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 REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The gravamen of Respondents' claim at trial was that, pursuant to Centennial's Medication Administration Procedure, hospital nurses administered a physician-prescribed drug more frequently than appropriate, resulting in Ms. Murray's death while being treated for a sickle cell episode. Respondents attempt to recharacterize that claim as something other than professional negligence by labelling it an intentional breach of fiduciary duty and attributing a "profit motive" to hospital policy. But Respondents' own brief—with its detailed review of expert medical testimony that Centennial breached the standard of care in deviating from "black box" pharmaceutical warnings—confirms this is a case of professional negligence subject to Chapter 41A.

Even if this Court accepts Respondents' invitation to recognize a new fiduciary duty owed by hospitals when treating patients—independent of the medical standard of care to which Respondents' experts testified—the nature of their claims would not change for the purposes of Chapter 41A. Neither the evidence nor Nevada law support the current judgment against Centennial with respect to uncapped noneconomic damages, compensatory damages unreduced by the 35% negligence attributed to Drs. Arora and Vicuna, and punitive damages.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

While Respondents focus on evidence that might support professional negligence, portions of their statement of facts are sufficiently disconnected from the record to warrant response because they are central to this Court's gravamen analysis under Chapter 41A.

A. The District Court Properly Rejected Respondents' Understaffing Theory.

Defending their fiduciary duty claim, Respondents argue that Centennial "knowingly created a staffing crisis" that contributed to Ms. Murray's death. (Resp. Br. 1; *see also id.* at 3, 7–12, 23, 30, 62–64, 65–69.) But the district court expressly rejected the notion that understaffing even occurred—much less that it was intentional:

> This COURT found no record of any evidence that established intentional conduct on behalf of Defendant as it relates to intentional understaffing. Furthermore, 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. *** There was no testimony or evidence presented to support that Defendant intentionally understaffed in an effort to increase the hospital's profits at the expense of patients' wellbeing. *** Most importantly, no expert was proffered by Plaintiff to show that the staffing numbers were inappropriate on the floor that day.

(33A6794–96.)

The district court's correct holding that there was no evidence "that an actual understaffing occurred" cannot be reconciled with Respondents'

argument that Centennial deliberately put patients at risk by adopting and carrying out its Medication Administration Procedure for the purpose of saving money by *not hiring more nurses*. (*See* Resp. Br. 16, 19, 29, 62–64.)

Respondents allege no other causal nexus between Centennial's Medication Administration Procedure and Ms. Murray's death. Instead, they argue the policy was driven by a "profit motive," hoping to recharacterize it as entirely disconnected from medical decision-making. (Resp. Br. xv, 1, 3, 29, 38, 61–64, 88.) But there is nothing in the record to support a finding that this alleged financial motive caused Ms. Murray's death. Respondents claim the profit motive manifested itself in understaffing—which the district court found did not exist.

In any event, Respondents cite scant record support for any alleged "profit motive"—and no evidence to support a finding that Centennial adopted the Medication Administration Procedure for the purpose of intentionally exploiting Ms. Murray for financial gain, as the jury was instructed it must find for a breach of fiduciary duty. (19A3688; 33A6796.) Respondents cite only the testimony of Centennial's nursing director Janine Jones and Centennial's nursing expert (Resp. Br. 15–17), which merely acknowledged the self-evident proposition that if every scheduled medication had to be given at the exact scheduled time with no permissible

window, more nurses would have to be hired. (12A2339–40; 17A3333–34.) Understandably, the district court found this testimony insufficient to establish "understaffing."

B. The Medication Administration Procedure Evidence Does Not Support Exploitation for Financial Gain—But it Confirms the Professional Negligence Gravamen.

While there is a complete absence of a causal nexus between any alleged profit motive behind the Medication Administration Procedure and Ms. Murray's death, Respondents cite evidence that the policy—and the way nurses followed it—breached the *standard of care* applicable to a hospital treating a patient. (*See* Resp. Br. 7 & n.2, 12–19, 39, 76.) This evidence only confirms that the procedure sounds in medical decision-making, as relevant to this Court's gravamen analysis.

Respondents argue, for example, that Centennial did not follow Safe Medication Practices guidelines in implementing the policy, and that the nurses ignored a physician order and FDA warnings when they administered Toradol more frequently than exactly every six hours. (Resp. Br. 14–15.) Respondents also cite medical expert testimony that the Medication Administration Procedure "was inappropriate" and "flawed," and that it "did not comply with the standard of care and that the utilization

of the policy by the hospital breached the standard of care." (Resp. Br. 17–19.)

But their expert (Dr. DeBaun) also testified that nurses are not expected to give scheduled medications at the exact scheduled time (13A2638), that a one-hour window (before or after scheduled time) is within the standard of care for non-time-critical medications (14A2706–07), and that a 30-minute window (before or after the scheduled time) is acceptable even for time-critical medications (13A2636).[1] Consistent with Dr. DeBaun's expert testimony, Centennial's Medication Administration Procedure provided that time-critical medications could be given within such a half-hour window. (38A7799, 7807.)

Respondents largely ignore other evidence that the Medication Administration Procedure was reviewed, approved, and implemented by Centennial medical staff exercising medical judgment. (*See* App. Br. 9–13; *see also* 38A7800 (directing pharmacy to "review, approve and profile" every medication order before releasing it for administration by the

[1] Respondents' own chart (Resp. Br. 6) confirms how intertwined their medication policy argument is with medical treatment and judgment. From April 20, 2013 (2:10 pm) to April 23 (12:22 pm)—a period of 70 hours and 12 minutes—Ms. Murray received *thirteen* Toradol doses. Had she received Toradol at exactly 6-hour intervals, as Respondents insist was the "standard of care," then in that same 70 hour and 12-minute time period, she would have received a total of *twelve* doses, with a thirteenth dose due to be administered in 1 hour and 48 minutes, *i.e.,* at 2:22 pm on April 23.

Centennial nurses).) Centennial's pharmacist (Andrew Jackson) did that here, conducting a risk-benefit analysis taking into account that Ms. Murray was also prescribed opioids. (App. Br. 12–13; *see also* 13A2438; 16A3210–14, 3226–27; 36A7308.) In Jackson's opinion,[2] this was within the standard of care. (16A3219–20, 3259–60, 3264, 3271.) Respondents' own expert, Dr. DeBaun, concurred that a hospital team may decide, within the standard of care, to go outside a black box warning in the belief that the benefit to the patient would outweigh the risk, as long as that decision is first discussed with the patient and the patient's family. (13A2539–40; 14A2689.)

While this conflicting evidence may, when weighed against the verdict, support a professional negligence finding, it simply does not support any finding that Centennial implemented—or its nurses carried out—the Medication Administration Procedure to exploit Ms. Murray for financial gain. Nor does it support a finding that any Centennial employee—

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[2] In a footnote, Respondents mention their motion to strike Jackson's testimony. (Resp. Br. 15–16 n.5.) Respondents did not object during Jackson's testimony, but moved to strike the next day, which the district court denied as untimely. (17A3283, 3288.) In any event, Respondents relied on Jackson's testimony in arguing to the jury (18A3552), in their own post-judgment briefing (*see, e.g.*, 25A4988-90; 32A6534, 6536), and in their brief on appeal (Resp. Br. 14, 15, 58, 60, 61, 64, 71).

much less any hospital manager with authority to effectuate policy—acted with fraud, malice, or oppression toward Ms. Murray.

What this evidence does do, however, is confirm that the gravamen of Respondents' claim sounds in professional negligence.

ARGUMENT

I. THE COURT SHOULD REJECT RESPONDENTS' INVITATION TO CREATE A NEW AND SEPARATE FIDUCIARY DUTY FOR HOSPITALS TREATING PATIENTS.

A. The Court Should Not Adopt a Separate Fiduciary Duty Above the Applicable Standard of Care for Hospitals.

Nevada has never recognized a breach of fiduciary duty claim against a hospital independent of a professional negligence claim where the alleged wrongdoing occurs during medical treatment. The Court should decline Respondents' invitation to expand the law to create a heightened and independent duty above and beyond the standard of reasonable care now imposed by NRS 41A.015. (Resp. Br. 31–36.) Consistent with NRS 41A.015, Nevada already recognizes that hospitals have duty to exercise the reasonable care, skill, or knowledge ordinarily used under similar circumstances in their institutional conduct. *See, e.g.*, *Oehler v. Humana, Inc.,* 105 Nev. 348, 350–51, 775 P.2d 1271, 1272–73 (1989).

Respondents do not address the numerous other courts that have rejected the argument that hospitals owe patients a heightened fiduciary

duty above the standard of care and have held that such a fiduciary duty claim in this context is redundant of a medical malpractice claim. (App. Br. 26–27 (citing cases); *see also* 23A4523–26.) Instead, borrowing general arguments from a law review article,[3] Respondents reference a variety of out-of-state cases discussing distinguishable scenarios like duties of confidentiality and disclosure (neither of which is relevant here), staffing decisions (which the district court rejected as a basis for Centennial's alleged breach), and other cases that do not discuss "fiduciary" duties but instead evaluate a hospital's duties to adopt and enforce rules and policies for patient care (which are governed by Nevada statutes here—not common law fiduciary duties). (Resp. Br. 31–34.) None of these cases are relevant, much less persuasive, here.

Respondents cite, for example, a 1979 Illinois Court of Appeals case for the notion that a breach of fiduciary duty is "not the same as medical malpractice." (Resp. Br. 34–35 (citing *Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 399 N.E.2d 198 (Ill. App. Ct. 1979).) But *Johnson* does not mention "fiduciary" duties, much less distinguish them from medical malpractice—the court looked to the question of vicarious liability and

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[3] Barry R. Furrow, *Patient Safety and the Fiduciary Hospital: Sharpening Judicial Remedies*, 1 DREXEL L. REV. 439 (2009).

reversed summary judgment for a physician and hospital based on alleged negligent care and treatment.

Two decades later, however, the Illinois Supreme Court *did* address the distinction between fiduciary duty and medical malpractice claims—and rejected the same argument Respondents make here. In *Neade v. Portes*, the Illinois high court reviewed cases from other jurisdictions and held that a breach of fiduciary duty claim against a doctor "is duplicative of a negligence claim." *Neade v. Portes*, 193 Ill. 2d 433, 440–41, 739 N.E.2d 496, 501 (2000) (citations omitted). Finding these cases persuasive, the court refused to recognize an independent fiduciary duty, concluding that "a medical negligence claim sufficiently addresses plaintiff's injuries." *Id.*, 739 N.E.2d at 503; *see also Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064, 1071 (S.D. Fla. 2003) ("Courts routinely hold that where a patient's claim that the doctor breached his fiduciary duty arises from the same operative facts and results in the same injury as another claim asserted against the doctor, then the breach of fiduciary claim is duplicative."). The Court should reach the same conclusion here.

B. Even If a Fiduciary Duty Exists, Respondents' Claim Fails Based on the Pleadings and Evidence.

Even if Nevada law imposed a fiduciary duty on Centennial with respect to medication administration beyond the standard of reasonable

care imposed by NRS 41A.015, Respondents' claim that Centennial breached that fiduciary duty—by intentionally exploiting Ms. Murray for its own gain or benefit (18A3512; 19A3688)—fails for lack of a pleading (2A241) and a lack of evidence. (App. Br. 27.)

Respondents added a fiduciary duty claim based solely on understaffing—not the Medication Administration Procedure. (App. Br. 6–8, 27.) Respondents argue that, under a "notice" pleading standard, their understaffing allegations and professional negligence pleadings are sufficient. (Resp. Br. 37.) Respondents ignore that the fiduciary duty claim is subject to a heightened pleading standard under NRCP 9(b) and must be pleaded with particularity. *Guzman v. Johnson*, 137 Nev. Adv. Op. 13, 483 P.3d 531, 536 (2021) (quoting *In re Amerco Derivative Litig.*, 127 Nev. 196, 223, 252 P.3d 681, 700 (2011)). (*See* App. Br. 27.)

Moreover, in subsequently defeating Centennial's summary judgment motion on the fiduciary duty claim, Respondents continued to urge that their fiduciary duty claim was based solely on their understaffing allegations and not the administration of Toradol. (App. Br. 7–8; *see* 9A1611–12; 10A1929–39; 16A3068–71.) It was not until closing argument that Respondents first urged that their breach of fiduciary duty claim was premised on Centennial's Medication Administration Procedure.

(18A3551–56.) That was far too late to give Centennial the required notice of a theory on which the entire $32,420,000 punitive damage award rests. (App. Br. 45.) *See Sprouse v. Wentz*, 105 Nev. 597, 601–04, 781 P.2d 1136, 1138–40 (1989) (reversing punitive damages awarded on an unpleaded claim as a violation of defendant's rights to procedural due process and a fair trial).

In any event, as detailed in Appellant's Brief and *supra*, there was no evidence that Centennial's Medication Administration Procedure was intended to exploit or harm Ms. Murray or any other hospital patient. While Respondents introduced previously undisclosed expert testimony that the procedure violated the standard of care, there is no evidence of any intentional exploitation that would support a fiduciary duty claim.[4]

And for the reasons given by the district court (33A6794–97), Respondents' argument that Centennial implemented "an intentionally harmful staffing policy" (Resp. Br. 65–68) has no evidentiary support and cannot support the judgment. "[N]o evidence was presented that an actual

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[4] In a single sentence, Respondents claim their expert testimony "supported that the policy was a breach of the hospital's fiduciary duty." (Resp. Br. 65.) But this testimony only addresses whether the policy was "flawed" and below the standard of care, and whether Centennial nurses violated the standard of care in failing to adhere to the black box warning—a claim Respondents pleaded only as professional negligence—not whether Centennial's procedures exploited patients for financial gain. (13A2624, 2539–40; 14A2688–94.)

understaffing occurred, let alone, that one occurred and was done with the goal of increasing Defendant's profits." (33A6794.)

II. THE COURT SHOULD DECLINE RESPONDENTS' INVITATION TO JUDICIALLY REINSTATE CHAPTER 41A EXCEPTIONS THAT NEVADA VOTERS REJECTED IN KODIN.

A. Under *Szymborski*, *Curtis*, and *Montanez*, the Gravamen of Respondents' Claim is Professional Negligence.

"'When the duty owing to the plaintiff by the defendant arises from the physician-patient relationship or is substantially related to medical treatment, the breach thereof gives rise to an action sounding in medical malpractice as opposed to simple negligence.'" *Montanez v. Sparks Fam. Hosp., Inc.*, 137 Nev. Adv. Op. 77, 499 P.3d 1189, 1192 (2021) (citations omitted). "By extension, if the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert, then it is a [professional negligence] claim." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017).

This Court has repeatedly rejected attempts to plead around Chapter 41A's restrictions in cases involving, *e.g.*, failure to employ and adequately train medical staff (*Szymborski*); negligent hiring, retention, training, supervision, mismanagement, understaffing, or budgeting (*Curtis*); conspiracy to falsify medical records (*Schwarts*); negligent hiring, training,

and supervision (*Zhang*—citing with approval a Texas case[5] involving the "negligent failure to institute adequate policies and procedures"); and, most recently, failure to maintain a clean facility (*Montanez*). *See Montanez*, 499 P.3d at 1192–93; *Schwarts v Univ. Med. Ctr. Of S. Nevada*, Nos. 77554, 77666, 460 P.3d 25, 2020 WL 1531401, at *1–2 (Nev. Mar. 26, 2020) (unpublished disposition); *Curtis*, 136 Nev. at 352–54, 358, 466 P.3d at 1265–67, 1269–70; *Szymborski*, 133 Nev. at 645, 403 P.3d at 1286; *Zhang*, 2016 WL 4926325, at *4–7.

Even when labelled as both professional negligence and a breach of fiduciary duty, a complaint about the procedures by which a hospital administers a prescribed drug to a patient is the same, even if those procedures are pursuant to hospital policy.

First, Centennial's alleged fiduciary duty could arise solely from the provider-patient relationship and is substantially related to medical treatment. *Montanez*, 499 P.3d at 1192. Respondents allege that "[a]s a hospital providing care and treatment" Centennial "was obligated to

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[5] In *Zhang*, this Court specifically stated: "Negligent hiring, training, and supervision claims cannot be used as a channel to allege professional negligence against a provider of health care to avoid the statutory caps on such actions." *Zhang v. Barnes*, No. 67219, 132 Nev. 1049, 382 P.3d 878, 2016 WL 4926325, at *4–7 (Nev. Sept. 12, 2016) (unpublished disposition) (having discussed *Duncanville Diagnostic Ctr., Inc. v. Atl. Lloyd's Ins. Co. of Tex.*, 875 S.W.2d 788, 791 (Tex. App.—Eastland 1994, writ denied)).

exercise the utmost good faith in caring for and treating her" and had a duty "to make appropriate and good faith decisions regarding her medical care and treatment." (Resp. Br. 37 (quoting complaint); *see also* Resp. Br. 58 ("In surrendering to the care of a hospital, a patient entrusts the hospital with the administration of all medications.").)

Second, even if there were evidence of financial[6] or "efficiency"[7] considerations, Centennial's adoption and implementation of a Medication Administration Procedure is "*inherently linked* to the provision of medical treatment," which is "reflected in the statutes enacted by the Nevada Legislature that regulate" medication administration by hospitals and nurses. *Montanez*, 499 P.3d at 1193 (emphasis in original). Here, in addition to federal law, there are a variety of Nevada statutes and

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[6] KODIN's history and Chapter 41A both confirm that financial considerations are unavoidable in running a hospital and must be considered. Indeed, a substantial body of Nevada statutory law addresses hospital economics and acknowledges that financial considerations are inherently part of providing health care to the Nevada public. *See, e.g.*, NRS Chapter 439B ("Restraining Costs of Health Care").

[7] In addition to "profit motive," Respondents argue the Medication Administration Procedure was implemented for "efficiency." (Resp. Br. 15). But Nevada law expressly recognizes "efficiency" in rendering hospital services as a mandatory—not exploitative—goal. (App. Br. 41.) *See, e.g.*, NRS 439B.220(3); *see also* NAC 449.314(1) ("A hospital must be administered in a manner that enables the hospital to use its resources effectively and efficiently to meet the needs of and provide quality care to its patients."). Respondents do not address that policy requiring efficiency.

regulations that specifically govern hospital medication administration procedures. (App. Br. 35.) *See* 42 C.F.R. § 482.23(c); NRS 449.476; NAC 449.349(3); *see also* NRS 433.514(2) ("Each administrative officer shall establish a policy for the review of the administration, storage and handling of medications by nurses and nonprofessional personnel."); NRS 632.018 ("practice of professional nursing" defined to include "the administration of medications"); NAC 632.238 (practical nurses may prepare required dosages and administer medication). Indeed, Nevada law *requires* hospitals to adopt policies with respect to the administration of medications. *See* NAC 449.340(3).

Third, Respondents required—and continue to heavily rely upon—expert medical testimony to support their claim as to the Medication Administration Procedure. *Szymborski*, 133 Nev. at 642, 403 P.3d at 1284; *Dolorfino v. Univ. Med. Ctr. of S. Nev.*, No. 72443, 450 P.3d 391, 2019 WL 5390460, at *2 (Nev. Oct. 21, 2019) (unpublished disposition) (Chapter 41A applies "where the jury requires a medical expert's guidance on the professional standard of care"); *see also* NRS 41A.100. Respondents' experts testified that administering Toradol pursuant to hospital procedures at the times reflected in Respondents' chart (Resp. Br. 6) breached "*the standard of care*" by Centennial, its pharmacy, and its

nurses. (Resp. Br. 7 & n.2, 17–18, 24, 26, 39, 76 (emphasis added).) And even their intentional understaffing theory—rejected by the district court—rested on the testimony of Respondents' experts that the nurses on Ms. Murray's allegedly understaffed floor breached "*the standard of care*" in various respects concerning urine measurements, reporting critical lab values, and carrying out physician orders. (Resp. Br. 9–12, 19–22 (emphasis added).)

Liability under either of the Respondents' fiduciary duty theories (Medication Administration Procedure or understaffing) ultimately requires and relies on the testimony of Respondents' physician experts that the hospital nurses violated the standard of care in their treatment and care of Ms. Murray. Because their claims necessarily depend on a breach of care, Chapter 41A applies. *See Est. of Curtis v. S. Las Vegas Med. Invs.*, LLC, 136 Nev. 350, 354, 466 P.3d 1263, 1267 (2020) (understaffing claim subject to Chapter 41A because "if the underlying negligence [of nurses and staff] did not cause Curtis's death, no other factual basis was alleged for finding LCC liable for negligence staffing, training, and budgeting"); *see also, e.g., Williams v. Alvista Healthcare Ctr., Inc.,* 283 Ga. App. 613, 616, 642 S.E.2d 232, 235 (Ga. Ct. App. 2007) (complaint related to timing and urgency of

administering medication "involved the professional skill and judgment of a nurse," and was thus construed as a "claim of professional negligence").

B. Chapter 41A Applies to Doctors and Institutions.

Respondents also suggest that KODIN was designed to protect doctors—not "institutions with bad policies"—and thus hospital medication procedures are not entitled to Chapter 41A protections. (Resp. Br. 39–40.) This argument has no support in case law and ignores that Chapter 41A's plain definition of "health care providers" includes "a licensed hospital and its employees." NRS 41A.017; *cf. Curtis*, 136 Nev. at 353, 466 P.3d at 1266 ("Direct liability claims against a nursing home facility do not excuse compliance with NRS 41A.071's affidavit requirement."). Respondents' argument that hospital policies and procedures concerning patient treatment should not be covered by Chapter 41A based on KODIN's purpose fails.

C. Respondents' "Intentional Tort" Argument Ignores KODIN's History, Chapter 41A's Defined Terms, and this Court's Established Precedent.

Respondents concede Centennial is correct "that characterizing a claim as intentional does not change its underlying nature." (Resp. Br. 49–50, citing *Schwarts*).[8] Respondents nonetheless argue at length that this

[8] In *Schwarts*, this Court held that a civil conspiracy claim sounded in professional negligence even though it was raised as intentional tort.

Court should hold that Chapter 41A does not apply to "intentional" torts.[9] (Resp. Br. 41–52, 56.) Respondents' argument is misguided—the relevant inquiry is not a *defendant's* motive or intent—but the gravamen of the *plaintiff's* claim. *Szymborski*, 133 Nev. at 643, 403 P.3d at 1285 (courts "must look to the gravamen or 'substantial point or essence' *of each claim* rather than its form" when determining if the claim is for professional negligence) (emphasis added, citation omitted). More importantly, Respondents ignore KODIN's history, Chapter 41A's defined terms, and this Court's precedent construing them.

First, Respondents ask this Court to judicially reinstate exceptions to Chapter 41A that Nevada voters repealed in 2004 in order to ensure the availability of healthcare in Nevada. The original 2002 reforms included exceptions that allowed plaintiffs to avoid Chapter 41A's limits, including the noneconomic damages cap. (*See* 28A5649–50.) In 2004, Nevada voters passed KODIN in order "to provide greater predictability and reduce costs for health-care insurers and, consequently, providers and patients" and to

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Schwarts, 2020 WL 1531401, at *1 (noting civil conspiracy requires intent to accomplish an unlawful objective for the purpose of harming another).

[9] Respondents' citation of cases involving "deliberate indifference" claims under § 1983 (Resp. Br. 50–51) has no application here as "§ 1983 liability is governed by federal law." *Jackson v. Barnes,* 749 F.3d 755, 765 (9th Cir. 2014).

"ensur[e] that adequate and affordable health care is available to Nevada's citizens." *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 798–99, 358 P.3d 234, 239 (2015).

KODIN made two key changes relevant here: (1) it prohibited joint liability against health care providers where the jury apportions responsibility among joint tortfeasors (codified as NRS 41A.045), and (2) it repealed NRS 41A.031, which had allowed noneconomic damages over the $350,000 cap for "exceptional circumstances" established by clear and convincing evidence, or where the conduct constituted "gross malpractice"—defined as "conscious indifference to the consequences which may result from the gross malpractice; and … disregard for and indifference to the safety and welfare of the patient." 2002 Nev. Stat. 18th. Sp. Sess., Ch. 3 (A.B. 1) (28A5631–32, 5635–38.)

By adopting KODIN, Nevada voters repealed loopholes in the original 2002 legislation that allowed plaintiffs to argue the caps should not apply in a particular case due to egregious facts or gross misconduct. Respondents ask the Court to judicially reenact those very same loopholes by creating an exception to the caps for intentional conduct and breach of fiduciary duty, and by holding Centennial jointly liable for the 35% harm that the jury attributed to the doctors.

Second, Respondents urge this Court to adopt a "common understanding" of the term "negligence" to categorically exclude intentional torts from Chapter 41A. (Resp. Br. 41–43.) But statutory definitions of statutory terms control. *Delucchi v. Songer*, 133 Nev. 290, 297, 396 P.3d 826, 831 (2017). When Respondents filed this action in 2014, Chapter 41A contained two relevant definitions*:* "professional negligence"[10] (which specifically addressed negligence), and "medical malpractice"[11] (which addressed *any* failure to follow the standard of care—negligent or otherwise). Respondents focus on the former, which referenced a "negligent act or omission." (Resp. Br. 41.) But in *Tam*, this Court construed those two definitions together to hold that plaintiffs could not plead "medical malpractice" in the alternative to "professional negligence" to avoid the caps in NRS 41A.035. *Tam*, 358 P.3d at 240–42. Thus, the caps apply to *any* failure to use reasonable care, skill or knowledge—regardless of whether that failure was negligent or intentional.

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[10] "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…." NRS 41A.015 (2013).

[11] "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.009 (2013).

And in 2015, the Legislature clarified this point by consolidating the two definitions in NRS 41A.015,[12] eliminating any sophist insistence upon "negligence," and focusing on the health care provider's failure to exercise reasonable care, skill, and knowledge. NRS 41A.015. The Legislature's 2015 amendments to Chapter 41A did not substantively change its applicability—they clarified it. *Id*; *Zhang*, 2016 WL 4926325, at *4 n.1; *see also* NRS 0.023 (where statutory amendment is in keeping with the existing law it should be viewed as a continuation of such laws, and not new enactments). On its face, and in keeping with *Tam*, Chapter 41A is not restricted to negligent acts and cannot be construed to categorically exclude intentional conduct.

Third, Respondents ignore this Court's holding in *Fierle*, which confirmed that Chapter 41A does not exclude intentional conduct: "We conclude that both intentional and negligence-based medical malpractice claims are included in the affidavit requirement. 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 as appellants argue." *Fierle v. Perez*, 125 Nev. 728, 739 n.8, 219 P.3d

[12] "Professional negligence" is currently defined as "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRA 41A.015 (2015).

906, 913 n.8 (2009), *overruled on other grounds by Egan v. Chambers*, 129 Nev. 239, 299 P.3d 364 (2013).

Fourth, Respondents argue that NRS 41.141 applies instead of NRS 41A.045 because the jury found intentional conduct, and thus Centennial's liability is not limited to the 65% apportioned by the jury. (Resp. Br. 43–45, 56.) But this Court expressly rejected Respondents' argument in *Piroozi*: "Because NRS 41A.045 is a special statute focusing specifically on professional negligence of a provider of health care, it governs here. Thus, when applicable, NRS 41A.045 displaces NRS 41.141." *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015). Moreover, because NRS 41A.045 was passed years *after* NRS 41.141, it controls if there is any conflict. *Laird v. State Pub. Emp. Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982); *see also Williams v. State Dep't of Corr.*, 133 Nev. 594, 600, 402 P.3d 1260, 1265 (2017). Respondents' reliance on *Café Moda v. Palma*, 128 Nev. 78, 83–84, 272 P.3d 137, 141 (2012) and *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 608, 5 P.3d 1043, 1050 (2000) is misplaced, as neither case involved torts by health care providers. (Resp. Br. 56.)

III. THE EVIDENCE MIGHT SUPPORT PROFESSIONAL NEGLIGENCE, BUT IT DOES NOT SUPPORT PUNITIVE DAMAGES.

A. Neither the Evidence nor the Jury's Findings Support Punitive Damages.

1. There is no clear and convincing evidence to support a punitive damages award.

Respondents' defense of the over $32 million punitive damages award repeats the same professional negligence evidence that fails to support a finding that Centennial intentionally exploited Ms. Murray for financial gain—including departures from black box warnings and the "intentional understaffing" theory the district court rejected. (Resp. Br. 57–69.) Respondents do not address the lack of clear and convincing evidence to support "oppression, fraud or malice" as defined by Nevada law, NRS 42.005, much less the absence of evidence that Centennial acted with a "culpable state of mind" and "conscious disregard" of Ms. Murray's rights. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 743, 747, 192 P.3d 243, 255, 258 (2008). (*See* App. Br. 40–42.) Indeed, Respondents never cite *Thitchener* or mention the high standard of clear and convincing evidence (beyond "recklessness or gross negligence") required to sustain a punitive award. *Thitchener*, 124 Nev. at 743, 192 P.3d at 255.

Even if this evidence supports a professional negligence claim, there is simply no clear and convincing evidence that Centennial's adoption of the

Medication Administration Procedure—which merely defines the safe windows of time for administration of both time-critical and non-time critical medications (38A7799, 7807)—or its staffing of the sixth floor constituted fraud, malice, or oppression as those terms are defined by NRS 42.001(1)–(4).[13]

Significantly, the Medication Administration Procedure's permitted windows of time for both time-critical and non-time critical medications (38A7799, 7807) that were recognized as appropriate by Medicare and ISMP guidelines (12A2224–25, 2246–47; 16A3265-66; 17A3354–55) and even by Plaintiffs' own expert (13A2636; 14A2706–07). The Centennial pharmacy's decision to administer Toradol to Ms. Murray pursuant to the dosage timing requirements in the Medication Administration Procedure came only after a risk/benefit analysis in which the pharmacy determined that Toradol would alleviate Ms. Murray's pain while reducing the opioids (with their own black box warnings) that she would otherwise have to take. (16A3210–29, 3259–60, 3264, 3271.) Centennial staffed the sixth floor on

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[13] NRS 42001 defines *fraud* as "an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or rights or property or to otherwise injure another person"); *malice* as "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"; and *oppression* as "despicable conduct that subjects a person to cruel and unjust hardship with a conscious disregard of the rights of the person." NRS 42.001(1)–(4).

the morning of April 24, 2013 with an extra nurse and brought in a unit coordinator by noon (12A2327), all in an attempt to *avoid* any staffing crisis (12A2327, 2369–72, 2395; 16A3153–58, 3165–66, 38A7816–17, 7828.) Neither the Medication Administration Policy nor the actions of Centennial staff can be construed as exhibiting fraud, malice, or oppression.

Thus, while there are other punitive damages issues addressed below, the absence of clear and convincing evidence to support any punitive damages award renders those issues moot.

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

Respondents acknowledge the special verdict form (19A3710) did not require the jury to make the necessary findings that an officer, director, or managing agent of Centennial—who had authority to make corporate decisions that ultimately determine corporate policy—authorized or ratified an employee's conduct. (Resp. Br. 71–72.) *See* NRS 42.007(1); *Nittinger v. Holman*, 119 Nev. 192, 198, 69 P.3d 688, 692 (2003).

Respondents first urge that Centennial waived the issue by not objecting to the special verdict question that was limited solely to the conduct of "employees of Centennial Hills Hospital." (19A3710.) But Centennial objected to any instructions on the issue of punitive damages (18A3493), and consistently maintained that the evidence presented was

insufficient to justify an instruction on punitive damages (or on fiduciary duty). (*See e.g.*, 18A3477–82, 3486–88; 21A4135–49.) Moreover, it was Respondents' obligation to secure a jury finding on all the elements of the complicity doctrine necessary to impose punitive damages on Centennial. (App. Br. 44–45.) *See Perelman v. State*, 115 Nev. 190, 193, 981 P.2d 1199, 1201 (1999); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52–53, 623 P.2d 981, 983–84 (1981). The Georgia appellate court case cited by Respondents, *KDS Props., Inc. v. Sims*, 506 S.E. 2d 903, 905 (Ga. Ct. App. 1998)—where the defendant did not raise a verdict inconsistency argument until the jury had been discharged—is not relevant here. (Resp. Br. 69.)

Next, Respondents assert that because the jury was instructed on all necessary elements to establish corporate complicity (19A3700), this Court should presume that the jury made all the necessary findings that the verdict form omitted. (Resp. Br. 71–72.) Respondents cite this Court's decision in *Motor Coach Indus., Inc. v. Khiabani ex rel. Rigaud*, 137 Nev. Adv. Op. 42, 493 P.3d 1007, 1015 (2021), where the jury's *express* finding—that a bus manufacturer failed to provide an adequate warning that would have been acted upon by the bus driver—was sufficient to establish that the jury found the manufacturer's failure to warn was a legal cause of the accident. *Khiabani* is unhelpful here where the jury found only that

unnamed "employees of Centennial" acted with fraud, oppression, or malice toward Ms. Murray (19A3630)—but made no express findings as to Centennial itself.[14]

Respondents point to nursing director Jones and pharmacy director Jackson (Resp. Br. 70–71), but there was no evidence that either was responsible for Centennial's Medication Administration Procedure or the staffing requirements for the sixth floor. Moreover, to establish ratification, the employer must have been aware of the fraudulent, oppressive, or malicious nature of the employee's conduct. (*See* App. Br. 43.) *See J.C. Penney Co. v. Gravelle,* 62 Nev. 434, 452-53, 155 P.2d 477, 483 (1945). Here, neither Jones nor Jackson believed that any Centennial employee violated the standard of care in administering Toradol to Ms. Murray or in staffing the sixth floor (12A2244, 2249, 2251–52, 2262, 2353, 2401;

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[14] In a footnote (Resp. Br. 70 n.7), Respondents urge that the corporate complicity doctrine is inapplicable to Valley Health, LLC because it is a Delaware limited liability company and not a corporation. Respondents cite no authority for this assertion, and courts have applied the complicity rule in cases involving punitive damage claims against limited liability companies and other quasi-corporate entities. *Charnis v. Watersport Pro, LLC*, No. 2:07–cv–00623, 2009 WL 2581699, *7 (D. Nev. May 1, 2009); *Morrissey v. Nat'l Mar. Union of Am.*, 544 F.2d 19, 25 (2d Cir. 1976); *Fraternity Fund, Ltd. v. Beacon Hill Asset Management*, LLC, 479 F. Supp. 2d 349, 374–75 (S.D. N.Y. 2007); *Johnson v. ASK Trucking, LLC*, No. 09–4058, 2011 WL 1114247, *5–6 (C.D. Ill. Mar. 25, 2011).

16A3218–20, 3226–29, 3264, 3271), much less that they committed any act constituting fraud, malice, or oppression under NRS 42.005(1).

B. Respondents Cannot Recover Punitive Damages on the Entire Wrongful Death Verdict Under the Fiction That Ms. Murray Lived.

Nevada's wrongful death state modified the common law, which afforded no damages for a wrongful death. *Alsenz v. Clark Cty. Sch. Dist*, 109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993). "Statutes that operate in derogation of the common law should be strictly construed, and, if there is any doubt as to the statute's meaning, the court should interpret the statute in the way that least changes the common law." *Branch Banking & Trust Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158–59, 347 P.3d 1038, 1040 (2015).

Any recovery for wrongful death damages rests solely on NRS 41.085, which Respondents acknowledge "divvies up" recoverable damages into two separate actions—one by the heirs and one by the estate: "the statute makes it clear that the estate gets (1) special damages and (2) penalties and punitive damages, but not (3) general damages. (Resp. Br. 72, 74.) *Compare* NRS 41.085(4) (damages available to heirs, including noneconomic damages but not punitives) *with* NRS 41.085(5) (damages available to estate, including medical expenses, funeral expenses, and

punitives); *see also Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (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.").

Citing NRS 41.085(5)(b), Respondents ask the Court to rewrite the statute and hold "the heirs are entitled to punitive damages on their own claims" (Resp. Br. 75, n.8), reject the distinction between the heirs and the estate, and allow Respondents to recover the full $32,420,000 punitive damages award as if Ms. Murray "had lived." (Resp. Br. 74–75.) In other words, Respondents ask this Court to pretend this is not a "wrongful death" claim.

This Court should reject Respondents' proposed fiction. If Ms. Murray had lived, she would have been entitled to recover for her *own* damages and, if supported by the evidence, punitive damages up to three times that amount or $300,000 depending on the compensatory award.

But Ms. Murray did not live. Upon her death, the wrongful death statute created a new cause of action for her heirs to seek categories of damages that Ms. Murray could never have pursued because they arose

only after her death: loss of companionship, comfort, and consortium; damages for past and future grief and sorrow; and damages for loss of future support. By virtue of NRS 41.085(4), Ms. Murray's heirs were allowed to pursue damages that simply did not exist before Ms. Murray's death, and which she could never recover had she lived. But they are not entitled to punitive damages.

A statute is not to be interpreted contrary to its "plain language." *Egan,* 129 Nev. at 242-43, 299 P.3d at 366-67; *Piroozi,* 131 Nev. at 1008, 363 P.3d at 1171. Nor is the cause of action for punitive damages "lost" by reason of death (Resp. Br. 73)—rather, the wrongful death statute created a limited right for heirs to recover certain compensatory damages, and allows other damages, including punitives, to be recovered only by the estate subject to the caps in NRS 42.005(1)(a)(b). Furthermore, in a case involving death after a long-term injury, the estate's compensatory special damages for medical expenses could be well into seven figures— permitting a punitive damages award three times that amount.

Plaintiffs cite the rule of construction that when statutes conflict, a specific statute controls over a more general one. (Reply Br. 74.) But there are no conflicting statutes involved here. NRS 41.085 addresses who may recover punitive damages in a wrongful death case, and NRS 42.005

addresses the amount of punitive damages permitted in cases where the law and the evidence otherwise permit them.

C. Punitive Damages are Noneconomic Damages Capped By NRS 41.035.

Respondents do not respond to the case law Centennial cites for the proposition that punitive damages are "nonpecuniary damages." (App. Br. 49.) Nor can Respondents dispute that, by definition, noneconomic damages subject to the NRS 41A.035 cap include "other nonpecuniary damages." NRS 41A.011.

Respondents instead contend that NRS 41A.011 needed one more "and" to include punitive damages within the meaning of nonpecuniary damages. (Resp. Br. 54–55.) With or without one more "and," the Nevada Legislature chose to include "nonpecuniary damages" within the noneconomic damages definition in NRS 41A.011. That term, according to a myriad of authorities, includes punitive damages—thus carrying out the intent of KODIN, which repealed the cap exceptions for gross malpractice involving "conscious indifference" or "disregard for and indifference to patient safety." (*See* App. Br. 50.)

IV. RESPONDENTS CANNOT RECOVER PREJUDGMENT INTEREST.

A. Centennial Did Not Waive This Issue.

Respondents argue Centennial waived the prejudgment interest issue by not including it in its Rule 59 motion to alter or amend the original February 20, 2019 judgment order entered by Judge Bonaventure. (19A3718–19) (Resp. Br. 82.) But Centennial's motion to alter or amend that judgment was granted, and on August 14, 2019, Judge Bluth reduced the jury's verdict per Chapter 41A limits. (30A6234.) This was a new judgment that substantially modified the awarded damages and thus superseded Judge Bonaventure's original judgment. *See Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 386 (9th Cir. 1988); *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 708 (9th Cir. 2010); *Morrell v. Edwards*, 98 Nev. 91, 92–93, 640 P.2d 1322, 1324 (1982).

Subsequently, Judge Bluth reversed course and granted *Respondents'* motion to alter or amend the August 2019 amended judgment without awarding damages. (33A6804.) Centennial objected to Respondents' attempts to recover facially unauthorized prejudgment interest in their proposed form of judgment on May 22, 2020, before a final judgment was entered. (34A7019, 7023–24.) Judge Bluth entered a "Final Judgment" on July 31, 2020 in the amount of the original jury verdicts, but without addressing "calculation of interest on the judgment." (35A7091–93.)

Respondents acknowledge that Centennial appeals from Judge Bluth's final judgment—not Judge Bonaventure's original judgment in 2019. (*See* Resp. Br. 1.) The case Respondents cite for their waiver argument does not apply here because it involved a situation where the same aggrieved party filed a second tolling motion after their first such motion was denied. *See Benson v. St. Joseph Reg'l Health Ctr*. 575 F.3d 542, 546 (5th Cir. 2009).

But even if Centennial had not objected, the district court's failure to apply NRS 17.130(2)'s prohibition of prejudgment interest on future damages constitutes plain error, *Lee v. Ball*, 121 Nev. 391, 395, 116 P.3d 64, 67 (2005), which may be reviewed on appeal. *High Noon at Arlington Ranch Homeowners Ass'n. v. Eighth Jud. Dist. Ct.*, 133 Nev. 500, 511, 402 P.3d 639, 648 (2017).

B. Where Respondents Did Not Segregate Between Past and Future Damages, They Cannot Recover Prejudgment Interest on the Entire Verdict.

The Final Judgment expressly declines to address interest, and thus none was awarded. (35A7091–93.) Respondents did not appeal that decision. Respondents have made it clear, however, that they intend to pursue prejudgment interest on *all* amounts awarded in the 2020 Final Judgment, regardless of when they accrued, going back to Judge Bonaventure's first judgment entered in February 2019. (*See, e.g.*,

35A7035–37.) Centennial asks the Court to confirm that Respondents are not entitled to recover prejudgment interest.

Respondents blame Centennial for the jury's commingling of past and future damages in the verdict form. (Resp. Br. 83–84.) Centennial disagrees with that characterization,[15] but even if it were true, it would not mean Respondents can recover prejudgment interest on the whole verdict. It was not Centennial's burden to create a clean record on which Respondents can claim interest—if they want to recover prejudgment interest, they bore the burden of establishing their entitlement under NRS 17.130 and the cases construing it.

It is well-settled that "[p]rejudgment interest *may not* be awarded on an entire verdict 'when it is impossible to determine what part of the verdict represented past damages.'" *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549–50 (2005) (emphasis added, citations omitted). This Court has repeatedly held that "[i]t is error for a trial court to award prejudgment interest for the entire amount of the verdict when it is

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[15] Centennial did successfully object to Respondents' originally tendered verdict form—not because it separated past and future damages, but because it asked the jury to return separate damage awards on Respondents' professional negligence and fiduciary duty claims. (18A3494.) When a revised verdict form was tendered, Respondents' only objections were that it did not provide for separate damage awards and that it made a finding of professional negligence a prerequisite to a breach of fiduciary duty finding. (18A3493–94.)

impossible to determine what part of the verdict represented past damages." *Hazelwood v. Harrah's*, 109 Nev. 1005, 1011, 862 P.2d 1189, 1192 (1993), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999); *see also Jacobson v. Manfredi by Manfredi*, 100 Nev 226, 233, 679 P.2d 251, 255–56 (1984); *Stickler v. Quilici*, 98 Nev. 595, 597, 655 P.2d 527, 528 (1982).

Respondents next assert in a footnote that the only future damages awarded by the jury were for grief or sorrow and that the awards for loss of companionship, comfort and consortium and loss of probable support were for losses already suffered (past damages). (Resp. Br. 83 n.9.) That argument is belied by the jury instructions, which advised the jury that in determining the amount of those awards, the jury should consider the age, health, and respective life expectancy of the deceased and the heirs and consider "what the benefits the heir might reasonably have expected to receive from the deceased had she lived." (18A3514.)

While the issue is governed by Nevada law, the other state cases cited by Respondents are not to the contrary. (Resp. Br. 84.) In *Commonwealth v. Johnson Insulation*, 682 N.E. 2d 1323, 1334 (Mass. 1997), for example, the court held that lost earnings and benefits (the claim by Respondents here), constitute future damages. *Id.* Similarly, *Carey v. General Motors*

Corp., 387 N.E. 2d 583, 588–89 (Mass. 1979) dealt with a claim by an injured plaintiff for lost earning capacity, not a claim by a decedent's heirs for loss of support.

Respondents should be denied any prejudgment interest on the damages awarded in the Final Judgment.

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

A. The Erroneous Admission of Undisclosed and Prejudicial Expert Testimony Warrants a New Trial.

Undisclosed expert witness opinions are not admissible, and their improper admission requires a new trial. *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 427–33, 335 P.3d 183, 185–89 (2014) (remanding for new trial where undisclosed physician opinions were admitted into evidence).

Respondents never advised Centennial, pursuant to their duty to supplement set forth in NRCP 16.1(2)(D)[16] and 26(e)(1)(2), that both Dr. DeBaun and Dr. Schwimmer would criticize Centennial's Medication Administration Procedure that had been produced to Respondents three years prior. (3A626, 632, 639; 26A5253, 5260.) Respondents had apparently not even shown the Medication Administration Procedure to either witness until shortly before trial. (13A2622–23; 15A2928–29.)

[16] Now NRCP 16.1(2)(F).

Respondents argue Centennial's counsel opened the door by *cross-examining* Dr. DeBaun about the Medication Administration Procedure. (Resp. Br. 77; *see also* 13A2622–24.) But that cross-examination came *after* Dr. DeBaun was permitted, over Centennial's objection (13A2538–39), to criticize the procedure and testify that Centennial breached the standard of care in administering Toradol pursuant to dosage timing provisions for non-time-critical medications set forth in the procedure. (13A2539–45.) Respondents' counsel then directed several additional questions regarding the procedure to Dr. DeBaun, including whether it is dangerous. (13A2543.) Centennial did not "open the door" for this undisclosed opinion. *See Nolte v. Ford Motor Co.*, 458 S.W.3d 368, 379 (Mo. Ct. App. 2014) ("[O]ne cannot open the door to evidence that has already been admitted.").

B. The Excessive Verdict, Driven By Passion and Prejudice, Warrants a New Trial or Remittitur.

Respondents say it is not error to ask the jury to act as the "conscience of the community" and to "send a message" if the arguments are based on the evidence. (Resp. Br. 79–80.) But absent clear and convincing evidence of fraud, oppression, or malice sufficient to entitle the estate to a punitive damage award, these arguments—coupled with submission to the jury of the unfounded punitive damages claim—served

only to inflame and prejudice the jury against Centennial on all issues. (App. Br. 52–54.)

Respondents further claim that they never asked the jury to punish UHS (Resp. Br. 80)—Centennial's parent's company dismissed with prejudice three years before trial. (1A73–75.) But Respondents' counsel not only referred to the policy as one imposed on Centennial by a nonparty for the sake of profit, but also invited the jury to consider the size and implicitly the wealth of that non-party. (*See, e.g.*, 18A3553–55, 3619–20.) There could be no other purpose for Respondents' assertions, over objection, that UHS—a nonparty holding company—"traded on the New York stock exchange—created Centennial's administration policies" (18A3554) and that: "This is not Centennial Hills' policy. This is UHS policy." (18A3620.) Significantly, when arguing to the jury about the amount of punitive damages to award, even though only Centennial was a defendant in that part of the proceeding, Respondents continually referred to defendants in the plural. (*See, e.g*, 19A3639 ("[Y]ou have the opportunity to send these defendants a message.").)

Respondents contend that none of their inflammatory and improper arguments provide a "reasonable explanation" for the excessive compensatory and punitive damages verdicts. (Resp. Br. 80.) But there is

no other explanation for a jury that became so inflamed against Centennial and its parent company that it awarded $7,420,000 more in punitive damages than the estate even asked for (19A3640), and over $2,000,000 more in pain and suffering than the $100,000–$300,000 Respondents suggested (830% of the highest requested amount). (18A3557.)

A new trial is warranted. *Guar. Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206–07, 912 P.2d 267, 272–73 (1996); *see also DeJesus v. Flick*, 116 Nev. 812, 820, 7 P.3d 459, 464–65 (2000) (noting likelihood that passion contributed to award that exceeded plaintiffs requested damages), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008).

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

Centennial presented specific factual arguments, supported by the appendix and case law, showing that district court's award of attorney's fees and costs was an abuse of discretion. (App. Br. 57–66.) Respondents do not attempt to rebut these arguments. Instead, they simply recite the factors to be considered (with which Centennial agrees), adding only the conclusory assertion that no abuse of discretion occurred. (Resp. Br. 84–88.)

Accordingly, Centennial will stand on its unrebutted arguments on both the fees and costs issues.[17]

CONCLUSION

For the reasons stated herein and in Appellant's Brief, Centennial requests the relief set forth in its Appellant's Brief. (App. Br. 66–67.)

Dated this 26th day of January, 2022

Respectfully submitted,

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[17] Centennial notes a typographical error in its Appellant's Brief: On page 61, line 2, the word "economic" should read "noneconomic."

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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, except as stated in the accompanying Motion for Permission to Exceed Word Length, which seeks relief from the requirements of NRAP 21(d), this brief complies with all applicable Nevada Rules of Appellate Procedure; it is proportionately spaced, has a typeface of 14 points or more, and contains 8,591 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 26th day of January, 2022,

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CERTIFICATE OF SERVICE

I certify that on January 26, 2022, a true and accurate copy of the foregoing *Appellant's Reply Brief* 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.