IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

PHILLIP GRASSIE, as Personal Representative and Executor of the Estate of Walter Grassie,

Plaintiff-Appellee,

vs. **No. 28,050**

EASTERN NEW MEXICO MEDICAL CENTER,

Defendant-Appellant.

**APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO, COUNTY OF CHAVES
RALPH D. SHAMAS, DISTRICT JUDGE
No. D-504-CV-200600286**

PHILLIP GRASSIE'S REFORMATTED ANSWER BRIEF TO EASTERN NEW MEXICO MEDICAL CENTER'S BRIEF-IN-CHIEF

Stephen Durkovich
534 Old Santa Fe Trail
Santa Fe, NM 87501
(505) 986-1800
(505) 986-1602 fax

Ray M. Vargas, II
Garcia & Vargas, LLC
303 Paseo de Peralta
Santa Fe, NM 8750
(505) 982-1873
(505) 982-8012 fax

Attorneys for Phillip Grassie

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases:

Other State Court Cases:

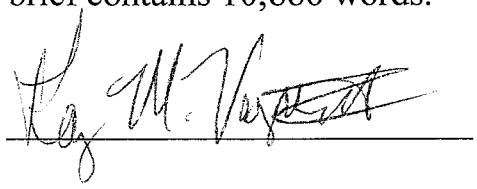
Federal Cases:

Statutes and Rules:

Other Authorities:

STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, I certify that this brief was prepared using a proportionally-spaced typeface and that the body of the brief contains 10,886 words.



In July, 2007, the case of *Grassie v. Eastern New Mexico Medical Center* was tried in the District Court in Roswell for the death of Walter Grassie, a farmer and a long-time resident of Dexter, New Mexico.

The Grassie family brought suit on two distinct bases. First, when Walter Grassie was brought to Eastern's emergency room ("ER") by ambulance with a genuine medical emergency that required immediate treatment, he received none. Second, the ER physician who played a key role in the whole scenario was a known deficient physician who should not have been allowed in Eastern's ER, according to a contract Eastern had with a corporation that provided Eastern with ER physicians.

The deficiencies in Eastern's ER were addressed at trial by four actively practicing New Mexico physicians. During trial, Dr. Steve McLaughlin, the director of UNM's residency program for ER physicians, ER physician Robert Henry, who has worked in Presbyterian's ER for thirty-three years, Presbyterian radiologist Jim Stevenson, and cardiovascular surgeon Dr. Burton Fowler. These physicians described Walter Grassie's blood pressure ("BP"), which was the untreated condition upon which the case focused, as "huge" and "frighteningly high." They talked about the need for team work in an ER, and then discussed what happened in the absence of team work at Eastern when x-rays went unread, BPs were

ignored and Eastern's nurses and doctor turned their backs on findings that "screamed out" an alarming diagnosis. They testified about Eastern's "conscious disregard for patient's safety" and "purposeful disregard of patient's safety" when describing what happened in Eastern's ER.

Their ultimate conclusion was that Walter Grassie died from a dissecting aorta, that he did not have to die from a dissecting aorta, that the emergency treatment for that dissecting aorta was simple and could have been accomplished in seconds with medications readily available. Had that treatment, which could have been given in seconds, been pursued, Walter Grassie would be alive today. Given what happened in Eastern's ER, Walter Grassie would have been better off if he had not left the ambulance.

Because the facts were both overwhelming and inescapable, Eastern avoids them in this appeal, detailing only a few self-serving facts for the Court where it claims there was not substantial evidence to support the jury's verdict. Eastern misstates the Grassies' contentions at trial (*see* §II, A, *infra)*, misstates what occurred at trial (*see* footnote 10, *infra*), argues claims never presented (*see* §II, A, *infra*), argues for the application of law for which it never requested in instructions (*see* §II, A, *infra*), and finally, claims that instructions were erroneous when Eastern participated in the

formulation of those instructions and made no objections to them when asked to do so at trial (*see* §IV, A, *infra*).

The Grassie family invites the Court's decision of this appeal.

SUMMARY OF FACTS RELEVANT TO THE QUESTIONS PRESENTED ON APPEAL

A. Facts Relevant to Walter Grassie's Treatment in Eastern's ER.

On August 19, 2005, Walter Grassie was driving back to Roswell from Ruidoso, when chest pain that was radiating to his back became so severe that he pulled over and called 911. [TR935]. When EMTs arrived at 4:10 p.m. [TR901], Mr. Grassie was sitting up and fully conscious [TR898, 907]. He told the EMTs about his severe chest pain and, upon taking his BP, the EMTs noted an incredibly high pressure of 260/120[1], [TR900-901], which everyone agrees is "frighteningly high," or "scary high." [TR1009, 1221, 1297, 1412]. Mr. Grassie reported his pain a 9 out of 10. [TR899].

The EMTs didn't know the underlying cause of Mr. Grassie's chest pain[2]; however, they knew that whatever the cause of the "scary high" BP, it

---

[1] Normal BP is 120/80 [TR1008].

[2] While the EMTs were unaware of the cause of Mr. Grassie's pain and high BP, any competent ER physician would have put a dissecting aorta at the top of his diagnostic list. [TR1154, 1158]. A dissecting aorta (or dissecting aneurism) is a tearing of the inner lining of the aorta caused by high BP; a dissecting aorta is an absolute emergency. [TR1154, 1178, 1225, 1409]. The immediate treatment for a dissecting aorta is to lower a patient's BP to prevent further tearing of the aorta. [TR1155-1156, 1227-28]. BP can be

needed to be reduced or it would cause his vessels to burst. [TR900-901]. Within six minutes of arriving, the EMTs gave Mr. Grassie a sublingual nitroglycerine tablet. [TR903] Two nitroglycerine tablets and 16 minutes later, Walter Grassie arrived at Eastern's ER door; his BP was reduced 90 points to 170/100 [TR905-905] and his pain was reduced to 5 out of 10 [TR1007]. While he was now at an ER where he should have received an even higher level of care, that never happened. The nitroglycerine given to Mr. Grassie at 4:25 p.m. was the last treatment of any kind he would ever receive for his BP until he coded.

Eastern was indifferent to medical emergencies as a matter of corporate policy. Eastern's chest pain protocol prohibited Nurse Pamela Hayes-Rodriguez from giving Walter Grassie the same nitroglycerine that the EMTs had used successfully; a doctor's order was required. [TR1010, 1012, 1069]. However, Eastern's triage policies did not require Mr. Grassie to be seen by a physician for an hour. [TR1022]. So Walter Grassie sat for 28 minutes unseen by any physician and untreated by anyone.

---

dropped to below normal in seconds within a hospital by giving an intravenous drug called Nipride, or simply by giving intravenous nitroglycerine; lowering BP stops the tearing, or dissecting, of the aorta. [TR1411].

Without treatment with nitrates, Mr. Grassie's BP quickly and predictably jumped 46 points in his first 11 minutes in the ER, to 216/96. [TR1014] [Pls. Ex. A, Tab 1, p. 5].

Despite Mr. Grassie's sudden rise in BP and the need for a doctor's order to give him more nitroglycerine, Nurse Rodriguez never went to Dr. Collins, the ER physician assigned to treat Walter Grassie, and never told him about Mr. Grassie's chest pain or rapid increase in BP.

Nurse Rodriguez did order chest x-rays at 4:45 p.m. in response to an automatic computer prompt, to see if Mr. Grassie had a widened mediastinum. [TR1033-35]. The mediastinum is the area behind the breast bone containing the aorta, which balloons out or widens when it begins to dissect. A widening mediastinum is a red flag indicating a likely dissecting aorta. [TR1223]. Mr. Grassie's chest x-ray was available for viewing five minutes later, at 4:50. However, Nurse Rodriguez never told Dr. Collins that the x-ray had been ordered or was available for viewing. [TR1087-1300].

After triaging Mr. Grassie, Nurse Rodriguez placed him in a cubicle and handed his care over to another nurse, Brian Miller. [TR1041]. Nurse Miller hooked Mr. Grassie up to a monitor that displays his BP, among other things. [TR937, 997]. Once hooked up, Mr. Grassie's BP was also

displayed on a monitor at the nurses' station. Both the monitors were set to alarm if Mr. Grassie's BP exceeded 170 systolic. [TR998, 1000, 1106].

Mr. Grassie then sat in his cubicle, without treatment, awaiting a doctor. At 5 p.m., Dr. Theodore Collins arrived in Mr. Grassie's cubicle. Dr. Collins was wearing Eastern scrubs and, to all appearances, was an Eastern ER physician. [TR1270].

By this time, Mr. Grassie was in terrible pain. Both Phillip Grassie (Walter's son) and Scottie Grassie (Walter's wife) saw the BP monitor register Walter Grassie's BP as 280/146[3]. [TR939-40]. Scottie Grassie told Nurse Miller about the insanely high BP reading and showed it to him on the monitor. Nurse Miller did nothing. [TR938]. Mrs. Grassie told Dr. Collins to look at the monitor and told him about it reading 280/146. [TR393]. Collins turned his back on her. [TR940]. The alarm that should have brought the other nurses at the nurses' station to Walter Grassie's cubicle to address the BP that Miller and Collins had ignored had apparently been turned off or disabled. [TR1106-08].

Dr. Collins knew a chest x-ray had been ordered for Mr. Grassie and knew it had been ordered to diagnose a dissecting aorta, but never looked at

---

[3] Such a high reading is "huge." Dr. Robert Henry, an ER physician at Presbyterian Hospital for 33 years, testified that he had seen a BP of 260/120 only one or two times in his career. Mr. Grassie's BP was now 20 points above that figure. [TR1235].

it. [TR1296, 1298, 1303]. Dr. McLaughlin from UNMH and Dr. Henry from Presbyterian Hospital both testified that it was unconscionable for Dr. Collins not to have looked at the x-ray. [TR1232, 1155]. Nurse Miller, who was present, knew the x-ray had been ordered but didn't remind Dr. Collins to look at it [TR1086, 1100, 1300], because it was Dr. Collins' job to look at the x-ray, and he didn't think he should have to remind the doctor to do so. [TR1100]. The chest x-ray, which was available 7 minutes after it was ordered, was not read by anybody for three weeks. When it was finally read on September 6, after Mr. Grassie's death, it of course showed the telltale widened mediastinum and the radiologist recommended ruling out a dissecting aorta. [TR1168, 1171, 1298, 1427].

Mr. Grassie's chart contained a checklist which required Dr. Collins to acknowledge either reviewing the x-ray or discussing it with a radiologist. [TR1169, 1301]. However, Dr. Collins, who had never been provided any orientation in charting by Eastern's nurses, was apparently unaware of the checklist requiring him to look at the x-ray. Having received no action or response from either Nurse Miller or Dr. Collins, Scottie Grassie told them both that she wanted Walter transported to Lubbock or Albuquerque as soon as possible, by any means necessary. [TR939-41]. Miller only said: "we have to get his blood tests back first." [TR 939]. Dr.

Collins totally ignored Mrs. Grassie. [TR941]. Dr. Collins and Nurse Miller then left Mr. Grassie's cubicle after spending only 4 or 5 minutes with Mr. Grassie [TR1455], but more importantly, they did nothing to address his "huge" BP or his excruciating pain. [TR1305, 1318, 1399, 1460].

Mr. Grassie was then left alone in the cubicle in so much pain, he literally couldn't sit still. Mr. Grassie implored his son to rub his back to take away the pain caused by his aorta tearing a little further with each beat of his heart. [TR 1455-56]. The Grassies, who knew what high BP meant and were alarmed by his increasing pain, became frantic and began calling every doctor they knew to come to the hospital to help; they called their family physician, a physician who was a board member of the hospital, and Mr. Grassie's doctor in Dexter, NM.[4] [TR 942-43, 1452, 1457].

Almost 45 minutes later, at 5:43p.m., Nurse Miller finally began to administer IV nitroglycerine. But it was too late; Mr. Grassie coded on the spot. When Mr. Grassie began coding, the family went out into the hallway and yelled for help; no one came. [TR943]. The family again called for help. *Id.* When no one came, Scottie Grassie ran down to the nursing station to get help and found four nurses sitting around eating pizza. [TR943].

[4] Two of those doctors rushed down to the hospital, but by the time they arrived, Walter Grassie was dead. [TR1477]

The dissection in Mr. Grassie's aorta had progressed too far; Mr. Grassie was pronounced dead at 6:46 p.m. [Pls. Ex. A, Tab 1]. Dr. McLaughlin from UNM, Dr. Henry from Presbyterian and Dr. Fowler, who did cardiovascular surgery both at Presbyterian and at Covenant in Lubbock, testified that Mr. Grassie had obviously died of a dissecting aorta, tearing down to his heart. [TR1230-31].

After Mr. Grassie coded, Eastern's nursing director came to Scottie Grassie and admitted that "mistakes were made" and said that Dr. Collins was taken off the case, and that he would undertake a full investigation of the matter. [TR944-45, 1463-64].

Walter Grassie's aortic dissection should not have killed him. [TR1236]. Both Presbyterian's Dr. Henry and UNM's Dr. McLaughlin testified that if Mr. Grassie's BP would have been treated in Eastern's ER, Mr. Grassie should be alive today. [TR1165, 1236]. Even Dr. Collins admitted that the EMTs treated Mr. Grassie's BP better than Eastern's ER did. [TR1318].

B. Facts Relevant to CEO Rich Robinson's Negligence in Allowing Dr. Collins to Work in Eastern's ER

Rich Robinson, Eastern's CEO, knew Theodore Collins never should have been allowed in Eastern's ER. Dr. Collins was unqualified under the terms of the Emergency Services contract, pursuant to which Dr. Collins had

been provided to Eastern by Chaves Emergency Services, LLC ("Chaves"). The contract specifically required any physician supplied by Chaves to be board-certified or board-eligible in Emergency Medicine. [TR1497]. Eastern CEO Rich Robinson had generated the contract with Chaves and was a signatory to it. [TR1497-98]. The contract, in relevant part, required the following:

> 1.1.3 Qualifications that must be satisfied by each of Contractor's Representatives as a condition of providing services under this Agreement:
>
> 1.1.3.1 Must be accepted by the Facility's Chief Executive Officer.
>
> ...
>
> 1.1.3.3 Shall be certified by the AMA/AOA recognized Board[5] in the specialty indicated or eligible for certification by such board . . . [Pls. Ex. B, Tab 1, p. 000002].

The magic of the board certification requirement was that it dispensed with the need for any judgment by Robinson about a prospective ER physician's professional qualifications. The members of the AMA or AOA certification boards, who were ER physicians themselves, had already

---

[5] AMA (American Medical Association) or AOA (American Osteopathic Association) certification was specified because other "certifications," which do not have the AMA's or the AOA's rigorous training educational and testing requirements, can basically be "bought" at will from bogus certifying agencies by physicians trying to meet board certification requirements. Theodore Collins had in fact purchased one of those bogus certifications but he had never met the rigorous AMA or AOA requirements for board certification in ER medicine.

investigated the prospective physician's education and residency training, and tested him orally and in writing as to his professional abilities in emergency medicine. [TR1963]

Thus, under the contract, all Robinson had to do was to ask the prospective physician if he was AMA or AOA board-certified in emergency medicine. [TR1502]. If he answered yes, he was professionally qualified; if he answered no, he was unqualified under the contract, and Chaves had to supply Eastern with an ER physician who was qualified. [TR1502].

Rich Robinson asked Collins about his board certifications [TR1332-33] and Collins testified that he would have said he was not board certified in emergency medicine; if board certification was required for the Eastern ER, he was not qualified. [TR1332-33].

While Robinson had reserved the right as Eastern's CEO to be the decision-maker as to which physicians were allowed to practice at Eastern's ER and which were not, Robinson did nothing to determine whether Dr. Collins was acceptable. [Pls. Ex. B, Tab 1, pg. 000002]. Had he merely asked a few questions, Robinson would have learned that Dr. Collins had been kicked out of two hospitals previously [TR1333-35], as well as being asked to leave the Air Force as a physician after only one year of a four-year enlistment. [TR1335-41]. Robinson, who never took the 4 or 5 minutes

necessary to ask Dr. Collins about his work history as an ER physician, admitted that he was unaware of Dr. Collins' history or service record, but didn't "necessarily" think these facts would have been important to him in determining whether Collins could work in Eastern's ER. [TR1536].

C. Facts Relevant to the Grassies' UPA Claim

Eastern is a 162-bed acute care hospital that advertises itself as the largest and most comprehensive hospital in southeastern New Mexico. [Pls. Ex. A, Tab 3]. Eastern offers a 24-hour ER. *Id.* Eastern advertised its ER on billboards throughout the town as "ER+." *Id.* The billboards stated, "You believe your emergency shouldn't have to wait. So do we." *Id.* On its web site, Eastern claims that "**[o]ur team** of trained physicians, nurses and technicians are able to provide fast, quality care . . . ." [Pls. Ex. A, Tab 3, p. 8]. In another online ad, Eastern boasts that: "**We** have highly trained doctors, experienced nurses and techs to handle the major and minor emergencies that life might throw your way. They respond to patient and family needs with skill and sensitivity...We understand that when you have an emergency – no matter how big or small – you want attention fast. And we'll give you the quickest possible emergency care" *Id.* at p. 2.

While Eastern advertised the ability of its ER to provide the quickest possible emergency-quality care without waiting, Eastern's policies,

including its triage policy and its chest pain protocol, were structured such that no one could receive immediate care in Eastern's ER. [TR1080]. And contrary to Eastern's contentions about ER+ or "our team," Eastern did not even manage its own ER. Eastern had contracted out both the direction and physician staffing of its ER to Chaves. [TR1044-45]. While Eastern's contract with Chaves required Board-certified ER physicians, Eastern's CEO waived the Board Certification requirement.

Phillip Grassie, Walter Grassie's son, had seen Eastern's billboard when he drove to town from the family farm in Dexter and thought that ER+ meant something special. [TR1453]. After learning the real facts about Eastern's ER through observing the treatment of his father, Mr. Grassie stated that he felt the community was being deceived by the hospital holding itself out as something special when it wasn't even providing the minimal requirements for basic ER care. [TR1463].

Mr. Grassie was surprised to learn that a hospital that advertised ER+ didn't take any responsibility for the doctors that were in its ER, and when things went wrong, Eastern said they weren't Eastern's doctors. [TR1464]. Mr. Grassie felt that by Eastern saying they were not responsible for what they do and how they treated patients didn't fit in at all with what Eastern said in its billboard about ER+. [TR1464].

And contrary to what Eastern advertised about its ability to respond to emergencies, when Walter Grassie most needed help and went to Eastern's ER for treatment, he got nothing. [TR464].

D. The Grassie Family's Lawsuit

The family's personal representative was Phillip Grassie. Phillip was the minister of the First Christian Church in Roswell. Phillip and Walter Grassie's wife, Scottie, testified that the Grassie family brought suit because Mr. Grassie went to Eastern with an emergency and was not treated [TR 947, 1462]. The ER staff did not listen; they were cold; they didn't ask any questions; they were uncaring. [TR947].

The Grassies wanted the facts of Walter Grassie's care heard by the community in the hopes that the lawsuit would make some changes for the betterment of the community, so that the rest of the community would not have to go through the needless suffering his family endured. [TR1463]. The Grassies wanted to make a difference. While the Grassies and the other citizens of Roswell were members of a rural community, they were not hillbillies. [TR1461]. Roswell deserved to have a good ER with good doctors. [TR1464]. The Grassie family did not want the matter swept under the rug. [TR948].

ARGUMENT

I. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S PUNITIVE DAMAGE AWARD AGAINST EASTERN FOR THE CONDUCT OF DR. COLLINS AND THE NURSES.

A. Eastern Waived any Claim that the Jury's Verdict was not Supported by Substantial Evidence by Failing to Comply with Rule 12-213 (A) (3,4).

Contrary to Rule 12-213(A)(4) NMRA, Eastern fails to identify with particularity the substance of the evidence bearing on the conduct of Dr. Collins and Eastern's nurses upon which the jury's punitive damage verdict was based. The rules of this Court impose a duty on any party who challenges the sufficiency of the evidence to marshal and state the substance of all of the evidence bearing on the finding challenged; both the evidence favorable to the court's findings and that unfavorable to the findings, and then demonstrate that, even if the evidence is viewed in the light most favorable to the decision below, it is insufficient to support the findings of the trial court. NMRA, 12-213(A)(3) (2008); *Maloof v. San Juan County Valuation Protests Bd.*, 114 .N.M. 755, 845 P.2d 849 (Ct. App. 1992). This Court will review substantial evidence claims only if the appellant complies with these provisions of Rule 12-213. *Chavez v. S.E.D. Labs*, 2000-NMCA-034 ¶26, 128 N.M. 768, 999 P.2d 412. See also *Maloof*, 114 N.M. 755, 845 P.2d 849 (Ct. App. 1992); *State v. Chamberlain*, 109 N.M. 173, 176, 783

P.2d 483, 486 (Ct. App. 1989); *State v. Fulton*, 99 N.M. 348, 350, 657 P.2d 1197, 1199 (Ct. App. 1983) (failure to comply with these requirements can result in waiver of the contention on appeal or in sanctions).

Eastern's *Statement of Proceedings* and argument fail to comply with this standard. Eastern has presented an incredibly scant, one-sided snapshot of the evidence favoring its position, while ignoring the plethora of evidence in the record which supports the jury's verdict. As the discussion below demonstrates, had Eastern complied with this Court's rules, it would be evident that their substantial evidence claims are frivolous.

Because of Eastern's failure to comply with this Court's rules, it has waived its substantial evidence arguments.

B. New Mexico Law Clearly Recognizes Cumulative Acts Theory of Vicarious Liability for Punitive Damages.

Eastern contends that New Mexico law does not support a corporation's vicarious liability for punitive damages under a "cumulative acts" theory, because UJI 13-1827 and proposed new 13-1827 do not include such a theory. In making its argument, Eastern knowingly ignores our Supreme Court's holding in *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, 140 N.M. 478.

> "A corporation may be held liable for punitive damages for the misconduct of its employees if: (1) corporate employees possessing managerial capacity engage in conduct warranting

> punitive damages; (2) the corporation authorizes, ratifies or participates in conduct that warrants punitive damages; or (3) under certain circumstances, the cumulative effects of the conduct of corporate employees demonstrate a culpable mental state warranting punitive damages."

Chavarria v. Fleetwood Retail Corp., 2006-NMSC-046, ¶21, 140 N.M. 478, 143 .3d 717; *Clay v. Ferrellgas, Inc.,*[6] 118 N.M. 266, 270, 881 P.2d 11, 15 (1994).

Eastern cites *Chavarria* to this Court as establishing managerial conduct and authorization, participation and ratification[7], but does not

---

[6] Eastern points out that *Clay* was decided in 1994, four years before UJI 13-1827 was last amended and UJI 13-1827 does not incorporate the cumulative conduct basis for vicarious liability in the instruction inferring that UJI 13-1827 some how repudiated the Court's earlier holding in *Clay*. Eastern fails to mention that *Chavarria,* which restated cumulative conduct of a corporation employee as one of the three bases for vicarious corporate liability, was decided in 2006, six years after UJI 13-1827 was amended. In short, the cumulative conduct basis of liability remains as governing New Mexico law.

[7] Ironically, through a fraudulent act undertaken at trial, Eastern did participate in and ratified the acts of Dr. Collins and the nurses. Corporations ratify the acts of its agents and employees by acquiescence or acceptance of the unauthorized acts. *See Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc.*, 118 N.M. 140, 144, 879 P.2d 772, 776 (1994). Moreover, the law requires prompt repudiation of an unauthorized act, otherwise ratification is inferred. "Upon knowledge of an agent's unauthorized act, a principle should promptly repudiate the act. Otherwise it will be presumed that he ratified it and affirmed it." *Grandi v. LeSage*, 74 N.M. 799, 810, 399 P.2d 285, 293 (1965). At trial, Eastern presented an exhibit with the heading "Welcome to Roentgen Files, the BRIT System DICOM Server!" [RP1394-95] [Defs. Ex. 16, Tab entitled: "ENMMC 8/19/05", p. 29-31]. The purpose of this "x-ray log," according to Eastern, was to show that Walter Grassie's x-ray was not available to be viewed until

acknowledge to this Court that *Chavarria* specifically includes "under certain circumstances, the cumulative effects of the conduct of corporate employees" as a third basis for corporate liability. *Chavarria* at ¶ 21. Those circumstances were clearly present here, and substantial evidence supports the jury's award of punitive damages against Eastern for the acts of its nurses and Dr. Collins.

C. There was Substantial Evidence to Support the Jury's Verdict Against Eastern for the Cumulative Conduct of Dr. Collins and Its Nurses.

Eastern's Duty of Care

Punitive damages may be imposed upon a corporation for the cumulative effect of the conduct of corporate employees demonstrating a culpable corporate state of mind. *Chavarria*, 2006-NMSC-046, and *Clay v. Ferrellgas,* 118 N.M. 266, 270 881 P.2d 11, 15 (1994). A culpable state of mind is one that exhibits willful, reckless or wanton conduct. UJI 13-1827. Willful conduct is the intentional doing of an act with knowledge that harm may result. *Id.* Reckless conduct is the intentional doing of an act with utter

---

17:01 (5:01 p.m.) and, thus, was not available for Dr. Collins to see until after he saw Walter Grassie. Unfortunately, whoever created this x-ray log for trial entered 16:39 (4:39 p.m.) as the start time, **which was 6 minutes before Eastern's triage computer even ordered the x-ray**. [TR1402]. In creating and presenting this false document, Eastern participated in and ratified the wrongful conduct of Dr. Collins and the nurses.

indifference to the consequences. *Id.* Wanton conduct is the doing of an act with either indifference to or conscious disregard of a person's safety. *Id.*

Walter Grassie's safety, i.e., his continued well-being and existence, was the sole reason he was brought to Eastern for ER care. However, Eastern did not recognize medical emergencies as a matter of corporate policy and procedure. Eastern's triage policy did not require patients who came to Eastern's ER unable to breathe, whose hearts weren't beating, or who were bleeding profusely to be seen by a physician for 15 minutes [TR1013, 1079-80]. Eastern's chest pain protocol did not allow Eastern's nurses to give Walter Grassie the same nitroglycerin he received with dramatic results from the EMTs on the way to the hospital. [TR1010, 1012, 1069]. Eastern's chest pain protocol required a doctor's order before Mr. Grassie could be given that nitroglycerin in the ER, but Eastern's triage system gave the doctor up to an hour before he had to see Mr. Grassie. [TR1022].

As a result, Walter Grassie was never even seen by an ER physician for 28 minutes, despite a known skyrocketing BP, and then received no care of any kind for more than an hour after his arrival in the ER.

Requiring a person whose heart isn't beating or whose heart is beating in such a way that it will burst that person's blood vessels to wait from 15

minutes to an hour before receiving any treatment is a corporate policy that ignores the basic needs of emergency care and shows absolute and utter indifference to the safety of those who come to the ER for treatment.

The actions of Eastern's nurses reflected that utter indifference, to wit:

- Not immediately obtaining the necessary order for nitroglycerin
- Not immediately getting a doctor for Walter Grassie [TR1012]
- Not informing Dr. Collins that Walter Grassie's blood pressure, which was lowered 90 points in 16 minutes by the EMTs with nitroglycerin, had now shot up 46 points in 11 minutes
- Ignoring Mr. Grassie's blood pressure of 280/146 after being told about it, and not even charting it [TR1016-17]
- Knowing that Mr. Grassie's chest x-ray had been ordered but not reminding Dr. Collins of it because "it wasn't their job"
- Turning off the alarm on Mr. Grassie's blood pressure monitor
- Ignoring the family's calls for help and eating pizza instead.

The actions of Dr. Theodore Collins also reflect utter indifference:

- Not immediately ordering IV nitroglycerin
- Ignoring Mr. Grassie's blood pressure of 280/146 when Mrs. Grassie told him about it and showed it to him on the monitor
- Not manually checking Mr. Grassie's BP, or ensuring that it got done, when he thought the extremely high BP reading was inaccurate [TR1287-88]
- Not looking at Mr. Grassie's chest x-ray that he knew had been ordered
- Ignoring the checklist in Mr. Grassie's chart mandating a review of Mr. Grassie's chest x-ray
- Not ordering any pain medication for Mr. Grassie
- Not treating Walter Grassie in any way, despite his absolute medical emergency
- Ignoring the Grassie family's pleas to have Mr. Grassie transported elsewhere.

The fact that every member of Eastern's ER crew who had a hand in Walter Grassie's care demonstrated utter indifference to his safety shows a corporate pattern of conduct, as opposed to an isolated act of negligence by a single employee. *Compare Clay*, 118 N.M. at 277. The fact that each person in Eastern's ER repeatedly engaged in acts demonstrating indifference to Walter Grassie's absolute emergency underscores that corporate mindset.

Given the risks presented by Walter Grassie's blood pressure, this indifference was not just negligent; it was absolutely reckless and wanton. *See Clay,* 118 N.M. at 269 ("[A]s the risk of danger increases, the duty of care also increases, ... Thus, as the risk of danger increases, conduct that amounts to a breach of duty is more likely to demonstrate a culpable mental state"). With each minute that Eastern's nurses and doctors delayed the administration of nitrates, the level of Eastern's culpability rose. Ignoring Mr. Grassie's BP of 280/146 for more than 40 minutes when the EMTs had jumped on a BP of 260/120 within 6 minutes of seeing Mr. Grassie absolutely demonstrated Eastern's indifference to Mr. Grassie's BP, the emergency situation it presented, and its consequences to his safety.

The Supreme Court in *Clay v. Ferrellgas* found the same general set of circumstances that exist here to be both reckless and meriting punitive

damages; i.e., a pattern of employee misconduct engaged in by two or more employees, each one of whom acted negligently on more than one occasion, checklists ignored and corporate policies or lack thereof, contributing to the negligent conduct at issue.

But there is more here that demonstrates a culpable mental state. Here, the ultimate fact of Mr. Grassie's risk, i.e., his "scary high" BP of 280/146, was actually pointed out to Eastern's nurses and Dr. Collins by Mr. Grassie's wife, who told them to look at it on the monitor, and demanded action. The fact of the risk did not simply escape the defendant's notice as it did in *Clay*. The point is that Eastern's ER staff was alerted to the immediate risk faced by Mr. Grassie. Walter Grassie could have been saved. But they turned away without a word when Mr. Grassie's life was obviously at the tipping point as a result of the BP.

D. Proximate Cause is Not Necessary to Each of the Employees' Actions Aggregated to Determine the Corporate State of Mind.

Eastern argues that because the jury found the nurses negligent, but not the proximate cause of Walter Grassie's death, their actions cannot be aggregated along with those of Dr. Collins in determining whether their cumulative conduct proves a culpable corporate state of mind. Eastern once again refuses to acknowledge the underlying law in *Clay* and *Chavarria.*

Footnote 4 in *Clay*, 118 N.M. 266, unequivocally disposes of Eastern's argument. There, the court stated that what was measured in determining punitive damages was the corporate mental state, and not negligence and proximate cause. As long as the jury found proximate cause elsewhere as to any one of the employees against whom negligence was alleged, the Plaintiff's burden is satisfied.

Thus, in the context of this case, the jury was free to consider the acts and omissions of the nurses, along with those of Dr. Collins[8] in determining a corporate mental state, independent of whether each had proximately caused Mr. Grassie's death. The separate finding that one of those persons proximately caused Mr. Grassie's death supports the jury's ultimate imposition of punitive damages against Eastern.

II. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT A CLAIM OF NEGLIGENCE AGAINST EASTERN FOR THE ACTIONS OF ITS CEO RICH ROBINSON AND FOR PUNITIVE DAMAGES FOR THAT ACTION.

A. The Grassies' Claim Against Eastern for the Actions of CEO Rich Robinson was for Ordinary Negligence, Not Negligent Credentialing.

[8] Eastern infers, without arguing, that Dr. Collins' conduct cannot be aggregated with the nurses because he was an apparent agent, rather than an actual agent or employee. This argument was made by Eastern at trial, however, it obviously abandons it here because the argument finds no support in the law; once agency is found, the type of agency is irrelevant—there is no such thing as "agency light."

The Grassies made two distinct claims against Eastern: one for the negligence of its ER staff in treating Walter Grassie; and a second against Eastern for the actions of its CEO in permitting Dr. Collins to work in Eastern's ER.

With regard to the second claim, the Grassies' specific claim was that Eastern's CEO, Rich Robinson, acted negligently in carrying out his duties as the CEO in not enforcing the requirement that all physicians furnished by Chaves to work in Eastern's ER be AMA/AOA board certified in emergency medicine; a certification that would have attested to Collins' professional qualifications. Collins told Robinson he was not board certified.

The Grassies made no negligent credentialing claim. Negligent credentialing is defined by UJI 13-1119B. Eastern never asked that 13-1119B be given. Eastern does not raise as a point of error the fact that 13-1999B was not given. The instruction that <u>was</u> given on CEO Robinson's negligence, Instruction No. 20, is a simple negligence instruction. [RP1435]. That is not raised as point of error by Eastern here. Therefore, Eastern cannot argue negligent credentialing and its requisites here. Accordingly, the expert testimony that is sometimes necessary to establish negligent credentialing was not necessary to establish Robinson's ordinary negligence in ignoring the single most important clause of the contract.

B. Substantial Evidence Supports the Jury's Finding that Robinson was Negligent and Possessed the Culpable State of Mind Necessary to Impose Punitive Damages

Ignoring the fact that Collins was not board certified in emergency medicine, when the contract Robinson signed required board certification, is evidence of negligence. Where a hospital or other entity adopts internal rules, either by contract or otherwise, aimed at the safe operation of a business, those rules are evidence on which a jury or court can rely to find that conduct violating the rule is negligent. See *Dobkins on Torts*, Section 165, Vol.1; *Bryan v. S. Pac. Co.*, 286 P.2d 761 (Ariz. 1955); *Sapp v. WT Grant Co.*, 341 P.2d 826 (Cal. Ct. App. 1959); *Gould v. New York City Health & Hosps Corp.*, 490 N.Y. S.2.d 87. See also, *Hole v. Womack*, 75 N.M. 522, 528, 407 P.2d 362, 366 (1965) (a bus company rule is relevant evidence in determining negligence). The negligence at issue here was Robinson's failure to exercise ordinary care as Eastern's CEO in performing an administrative duty. No medical expert is needed to assist the jury in making this determination. *See Gould,* 490 N.Y.S.2d at 88-9 (only administrative action is required to implement a common sense hospital rule and, therefore, no expert testimony is required to prove negligence).

Robinson, as Eastern's CEO, was fully aware of the contract's mandate for board-certification in emergency medicine. The contract

containing that provision was written in Robinson's office. Robinson was the decision-maker under the contract, and Robinson signed it as CEO on behalf of Eastern. [Pls. Ex. B, Tab 1, p. 000001] [TR1503-04].

Collins met with Robinson prior to approving him to work in Eastern's ER and Robinson asked about board certification. [TR 1330, 1331, 1333]. Collins stated that he was not certified by either the AMA or AOA in emergency medicine. [TR 1332-33]. Robinson's conversation with Collins went beyond simply whether Collins was board-certified in emergency medicine. Collins was asked a lot of questions in his conversation with Robinson. Although not specifically recalling the questions, Collins stated that if he had been asked his work history, he would have told Robinson that he had been booted out of two hospitals and may have told him that he had been forced out of the Air Force after only one year of a four-year enlistment. [TR1340-41, 1335].

Robinson denied knowing those facts, but said he didn't think those facts would have been important to him. [TR1536].

Robinson's actions and statement supports both the jury's determination that Robinson breached the duty of ordinary care and the imposition of punitive damages. Given the nature of the risk of putting an unqualified physician in charge of Eastern's ER, Robinson's breach of his

simple duties to enforce the contract gave rise to punitive damages in this circumstance. "Thus, as the risk of danger increases, conduct that amounts to a breach of duty is more likely to demonstrate a culpable mental state [for purposes of imposing punitive damages]." *Clay*, 118 N.M. at 269.

In deciding whether to allow Collins to work in Eastern's ER, Robinson wasn't passing on a candy-striper or a podiatrist. Instead, Robinson was picking a physician for the Roswell community who would meet them at all hours of the day and night in the ER and who would be asked to react, on the basis of his education and training, to situations both bizarre and commonplace, requiring immediate decisions on life and death situations. Eastern's ER physicians would be called upon to do all that its web page advertised. [Pls. Ex. A, Tab 3]. Emergency presentations like Walter Grassies' are a part of an ER physician's daily fare. Robinson's conduct in putting a known deficient physician in the ER, together with his statement at trial that it wasn't important to him to know if Collins had been thrown out of two other hospitals and forced to leave the Air Force as a physician after one year of a four-year enlistment, absolutely demonstrated an indifference to and willful disregard for the safety of Eastern's ER patients.

III. THE PUNITIVE DAMAGE AWARD DOES NOT VIOLATE DUE PROCESS AND IS PER SE CONSTITUTIONAL.

Three factors require evaluation to determine whether an award of punitive damages is constitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) whether there is a reasonable relationship between the punitive damage award and either the harm which could or did result from the defendant's conduct; and (3) the relationship between the punitive damage award and civil and criminal penalties that could be imposed for comparable misconduct. *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574-75 (1996). Each of these factors will be addressed in turn.

A. Eastern's Conduct Was Highly Reprehensible

In addressing reprehensibility, the court considers whether: (1) "the harm caused was physical as opposed to economic[9]; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional deceit, malice, trickery or deceipt, or mere

[9] The most important reprehensibility factors are physical rather than mere economic harm, and the related issue of conduct "evincing indifference to or reckless disregard for the health and safety of others." The largest awards of punitive damages are appropriate where there has been permanent physical injury. *BMW*, 517 U.S at 579, fn. 24.

accident. *State Farm v. Campbell*, 538 U.S. 408, 419 (2003). The presence of more than one factor from this list is normally required to justify a substantial punitive damages award. *Id.* Here, at least three of the factors are present: the harm was physical, Eastern's tortious conduct evinced an indifference to or reckless disregard to the health or safety of others, and the conduct at issue involved repeated actions by Eastern, rather than a single, isolated incident.

First, Walter Grassie lost his life. Loss of life is the most egregious and permanent physical injury possible.

Second, the operation of Eastern's ER demonstrated both a cavalier indifference and a reckless disregard for the health and safety of the patients who came to the ER for care. Eastern's triage and chest pain protocols made death or serious physical injury almost certain for those requiring emergency treatment. Eastern's chest pain policy prevented Eastern's ER staff from immediately giving Mr. Grassie the same life-saving nitroglycerin he had received within 6 minutes of the arrival of the EMTs in their ambulance. Eastern's triage policy compounded this risk to Mr. Grassie and other patients by giving its ER physicians up to an hour before they were required to see patients like Mr. Grassie.

Eastern never required at least an orientation between the nurses it employed and the physicians it didn't, thus ensuring that is emergency staff would never function together as a team. [TR1043, 1288]. When individuals such as the Grassies complained about the results of those policies and asked to be transported elsewhere, Eastern willfully disregarded their pleas.

Knowingly ignoring the mandatory requirement for board certification in emergency medicine – a contractual provision specifically placed in the contract to protect Eastern's patients from inadequately trained ER doctors – demonstrated the utmost indifference to those who came to Eastern's ER needing instant and correct decisions to save their lives. The needed physician decisions come only as the result of long training in well-run hospitals and medical schools. Disregarding the board certification requirement that virtually guaranteed a competent ER physician is a deafening statement of indifference. Robinson's testimony – that he did not consider it important to know whether a doctor had previously been thrown out of two other hospitals – was an absolute confirmation of Eastern's indifference to the health and safety of the hospital's patients by its own CEO.

Reprehensibility, as demonstrated by the repeated nature of the actions, exists here as well. Mr. Grassie did not die as the result of an

isolated act by a single employee. Mr. Grassie died as a result of multiple acts and omissions by multiple members of Eastern's ER staff. Mr. Grassie died as the result of being brought to an ER with policies and procedures that prevented emergency care. When Eastern's nurses and doctors were asked to rate the abysmal level of care given, all gave it an "A" or "B," meaning it was common policy. [TR1057, 2006]. It was sure to happen again. Eastern's ER crew did not see anything wrong with the care provided. Eastern's policies, its lack of team work, and the staff's disregard for the individual patient represented the standard of care at Eastern. In short, what happened to Walter Grassie repeated itself unless a jury told the hospital otherwise.

Robinson's conduct was likewise not a one-time error. Robinson said the board certification mandate was something he could waive; i.e., it wasn't any kind of mistake, but something he, as CEO, could, and would, do again and again. [TR1501-04].

B. The Ratio of the Punitive Damages Award to the Harm Inflicted is Reasonable

The Judgment appealed-from reflects a punitive damage award in a ratio of punitive to compensatory damages of slightly less than ten-to-one. Anything under a ratio of ten to one is generally regarded as per se constitutional. *State Farm v. Campbell*, 538 U.S. at 425. Although a ratio

of nine-to-one may be the maximum permissible ratio for cases involving only economic harm, the United States Supreme Court has emphasized that the particular circumstances of each case must be considered and that, especially where the harm is non-economic, a cut-off is not appropriate. *BMW*, 517 U.S. at 582, *quoted in, Chavarria*, 2006-NMCA-046, ¶ 38 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula").

Where Mr. Grassie needlessly lost his life as a result of the hospital's indifference to emergencies that it advertises to the Roswell community, that indifference created a potential of future risk to every other patient who came to Eastern's ER, making the jury's imposition of punitive damages both necessary and reasonable.

C. The Punitive Damages Awarded Are Reasonably Related to Criminal and Civil Penalties for Similar Conduct

Willful disregard for the safety of another in a life-threatening situation, resulting in death, is involuntary manslaughter. NMSA 1978,§ 30-2-3(B) (1994). Involuntary manslaughter is punishable by both a prison sentence and a fine. NMSA 1978, § 31-18-15(A)(6), (E)(6) (2007). Our Supreme Court has held, "the possibility of a jail sentence justifies a substantial punitive damages award." *Chavarria*, 2006-NMCA-046, ¶ 39.

D. The Jury Did Not Punish the Hospital for Injury to Others

Eastern argues tangentially that the jury impermissibly punished Eastern for injury caused to others in the community who are not parties to this litigation. *See Phillip Morris USA v. Williams,* 127 S. Ct. 1057, 1063 (2007). Eastern's claim is entirely baseless. The Supreme Court in *Phillip Morris* acknowledged that a jury must be permitted to consider whether a defendant's conduct poses a substantial risk of harm to others or to the public at large. *Id.* at 1063-64. The fact that Eastern's experts said that the care given Walter Grassie was in fact the standard of care and Roswell could not expect better [TR2007-08] was a fact that required the jury to consider how Eastern's care affected its citizens. These are factors directly relevant to the reprehensibility of the defendant's conduct for determining punitive damages purposes. *Id.,* at 1063-65.

Eastern's brief complains of the Grassies' counsel mentioning that Chaves was a bogus corporation. The evidence and argument were in response to Eastern's defense that if there was liability arising from Collins' conduct, it was the responsibility of Chaves, an independent contractor. [RP1429]. Eastern claimed that Chaves, as Dr. Collins' employer and an independent contractor, was to blame for Collins' failures. However, Chaves, on whom Eastern blamed Collins' conduct, didn't even pay

Collins—he testified that he was paid by the Schumacher Corporation. [TR1328]. Chaves was a bogus corporation. Eastern's reference to it was bogus as well.

In conclusion, the punitive damages award is not excessive under due process principles.

IV. THE PUNITIVE DAMAGE INSTRUCTION COMPORTED WITH NEW MEXICO LAW AND EASTERN DID NOT PRESERVE THE OBJECTIONS TO JURY INSTRUCTIONS THAT IT RAISES ON APPEAL.

A. Eastern Made No Objection to the Trial Court on the Issues it Raises Here and Therefore Preserved No Alleged Error.

Eastern claims error here based on instructions unobjected-to by it at trial. The jury decided the case in conformance with those unobjected-to instructions. Those unobjected-to instructions constitute the law of the case by which this appeal is decided. *Sanford v. Stoll*, 86 N.M. 6 (Ct.App. 1974); *Adamson v. Highland Corp*, 80 N.M. 4, (Ct.App. 1969).

1. The Standard of Review for Jury Instructions

The applicable standards for preserving error on appeal are as follows:

Instructions given to the jury by the Court become "the law of the case" on appeal and are not vulnerable to attack unless specifically objected to immediately prior to the time the instructions are given. *Sanford*, 86 N.M. 6 and *Adamson*, 80 N.M. 4.

> Unless the trial Court's attention is called in some manner to the fact that it is committing error and given an opportunity to correct it, cases will not be reversed because of errors which could and would have been corrected in the trial court if they had been called to its attention. In the hurry of trial work, such errors are common, and one who is not satisfied with the ruling of the trial court should call to its attention the fact that it may be committing error, thus giving opportunity to correct the ruling if, in light of the objections or exceptions, it should conclude that such ruling was error.

City of Albuquerque v. Ackerman 82 N.M. 360, 364, 482 P.2d 63, 67 (1971) (emphasis added).

Rule 51(I) expressly states:

> For the preservation of any error in the charge, objection must be made to any instruction given, whether in UJI Civil or not; or, in the case of a failure to instruct on any point of law, a correct instruction must be tendered, before retirement of the jury. Reasonable opportunity shall be afforded counsel so to object or tender instructions.

To preserve claimed error in instructions on review, the party claiming the error must tender a correct instruction or specifically point out the error in the proposed instruction. *Baros v. Kazmierczwk*, 68 N.M. 421, 262 P.2d 798 (1961); *Poorbaugh v. Mullen*, 99 N.M. 11, 365 P.2d 511 (Ct. App. 1982); *Hinger v. Parker & Parsley Petroleum Co.*, 120 N.M. 430, 902 P.2d 1033 (Ct. App. 1995).

2. The Court's Punitive Damage Instruction, Eastern's Participation and Eastern's Objections

The Grassie family contended that Eastern was directly liable for punitive damages for the conduct of CEO Rich Robinson when acting in a managerial capacity as the hospital's CEO he allowed Dr. Collins to treat patients in Eastern's ER, and then again for the cumulative effects of conduct of Eastern's employees demonstrating a culpable mental state under the *Chavarria* opinion's third criterion for corporate liability. *Chavarria*, 2006-NMSC-046 ¶21; *Clay v. Ferrellgas,* 118 N.M. at 270, 881 P.2d at 15.

The Court's UJI 13-1827 incorporates *Chavarria*'s first two bases of liability, but not the third. However, UJI 13-1827 expressly allows the trial court to modify 13-1827 when the circumstances require, thus allowing the vicarious liability paragraph of the instruction to be restated using the cumulative conduct criteria under *Chavarria* and *Clay* instead of the authorization, participation, ratification criteria.

In an effort to accurately convey the requisites of *Clay* and *Chavarria* on vicarious liability, the court met with counsel for Eastern and the Grassies on two separate occasions on the last day of trial to work out how the requirements of *Clay* would be incorporated in the vicarious liability paragraph of the punitive damage instruction in lieu of the language referring to authorization, participation and ratification. [TR1945-58, 2066-

71] No rulings were invoked, and none were requested. Instead, an ongoing discussion took place moderated by the court and participated in by all parties, in which at least two or three separate drafts of the punitive damage instruction evolved.

On the afternoon of July 11th, the trial court asked that the final draft of the instructions be printed. The portion of the instruction at issue reads as follows:

> In this case, Phillip Grassie seeks to recover punitive damages from ENMMC. You may consider punitive damages only if you find that Phillip Grassie should recover compensatory damages.
>
> If you find the conduct of Rich Robinson, the CEO of Eastern New Mexico Medical Center, was willful, reckless or wanton, then you may award punitive damages against it.
>
> If you find that the combined acts or omissions of Pamela Hayes-Rodriguez and/or Brian Miller, as employees, and Theodore Collins as the apparent agent of ENMMC, amounted to willful, reckless, or wanton conduct, you may award punitive damages against ENMMC.

That language closely approximated the Supreme Court's actual language in *Clay* where it stated that the jury was to view: "the actions of the employees in the aggregate to determine whether or not Ferrellgas had the requisite culpable mental state because of the cumulative conduct of the employees." *Clay*, 118 N.M. at 270.

A more perfect reflection of the court's statement in *Clay* was incorporated in an earlier draft of the punitive damage instructions prepared the morning of the 11th which required "the cumulative conduct" to "amount to corporate conduct." [TR1954]. However, Eastern's counsel objected to both the term "cumulative conduct" and "corporate conduct" as undefined terms which Eastern's attorneys stated they did not think the jury would understand. [TR1954]. Thus, the punitive damage instruction as it finally evolved is set forth above.

At 2:39 p.m., the court reconvened to hear objections to the instructions that had been drafted, to wit:

> **"THE COURT: Ms. Hall, I have the court's proposed Instructions 1 through 35 and a form of special verdict. May I hear your objections, please.**
>
> **"MS. HALL: Yes, sir. Would you just like me to go step by step, or –**
>
> **"THE COURT: Yeah. [Tr 2073]**
>
> **. . .**
>
> **"MS. HALL: With respect to Instruction No. 26, Your Honor, we have several objections to this instruction. And I will try to make them brief. First of all, we do not believe that this case warrants punitive damages. And we believe that it is inappropriate that punitive damages be – that a punitive damage instruction be submitted to the jury.**
>
> **Number two, we believe that this instruction misstates the law on punitive damage insofar as it talks about 'combined acts or omissions of Pamela Hayes-Rodriguez, Brian Miller and Dr. Collins.' Both insofar as there is an attempt to cumulate both the conduct of the employees and a possible**

> **apparent agent. And this also assumes that Dr. Collins would indeed be an apparent agent, and that is a jury finding. It shouldn't be assumed.**
>
> **Furthermore, it isn't clear why Mr. Robinson's conduct wouldn't be – would be somehow highlighted and separated versus, you know, the other folks. I mean, just because he's a CEO does not mean that he isn't an employee. He seems to be given some sort of a special status in these jury instructions. That seems to be unfair and to be a setup.**
>
> **With respect to – we also would like to make a continuing objection, Your Honor, based on our brief on apparent agency and the propriety of holding a principal liable for any misconduct that might rise to the level of punitive damages on the basis of vicarious liability based on apparent agency.** [TR2076-2077]

The above was the sum total of Eastern's objections to the punitive damage instruction. Any relief from the trial court's instruction must come from those objections.

The arguments that Eastern makes here on appeal were not made to the trial court when Eastern was asked for its objection to the instruction the trial court was about to tender to the jury.

3. Eastern Preserved No Error in the Trial Court's Instructions -- Eastern Made No Objection to the Court's Punitive Damage Instruction

The court gave the punitive instruction agreed to by the parties subject only to the objections Eastern voiced to the court.

Eastern never requested that UJI 13-1827 be given without modification. Eastern raised no objection to the trial court on the grounds argued here. Eastern also did not object that the trial court was omitting vicarious liability from its punitive damage instruction. The entire point of the drafting sessions was to address vicarious liability for punitive damages. Finally, Eastern never objected to the trial court that its instruction improperly stated the law from the *Clay v. Ferrellgas.*

Eastern never posed any of these objections to the trial court.[10] Any such objections are thus waived. *See* Rule 1-051(I); *Sanford,* 80 N.M. 6; *Baros*, 68 N.M. 421.

4. UJI 13-1827's Directions for Use Expressly Allow its Modification by the Trial Court

The trial court properly followed the "Directions for Use" of UJI 13-1827 in modifying the vicarious liability section of the instruction. UJI 13-1827 on Direct and Vicarious Liability for Punitive Damages is unique among almost all of the other UJIs in that the court is not required to adhere to the specific wording of the UJI. The Directions specifically state:

[10] Eastern cites pages TR 1577-85 and pages TR 2074 and 2077 as proof that it preserved the error claimed here. Eastern misstates the record. Eastern's argument at TR 1577-85 goes to Eastern's motion for a directed verdict, not instructions. The instructions were not even prepared on the date the motion for a directed verdict was argued. Eastern's argument on page 2074 and 2077, which does contain Eastern's objection to the court, never asks to give 13-1827 without modification or states that the court was erroneously not instructing on vicarious liability.

> **This instruction provides a general framework** for punitive damages instruction usable in any civil action involving direct or vicarious liability for punitive damages.
>
> . . .
>
> **In an unusual or complex case, it may be appropriate to modify this general form of instruction to instruct the jury clearly and carefully on the law.** (Emphasis added).

Because the Grassies' stated basis for Eastern's vicarious corporate liability was the cumulative conduct of Eastern's employees under *Clay* and not "authorization, participation, and ratification," it was appropriate for the Court to substitute the one for the other in the vicarious liability paragraph of the punitive damage instruction. The Directions for Use make it clear that it is anticipated that the suggested wording in UJI 13-1827 will be departed from where the trial court thinks appropriate. Here the trial court simply and properly substituted one recognized basis for vicariously corporate liability for another, and stated its reasons on the record for doing so. [2066-70].

B. The Special Verdict Form Clearly and Unambiguously Gave the Jury the Opportunity to Award Punitive Damages for Different Conduct and Different Claims, and the Jury Decided it was Appropriate to do so in this Instance.

Eastern contends that the court's special verdict form allowed the jury to award punitive damages against Eastern twice for the same conduct by failing to inform the jury that Eastern would be liable for any punitive damages against Eastern. Again, Eastern is wrong.

Instruction No. 26 – The Punitive Damage Instruction

The first two paragraphs of the trial court's punitive damage instruction, which the jury was deciding in entering its special verdict, make it clear that the punitive damages Phillip Grassie was seeking would be recovered from Eastern.

> In this case, Phillip Grassie seeks to recover punitive damages from ENMMC. You may consider punitive damages only if you find that Phillip Grassie should recover compensatory damages.
>
> If you find the conduct of Rich Robinson, the CEO of Eastern New Mexico Medical Center was willful, reckless or wanton, then you may award damages against it. [RP1441].

There was no jury confusion about the fact it was imposing punitive damages against Eastern, the single defendant in this case, for the conduct of its CEO, Rich Robinson.

Instruction Nos. 7 and 8 – The Grassies' Factual Contention – Different Actors, Different Conduct, Different Bases of Liability

The conduct which the jury was asked to decide in the special verdict form was set forth separately in Instruction No. 7 containing the factual contentions. The Grassies' first claim against Eastern was for the conduct of its apparent agent, Dr. Collins, and its ER nurses for the care that Walter Grassie received in Eastern's ER. That conduct was enumerated in paragraphs 1 through 5 of Instruction No. 7 [RP 1421]. Eastern's liability for that conduct was vicarious.

The Grassies' second claim against Eastern was for the action of Eastern's CEO Rich Robinson in allowing Theodore Collins to work in its ER [RP1421]. That second basis for liability is set forth separately in paragraph 6 of the Grassies' factual contentions enumerated in Instruction No. 7. Eastern's liability for Mr. Robinson's conduct as its Chief Executive Officer is direct. A corporation acts through its officers and directors. *See Cornell v. Albuquerque Chemical Co., Inc.*, 92 N.M. 121, 126-27, 584 P.2d 168, 173-74 (Ct. App. 1978).

Eastern both acknowledged and maintained the separate nature of the conduct complained of by denying liability separately in Instruction No. 8 [RP1423].

The Special Verdict Form[11]

The special verdict form asked the jury the type and amount of damages, if any, it would impose for the conduct detailed in Instruction No. 7 and denied in Instruction No. 8. The special verdict maintained that

[11] Eastern argues that the instructions were deficient because they do not tell the jury that it must first find that Dr. Collins was Eastern's apparent agent before it could award punitive damages. However, the Special Verdict Form required the jury to make the finding that Collins was Eastern's agent **before** it could award any damages. [RP1463]. Moreover, the jury was instructed that it could only award punitive damages after finding a basis to award compensatory damages. [RP1441]. Reading the jury instructions and special verdict form as a whole (*see Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 726, 779 P.2d 99, 103 (1989)), it is clear that the jury was properly instructed, and understood that it could only award damages, including punitive damages, if it found that Collins was Eastern's agent.

separation by asking for separate verdicts as to Eastern's direct liability for Robins and its vicarious liability for Collins and Eastern's nurses.

UJI 13-1827's Directions for Use anticipated the jury's need to consider two separate sets of conduct by the same corporate defendant in the identical fashion as it occurred in Grassie:

> Where the case includes a claim for punitive damages on a theory of direct liability, the section labeled Direct Liability shall be given. Where the case includes a claim of punitive damages on the theory of vicarious liability, the section on Vicarious Liability shall be given. Depending on the facts and pleadings, both direct and vicarious claims may be included in the same case against the same or different parties. (Emphasis added).

Thus, if two separate activities by the same corporate wrongdoer merit punitive damages, the purpose of the law behind punitive damages is best served by identifying each reckless or wanton act to give warning to others of the precise acts of misconduct that are being punished by the jury and the severity of each. The *Grassie* jury did exactly that.[12]

---

[12] Ironically, Eastern objected to both the punitive damage instruction and to the court's special verdict because it did not separate Robinson's conduct from that of Collins and the nurses and have his liability listed under the vicarious liability paragraph which was inviting the court to comment. The court properly declined. [TR2078-79]

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING EASTERN'S MOTION TO FILE A THIRD-PARTY COMPLAINT AGAINST CHAVES.

On the day of Walter Grassie's death, almost one year before the Grassies brought suit, Eastern knew of Theodore Collins' wrongdoings and how they contributed to Walter Grassie's death. The director of the ER expressly told Walter Grassie's wife that "mistakes have been made, Dr. Collins has been taken off the case, I give you my personal word a full investigation will be made."

Three weeks later on September 12, 2005, Walter Grassie's unread chest x-ray was read by Eastern's radiologist. The written report of Eastern's radiologist showed confirmatory evidence of the probable existence of the dissecting aorta and the fact that it had been subsequently discussed with Eastern's ER personnel.

Thus, Eastern had a known basis for bringing an indemnification action against Chaves almost a year before Eastern was ever served with the Grassies' complaint. Rule 1-014 permits a defendant to file a third-party complaint without leave of the court if it is done within ten days after the defendant files its Answer. Leave of the court is required only if the defendant does not bring in any potential third-party defendant at the time the defendant files his Answer.

Eastern could have filed its indemnification without leave of the court in May of 2006 when it filed its Answer, and again in January 2007 when it answered an Amended Complaint. [RP482]. Eastern did nothing. Eastern offers no reason for not doing so.[13]

The Prejudice to the Grassies

Eastern waited eight months after suit was filed before asking to bring in Chaves and then never requested an expedited hearing on its motion. As a result, Eastern's motion was never even heard until May 2007, a little more than one month before the scheduled trial date of June 28th. Adding Chaves, even if it could have been done on the date the motion was filed, would have clearly derailed everything that had gone on to date, and certainly the June 28th trial date which had already been extended once on Eastern's motion.

Bringing in Chaves at May 2007 meant not just another issue to be dealt with by the existing parties, but rather a new party with a new attorney that would have to file an answer, obtain witnesses, re-depose the witnesses already deposed and the like. At the time Eastern had made its motion, both sides had named their experts, and the discovery cutoff was but 30 days

[13] The reason for not immediately pursuing an indemnification claim against Chaves for Collins' action was obvious—Chaves wasn't Collins' employer; Collins and others testified that Schumacher was his employer. Chaves was an entity that was made up to sign a contract, according to Rich Robinson. [RP1493-94, 1508]. It was really Schumacher that provided Collins. Eastern knew that Chaves was not a real entity to pursue.

away. Adding another party at that time would have meant starting the case all over again, all to the detriment of the Grassies who had done nothing to delay Eastern if it really desired Chaves to be a party.

The Absence of Prejudice to Eastern

The issue before the jury was what Eastern CEO Rich Robinson knew about Chaves, the corporation he was contracting with and depending upon to staff and direct Eastern's ER. Why did Eastern enter into a contract with a corporation that Eastern knew probably didn't even have a phone number or an office in the town listed as its address? Why did Eastern enter into a contract with Chaves when Eastern was "really" dealing with the Schumacher Corporation, the organization that was paying Collins? These were all questions that Eastern and its CEO Robinson had to answer and did not. The presence or absence of Chaves in the lawsuit would have added nothing on these issues. If Eastern needed Chaves' testimony, it could have subpoenaed a Chaves official or employee, if such a person really existed. Moreover, nothing prevents Eastern from pursuing its indemnity claims against Chaves now.

It was clearly within the court's discretion to deny Eastern's motion.

VI. THE GRASSIES' UPA CLAIM WAS PROPERLY GIVEN TO THE JURY BECAUSE EASTERN MADE FALSE AND MISLEADING STATEMENTS ABOUT THE SERVICES IT OFFERED IN ITS ER AND ABOUT ITS ROLE IN OPERATING ITS ER.

Despite having argued vehemently to the trial court that the UPA cannot apply to hospitals [RP727-735], Eastern admits, for the first time in its brief to this Court, that physicians, healthcare providers, and hospitals are subject to the provisions of the New Mexico UPA. Eastern's argument to this Court is that its false and misleading representations were mere "puffery."

Eastern does not attempt to defend its representations or say that they were not, ultimately, false. Rather, Eastern chooses to re-characterize those representations as "mere puffery." What Eastern fails to mention, however, is that it asserted substantive rights in this litigation that were directly at odds with the alleged "puffery."

Specifically, while Eastern advertised its "ER+" and "Our team of trained physicians" [Pls. Ex. A, Tab 3, p 7] it immediately attempted to disavow Dr. Collins as one of its "trained physicians" when his negligence was alleged even though his presence in Eastern's ER was the result of the actions of Eastern's CEO.

Interestingly, Eastern's argument about "puffery" in its briefing to this Court is the first time that word has been uttered in this case. Eastern made no such claim before the trial court, either in its Motion for Directed Verdict [RP 1558-1566], or its Motion for Judgment as a Matter of Law [RP 1508-1512], nor before the trial court when the trial court asked for its objections to the instructions [TR2078-2079]. In its Motion for a Directed Verdict, counsel for Eastern did state that Eastern's advertising was so vague or so unspecific that it could not be deceitful. However, Eastern's objection is so vague and unspecific that it did not preserve any error on appeal. *See Baros,* 68 N.M. 421. If Eastern's objection about the general and vague nature of its advertising in fact equates to the issue of puffery that Eastern raises with this Court, it is without merit.

The Grassies' UPA Claim – False and Deceitful Advertising

The Grassies' claim against Eastern as reflected by Jury Instruction No. 7 was that:

Eastern, through its internet and billboard advertising, held itself out to the Roswell community as providing "ER+" care in Eastern's ER. [RP1421-22] Phillip Grassie, who saw those billboards when he came into town, always thought that that meant something extra. Pamela Hayes-Rodriguez, Walter Grassie's nurse who was supposed to be providing that care, did not have any idea what "ER+" meant. The ER+ slogan had come

from CHS, Eastern's corporate parent. [TR1489]. In fact, the entire issue of quality of care in the ER was out of Eastern's hands as Chaves provided the ER medical director [TR1044-45] and no one from Eastern had the right to control how Dr. Collins treated patients there. [TR1342-43].

Eastern represented to the community that it provided trained, qualified physicians in its ER. [RP1421-22]. Eastern's contract with Chaves specifically required Chaves to provide it with trained ER physicians by virtue of its board-certification requirement. However, Eastern ignored the board-certification requirement and allowed physicians like Collins to practice in its ER, despite the fact that Collins did not meet those requirements. By ignoring the board-certification requirement, Eastern reneged on its representation to the community that it would provide highly trained physicians in its ER.

Eastern advertised the ability of <u>its</u> ER team to provide fast, quality care in its ER. [RP1421-22]. The Roswell public never knew that the care that Eastern had advertised it would provide was totally under the control of a corporation whose officers and directors were unknown to Eastern, and for whom Eastern did not even have a phone number. [TR1507-08]. Despite that fact, Eastern's nurses admitted that there would be no way for any ER patient to tell that the physicians treating them were

not Eastern employees. [TR1047-48] They wore Eastern lab coats and identified themselves with Eastern badges. *Id.* If another corporation was providing Eastern's ER care, the Roswell public deserved to know that fact so they could make their own choices about whether to accept that care.

Eastern advertised the abilities of its team to listen, examine carefully and provide fast, quality ER care. [RP1421-22]. The team that Eastern advertised as "our team" did not exist. There wasn't even a Chaves team, but rather a Schumacher team. Instead of it being "our" team, as Eastern advertised, it became "Chaves' team" as soon as one of the members of the Roswell community was harmed by one of Eastern's physicians.

In summary, Eastern's statements about its team and their training and qualifications and the speedy services they would provide weren't just puffery. Those statements went to the fundamentals that ERs such as Eastern's are supposed to deliver. If Eastern did not operate its ER and had no control over the physicians who staffed it, Eastern could not advertise it as "ER+." Eastern had no way of controlling its ER's quality. If Eastern's CEO didn't care to demand board certified physicians—as provided for in the contract—then Eastern could not advertise such specialized services. Such actions are not "mere puffery," but rise to the level of deceit.

The UPA imposes a duty upon those advertising services to disclose material facts reasonably necessary to prevent any of Eastern's statements from being misleading. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 15, 135 N.M. 265. Eastern's ads clearly gave the public the impression that it employed its physicians, ran its own ER, and provided certain services therein. Those impressions were all false and misleading and, given Eastern's arguments at trial that it was not liable because Dr. Collins was an independent contractor, Eastern had a duty to disclose those facts under the UPA.[14]

VII. CONCLUSION

For the foregoing reasons, the Grassie family respectfully requests that this Court affirm the jury's verdict and resulting judgment in their entirety.

[14] As an aside, Eastern mentions—as though important—that Mr. Grassie did not rely upon these advertisements. However, the *Smoot* case makes it clear that reliance is not necessary to a successful UPA claim. 2004-NMCA-027, ¶22.

Respectfully submitted,

Stephen Durkovich
534 Old Santa Fe Trail
Santa Fe, NM 87501
(505) 986-1800
(505) 986-1602 fax

Ray M. Vargas, II
Garcia & Vargas, LLC
303 Paseo de Peralta
Santa Fe, NM 8750
(505) 982-1873
(505) 982-8012 fax

Attorneys for Phillip Grassie

I hereby certify that the foregoing was mailed to the following counsel of record on this 13th day of August, 2008.

Sarah Singleton
Montgomery & Andrews
P.O. Box 2307
Santa Fe, NM 87504

Sheehy, Serpe & Ware, PC
Richard A. Sheehy
2500 Two Houston Center
Houston, TX 77010