

IN THE NEW MEXICO COURT OF APPEALS

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

MAY 03 2013

Wendy E. Jones

JOSE GONZALES and EDITH LUCERO,
as Co-Personal Representatives of
The Estate of ALFRED GONZALES, Deceased,
Plaintiffs-Appellees,

Ct. App. No. 32,147

v.

ST. VINCENT HOSPITAL; et al.
Defendant-Appellant

**BRIEF-IN-CHIEF
OF APPELLANT ST. VINCENT HOSPITAL**

APPEAL FROM
FOURTH JUDICIAL DISTRICT COURT
THE HONORABLE ABIGAIL ARAGON
No. D-412-CV-2008-116

WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP
Lori S. Nugent
Melissa K. Ventrone
55 West Monroe Street
Suite 3800
Chicago, Illinois 60603-5001
Telephone: (312) 704-0550

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Jennifer G. Anderson
Emil J. Kiehne
P.O. Box 2168
Albuquerque, New Mexico 87103
Telephone: (505) 848-1800

HINKLE, HENSLEY, SHANOR & MARTIN, LLP
David B. Lawrenz
218 Montezuma Avenue
P.O. Box 2068
Santa Fe, New Mexico 87504-2068

Counsel for Appellant St. Vincent Hospital

ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

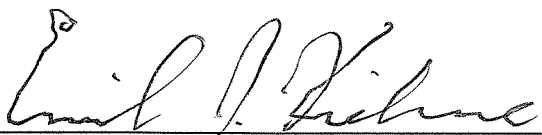
Table of Authorities	ii
Introduction	1
Summary of Facts and Proceedings	3
Argument	9
I. Precluding St. Vincent’s Comparative Fault Defense Was An Abuse of Discretion	9
II. Unfair Limitation of St. Vincent’s Expert’s Testimony	16
III. A Biased Juror Resulted in an Unfair Trial	20
A. The Biased Juror Denied St. Vincent a Fair Trial	22
B. At a Minimum, Due Process Requires Remand for an Evidentiary Hearing	28
IV. Wrongful Removal of Personal Representative Unfairly Prejudiced St. Vincent	29
V. The Punitive Damage Award is Unconstitutionally Excessive	32
A. The Unfair Verdict Stems from Passion and Prejudice	34
1. Jury Improperly was asked to “Send a Message”	34
2. Unfair Adjudication for “Thousands of Alfred Gonzaleses”	36
3. Unfairly Incited Bias Against Wealthy Multi-State Corporations	37
B. Court Erroneously Refused <i>De Novo</i> Review of the Punitive Damages Award	39
C. Unfair Procedures and Unequal Application of the Law	40

D. The Unfair Verdict is Grossly Disproportionate	42
1. Reprehensibility	43
2. Ratio	45
3. Comparison to Civil Penalties	46
Conclusion	47
Statement Regarding Oral Argument	47
Certificate of Service	49

CERTIFICATE OF COMPLIANCE

As required by Rule 12-213(G), we certify that this Brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word, the body of the Brief-in-Chief, as defined by Rule 12-213(F)(1), contains 10,955 words.

DATED this 3rd day of May 2013.



 Emil J. Kiehne

TABLE OF AUTHORITIES

New Mexico Cases

<i>Aken v. Plains Elec. Generation & Transmission Co-op., Inc.</i> , 2002-NMSC-021, 132 N.M. 401, 49 P.3d 662	39, 40, 43, 45
<i>Apodaca v. United States Fidelity & Guar. Co.</i> , 78 N.M. 501, 433 P.2d 86 (1967)	31, 32
<i>Bartlett v. N.M. Welding Supply, Inc.</i> , 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982)	10
<i>Benavidez v. City of Gallup</i> , 2007-NMSC-026, 141 N.M. 808, 161 P.3d 853	16
<i>Chavez-Rey v. Miller</i> , 99 N.M. 377, 658 P.2d 452 (Ct. App. 1982)	45
<i>Coates v. Wal-Mart Stores, Inc.</i> , 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999	10, 17
<i>Gonzales v. Surgidev Corp.</i> , 120 N.M. 151, 899 P.2d 594 (1995)	36
<i>Jaramillo v. Fisher Controls Co., Inc.</i> , 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985)	12, 13
<i>Jolley v. Energen Resources Corp.</i> , 2008-NMCA-164, 145 N.M. 350, 198 P.3d 717	39
<i>Kilgore v. Fuji Heavy Indus., Ltd.</i> , 2010-NMSC-040, 148 N.M. 561, 240 P.3d 648	21, 22, 28, 29
<i>Lamphere v. Agnew</i> , 94 N.M. 146, 607 P.2d 1164 (Ct. App. 1979)	22
<i>Lewis v. Samson</i> , 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972	14

<i>Lujan v. Healthsouth Rehabilitation Corp.</i> , 120 N.M. 422, 902 P.2d 1025 (1995)	9
<i>Madrid v. Univ. of California</i> , 105 N.M. 715, 737 P.2d 74 (1987)	18
<i>Mares v. State</i> , 83 N.M. 225, 490 P.2d 667 (1971)	22, 24
<i>Romero v. Melbourne</i> , 90 N.M. 169, 561 P.2d 31 (Ct. App. 1977)	30
<i>Segura v. K-Mart Corp.</i> , 2003-NMCA-013, 133 N.M. 192, 62 P.3d 192	10, 16
<i>Sewell v. Wilson</i> , 97 N.M. 523, 641 P.2d 1070 (Ct. App. 1982)	18
<i>State v. Cooper</i> , 2000-NMCA-041, 129 N.M. 172, 2 P.3d 149	35
<i>State v. Doe</i> , 99 N.M. 456, 659 P.2d 908 (Ct. App. 1983)	20
<i>State v. Mann</i> , 2002-NMSC-001, 131 N.M. 459, 39 P.3d 124	20, 22
<i>State v. Sims</i> , 51 N.M. 467, 188 P.2d 177 (1947)	20
<i>Wilson v. Gillis</i> , 105 N.M. 259, 731 P.2d 955 (Ct. App. 1986)	10

Cases From Other Jurisdictions

<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996)	40, 43, 46
---	------------

<i>Brewster v. Bd. of Educ. of Lynwood Unified School Dist.</i> , 149 F.3d 971 (9th Cir. 1998)	28
<i>Cooper Indus., Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001)	33, 39
<i>Exxon Shipping Co. v. Baker</i> , 54 U.S. 471 (2008)	39, 46
<i>Illinois Central R. Co. v. Welch</i> , 52 Ill. 183 (1869)	38
<i>Lindsey v. Normet</i> , 405 U.S. 56 (1972)	35
<i>Philip Morris USA v. Williams</i> , 127 S.Ct. 1057 (2007)	33, 37
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	41
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	33, 43, 45, 46
<i>TXO Prod. Corp. v. Alliance Res. Corp.</i> , 509 U.S. 443 (1993)	38, 41

Statutes

NMSA 1978, § 30-47-5(D)	47
NMSA 1978, § 31-18-15(E)(4)	47
NMSA 1978, § 41-3A-1 (1987)	10
NMSA 1978, § 61-3-3(J)	19

Rules

Rule 11-702 18, 19

Rule 11-705 (1993) 12 , 13

Rule 12-216(B) 34

Regulations

7.1.8.8(F) NMAC 47

INTRODUCTION

The ratio of punitive to compensatory damages award in this case—16.38:1—is higher than any affirmed New Mexico punitive award where compensatory damages were substantial. This is not a wrongful death case. There was no evidence of malicious intent to cause Alfred Gonzales harm.

What happened at St. Vincent Hospital that was so egregious? Plaintiff alleged that nurses failed to comply with St. Vincent's wound care protocol during an initial 7-day hospitalization for hip surgery. When Plaintiff was discharged from St. Vincent into the care of another defendant, Mr. Gonzales had blisters on his heels. This is the only period when St. Vincent employees are alleged to have injured Mr. Gonzales. While in another defendant's care, he developed an infection on his hip. He was readmitted to St. Vincent for an additional 14 days, during which his heels improved and no further injury was caused by St. Vincent. He then was discharged to another defendant, and St. Vincent had no further role in his care. Yet the jury was never permitted to learn what the other defendant did to Mr. Gonzales—negligently causing his heel wounds to become infected and deteriorate and failing to provide adequate home care instructions when they discharged him to the care of Mr. Jose Gonzales. Instead, the jury was informed of injuries that developed and worsened, but the jury was not permitted to learn that

this conduct did not happen at St. Vincent and was another defendant's fault. Frankly, that was unfair.

Rather than risk an admission that another defendant was more responsible than St. Vincent, Plaintiffs' counsel replaced the personal representative for trial, telling the court that she was unavailable. Subsequently, the personal representative contacted St. Vincent, stating that she was not represented by counsel and was removed because she disagreed with counsel. Rather than permit discovery on this issue, opposing counsel obtained a gag order precluding communication between her and St. Vincent—an unconstitutional prior restraint of free speech.

Further, in reliance on pretrial rulings and longstanding New Mexico law, St. Vincent's opening statement discussed testimony that would be presented to the jury concerning the other defendant's negligence. Contrary to binding precedent, the court subsequently refused to permit the testimony. In closing argument, Plaintiffs highlighted St. Vincent's "failure" to provide testimony of the other defendant's negligence, encouraging jurors to find that all of the fault lay with St. Vincent.

Plaintiffs' counsel told the jury they had more power than the President of the United States—they could change healthcare in New Mexico and protect thousands of others by rendering a substantial punitive damages award in this case.

One juror, who failed to disclose during voir dire that his wages were being garnished by a hospital during the trial, did exactly that—telling the other jurors “Let’s get this hospital.” RP2838-RP2869. And they did, assessing a \$10,345,000 verdict. It was unfair and violated St. Vincent’s constitutional rights. The unfair trial and resulting excessive verdict undermines the fair administration of justice in New Mexico and the verdict should not be permitted to stand.

SUMMARY OF FACTS AND PROCEEDINGS

Alfred Gonzales filed suit alleging that three medical facilities – St. Vincent, THI of New Mexico at Vida Encantada LLC (“Vida”), and Silverstone Healthcare of Santa Fe, II, LLC d/b/a Casa Real (“Casa Real”) negligently provided medical care, causing ulcers on his heels. RP1-RP11, RP1618-RP1630. Mr. Gonzales broke his hip and was admitted to St. Vincent for surgery where he remained hospitalized for seven days. *Id.* Plaintiffs alleged that St. Vincent nurses failed to implement the hospital’s pressure ulcer prevention protocol, causing injury to Mr. Gonzales’ heels. *Id.* He was discharged to nursing home Casa Real. *Id.* Plaintiffs alleged that Casa Real’s negligent treatment caused the heel blisters to develop into ulcers. *Id.* Mr. Gonzales developed an infected hip incision, and was transferred for treatment to St. Vincent. *Id.* There was testimony that Mr. Gonzales’ heel ulcers improved and no further injury was caused by St. Vincent during the second stay. RP2926-RP2978; Tr.2/15/2011:233-235. After spending a total of 21 days at

St. Vincent—7 days during which injury was alleged and 14 days where no further injury was alleged—Mr. Gonzales was discharged to Vida, a nursing home in Las Vegas. RP1618-RP1630; Tr.2/15/2011:233-235.

Mr. Gonzales remained at Vida for 139 days, where Plaintiffs alleged that Vida's negligence caused his heel ulcers to become painfully infected. RP1060-RP1067; RP3371-RP3407. Vida discharged Mr. Gonzales to his brother's care. RP1618-RP1630. Plaintiffs alleged that Vida's negligent care and inadequate instructions for home care led to Mr. Gonzales' admission to Miners Colfax hospital for treatment of his infected ulcers. *Id.*

This lawsuit was filed, alleging that Casa Real, Vida, and St. Vincent were negligent, causing Mr. Gonzales' his ulcers and resulting in damages. RP1618-RP1630. St. Vincent denied Plaintiffs' allegations. RP1651-RP1661. A default judgment was entered against Casa Real. RP232-RP233. Immediately before jury selection, Plaintiff settled for \$25,000 with Vida. RP2005-14; Tr.6/17/2010:15. Trial was rescheduled, and proceeded against St. Vincent in February 2011.

Until settling with Vida, Plaintiffs consistently asserted that Vida's negligence caused Mr. Gonzales' heel ulcers to develop further and become infected. RP1507-RP1518, RP1618-RP1630. After Vida's settlement, St. Vincent filed a Motion for Partial Summary Judgment, arguing that the settlement agreement precluded Plaintiff's claim of successive tortfeasor liability against St.

Vincent. RP1977-RP1991. The court granted the motion, holding that the settlement agreement limited Vida's liability to: "the amount specified in the settlement agreement thereby precluding indemnification by St. Vincent. St. Vincent cannot be liable as a successive tortfeasor, while at the same time be precluded from asserting a third party complaint for indemnification." RP2051-RP2054.

Before trial, Mr. Gonzales died of causes unrelated to this lawsuit, and Edith Lucero was appointed as personal representative. RP426-RP427. Based on counsel's statement that she was unavailable for trial, Jose Gonzales replaced her as personal representative at trial.

At trial, Plaintiffs' new theory was that St. Vincent was solely responsible for Mr. Gonzales' pressure ulcers and all resulting damages. Plaintiffs claimed that St. Vincent's nurses failed to prevent Mr. Gonzales' pressure ulcers from developing, thus causing his pain and suffering. St. Vincent had a Pressure Ulcer Prevention Protocol, which instructed nurses to assess patients and identify those who were at risk for developing pressure ulcers, and to take precautionary measures to prevent their development Tr.2/15/2011:8, 22-24, 26-27. Plaintiffs' experts acknowledged that the policy was a good one. Tr.2/15/2011:10, 192.

Mr. Gonzales had no pressure ulcers on his heels when he was admitted for the first time on July 8, 2006, but that he was at risk for developing them.

Tr.2/15/2011:30-32. Plaintiffs presented evidence that despite this risk, St. Vincent's nurses failed to follow the Pressure Ulcer Prevention Protocol – they did not create a care plan, and inconsistently took measures to prevent pressure ulcers from developing. Tr.2/15/2011:31-32, 36-37, 39, 41, 68. Plaintiffs presented evidence that Mr. Gonzales' chart reflected that St. Vincent's nurses turned him about fifty percent of the time, and physical therapists at St. Vincent took measures to increase Mr. Gonzales' mobility after the hip surgery. Tr.2/15/2011:51, 57, 193-94. But St. Vincent's nurses did not document that they took any measures to reduce the pressure on his heels until July 13, when a blister was detected on his left heel (which ultimately developed into an ulcer). Tr.2/15/2011:39, 43, 67, 193-94. Pressure hose had been placed on Mr. Gonzales' legs to prevent blood clots, and these needed to be removed periodically to allow blood to circulate, but the medical chart contained no indication that this was done. Tr.2/15/2011:46-47, 69. Good nutrition is a part of preventing pressure ulcers, but St. Vincent's nurses did not seek a nutritionist's assistance when there were indications that Mr. Gonzales' nutritional intake was inadequate. Tr.2/15/2011:50-52, 57-58. Mr. Gonzales' medical chart contained inconsistencies and sometimes incorrect information. Tr.2/15/2011:50-52, 63; 2/16/2011:38-39. No photographs were taken to document the progress of the ulcer, contrary to the Protocol. Tr.2/15/2011:73. And St.

Vincent's nurses admitted that they had not cared for Mr. Gonzales as they should have. Tr.2/15/2011:162-63.

Plaintiffs' experts testified that it was important to implement the Protocol because Mr. Gonzales was mentally impaired, and due to his hip fracture, could not adequately move himself. Tr.2/15/2011:33-34, 189. Pressure ulcers are painful, and are difficult to treat once they come into existence, so prevention is a priority. Tr.2/15/2011:81, 190-91. Plaintiffs' experts attributed St. Vincent's faults to a pattern of haphazard treatment and lack of communication. Tr.2/15/2011:55, 71, 196. Plaintiffs did not, however, present evidence that any other patients at St. Vincent had received similar treatment.

Mr. Gonzales was taken to Casa Real nursing home on July 14, but returned to St. Vincent on July 21, where he remained until August 4. During this second admission, Plaintiffs' experts said that St. Vincent did a better, but not entirely consistent, job of turning and repositioning Mr. Gonzales. Tr.2/15/2011:83-84, 86.

After his second admission to St. Vincent, Mr. Gonzales was moved to the Vida nursing home in Las Vegas, where he remained from August until December. Plaintiffs' expert, Dr. David Mansfield, testified that Mr. Gonzales also developed an ulcer on his right heel, which he attributed to St. Vincent. Tr.2/15/2011:195. Medical records indicated that Mr. Gonzales' heel ulcers became infected after he left St. Vincent, and Dr. Mansfield attributed the infections, and all treatment for

those infections at Vida and ultimately at Miners Colfax Hospital, to St. Vincent's alleged negligence. Tr.2/15/2011:197-203; Exhibits 13-17, 19, 21-24. Mr. Gonzales' pressure ulcers did not completely heal until September 2007. Tr.2/15/2011:207.

To rebut Plaintiffs' new theory of the case, St. Vincent was prepared to present testimony that 1) St. Vincent's nurses were not negligent, and 2) Vida's negligence contributed to his injuries, pain and suffering. RP2267-RP2275. Based on pretrial rulings and longstanding New Mexico precedent, St. Vincent's counsel told the jury during opening statement that St. Vincent would present testimony in support of these defenses. Tr.2/14/2011:24-38. But during trial, the court prohibited St. Vincent from presenting these defenses to the jury.

During trial, the court did not permit St. Vincent to introduce evidence that Vida was at fault for causing the pressure ulcers to become infected and failing adequately to inform Jose Gonzales of the care that would be required when Mr. Gonzales went home with Jose. Nor was St. Vincent's wound care expert permitted to opine that St. Vincent's nurses met the standard of care. RP2381-RP2383, Tr.2/16/2011:99. Furthermore, Plaintiffs' improper comments during closing incited the excessive jury award, resulting from passion and prejudice. Plaintiffs focused jurors on St. Vincent's purported corporate wealth throughout their closing argument. *See*, Tr.2/17/2011:93-94, 111:18-19, 112:1-5, 121:1-7,

147:21-22, 148:11-12, 149:20-24, 150:3-5, 152:6-10. Plaintiffs' counsel encouraged the jury to infer that St. Vincent, a non-profit organization, generated a profit and should have paid taxes, stating that: "Can you believe that a hospital that makes 245 million dollars a year every year – by the way doesn't pay taxes, okay...." *Id.* at 147:21-23. This misleading statement unfairly incited passion and prejudice against St. Vincent.

The final ingredient in this toxic soup in which St. Vincent tried to defend itself even though the playing field unfairly was tilted against it was the presence on the jury of a biased juror. Specifically, the jury was contaminated by a juror who failed to disclose that his wages were being garnished by another hospital during the trial, and said to his fellow jurors "Let's get this hospital." RP2525; RP2838-RP2869. They did, assessing \$595,000 in compensatory damages and \$9,750,000 in punitive damages. RP2407-RP2410. St. Vincent timely sought and was denied post-verdict relief and appealed. RP3696-RP3710.

ARGUMENT

I. PRECLUDING ST. VINCENT'S COMPARATIVE FAULT DEFENSE WAS AN ABUSE OF DISCRETION.

As the court ruled that successive tortfeasor liability was not applicable, evidence should have been taken and the jury should have been instructed on concurrent tortfeasor liability and comparative fault. *See, e.g., Lujan v. Healthsouth Rehabilitation Corp.*, 120 N.M. 422, 902 P.2d 1025 (1995). The court

refused to allow St. Vincent to present evidence of Vida's fault, so the jury never learned about it, unfairly prejudicing St. Vincent. The court's rulings on this issue were an abuse of discretion.

Standard of Review. Decisions regarding admission or exclusion of evidence are reviewed for abuse of discretion. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶¶36-37, 127 N.M. 47, 976 P.2d 999.

Preservation of issue. St. Vincent raised this issue in its answer, (RP1651-RP1661) attempted to elicit testimony on Vida's negligence (Tr.2/15/2011:213:3-21; 216-219:1-6) and moved for a new trial on this ground. RP2872-RP2923.

Comparative fault has been the law in New Mexico for nearly three decades. "It is accepted practice to include all tortfeasors in the apportionment question." *Bartlett v. N.M. Welding Supply, Inc.*, 98 N.M. 152, 159, 646 P.2d 579, 586 (Ct. App. 1982) (citation omitted), *superseded in part on other grounds by* NMSA 1978, §41-3A-1 (1987); *see Segura v. K-Mart Corp.*, 2003-NMCA-013, ¶24, 133 N.M. 192, 62 P.3d 192 (court erroneously denied defendant's attempt to apportion fault to nonparty through verdict). Fault can be apportioned to settling parties. *Wilson v. Gillis*, 105 N.M. 259, 261, 731 P.2d 955, 957 (Ct. App. 1986).

Under settled New Mexico law, St. Vincent had the right to present testimony and evidence to the jury on Vida's fault for Mr. Gonzales' injuries. The court precluded St. Vincent from eliciting any comparative fault testimony, denied

St. Vincent's request that the jury be instructed to assess comparative fault between St. Vincent and Vida, and refused St. Vincent's request that the jury verdict form permit apportionment of fault to Vida. The court's rulings should be reversed as an abuse of discretion, unfairly holding St. Vincent responsible for Vida's negligence contrary to controlling New Mexico precedent.

Before trial, and before Plaintiff had settled with Vida, Dr. Mansfield testified at his deposition that Vida bore a share of responsibility for the injuries to Mr. Gonzales. RP 2903-04 (pressure ulcers became infected at Vida, which is not part of natural progression, and Vida did not properly treat them); 2905 (Vida failed to give proper discharge instructions to enable family to adequately care for Mr. Gonzales); 2906 (Vida failed to make appropriate referrals for wound care); 2907 (Vida's conduct constituted willful neglect); 2908 (Mr. Gonzales suffered heel ulcer infections and Vida failed to give appropriate emergent treatment and failed to timely notify a physician).

At trial, Dr. Mansfield testified that the \$94,940.12 in medical bills from providers other than St. Vincent were "reasonably and necessarily incurred and caused by the treatment that Alfred Gonzales received at St. Vincent Hospital...." Tr.2/17/2011:197-209. Among other things, these bills were incurred to treat the infections in Mr. Gonzales' heel ulcers. This testimony effectively attributed the entire fault for these injuries to St. Vincent, thereby opening the door for cross-

examination on causation, but when St. Vincent attempted to question Dr. Mansfield whether Vida's negligence caused the need for subsequent medical care, Plaintiff objected. *Id.* The court sustained the objection, ruling that St. Vincent was required to limit its cross-examination to "the reasonableness of the bills..." Tr.2/15/2011:217-218. This ruling was an abuse of discretion. When an expert provides an opinion, the opposing party is permitted to cross-examine the expert on underlying facts or data supporting the opinion. Rule 11-705 (1993) provided that:

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data. . . The expert may in any event be required to disclose the underlying facts or data on cross-examination.

See, e.g., Jaramillo v. Fisher Controls Co., Inc., 102 N.M. 614, 624-25, 698 P.2d 887, 897-98 (Ct. App. 1985) ("[c]ross-examination extends to matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief by the witness on direct examination," and Rule of Evidence 611(b) "is not to the contrary"; an "expert is not to be sheltered from a testing of the basis of his opinion").

Dr. Mansfield opined that follow-on medical care was reasonably necessary because of treatment provided by St. Vincent, yet the court prevented St. Vincent from cross-examining Dr. Mansfield on the underlying facts or data supporting his opinion, including his previously-expressed opinions that Vida's negligence caused

the ulcers to become infected. The court's rulings were an abuse of discretion, contrary to controlling precedent, and unfairly prevented St. Vincent from presenting a viable defense.

Plaintiffs advanced several grounds for preventing the cross-examination, all of which lack merit. Plaintiffs' counsel objected that any questions about the care Mr. Gonzales received at Vida were beyond the scope of direct examination. Tr.2/15/2011:216-217. St. Vincent responded that Mr. Gonzales incurred medical bills for treatment of his infected heel ulcers, and as Dr. Mansfield testified that St. Vincent caused the need for this treatment, St. Vincent should be permitted to elicit testimony that the infections were caused by Vida's negligence. Tr.2/15/2011:217. Since Dr. Mansfield asserted St. Vincent was at fault, the door was opened for cross-examination to establish others' fault—a proper ground for cross-examination. *See Jaramillo*; Rule 11-705.

Plaintiffs also asserted that evidence on comparative fault could be “sponsored” only by defense witnesses, but when St. Vincent said its expert was prepared to so testify, Plaintiffs' counsel asserted St. Vincent's expert would be precluded from so doing. Tr.2/15/2011:217. St. Vincent argued that the testimony it sought from Dr. Mansfield was “a response to his testimony that these medical bills were necessitated and caused by St. Vincent's negligence” and “two-thirds of the medical bills that they're claiming were for treatment for infected pressure

ulcers.” Tr.2/15/2011:217. The Court limited St. Vincent’s cross-examination to questioning the reasonableness of the amounts of the medical bills, ruling that St. Vincent would not be permitted to ask about the “care” provided by Vida. Tr.2/15/2011:217-18. St. Vincent again protested that it needed to ask about the “care” provided at Vida, to rebut Dr. Mansfield’s trial testimony attributing the infections to St. Vincent. Tr.2/15/2011:218.

New Mexico law does not require comparative fault testimony to be “sponsored” by a defense witness. During a post-trial hearing, Plaintiffs’ counsel, Mr. Rhodes, admitted that comparative fault testimony can be elicited from an opponent’s expert. Tr.4/18/2011:21.

Plaintiffs also asserted that St. Vincent’s cross-examination of Dr. Mansfield would somehow bring successive tortfeasor liability back into the case. Tr.2/15/2011:218. The District Court agreed with this assessment. Tr.2/15/2011:218. This was error. Successive tortfeasor liability and comparative fault are distinct theories. “In a typical negligence case involving concurrent tortfeasors, the jury assesses whether each defendant’s negligence is a cause of the plaintiff’s harm and, if so, then the jury compares the negligence of each tortfeasor in order to assign a percentage of fault.” *Lewis v. Samson*, 2001-NMSC-35, ¶35, 131 N.M. 317, 35 P.3d 972. Successive tortfeasor liability makes the original tortfeasor “jointly and severally liable...for the original and enhanced injuries.”

(internal citations omitted) *Id.* at ¶33. It is the Plaintiff's burden to prove proximate cause, so evidence regarding another tortfeasor's negligence or wrongdoing "represents a basic proximate cause defense...." *Id.* at ¶35. Here, Plaintiffs lost the ability to present a successive tortfeasor claim against St. Vincent by virtue of their settlement with Vida. St. Vincent, however, was still entitled to present a comparative fault defense, and Plaintiffs have never cited any authority to the contrary.

The District Court's ruling prejudiced St. Vincent. St. Vincent was prepared to adduce testimony at trial about Vida's negligence from Plaintiffs' expert. Based on this evidence, a reasonable jury could have found that Vida's negligence caused or contributed to Mr. Gonzales' condition. Plaintiffs presented evidence that an infected heel ulcer can cause severe pain (Tr.2/15/2011:236) and during closing argument asserted that Mr. Gonzales "remains in pain for 14 months" due to the pressure ulcers (Tr.2/17/2011:106)—which included the time during which Vida's negligence caused the ulcers to become infected. Had St. Vincent been permitted to present Dr. Mansfield's testimony that Vida negligently caused the ulcers to become infected, the jury could have found that Vida was at fault for some portion of Mr. Gonzales' damages. And because the jury was instructed that an award of punitive damages must "tak[e] into account all the circumstances" and must be "reasonably related" to the amount of compensatory damages (RP 2406), the

testimony about Vida's fault could have affected the jury's determination on punitive damages.

Thus, the trial court abused its discretion by prohibiting St. Vincent from presenting evidence of Vida's comparative fault, which meant that Vida's comparative fault was not included in the jury instructions or the verdict form. *See Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 19, 141 N.M. 808, 161 P.3d 853 ("A party is entitled to instructions on all of his or her correct legal theories of the case if there is evidence in the record to support the theories."). Absent evidence of Vida's negligence, the jury had no way of knowing that any other entity's conduct injured Mr. Gonzales. They rendered the verdict without having access to the truth—including evidence of Vida's fault. St. Vincent is entitled to a new trial. *See Segura v. K-Mart Corp.*, 2003-NMCA-013, ¶24, 133 N.M. 192, 62 P.3d 283 (erroneous exclusion of evidence that would have supported a comparative fault defense warrants new trial).

II. UNFAIR LIMMITATION OF ST. VINCENT'S EXPERT'S TESTIMONY

The court improperly limited testimony of Vincent's expert witness Nurse Robert Ruzicka, preventing St. Vincent from presenting critical testimony to the jury, keeping the truth from the jury, and denying St. Vincent a defense. The rulings were an abuse of discretion, and should be reversed.

Standard of Review. A trial court's decision on admission or exclusion of evidence is reviewed for abuse of discretion and will be reversed upon showing of a clear abuse. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶¶36-37, 127 N.M. 47, 976 P.2d 999.

Preservation of Issue. St. Vincent preserved this issue by opposing Plaintiffs' pre-trial motion in limine (RP2365-RP2376), opposing Plaintiffs' motion to strike Mr. Ruzicka (Tr.2/16/2011:4, 90-99), attempting to elicit testimony from him at trial (*Id.* at 101-143), and post-judgment motions. RP2836-RP2837.

Plaintiffs filed two motions seeking to limit or otherwise bar testimony of St. Vincent's experts (RP2330-RP2338; RP2339-RP2346), and a third motion seeking to strike Mr. Ruzicka as an expert witness. Tr.2/16/2011:4, 90-99. The court's rulings on these motions are contrary to controlling precedent.

Specifically, the court improperly limited testimony of Robert Ruzicka, a Licensed Practical Nurse with over 30 years experience in the care and treatment of wounds, relying on the mere fact that he was not a Registered Nurse, rather than his substantial experience with the care and treatment of wounds. St. Vincent provided evidence that Mr. Ruzicka was an LPN providing wound care for 33 years, including service in numerous Army field hospitals, consulting daily with RNs and doctors on wound care. Tr.2/16/2011:99. 102-05, 107-110. The court

ignored this evidence and granted Plaintiffs' motion, precluding him from testifying that St. Vincent's nurses met the standard of care. *Id.* It was reversible error for the court to preclude Mr. Ruzicka's testimony based on his status as an LPN rather than an RN, and ignoring his extensive wound care experience which qualified him to testify. His license goes to weight—not admissibility—of his testimony. New Mexico Rule 11-702, governing admission or expert testimony, provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an **expert by knowledge, skill, experience, training or education** may testify thereto in the form of an opinion or otherwise. (emphasis added).

“The use of the disjunctive ‘or’ in Rule 11-702 indisputably recognizes that an expert witness may be qualified on foundations other than licensure.” *Madrid v. Univ. of California*, 105 N.M. 715, 717, 737 P.2d 74, 76 (1987). Thus, when expert testimony is required, “the mere fact that a medical witness is not a specialist goes to the weight, not the admissibility, of the witness’ expert testimony.” *Sewell v. Wilson*, 97 N.M. 523, 528, 641 P.2d 1070, 1075 (Ct. App. 1982).

Plaintiffs' reliance on the Nursing Practice Act (“NPA”) to strike Nurse Ruzicka was misplaced. Tr.2/16/2011:90-94. The NPA does not address the scope of expert testimony that may be given by a LPN. Even if the NPA were relevant to

the Rule 11-702 analysis, it is plain that Nurse Ruzicka should have been permitted to testify. Under the NPA, an LPN's scope of practice includes, but is not limited to "contributing to the assessment of the health status of individual"; "participating in the development and modification of the plan of care"; "implementing appropriate aspects of the plan of care commensurate with education and verified competence"; and "collaborating with other health care professionals in the management of health care." NMSA 1978, §61-3-3(J). These areas of practice are well within the realm of Nurse Ruzicka's knowledge and experience. Thus, the court abused its discretion by preventing Nurse Ruzicka from testifying as an expert on wound care merely because he was an LPN and not a RN.

The court's rulings regarding Mr. Ruzicka unfairly prejudiced St. Vincent. During its opening statement, St. Vincent informed the jury that they would hear testimony that St. Vincent's nurses met the standard of care, and that St. Vincent was not negligent. Tr.2/14/2011:31-32. The court's erroneous rulings prevented the jury hearing testimony that St. Vincent's nurses were not negligent, unfairly precluding rebuttal of Plaintiffs' experts. These rulings unfairly prejudiced St. Vincent, forming the basis of Plaintiffs' closing argument, in which counsel emphasized to the jury that defense counsel said it would present testimony contrary to Plaintiffs' allegations, and failed to do so. "[Mr. Ruzicka] didn't testify to that because we find out during the trial he's not qualified to testify to that

because he's a LPN" Tr.2/17/2011:112-113. A new trial is the only way to cure the prejudice from the court's erroneous rulings.

III. A BIASED JUROR RESULTED IN AN UNFAIR TRIAL

St. Vincent learned after trial that one of the jurors unfairly hid his bias against hospitals. The New Mexico Constitution "guarantees defendants an 'impartial jury,' meaning 'a jury where each and every one of the...members constituting the jury is totally free from any partiality whatsoever.'" *State v. Doe*, 99 N.M. 456, 458, 659 P.2d 908, 910 (Ct. App. 1983). The presence of even one biased juror on a panel requires a new trial. *State v. Mann*, 2002-NMSC-001, ¶25, 131 N.M. 459, 39 P.3d 124; *State v. Sims*, 51 N.M. 467, 470-71, 188 P.2d 177, 179 (1947). The uncontroverted evidence in this case establishes that juror Mares, whose wages were being garnished by a hospital during trial, and who told jurors "Let's get this hospital" was biased and failed to disclose his bias. St. Vincent is entitled to a new trial. If this Court determines that the appearance for Mr. Mares' deposition somehow was an evidentiary hearing—even though there was no notice to St. Vincent that it needed to present all testimony and evidence in support of its position when it appeared to take Mr. Mares' deposition before the court—then the uncontroverted evidence establishes Mares' bias. Alternatively, St. Vincent is entitled to full discovery and an evidentiary hearing on Mares' bias, and the case

should be remanded to the trial court for full discovery and an evidentiary hearing on this issue.

Standard of Review. District court decisions on juror bias and misconduct are reviewed under an abuse of discretion standard. *See Kilgore v. Fuji Heavy Indus., Ltd.*, 2010-NMSC-040, ¶20, 148 N.M. 561, 240 P.3d 648.

Preservation of Issue. After trial, but before judgment was entered, St. Vincent filed an emergency motion for leave to conduct discovery, for an evidentiary hearing, and a new trial based on juror bias issues that were discovered after the verdict. RP2516-RP2527. St. Vincent further preserved this issue through post-judgment motions. RP2838-RP2869.

After the verdict, St. Vincent learned that a juror Mr. Bernie Mares told the other jurors that his wages were being garnished by a hospital in Las Vegas, and urged the jury to punish St. Vincent, stating “Let’s get this hospital!” RP2525, RP2838-RP2869. And they did. St. Vincent promptly sought relief, by filing a motion seeking discovery and an evidentiary hearing. RP2516-RP2527. While the court initially granted St. Vincent’s motion, it later denied St. Vincent discovery and an evidentiary hearing. Tr.4/18/2011:31; RP3297-RP3299. These rulings were an abuse of discretion, and should be reversed. Alternatively, the uncontroverted evidence establishes juror Mares’ bias and a new trial is mandated to protect the integrity of jury trials.

A. The Biased Juror Denied St. Vincent a Fair Trial

New Mexico courts define juror misconduct as “activity by members of the jury which is inconsistent with the instructions by the court.” *Mann*, 2002-NMSC-001, ¶ 22. Juror misconduct during *voir dire* occurs when a juror either falsely states any fact or conceals a material fact relevant to the controversy. *Lamphere v. Agnew*, 94 N.M. 146, 147-48, 607 P.2d 1164, 1165-66 (Ct. App. 1979) (juror’s withholding of material information during *voir dire* is improper because “[f]ull knowledge of all relevant and material matters that might bear on possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily”). Specifically:

It is the duty of a juror to make full and truthful answers to such questions as are asked, neither falsely stating any fact nor concealing any material matter. If a juror falsely represents his interest or situation or conceals a material fact relevant to the controversy and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived thereby, **upon discovering the facts of the juror’s incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts**, even though the bias or prejudice is not shown to have caused an unjust verdict, it being sufficient that a party, through no fault of his own, has been deprived of this constitutional guarantee of a trial of his case before a fair and impartial jury. *Mares v. State*, 83 N.M. 225, 227, 490 P.2d 667, 669 (1971)(emphasis added).

The presence of a biased juror deprives a defendant of its due process rights. *See Kilgore*, 2010-NMSC-040, ¶16.

After the verdict, St. Vincent interviewed jurors to determine why the jury had awarded such a large verdict. RP2838-RP2869. A juror, Mr. Earl Reiss, told St. Vincent that during the trial another juror informed all of the jurors that his wages were being garnished by a hospital. RP2525; RP2838-RP2869. The juror, Mr. Mares, urged the jury to punish St. Vincent, stating: “Let’s get this hospital!” *Id.* This uncontroverted statement is strong evidence of juror Mares’ bias and his action on that bias.

Mr. Mares misled the court and counsel during the jury selection process. Specifically, in answer to a juror questionnaire seeking disclosure of prior personal participation in civil litigation, Mr. Mares falsely answered “no”, indicating that he had never been sued. *Id.* Not only had Mr. Mares personally participated in litigation, his wages were being garnished as a result of prior litigation. Mr. Mares had been sued several times in addition to the judgment and garnishment. *Id.* Yet he disclosed none of these lawsuits. During voir dire, despite being asked by the court and counsel to disclose any bias that could affect his ability to fairly consider the evidence, Mr. Mares failed to disclose his negative view of hospitals and that his wages were being garnished by a hospital. Tr.2/14/2011:10-11, 21, 94-95. Mr. Mares’ conduct—falsely stating that he had never been sued—requires a new trial because St. Vincent was denied the opportunity to question him about these suits, potentially establishing prejudice and disqualifying him from serving on the jury,

or simply using an available peremptory challenge to preclude his service on the jury. *Mares v. State*, 83 N.M. 225, 227, 490 P.2d 667, 669 (1971). Mr. Mares' conduct denied St. Vincent its right to a fair trial.

St. Vincent filed an Emergency Motion to place the issue of juror misconduct before the court. RP2516-RP2527. At the hearing, St. Vincent sought discovery of Mares' bias. Tr.4/18/2011:12-13. The court granted St. Vincent's Motion to conduct discovery on the issue of juror bias, stating that: "I will allow discovery to proceed." *Id.* at 34:18.

Plaintiffs subsequently filed a motion for a protective order allegedly to "protect the jurors from harassing depositions" by St. Vincent. RP2567-2576; RP2577-RP2580. There was and is no evidence of any such harassment. At the hearing on the motion, Plaintiffs' counsel said that "Plaintiffs have no objection to the Defendants having an evidentiary hearing in this matter." Tr.6/6/2011:20. Plaintiffs requested that Mr. Mares' deposition be conducted in the court's presence. *Id.* at 24:2-8. Over St. Vincent's objections, the court set a court appearance for the sole purpose of deposing Mr. Mares—not to conduct a full evidentiary hearing on the issue of juror bias:

THE COURT: ... I think what needs to be done, is we need to bring Mr. Mares in and the parties can fully examine him as to his questionnaire, whether he fully understood the questions, whether he was truthful or not and all parties would have an opportunity to question at that time before the Court, before we proceed with any other discovery with other jurors...

Tr.6/6/2011:27.

Process servers felt threatened in attempting to serve Mr. Mares, so the court directed St. Vincent to prepare a subpoena for the court's signature and said it would "sign off on it and deliver it to the Sheriff's Office" for service. *Id.* at 31:23-25-32:1. St. Vincent followed the court's instructions, and the court issued its subpoena requiring Mr. Mares to appear on June 27, 2011. RP2752; Tr.6/27/2011:4:9-16. Mr. Mares apparently was not served by the Sheriff's Office prior to the June 27, 2011 deposition. *Id.*

On June 27, 2011 the parties appeared before the court to conduct the discovery deposition of Mr. Mares. Notably, neither party nor the court believed the purpose of the proceeding was to conduct an evidentiary hearing on St. Vincent's Motion for a new trial:

THE COURT: Good afternoon. We are here—please be seated. We are here on Defendant's Motion for a deposition of Mr. Bernie Mares.

Ms. Anderson, are you handling this matter?

MS. ANDERSON: Your Honor, I don't see the witness here. Ms. Nugent actually will be taking the deposition if the witness appears.

Tr.6/27/2011:8-9.

Mr. Mares did not appear for his deposition, but the court allowed the parties to enter into evidence the exhibits that would have been used at Mr. Mares' deposition had he appeared. *Id.* at 7. Notably, St. Vincent did not submit the evidence in lieu of the evidentiary hearing. See *Id.* at 14 ("Well, your Honor,

ideally, as you know, this was supposed to be the deposition of Mr. Mares. I still believe that we need discovery; that we need information from him. That said, we do have some exhibits today that I think we should proffer to the Court.”)

On July 13, 2011 the court issued an Order denying St. Vincent's Motion for a new trial. RP3297-RP3299. In its Order, the court labeled the June 27, 2011 proceedings as an "evidentiary hearing." *Id.* The court held that the defendant failed to demonstrate due diligence in assuring that Mares was served with a subpoena, by failing to pay a fee (although the applicable statute requires no such fee and none was requested), and contacting the court or the San Miguel Sheriff's Department prior to the hearing to assure service of the subpoena. *Id.* The court's ruling was entered BEFORE briefing was complete on St. Vincent's Motion for a new trial. RP3300-RP3319.

St. Vincent filed a motion to reconsider, submitting evidence that its counsel had contacted the Sheriff's Department repeatedly before the hearing to determine if Mr. Mares had been served, but the Sheriff's Department was unable to determine whether or not service had been completed, could not locate a copy of the subpoena, could not determine whether the court had provided it with a copy of the subpoena, and could not confirm whether or not the subpoena was with an officer for service on Mr. Mares. RP3499-RP3569. The trial court ignored this evidence, and denied St. Vincent's motion to reconsider. RP3614-RP3616. Thus,

St. Vincent was denied the opportunity to conduct *any* discovery into the jury bias issue, and also was denied an evidentiary hearing.

The uncontroverted facts show that Mr. Mares withheld material information during voir dire regarding his bias against hospitals. He failed to disclose that he had been sued several times: in October 1991 by the New Mexico Educational Assistance Foundation, and on June 4, 2010 by Alta Vista for unpaid medical expenses. *See* Defendants' Exhibits 1-6, presented at June 27, 2011 Hearing. Mr. Mares failed to disclose that Alta Vista was garnishing his wages on a bi-monthly basis, totaling approximately 22% of Mr. Mares' gross income. Notably, Mr. Mares did not disclose that his wages were being garnished *during trial!* At minimum, he acted contrary to the court's order by providing false answers on his Juror Questionnaire.

Mr. Mares' conduct denied St. Vincent the opportunity to further question him, seek his removal as a juror for cause, and if necessary use a preemptory challenge to keep him off the jury. The uncontroverted testimony of juror Reiss that Mr. Mares told jurors "Let's get this hospital" establishes Mr. Mares' prejudice and his effort to infect other jurors with his bias. Mr. Mares' conduct denied St. Vincent its right to a fair and impartial jury. A new trial is warranted.

B. At a Minimum, Due Process Requires Remand for an Evidentiary Hearing.

The trial court initially ruled that St. Vincent would be allowed to conduct discovery on juror bias. Tr.4/18/2011:12-13. But the court reversed itself, limiting discovery to Mr. Mares' deposition only. Ultimately, rather than permitting discovery, without notice to St. Vincent, the court retroactively converted the parties' appearance for Mr. Mares' deposition into an evidentiary hearing. Notably, the court commenced the June 27, 2011 proceeding by stating that the parties were present for the deposition of Mr. Mares. Tr.6/27/2011:4:3-4. In its ruling, the court labeled the proceeding as an evidentiary proceeding *AFTER* the proceeding occurred. This procedure unfairly denied St. Vincent its due process right to discover, prepare, and present evidence including witnesses at an evidentiary hearing on Mr. Mares' bias. *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 984 (9th Cir. 1998) (due process requires an opportunity to be heard at a meaningful time and in a meaningful manner.)

The court's Order is contrary to binding precedent. *See Kilgore*, 2010-NMSC-040, ¶20 (when a party asserts juror misconduct, the appropriate remedy is an evidentiary hearing to establish a "reasonable possibility or likelihood that the ... conduct would have had an effect upon the verdict or upon a typical juror.") Uncontroverted evidence establishes that Mr. Mares' conduct meets this test. By denying St. Vincent's motion for a new trial without allowing St. Vincent to

conduct necessary discovery and present evidence at a properly-noticed, scheduled evidentiary hearing, and considering only the affidavit of a juror alleging improper conduct occurred, the trial court did exactly what the Supreme Court held was error in *Kilgore*. Under *Kilgore*, it is error to deny a motion for an evidentiary hearing on juror misconduct when the moving party presents a juror affidavit making a prima facie showing of misconduct. *Kilgore, supra*.

Further, the court erred by reversing, without explanation, its prior ruling that it could consider Mr. Reiss' affidavit on the issue of whether Mr. Mares was truthful on his juror questionnaire. The court further erred because it is not necessary to show that Mr. Mares' bias affected the verdict (it did)—under controlling precedent the mere presence of even one biased juror deprives the defendant of a fair trial. The court's finding that Mr. Mares' statement is not the sort of "extraneous information" contemplated by *Kilgore* is misplaced—St. Vincent is not complaining that "extraneous information" reached the jury, but rather that juror Mares was biased.

IV. WRONGFUL REMOVAL OF PERSONAL REPRESENTATIVE UNFAIRLY PREJUDICED ST. VINCENT

Before trial, Ms. Lucero's attorneys stated that she was "unavailable" for trial and asked the trial court to remove her as personal representative Mr. Gonzales' estate. After trial, counsel moved for the reappointment of Edith Lucero as Co-Personal representative, stating that: "As the Court knows, [Ms. Lucero]

couldn't attend the trial, so that's why we had done that substitution." Tr.4/18/2011:35:10-16. At that time, St. Vincent had no basis for opposing the substitutions.

On April 27, 2011, Ms. Lucero called Kathleen Hessler, St. Vincent's risk management director, and informed Ms. Hessler that opposing counsel had "discharged" her because she believed that Vida was more responsible for Alfred Gonzales' injuries than St. Vincent, and because she disagreed with her counsel's decision to settle with Vida. RP3065-66. In response, St. Vincent copied opposing counsel on a letter requesting Judge Aragon to have Edith Lucero appear in her courtroom to investigate Ms. Lucero's statement to Ms. Hessler. RP 3087-89. Rather than address this issue before Judge Aragon, opposing counsel surreptitiously obtained a prior restraint of Ms. Lucero and St. Vincent's free speech rights in a proceeding before the probate court in Colfax County. RP3099-3136. St. Vincent has also appealed from the order in Colfax County, and that appeal is presently pending before this Court at Docket No. 32,239.

Standard of Review. Whether opposing counsel's misconduct warrants a new trial is left to the discretion of the trial court. *See Romero v. Melbourne*, 90 N.M. 169, 173, 561 P.2d 31, 35 (Ct. App. 1977).

Preservation of Issue. After learning from Ms. Lucero that a deceit seemed to have been practiced on the court, St. Vincent sought an opportunity to

conduct an evidentiary hearing on the issue. St. Vincent also sought relief from the probate court, and further preserved the issue through its post-judgment motions and appeal of the probate court's rulings. RP3048-RP3066.

The gag Order remains in place. St. Vincent received no notice of the hearing at which the Order restraining St. Vincent's free speech rights was entered. Nobody at the hearing represented St. Vincent, its attorneys, representatives, agents and employees, all of whom remain subject to prior restraint of their free speech rights.

Under New Mexico law, a jury verdict may be overturned and a new trial granted where an attorney engages in improper conduct that has unfairly prejudiced the result of trial. *Apodaca v. United States Fidelity & Guar .Co.*, 78 N.M. 501, 502-03, 433 P.2d 86, 87-88 (1967) (reversing a jury verdict where appellant demonstrated two elements, 1) that opposing counsel engaged in improper conduct, and 2) that such conduct "was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case"). Both elements of *Apodaca* are satisfied here. First, counsel represented to the court that Ms. Lucero was unavailable to attend the trial. RP3048-RP3066. The only evidence properly before the court was that Ms. Lucero was removed by counsel because she believed that Vida was more responsible for the alleged injuries to Mr. Gonzales than St. Vincent, and because she disagreed with her counsel's decision

to settle with Vida. *Id.* In replacing Ms. Lucero as personal representative, opposing counsel provided the court with an inaccurate reason to support the replacement. Counsel's conduct in obtaining a gag order against his own client is strong evidence of impropriety in replacing Ms. Lucero. More than a year later, opposing counsel has yet to provide any evidence to support their claim to represent the client they gagged, Ms. Lucero.

Opposing counsel's actions were improper and "reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case." *Apodaca, supra.* Counsel prevented St. Vincent from obtaining, and the jury from hearing, Ms. Lucero's view that Vida bore a greater share of responsibility for Alfred Gonzales' injuries than St. Vincent. The suppression of this testimony—supporting St. Vincent's comparative fault defense—on false pretenses unfairly prejudiced St. Vincent. A new trial is warranted.

V. THE PUNITIVE DAMAGE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

The jury awarded \$595,000 in compensatory damages and \$9,750,000 in punitive damages against St. Vincent. This case concerns heel ulcers that developed during 166 days of treatment between three separate facilities, of which only 21 days of treatment were provided by St. Vincent. The evidence showed that no further injury to Mr. Gonzales happened during his second 14-day stay at St. Vincent, so St. Vincent's liability stems from his initial 7 days at St. Vincent.

Tr.2/15/2011:233-235. The jury never was permitted to learn of Plaintiffs' expert's testimony that Vida was negligent during the time it cared for Mr. Gonzales-- 139 of the 166 days (over 83%) of Mr. Gonzales' care, nor that Vida also failed to adequately instruct Jose on the care he would need to provide Mr. Gonzales. The jury's award is unconstitutionally excessive.

Standard of Review. Whether an award of punitive damages is unconstitutionally excessive or violates due process is reviewed de novo. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

Preservation of Issue. St. Vincent preserved this issue in its post-judgment motions. RP2981-RP3030; RP3033-R3042.

The Due Process Clause prohibits imposition of grossly excessive or arbitrary punishments. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-417 (2003)(citations omitted). The Constitution places both procedural and substantive limits on punitive damages, prohibiting arbitrary procedures for assessing punitive damages and excessive awards. *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1062 (2007)(quotations and citations omitted).. Here, the trial and resulting punitive damages award suffers from both deficiencies: arbitrariness and excessiveness.

A. The Unfair Verdict Stems from Passion and Prejudice.

What caused the jury to assess the punitive damages award in this case? Passion, prejudice, partiality and sympathy resulting from harmful procedural and evidentiary errors and a toxic soup of invective that permeated the courtroom caused jurors to act on passion, prejudice, partiality and sympathy. The cumulative effect of the toxic communications resulted in a toxic sludge that unfairly denied St. Vincent its constitutional right to a fair trial. Examples of the toxic combination that violated St. Vincent's constitutional rights are provided below. Although St. Vincent did not object to the closing argument on these grounds, this Court may review the matter – the propriety of closing arguments like these is a question of “general public interest,” and allowing the arguments was “fundamental error.” Rule 12-216(B).

1. Jury Improperly was asked to "Send a Message"

During closing argument, Plaintiffs told the jury they had “more power than the president of the United States”, more power than the governor, more power than the judge, and implored the jury to "send a message" with its award of punitive damages, not only to St. Vincent, but to hospitals in the rest of New Mexico and “in all the places where the hospital for this chain operates.” Tr.2/17/2011:91. Plaintiffs' impermissible arguments converted this case to a trial about the public policies on healthcare, rather than whether St. Vincent provided

negligent care to Mr. Gonzales. These arguments were improper and unfairly prejudicial, improperly urging the jury to render its verdict for reasons other than the evidence presented at trial. *See State v. Cooper*, 2000-NMCA-41, ¶¶14-15, 129 N.M. 172, 2 P.3d 149 (stating "[p]rosecutorial commentary that urges a jury to convict for reasons other than the evidence defies law and undermines the integrity of a verdict.").

Plaintiffs argued, "Alfred Gonzales's life can stand for something huge, Alfred Gonzales's life can stand for changing the health care system in New Mexico to say ... that these huge corporation's [sic] going to spend the money to give the care they need to give." Tr.2/17/2011:146:2-5. These arguments unfairly and impermissibly asked the jury to look use this case for political reasons—to "change health care." *Id* at 151:17-19. The jury is not the legislature, and it was improper for the jury to be asked to, and to use its verdict to change public policy. Healthcare in New Mexico was not on trial, the only matter before the jury was whether St. Vincent was the sole cause of Mr. Gonzales' injuries, and if so, the amount of damages. A state is prohibited from punishing an individual without first providing that individual with an opportunity to present every available defense. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

By permitting the trial to put St. Vincent on trial to "change health care," St. Vincent was deprived of its right to a fair trial—it had no opportunity to present

“every available defense’ because it should not have been St. Vincent’s role to answer for whatever Plaintiffs’ counsel asserted needs to “change in healthcare.” Because Plaintiffs told the jury to use its power to “change health care”—a legislative role that is not the province of a jury, a new trial is required to remove the unfair taint of a procedure where a defendant is required to defend public policy rather than its conduct that allegedly injured the plaintiff. The jury was permitted to usurp the legislature’s role and was incited by passion and prejudice, contributing to the toxic sludge of unfairness that denied St. Vincent’s right to a fundamentally fair trial.

2. Unfair Adjudication for “Thousands of Alfred Gonzaleses”

Plaintiffs' counsel said that "the thousands of Alfred Gonzaleses that are sitting in [St. Vincent's] hospitals [sic] that are laying in [St. Vincent's] hospitals right now in Texas, in Louisiana, in Mexico...," and told the jury that "[t]hose people are not throw away people." Tr.2/17/2011:146:1-5. This argument unfairly contributed to the toxic sludge that denied St. Vincent its right to a fair trial, as "[a]n award of punitive damages is based on a party's misconduct towards the individual" and not on asserted misconduct to non-parties. *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 154, 899 P.2d 594, 597 (1995). Here, the jury was urged to punish St. Vincent based on purported conduct to non-parties that was not in evidence. Punitive damages cannot be awarded to inflict punishment on a

defendant for alleged injury to "those who are, essentially, nonparties to the litigation." *Phillip Morris USA v. Williams*, 549 U.S. 346, 543 (2007). This case is not a class action—the potential claims of “thousands of Alfred Gonzaleses” were neither at issue nor in evidence, and St. Vincent had neither the protections inherent in class actions nor discovery to rebut these purported claims. This deepened the toxic sludge that eviscerated St. Vincent’s constitutional right to a fair trial.

3. Unfairly Incited Bias Against Wealthy Multi-state Corporations

The toxic sludge further was enhanced by Plaintiffs’ references to St. Vincent's purported corporate wealth—at least five times in their closing argument and at least five times in their rebuttal closing argument Tr.2/17/2011:93:12-13, 93:25-94:1, 111:18-19, 112:1-5, 121:1-7, 147:21-22, 148:11-12, 149:20-24 150:3-5; 152:6-10. Plaintiffs also confusingly stated that non-profit St. Vincent somehow should have paid taxes: "Can you believe that a hospital that makes 245 million dollars a year every year — by the way doesn't pay taxes, okay..." *Id.* at 147:21-23. A jury evaluating a punitive damages claim is not the Internal Revenue Service—determining whether St. Vincent paid the proper amount of taxes was not the province of the jury. These assertions unfairly inflamed jurors passions against what Plaintiffs' counsel refers to as a "huge corporation" that does not pay taxes *Id.* at 149:15-16. Plaintiffs apparently were advocating that St. Vincent should pay

more in punitive damages because they “don’t pay taxes” and purportedly were a "huge" corporation.

There is no evidence that St. Vincent was anything other than a single hospital and a New Mexico corporation at the time of Mr. Gonzales' care. Yet repeatedly, and contrary to the court's ruling, Plaintiffs referred to St. Vincent as a "hospital chain" operating in multiple states, implying it was a multinational corporation. *Id.* at 91:14-18; 111:21-24. Plaintiffs' reference to "the several other hospitals" in the CHRISTUS network served no purpose other than to attempt to paint St. Vincent as a big, out-of-state corporation. *Id.* at 91:14-18. Courts have recognized that jurors may have biases against large corporations, and there is a risk that the jury unfairly may base an award on prejudice against large corporations, a risk that is heightened when the corporation is a non-resident. *See, e.g., Illinois Central R. Co. v. Welch*, 52 Ill. 183, 188 (1869); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 463 (1993). Significantly, CHRISTUS is a non-party and should not have been put on trial in this case.

Plaintiffs repeatedly portrayed St. Vincent as a wealthy, huge multi-national corporation that does not pay taxes, and implied that there were thousands of Alfred Gonzaleses in hospitals in multiple states. There was no evidence before the jury of any hospital other than the facility where Mr. Gonzales was a patient. Plaintiffs' conduct in seeking relief against unnamed individuals in numerous non-

party hospitals unfairly inflamed the jury's passion and invited the jury to look outside of the facts of the case to "send a message" and "change health care." Frankly, that is not the province of a jury. In reaching its verdict, the jury improperly invaded the province of the legislature, determining policy based on non-parties and purported injuries that were not proven. A new trial should be ordered as the only way to remove the taint of the resulting excessive verdict that violates St. Vincent's due process rights, and stems from passion, prejudice, partiality and sympathy. *Exxon Shipping Co. v. Baker*, 54 U.S. 471 (2008); *Jolley v. Energen Resources Corp.*, 2008-NMCA-164, ¶24, 145 N.M. 350, 198 P.3d 717.

B. Court Erroneously Refused *De Novo* Review of the Punitive Damages Award.

Whether a punitive damages award is excessive is a question of law. *Aken v. Plains Elec. Generation & Transmission Co-op., Inc.*, 2002-NMSC-021, ¶ 19, 132 N.M. 401, 49 P.3d 662. A punitive damages award should be reviewed *de novo* – deference to the jury's determination of the amount of punitive damages is not permitted. *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *Aken*, 2002-NMSC-021, ¶19.

At the March 5, 2012 hearing on the post-judgment motions, the court affirmed the punitive damages award, stating that: "I must not substitute my judgment for that of the jury." Tr.3/5/2012:70. This ruling is contrary to controlling precedent requiring *de novo* review without deference to the jury's determination

of the amount of a punitive damages award. Because Judge Aragon improperly deferred to the jury in affirming the punitive damages award, merely rubber-stamping the jury's judgment, her decision affirming the punitive damages award should carry no weight with this Court. She substituted her judgment for controlling precedent and failed in her judicial duty because she did not review the jury's punitive damages award *de novo* without deference to the jury. Her ruling is nothing more than a reflection of the jury's judgment. St. Vincent is entitled to independent, *de novo* judicial review of the jury's record-setting, excessive punitive damages award.

As the Supreme Court stated in *Aken*, “[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles.” *Id.* Accordingly, we respectfully submit that this Court must independently review the jury's verdict—without deference to the jury or to Judge's Aragon's decision—which merely adopts the jury's judgment and does not provide her own independent *de novo* review.

C. Unfair Procedures and Unequal Application of the Law

The Supreme Court requires considerable care to be taken to protect defendants' constitutional rights when punitive damages are at issue. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Due process requires a fundamentally fair trial procedure in which unambiguous laws are applied equally

to all parties. See *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984). “Procedural regularity” is important “as underpinning any substantive analysis: ‘Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity.’” *Aken*, 2002-NMSC-021, ¶12, quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993). Conversely, a judgment that is not a product of procedural regularity, like this case, must be closely scrutinized. Here, as a matter of procedural due process, St. Vincent was denied its constitutional right to a fundamentally fair trial. A new trial in which fair procedures apply is warranted, but at minimum, the run-away verdict resulting from the unfair trial is not entitled to a presumption of validity, and should be subjected to close scrutiny.

This case is replete with examples of unequal application of rules of evidence and fundamentally unfair treatment of St. Vincent, as noted above:

- 1) St. Vincent relied on controlling precedent and pretrial rulings in discussing its anticipated comparative fault defense in opening statements, only to have the rug pulled out when the court unfairly prohibited St. Vincent from presenting evidence of comparative fault. Because of rulings contrary to precedent, Plaintiff was permitted to argue that St. Vincent failed to present evidence that it said would be presented during its opening statement. This was fundamentally unfair to St. Vincent in violation of its procedural due process rights.
- 2) Rulings prohibiting rebuttal testimony and precluding Nurse Ruzicka from testifying about the standard of care, unfairly materially changed the scope of testimony that would be permitted after voir dire and Opening Statements and unfairly denied St. Vincent the ability to effectively defend itself in violation of its procedural due process rights;

3) St. Vincent was further deprived of a fair trial because a biased juror participated in the deliberations and rendering of the verdict, violating St. Vincent's procedural due process rights;

4) The personal representative, Edith Lucero, was removed prior to trial because she disagreed with opposing counsel, depriving St. Vincent of her testimony in violation of St. Vincent's procedural due process rights and subjecting St. Vincent to prior restraint of free speech.

The cumulative impact of these procedural due process violations, each of which standing alone requires a new trial as fairness cannot be magically restored to the trial retroactively, combined with rulings that treated St. Vincent unequally as compared to Plaintiffs, resulted in a fundamentally unfair trial in violation of St. Vincent's constitutional rights. The only way to remove the unfair taint is to order a new trial.

D. The Unfair Verdict is Grossly Disproportionate

The \$595,000 in compensatory damages and \$9,750,000 in punitive damages constitutes a 16.38 to 1 ratio—an exceptionally high ratio. This ratio is particularly significant, as the truth about Vida's negligence was withheld from the jury. Even if this Court were to adopt the trial court's novel comparative fault determination, which would undermine decades of New Mexico precedent and give tortfeasors who follow others' negligence a dangerous freedom to act with gross negligence knowing that they can escape liability and responsibility for any harm that they do under the holding of this case, the jury's punitive damages award

is excessive. It is unconstitutionally excessive under New Mexico law as well as under the guideposts articulated by the United States Supreme Court, and should not be permitted to stand.

The jury's verdict is excessive under all of the "three 'guideposts' for determining whether a punitive damages award is excessive: (1) the degree of reprehensibility; (2) the disparity between the harm or potential harm and the punitive damages award; and (3) the difference between the remedy and the civil penalties authorized or imposed in comparable cases." *Aken*, 2002-NMSC-021, ¶¶19-20, citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-575 (1996).

1. Reprehensibility

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Aken*, 2002-NMSC-021, ¶21, quoting *Gore*, 517 U.S. at 575. To determine reprehensibility, court's consider: (1) whether the harm caused was physical as opposed to economic; (2) whether the conduct evidenced an indifference to or a reckless disregard of the health or safety of others; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit or whether it was a mere accident. *See State Farm*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576-77).

Neither the first or second factors support a punitive damages award of \$9,750,000. The physical harm caused by St. Vincent during 7 of 166 days at issue does not support this award. St. Vincent's nurses allegedly failed to follow and document compliance with St. Vincent's pressure ulcer protocol. RP2926-RP2978. Even if the trial court's novel decision on comparative fault is adopted, and St. Vincent is held liable for others' conduct that injured Mr. Gonzales, St. Vincent should not be punished for others' conduct. St. Vincent's conduct does not warrant the 16.38:1 punitive to compensatory damages ratio. There was no evidence of malicious intention by St. Vincent to cause harm to Mr. Gonzales. If the 16.38:1 ratio is affirmed in this case, what ratio would be acceptable in a case where the defendant intentionally and maliciously injured plaintiff knowingly causing death? Simply stated, the conduct at issue is not sufficiently reprehensible to support such a high ratio.

Likewise, the third, fourth, and fifth factors do not support the \$9,750,000 punitive damages award. Under the third factor, nothing in the record supports a conclusion that the conduct targeted financial vulnerability. Under the fourth factor, there is no evidence of repeated engagement in prohibited conduct knowing or suspecting it is unlawful. For the fifth factor, no evidence showed that the harm was the result of intentional malice, trickery, or deceit. There is no evidence that

anybody at St. Vincent intended to harm Mr. Gonzales. The punitive damage award is not supported by the third, fourth or fifth factors.

Simply stated, the five reprehensibility factors do not support a 16.38 to 1 punitive to compensatory damage ratio.

2. Ratio

The 16.38 to 1 ratio of compensatory to punitive damages is unconstitutionally excessive. A punitive damages award must bear a reasonable relationship between “the amount of harm to the plaintiff and to the general damages recovered.” *State Farm*, 538 U.S. at 426. The Supreme Court in *State Farm* explained:

Our jurisprudence and the principles it has now established demonstrate... that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages... will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety... We cited that 4-to-1 ratio again in *Gore*... While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1... or, in this case, of 145 to 1.

Similarly, New Mexico requires that “ [t]he amount of an award of punitive damages must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason.” *Aken*, 2002-NMSC-021, ¶23, quoting *Chavez-Rey v. Miller*, 99 N.M. 377, 379, 658 P.2d 452, 454 (Ct.

App. 1982). At issue here is the injury caused by St. Vincent—not the injury caused by Vida after Mr. Gonzales was no longer in St. Vincent’s care. The ratio in this case of 16:38:1 considerably exceeds the 10:1 ratio, is more than four times 4:1 of *Gore*, is more than 16 times the 1:1 ratio affirmed in *Exxon. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-14 (2008). St. Vincent’s conduct is not more than 16 times worse than the conduct of the drunken captain who grounded the Exxon Valdez.

As noted in *State Farm*, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 538 U.S. at 425. The facts of this case do not support the need for punishment well beyond the 1:1 ratio adopted by the Supreme Court. The excessive ratio is strong evidence that the jury’s verdict is excessive, unconstitutionally resulting from passion and prejudice.

3. Comparison to Civil Penalties

“The third guidepost in *Gore* is the disparity between the punitive damages award and ‘civil penalties authorized or imposed in comparable cases.’” *State Farm*, 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). “When penalties for comparable misconduct are much slighter than a punitive damages award, it may be said that the tortfeasor lacked ‘fair notice’ that the wrongful conduct could entail a substantial punitive award.” *Gore*, 517 U.S. at 583.

In this case, the closest comparable civil penalties are those assessed for nursing home neglect. In New Mexico, a maximum fine of \$12,500 may be assessed for neglect of a nursing home resident resulting in death. *See* NMSA 1978, §30-47-5(D); §31-18-15(E)(4). St. Vincent's conduct did not cause Mr. Gonzales' death, yet the punitive damage award against St. Vincent is \$9,750,000 – 780 times the \$12,500 maximum fine for nursing home neglect resulting in death. Where a nursing home fails to meet applicable standards, a daily civil penalty not to exceed \$5,000 can be imposed. *See* 7.1.8.8(F) NMAC. To support the \$9,750,000 punitive damages award, the record would need to show 1950 days of St. Vincent's failure to meet applicable standards. As Mr. Gonzales was in St. Vincent's care only 21 days, the punitive damages award is excessive under this guidepost

CONCLUSION

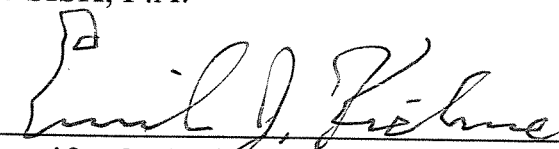
For the foregoing reasons, St. Vincent respectfully requests that this Court reverse the judgment and remand this case for a new trial. Alternatively, St. Vincent requests this Court reduce the punitive damage award to a reasonable, constitutional amount.

STATEMENT REGARDING ORAL ARGUMENT

Given the large appellate record in this case, and the multiple issues presented, St. Vincent believes that oral argument will benefit the Court.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: 

Jennifer G. Anderson

Emil J. Kiehne

Attorneys for Appellant St. Vincent Hospital

Post Office Box 2168

Bank of America Centre

500 Fourth Street NW, Suite 1000

Albuquerque, New Mexico 87103-2168

Telephone: 505.848.1800

AND

WILSON ELSER MOSKOWITZ EDELMAN
& DICKER LLP

Lori S. Nugent

Melissa K. Ventrone

Attorneys for Appellant St. Vincent Hospital

55 West Monroe Street

Suite 3800

Chicago, IL 60603-5001

312.704.0550

AND

HINKLE, HENSLEY, SHANOR & MARTIN LLP

David B. Lawrenz

Attorneys for Appellant St. Vincent Hospital

218 Montezuma Avenue

P.O. Box 2068

Santa Fe, New Mexico 87504-2068


WE HEREBY CERTIFY that the foregoing document
was served on the following persons this
3rd day of May 2013 by first-class mail:

Jerry Todd Wertheim
Jones, Snead, Wertheim & Wentworth, P.A.
P.O. Box 2228
Santa Fe, New Mexico 87504-2228

J. Thomas Rhodes, III
Laura Pazin Porter
Rhodes Law Firm
126 Villita Street
San Antonio, Texas 78205

Ethan Shaw
Moore Landrey, LLP
1609 Shoal Creek Blvd., Suite 100
Austin, Texas 78701

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: 
Emil J. Kiekne

Y:\dox\client\84724\0001\PLEADING\W1922577.DOC