courts must "carefully evaluate" and apply certain factors in determining whether to award attorney's fees to a defendant under NRCP 68. In *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 251–52, 955 P.2d 661, 672–73 (1998), this Court applied the factors when a defendant rejects an offer and then suffers an adverse judgment exceeding the offer:

> (1) whether the defendant's defenses were brought in good faith; (2) whether the plaintiff's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the defendant's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Centennial challenges the district court's findings regarding the third and fourth elements on appeal.[12] The *Yamaha* Court emphasized the need to appropriately weigh whether the defendant's refusal of the offer was "grossly unreasonable" or in "bad faith." *Id.* Proper analysis of that critical factor in this case, together with the unreasonable amount of fees sought,

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[12] Plaintiffs did not assert, and the court did not find, that Centennial's defenses were not brought in good faith, and there would have been no basis for concluding otherwise.

demonstrates that the district court abused its discretion in awarding any attorney fees, or alternatively in awarding the sum that it did.

1. Centennial's rejection of Plaintiffs' $300,000 offer was not "grossly unreasonable" or in "bad faith."

The district court abused its discretion in finding "Defendant's rejection of the offer was in bad faith and/or grossly unreasonable." (32A6517.) The district court acknowledged that "this was a heavily contested and complex case." (32A6518.) While in hindsight Centennial miscalculated its chances of successfully defending the case or holding the damages below $300,000, this does not equate with "grossly unreasonable" or "bad faith" conduct.

The district court provided three grounds for its finding of bad faith and/or gross unreasonableness: 1) "Defendant knew the evidence which supported Plaintiff's claims," 2) Defendant "knew the economic damages claimed were approximately $2,000,000;" and 3) Defendant "knew that Plaintiffs were seeking punitive damages." (32A6517–18.) The evidence, however, did not support these grounds in 2016 when Centennial received the offer.

First, the district court wholly failed to recognize or even address Centennial's defensive theories in determining that Centennial's rejection

of the offer was in bad faith or grossly unreasonable. This alone is an abuse of discretion. *See Yamaha*, 114 Nev. at 252 (reversing a finding that offer was rejected in bad faith because "it appear[ed] that the trial court may not have weighed appropriately the liability issues in [its] analysis" and noting that the liability issues were "quite intricate").

The evidence supporting Centennial's defensive theories, which the district court should have analyzed and given credence to, included:

a) Plaintiffs' own expert witnesses had testified in depositions or reported in their disclosures that the negligent conduct of Drs. Arora and Vicuna was a significant cause of Ms. Murray's death. (23A4633–34, 4640–42, 4647, 4649, 4653, 4699, 4701, 4706–08; 24A4746–49, 4754, 4777, 4785–90, 4796–4804, 4806.)

b) Plaintiffs' nursing expert (Kathleen Martin, RN) testified by deposition that she did not have any criticism of Centennial's Medication Administration Procedure. (24A4828–29.)

c) Centennial's nursing expert opined the nurses complied with the standard of care in treating Ms. Murray. (24A4868–74.) Centennial also engaged a causation expert who opined that nothing the nursing staff did or failed to do contributed to Ms. Murray's death, and that her organ failure resulted from an infectious process emanating from her sickle cell disease. (24A4878–90; *see also* 24A4891–96, 4898.)

d) Plaintiffs' assertion of negligent staffing, which was the only alleged basis for their fiduciary duty claim, was not supported by any expert testimony.

In addition to these hotly contested issues, Centennial had defensive legal theories as well, including that Plaintiffs could not recover under a

breach of fiduciary duty theory as a matter of law, and that Plaintiffs' economic damages would be capped.

The district court's second ground was that Centennial "knew the economic damages claimed were approximately $2,000,000." (32A6517–18.) But knowing the amount of damages a plaintiff seeks says nothing about a defendant's good faith belief that the plaintiff will be unable to prove those damages at trial. This is particularly true where Ms. Murray was not employed at the time of her death (3A565), and there was a real possibility a jury would apportion all or a significant percentage of the responsibility to Drs. Arora and Vicuna—as the jury did.

Finally, the district court found that Centennial "knew that Plaintiffs were seeking punitive damages." (32A6517–18.) But again, knowing what a plaintiff seeks says nothing about a defendant's good faith belief that the lack of evidence or the lack of a viable basis for punitive damages would defeat any such recovery. Plaintiffs' breach of fiduciary duty claim based on alleged negligent staffing sought punitive damages. (2A241.) Centennial had pending motions for summary judgment on Plaintiffs' breach of fiduciary duty and punitive damages claims. Centennial reasonably expected that the district court would rule (as it eventually did (33A6794–

97)) that Plaintiffs' breach of fiduciary duty claim based on understaffing failed.

Centennial reasonably believed there was no substantial evidence its employees intentionally exploited Ms. Murray for its own gain or benefit, and that Plaintiffs' fiduciary duty claim was a professional negligence claim subject to Chapter 41A. There was no clear and convincing evidence that any Centennial employee was guilty of fraudulent, malicious, or oppressive conduct required for a punitive damages award.

2. The $511,200 attorney's fee award is excessive.

The fourth factor set forth in *Beattie* is that the fees sought must be reasonable and justified in amount. The district court was required to consider the reasonableness of the fees pursuant to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The factors outlined in *Brunzell* include: "(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and

what benefits were derived." *Id.* The district court was required to demonstrate that it considered the *Brunzell* factors and that its attorney fee award is supported by substantial evidence. *See Logan v. Abe,* 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

Plaintiffs asked for an award of fees based on their contingency agreement, or alternatively based on their "counsels' hourly rate." (22A4408.) They presented summaries of hours spent by various attorneys and staff, indicating both Mr. Creasy's and Mr. Laird's time was charged at a rate of $600 per hour. (22A4412.) Other than a conclusory statement that the "fees are reasonable and were necessarily incurred in this action" (22A4487, 4498), there was no affidavit or expert testimony that the *rate* was reasonable.

The district court also failed to analyze or find these hourly rates to be reasonable. *See LVMPD*, 312 P.3d at 510 (court required to analyze whether charged hourly rates are reasonable). Plaintiffs failed to show that a $600 hourly rate for either attorney falls within the range of customary charges for attorneys trying this kind of case in Clark County. *See, e.g., Beach v. Wal-Mart Stores, Inc.*, 958 F. Supp. 2d 1165, 1172 (D. Nev. 2013) (finding that an hourly rate of $145 for lead counsel and $135 an hour for associate

counsel was shown to be within the range of customary hourly charges in the locality).

In addition, over 200 hours of attorney's fees were attributed to work described solely as "Trial Preparation." (22A4471–83, 4489–92.) Without any further specificity of the actual work performed, it was impossible for the district court to determine "its difficulty, its intricacy, its importance, [the] time and skill required, [or] the responsibility imposed." *Brunzell,* 85 Nev. at 349, 455 P.2d at 33; *see also 569 East County Blvd. LLC v. Backcountry Against the Dump, Inc.*, 6 Cal. App. 5th 426, 440–41, 212 Cal. Rptr. 3d 304, 317–18 (2016) (court properly adjusted attorneys' fees downward for vague entries); *Christian Research Institute v. Alnor*, 165 Cal. App. 4th 1315, 1325, 81 Cal. Rptr. 3d 866, 874 (2008) (same). Accordingly, if any attorney's fees are justified under NRCP 68, the $511,200 award should be substantially reduced.

B. The District Court Abused Its Discretion By Awarding Plaintiffs The Full Amount Of Expert Witness Fees Charged By Drs. DeBaun And Schwimmer.

The district court originally awarded $40,374.21 in costs to Plaintiffs, which included $1,500 each for Drs. DeBaun and Schwimmer, the statutory limit under NRS 18.005(5). However, the court then awarded Plaintiffs the full fees charged by Drs. DeBaun ($87,201.94) and Schwimmer

($82,693.67). (33A6747–51.) That award is governed by the factors outlined in *Frazier v. Drake*, 131 Nev. 632, 650–51, 357 P.3d 365, 377–78 (Nev. App. 2015) (factors include the importance of the testimony, its helpfulness to the jury, whether it was repetitive of other experts, the time spent, the expert's area of expertise, the fee charged, and comparable fees in similar cases). In addition, NRS 18.005(5) requires that the expert's testimony be "of such necessity as to require the larger fee."

Plaintiffs acknowledged that some of the testimony of Drs. DeBaun and Schwimmer "may have been similar" (31A6264) and that neither Dr. Schwimmer nor Dr. DeBaun performed any independent investigation or testing. (31A6265.) Some of the added expense was due to the experts having to re-review materials because of trial continuances, one of which was ordered on Plaintiffs' motion. (7A1402–04; 33A6747–51.)

In their motion, Plaintiffs also emphasized these doctors' credentials and the time spent reviewing voluminous records, but demonstrable expertise and record review is a given for any expert witness to testify. *See* NRS 50.275. Moreover, a significant portion of Drs. DeBaun's and Schwimmer's testimony consisted of undisclosed opinions critical of Centennial's Medication Administration Procedure and speculative opinions criticizing nurses for following the Procedure. Certainly, Plaintiffs

should not be reimbursed for the cost of testimony that should not have been admitted in the first instance.

Accordingly, the expert witness fees awarded for Drs. DeBaun and Schwimmer should be significantly reduced to the original $1,500 for each, or some other equitable amount.

CONCLUSION

Centennial requests the Court reverse the district court's Final Judgment and prior rulings finding the existence and breach of fiduciary duty, reduce the compensatory damages award to $1,339,000 pursuant to NRS 41A.035 and 41A.045, and vacate the punitive damages award in its entirety. In the alternative to vacating the punitive damage award, Centennial requests the Court reduce the punitive award to $65,000 or another amount consistent with the evidence, Nevada law (including NRS 41.085 and 42.005), and due process. Centennial further requests the Court reverse or reduce the attorney's fees and costs awards, vacate the award of prejudgment interest for future damages in the First Judgment, and grant Centennial any additional relief to which it is entitled in law or equity.

/ / /

In the alternative, Centennial requests a new trial or a substantial remittitur of damages awarded in the Final Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

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 MS Word 365 in Georgia 14-point type.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,695 words.

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 a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of April 2021.

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CERTIFICATE OF SERVICE

I certify that on April 23, 2021, a true and accurate copy of the foregoing document was filed and served to all counsel of record via this Court's e-filing system on counsel of record for all parties to the action below in this matter.

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ADDENDUM

The following statutes are at issue in this appeal, which involves claims that accrued in April of 2013.

Actions For Death By Wrongful Act Or Neglect

NRS 41.085(4),(5) Heirs and personal representatives may maintain action.

> 4. The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for the person's grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent.
>
> 5. The damages recoverable by the personal representatives of a decedent on behalf of the decedent's estate include:
>
> > (a) Any special damages, such as medical expenses, which the decedent incurred or sustained before the decedent's death, and funeral expenses; and
> >
> > (b) Any penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if the decedent had lived,
>
> but do not include damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are liable for the debts of the decedent unless exempted by law.

NRS Chapter 41A—*Actions for Professional Negligence*

NRS 41A.009 "Medical malpractice" defined. (eff. 2006; repealed 2015)

> Medical malpractice means the failure of a physician, hospital or employee of a hospital, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances.

NRS 41A.011 "Noneconomic damages" defined. (eff. 2002)

"Noneconomic damages" includes damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages.

NRS 41A.015 "Professional negligence" defined. (eff. 2004)

"Professional negligence" means a negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death. The term does not include services that are outside the scope of services for which the provider of health care is licensed or services for which any restriction has been imposed by the applicable regulatory board or health care facility.

NRS 41A.035 Limitation on amount of award for noneconomic damages. (eff. 2004)

In an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed $350,000.

NRS 41A.045 Several liability of defendants for damages; abrogation of joint and several liability. (eff. 2004)

1. In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.

2. This section is intended to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

NRS Chapter 42—Damages

NRS 42.001 Definitions; exceptions.

1. "Conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.

2. "Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injure another person.

3. "Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

4. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

NRS 42.005(1) Exemplary and punitive damages: In general; limitations on amount of award; determination in subsequent proceeding.

1. Except as otherwise provided in NRS 42.007, in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:

(a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more; or

(b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000.

NRS 42.007(1) Exemplary and punitive damages: Limitations on liability by employer for wrongful act of employee; exception.

1. Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his or her employee, the employer is not liable for the exemplary or punitive damages unless:

(a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others;

(b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or

(c) The employer is personally guilty of oppression, fraud or malice, express or implied.

If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.