IN THE NEW MEXICO COURT OF APPEALS

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

REPLY BRIEF
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

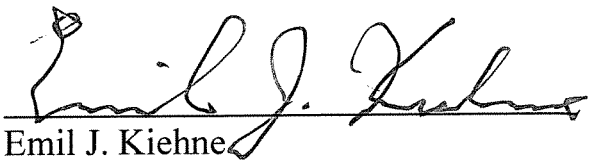
ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

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 4,393 words.

DATED this 19th day of September 2013.



Emil J. Kiehne

TABLE OF AUTHORITIES

New Mexico Cases

Cases From Other Jurisdictions

Statutes

Rules

INTRODUCTION

Plaintiffs' Answer Brief confirms the simple truth: the trial was fundamentally unfair. Plaintiff does not claim that the alleged errors were harmless. The trial court's rulings abused its discretion and kept the jury from learning the truth, unfairly precluding St. Vincent Hospital ("SVH") from presenting evidence, denying SVH the ability to defend itself, and allowing Plaintiffs to disregard the law. Plaintiffs' closing argument repeatedly went outside the record, encouraged jurors to base their verdict on speculation and conjecture, and improperly incited juror passions and prejudices. The result was a staggering punitive damages award of $9,750,000.

Plaintiffs' Answer Brief fails to address SVH's arguments directly. Instead, Plaintiffs confuse simple issues by raising irrelevant arguments, twisting facts, citing no case law supporting novel arguments, and citing case law irrelevant to the arguments presented.

The conclusion is inescapable: the fundamentally unfair trial resulted in an unconstitutionally excessive punitive damages award. A new trial is the only remedy that removes the taint.

I. ARGUMENT

A. Precluding the Comparative Fault Defense was an Abuse of Discretion.

Plaintiffs fail to substantively address the court's abuse of discretion in precluding the cross-examination of Dr. Mansfield about the fault of THI of New Mexico at Vida Encantada LLC ("Vida"). Instead, Plaintiffs assert meritless arguments in an effort to excuse preclusion of this testimony. (AB 17-21).

1. The Limitation on Weiland's Testimony Did Not Limit Dr. Mansfield's Testimony

Plaintiffs first argue that the court's ruling limiting the testimony of an entirely different witness, SVH's expert, Dennis Weiland, somehow barred SVH from eliciting Mansfield's testimony. (AB 17-21). Plaintiffs assert that preclusion of SVH's comparative fault defense "flowed from [SVH's] discovery abuse and the tactical choices it made." (AB 17).

Plaintiffs are trying to rewrite history. Plaintiffs did not request limitation of any other witness's testimony (RP7:2330-32, Tr.2/14/2011:125-133), and the trial court's ruling only limited SVH's right to question Weiland (Tr.2/14/2011:132-33). Nothing precluded SVH from presenting its comparative fault defense entirely through Mansfield, which would have been especially effective as he was Plaintiffs' expert.

Mansfield testified that medical bills were "reasonably and necessarily incurred and caused by the treatment" SVH's treatment of Mr. Gonzales. Indeed,

Plaintiffs rely on Mansfield's testimony to argue that St. Vincent was responsible for the ulcers becoming infected at Vida, thereby inflicting pain on Mr. Gonzales and depriving him of mobility. (AB 15-16). This testimony opened the door for SVH to cross-examine Mansfield to obtain evidence that Vida's negligence caused these problems. *Jaramillo v. Fisher Controls Co., Inc.*, 1985-NMCA-008, ¶¶50-51, 102 N.M. 614 (parties may cross-examine witnesses on "matters that may modify, supplement, contradict, rebut or make clearer the facts testified to" on direct). Simply put, Plaintiffs introduced over $90,000 in medical bills for treatment at locations other than SVH through Mansfield's testimony, and attributed the infections and resulting pain to SVH, yet the court precluded SVH from cross-examining Mansfield regarding the negligent care that caused those injuries.

The court's ruling kept the jury from hearing about Vida's negligence and was an abuse of discretion. Plaintiffs argue that SVH is asking this Court for a "rescue" from the trial court's ruling concerning Weiland, but in reality Plaintiffs are the ones asking to be saved. Plaintiffs led the trial court into error, depriving SVH of a critical defense. Plaintiffs should not be heard to blame SVH for the consequences of their own overreaching.

2. Comparative Fault May Be Proven Through Others' Witnesses

Plaintiffs argue that SVH was precluded from obtaining comparative fault testimony from Mansfield because SVH did not have its own witness on Vida's fault. Yet Plaintiffs' counsel stated just the opposite after trial. Tr.4/18/2011:21 (conceding that comparative fault testimony can be elicited from opponent's expert). Plaintiffs' position is meritless.

3. Plaintiffs' Waiver Arguments are Meritless

Plaintiffs claim that SVH failed to preserve its right to obtain testimony from Mansfield, and waived its comparative fault argument because it did not make an offer of proof. (AB 19).

But an offer of proof is not required on cross-examination. *See Davey v. Davey*, 1967-NMSC-002, ¶26, 77 N.M. 303 ("an offer of proof is not necessary for preservation of error in the exclusion of testimony sought to be elicited on cross-examination of an adverse witness"). And even if it were, SVH properly preserved its claims. Rule 11-103(A)(2) provides that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and...in case the ruling is one excluding the evidence, the substance was made known to the court by offer or was apparent from the context within which the questions were asked."

Here, the substance was apparent. During Mansfield's cross-examination, SVH attempted to elicit evidence of Vida's comparative fault. Tr.2/15/2011:212:22-25; 214:21-23; 216:6-8. Plaintiffs objected, SVH explained that the testimony was to counter Plaintiffs' contention that the medical bills for treatment of the infected heel ulcers were caused by SVH's negligence, and the court sustained the objection, stating "[l]imit your cross-examination as to whether these bills—because I previously ruled that Vida Encantada, the care would not be allowed." *Id.* at 217:24-218:5. This exchange proves the trial court understood that SVH sought comparative fault testimony, and refutes Plaintiffs' assertions that SVH *never* advised the trial court that it desired to present comparative fault testimony.

Plaintiffs also assert that SVH intentionally decided not to continue questioning Mansfield (AB 24-27), but that is contrary to the record. After SVH explained that the testimony it sought had nothing to do with "successor tort," the trial court said "[g]o ahead and proceed and then we'll address successive tort." Tr.2/15/2011:219. But Plaintiffs' counsel then asked if his objection was sustained, and the trial court said his initial objection was sustained. Tr.2/15/2011:219. Plaintiffs' initial objection, of course, was that SVH should not be permitted to ask about comparative fault. Tr.2/15/2011:216:7-20. Thus, although the trial court

apparently wavered at one point, in the end it definitively sustained Plaintiffs' objection. Plaintiffs' Answer Brief somehow omits this critical point.

Plaintiffs' arguments are self-contradictory. Plaintiffs first argue that the trial court precluded the cross-examination because it knew SVH was trying to introduce evidence of comparative fault through Mansfield in order to evade its ruling on Weiland (AB 17-19). Plaintiffs then argue that absent an offer of proof, the trial court would have had no idea that SVH was trying to present comparative fault evidence (AB 19-21). After that, Plaintiffs return to the story that the trial court decided to preclude comparative fault testimony to enforce its ruling on Weiland, but then switch back to the argument that SVH never alerted the trial court that it wanted to present comparative fault testimony. (AB 21-23). Plaintiffs' inability to get their story straight confirms that their arguments lack merit.

4. Successive Tortfeasor Claim Does Not Bar Comparative Fault Testimony

Plaintiffs appear to assert that evidence of Vida's fault was properly barred because it would have resurrected Plaintiffs' successive tortfeasor claim. (AB 25). This is contrary to New Mexico law. *See, e.g.*, *Payne v. Hall*, 2006-NMSC-029, ¶14, 139 N.M. 659.

Based on a pretrial ruling, Plaintiffs' successive tortfeasor liability claim was out of the case because Plaintiffs voluntarily gave it up. RP1977-1991, 2051-2054. The ruling did not preclude SVH from presenting evidence on its comparative fault

defense. Comparative fault evidence would not have allowed Plaintiffs to resurrect their successive tortfeasor liability claim – Plaintiffs cite no authority for that proposition (AB 26). And SVH did not curtail its cross-examination due to some fear that cross-examining Mansfield would somehow resurrect Plaintiffs' successive tortfeasor claim (AB 27-28). Not only does this theory lack any support in the record, but, as noted above, the trial court in the end sustained Plaintiffs' objection that SVH should not be allowed to ask Mansfield about Vida's comparative fault. *That* is what prevented SVH from asking about comparative fault.

5. The Trial Court's Error Was Not Harmless.

Plaintiffs do not dispute that Mansfield would have testified that Vida also was at fault. Nor do Plaintiffs dispute that precluding this testimony was prejudicial .

B. Precluding Nurse Ruzicka's Testimony Was Error.

Plaintiffs do not dispute that Ruzicka had extensive wound care experience. Plaintiffs assert that SVH did not make an offer of proof on Nurse Ruzicka's testimony, and that Ruzicka's licensure precluded his testimony.

A formal offer of proof is not necessary to preserve an issue. Rule 11-103(A)(2). The "substance of the evidence" to be introduced must be "apparent from the context within which the questions were asked." Based on Plaintiffs'

motions *in limine* to bar SVH's experts, and counsel's argument, the court and Plaintiffs knew that Ruzicka would testify that SVH's nurses did not breach the standard of care. RP7:2339 (Plaintiffs acknowledged that Ruzicka intended to testify that the "nursing care provided at St. Vincent hospital met the standard of care."); Tr.2/16/2011:9-10, 90-100. The Court's ruling states that Ruzicka "may not opine on the ultimate issue of causation or standard of care" or opine on whether the RNs met the standard of care. *Id.* at 99:23-100:2. No offer of proof was necessary.

Plaintiffs' assertion that Ruzicka's status as an LPN prohibited his expert testimony on an RN's provision of wound care is contrary to precedent. *See e.g., Baerwald v. Flores*, 1997-NMCA-022, ¶9, 122 N.M. 679 ("[a]n expert witness" "may be qualified on foundations other than licensure under Rule 11-702."); *Madrid v. Univ. of California*, 1987-NMSC-022, ¶10, 105 N.M. 715 (Rule 11-702's use of the disjunctive "or" "indisputably recognizes that an expert witness may be qualified on foundations other than licensure.") Plaintiffs have not and cannot offer contrary New Mexico authority.

Notably, Plaintiffs do not assert that failure to permit Ruzicka's testimony was harmless, nor do they dispute that its exclusion prejudiced SVH.

C. Juror Bias

1. Reiss' Affidavit Should Have Been Considered.

Plaintiffs assert that Mr. Reiss' uncontroverted testimony was inadmissible, citing Rule 11-606(B)(1) NMRA. Relying on *Kilgore v. Fuji Heavy Indus.*, 2010-NMSC-040, 148 N.M. 561, Plaintiffs further assert that a juror may only testify regarding the limited issue of whether extraneous prejudicial information reached the jury, and that Rule 11-606(B) prohibits juror testimony concerning statements made during deliberations. Plaintiff's argument is not on point. The issue is whether the court could consider the affidavit in determining Mares' *qualifications* to serve on the jury.

Kilgore addresses impeachment of a verdict because extraneous information reached a jury, and does not address the initial qualification of a juror to serve. There is no authority supporting the assertion that testimony on juror untruthfulness during voir dire, or juror bias and action on that bias, should be ignored.

The court erred by reversing its prior ruling and failing to consider the evidence of Mares' untruthful answers under oath, and his biased conduct. "To question a juror concerning the truthfulness of her answers given on voir dire is a subject separate from the question of impeaching the jury verdict." *State v. Martinez*, 1977-NMCA-068, ¶12, 90 N.M. 595. Uncontroverted evidence

establishes Mares' bias and untruthfulness on his juror questionnaire and in voir dire, disqualifying him from service as a juror, and warranting a new trial.

2. Lack of Evidentiary Hearing Violated Due Process

Plaintiffs do not dispute that the court set the June 27, 2012 court appearance for the sole purpose of deposing Mares in the court's presence. Plaintiffs also do not dispute that—without prior notice to SVH—the court converted the parties' appearance for Mares' deposition into an evidentiary hearing.

Plaintiffs nevertheless assert that somehow "SVH had its jury bias claim heard at a meaningful time, in a meaningful manner." (AB 34). Due process requires "timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation ... and a hearing before an impartial decisionmaker." *State ex rel. Children, Youth & Families Dep't v. Pamela R.D.G.*, 2006-NMSC-019, ¶12, 139 N.M. 459.

SVH had no notice that the June 27, 2011 deposition of Mares would be converted into an evidentiary hearing. SVH had no notice that the trial court subsequently would decide not to schedule an evidentiary hearing to take testimony of witnesses not present for Mares' deposition. Thus, SVH had no notice that it needed to seek a continuance at the June 27, 2011 hearing in order

preserve an opportunity to present further testimony. This procedure violated SVH's due process rights.

3. SVH Exercised Due Diligence on Mares' Subpoena.

Plaintiffs argue that SVH lacked diligence in serving a subpoena on Mares, somehow justifying the court's failure to permit an evidentiary hearing and denial of SVH's Motion for New Trial. Plaintiffs assert that service was not accomplished because SVH neglected to pay a $40 fee to the sheriff's office. Plaintiffs ignore the fact that, due to difficulties encountered by SVH's process server in attempting to serve Mares, the trial court – not SVH – issued the subpoena. Tr.6/6/2011:31-32; RP8:2752-61.

Because the Court arranged service of its subpoena, no fee was required. NMSA 1978, § 4-41-16(A)(1)(sheriff may not collect fee "from the state or any state agency"). Even if a fee were required, a fee is due only if the Sheriff specifically demands advance payment. NMSA 1978, § 4-41-15. Uncontroverted evidence establishes that no demand for advance payment was made, even though SVH's counsel repeatedly communicated with the Sheriff's Department to determine whether the court's subpoena had been served. RP11:3564-66 at ¶¶10, 17, 22. New Mexico law does not support penalizing SVH for the Sheriff's failure to serve the court's subpoena. *See State v. Torres*, 1999-NMSC-010, ¶11, 127 N.M. 20.

D. Conduct Concerning Ms. Lucero Warrants a New Trial

Plaintiffs do not substantively address SVH's assertion that the wrongful removal of Ms. Lucero as Personal Representative unfairly prejudiced SVH. Plaintiffs contend that SVH did not object to the substitution of personal representatives, attempt to call Lucero as a trial witness, or read Lucero's deposition to the jury at trial. (AB 44).

Significantly, when Plaintiffs moved to substitute Jose Gonzales for Lucero, and during trial, SVH had no basis to doubt opposing counsel's representations to the court. Plaintiffs, however, benefitted from obscuring Lucero's evidence of Vida's fault.

Now, uncontroverted evidence establishes that Lucero was not voluntarily removed as Personal Representative, but was removed because she believes that Vida was more responsible for Mr. Gonzales' injuries than SVH. RP3048-RP3066. Additional evidence likely would have been discovered, absent the gag order against Lucero and SVH that Plaintiffs obtained without notice to SVH. Opposing counsel's unwillingness, or inability, to present contrary evidence is damning and supports reversal of the trial court's order denying SVH a new trial.

Plaintiffs ignore well-established case law holding that 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 the trial. *Apodaca v. United States*

Fidelity & Guar. Co., 1967-NMSC-250, ¶8, 78 N.M. 501. By misrepresenting the reasons for removing Lucero as Personal Representative and gagging Lucero and SVH, Counsel improperly prevented SVH from learning, and the jury from hearing, Lucero's views on Vida's fault. Had the jury learned that Lucero believed that Vida is more responsible than SVH for Mr. Gonzales' injuries, the verdict likely would have been different. Plaintiffs' successful suppression of Lucero's testimony was harmful and prejudiced SVH. Plaintiffs do not assert harmless error or lack of prejudice.

E. The Punitive Damages Award is Unconstitutionally Excessive

1. Procedural Due Process

Plaintiffs' assert jury instructions on punitive damages and post judgment motions preclude any procedural due process violation. (AB 36-37). It is illogical to assert that a *trial* complies with procedural due process because the injured party is given an opportunity to file *post judgment* motions.

Due process requires a fundamentally fair *trial* in which unambiguous laws are applied equally to all parties. *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984). Plaintiffs fail to provide any precedent to support the novel theory that procedural due process violations at trial can be cured by jury instructions or an opportunity to file post judgment motions. Here, the jury's verdict was the result of significant procedural errors made during trial that unfairly permitted the jury to

render its verdict based on speculation and conjecture, and on argument outside of the record that incited passions and prejudices. Jury instructions and post judgment motions cannot cure the procedural fundamental unfairness of this trial, which violated SVH's procedural due process rights.

Plaintiffs' assertion that de novo review is not required and great deference must be given to the jury's award is contrary to well-settled law. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (*de novo* standard of review applies to constitutional review of punitive damages awards). The court's refusal to abide by controlling precedent violated SVH's due process rights.

2. Passion and Prejudice Infected the Verdict

Plaintiffs contend that SVH is precluded from challenging the unconstitutionally excessive punitive damages verdict that resulted from Plaintiffs' inflammatory and prejudicial remarks made during closing argument. Plaintiffs argue that, although SVH raised the issue of remittitur in its docketing statement, it abandoned the argument by not explicitly identifying it in its Brief-in-Chief. (AB 49). Contrary to Plaintiffs' assertion, SVH's Brief in Chief requests as relief that "this Court reduce the punitive damage award to a reasonable, constitutional amount." (BIC 47).

Plaintiffs also argue that SVH failed to object to the statements of which it complains. (AB 49). But SVH objected during closing arguments when counsel referenced multiple hospitals in the CHRISTUS chain, and when counsel referenced huge corporations, pointing out that the district court had previously instructed Plaintiffs' counsel not to discuss those matters. Tr.2/17/2011:146:2-17, 149:14-24. Even without any objection, "a judgment will be reversed and a new trial ordered where lawyers go outside the record when they address the jury or attempt to influence the minds of the jury against opposing litigants." *Grammer v. Hohlhaas Tank and Equip. Co.*, 1979-NMCA-149, ¶36, 93 N.M. 685. The uncontroverted evidence demonstrates that Plaintiffs' went outside the record extensively with improper remarks that, taken individually or cumulatively, incited juror passions, prejudices, partiality, and sympathy, inducing the unconstitutionally excessive punitive damages award.

Plaintiffs do not directly dispute SVH's contention that Plaintiff's counsel improperly implored the jury to use a punitive damages award against SVH to "send a message" not only to SVH, but to hospitals in the rest of New Mexico and "in all places where the hospital for this chain operates." *See* (BIC, 34). Plaintiffs' closing argument was replete with instances of improper argument outside of the record, and incitement of juror passions, prejudices, partiality, and sympathy. Plaintiffs dismiss these examples, stating that "[i]n each instance about which SVH

complains, counsel aimed his argument to the purposes of punitive damages: punishment and deterrence of others from the commission of like offenses." (AB 51). This does not excuse argument outside of the record or encouraging jurors to speculate or assess punishment based on passion and prejudice rather than application of the law to the evidence in the record.

Plaintiffs contend that *Campbell v. State Farm Mut. Auto Ins. Co.*, 98 P.3d 409, 417 (Utah 2004) supports their assertion that a punitive damages award in the upper permissible range is justified "because a lack of remorse increases the likelihood of recidivism." (AB 51). Notably, the *Campbell* court explicitly states that it "cannot invoke deterrence as a justification for punitive damages based on conduct dissimilar to that which [the defendant] inflicted on the [the plaintiffs]." ¶35.

Plaintiffs assert that their reference to "thousands of Alfred Mr. Gonzales" was not intended to encourage jurors to punish SVH for treatment of non-parties. (AB 52). Plaintiffs assert that, under *Grassie v. Roswell Hospital Corp.*, 2011-NMCA-024, ¶54, 93 N.M. 685, closing remarks regarding "thousands of Alfred Mr. Gonzales" did not run afoul of *Phillip Morris USA v. Williams,* 549 U.S. 346 (2007) (which prohibits such arguments) because they were made in the "context of deterrence and public safety." (AB 52). Unlike here, where counsel referred to the "thousands of Alfred Mr. Gonzales that are...laying in [SVH's] hospitals right

now in *Texas, in Louisiana, in Mexico...,*" Tr.2/17/2011:146 (emphasis added), the *Grassie* closing was permitted because it did not refer to injuries purportedly inflicted on other non-parties, only referring to the hospital's parent corporation. *Grassie*, at ¶54. There was no evidence concerning any SVH patient other than Mr. Gonzales or any other SVH hospital location. Plaintiffs' argument improperly encouraged jurors to speculate that there were thousands of SVH patients in numerous hospitals in the same circumstances as Mr. Gonzales, violating SVH's right to a fair trial.

Plaintiffs assert that it was permissible to refer to SVH's revenue and non-profit status because this was linked to SVH's unwillingness to spend enough to train its nurses, and presented to demonstrate that a large punitive award was needed to deter SVH. (AB 52). There is no evidence in the record that Mr. Gonzales' injuries were caused by unwillingness of SVH to spend money to train nurses, so this argument was improper.

The record shows that counsel mentioned SVH's purported corporate wealth and non-profit status at least 10 times during closing and rebuttal, and invited the jury to infer that a "huge corporation" such as SVH makes millions of dollars and then fails to pay taxes on this income. 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.

There is no evidence that SVH fails to pay any taxes it owes, nor is there evidence that its purported wealth has any connection to Mr. Gonzales' injuries.

Plaintiffs' closing argument is replete with inflammatory statements going outside of the record, appealing to the passions, prejudices, and partiality of the jury, and violating SVH's right to a fair trial.

3. The Punitive Damages Award is Unconstitutionally Excessive

The punitive damages award is unconstitutionally excessive and should not be permitted to stand.

a. Reprehensibility

SVH's conduct is not sufficiently reprehensible to support the record-setting punitive damages award. The record does not support Plaintiffs' claim that their expert testified that SVH's nurses intentionally falsified charts, nor that SVH was required but failed to employ a wound care expert.

The record does not establish any requirement to employ a wound care expert, and uncontroverted evidence establishes that SVH employed Nurse Collins who was "certified" in wound care. Tr.2/15/2011:226:16-19.

Plaintiffs' expert did not testify that SVH intentionally falsified any charts, though she used that word at the prompting of Plaintiffs' counsel; rather, she testified that the nurses were not properly assessing Mr. Gonzales on those charts. Tr.2/15/2011:63-64.. Plaintiffs' experts conceded that the Pressure Ulcer

Prevention Protocol in place at SVH was "good." Tr.2/14/2011:10, 192. This conduct is not sufficiently reprehensible to support such a large punitive damages award.

Plaintiffs cite *Grassie* for the proposition that aggravated patient neglect by nurses supports a conclusion of reckless disregard for patient safety. But *Grassie* does not apply to this case. The hospital in *Grassie* (unlike SVH) neither argued nor presented any evidence refuting the plaintiff's assertion it was indifferent or recklessly disregarded the decedent's health. 2011-NMCA-024, ¶¶51-52. Here, Plaintiffs' assertions of intentional false charting and failure to employ a required wound expert are outside of the record, at best.

Although Plaintiffs characterize Mr. Gonzales as deaf, poor, paralyzed, and hobbled by a broken hip, no evidence indicates that SVH exploited Mr. Gonzales' financial vulnerabilities.

Nor have Plaintiffs presented any evidence establishing that SVH repeatedly engaged in prohibited conduct knowing or suspecting it was unlawful. *See Weidler v. Big J Enter.*, 1998-NMCA-021, 124 N.M. 591. Plaintiff relies on Nurse Frederick's opinion that SVH may have suffered from lack of training, poor charting, and inadequate staffing in support of this argument. But there is no evidence in the record that SVH knew or suspected that lack of training, poor

charting, or inadequate staffing was unlawful conduct yet repeatedly engaged in it. This record does not support the jury's huge punitive damages award.

Plaintiffs assert that incorrect assessment of Mr. Gonzales' condition amounts to intentional malice, trickery, or deceit, without any evidence supporting this assertion. This does not support the punitive damages award.

b. Ratio

No New Mexico case since *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) has upheld a ratio as high as the 16.38 to 1 ratio here in any case involving a substantial award of compensatory damages. The facts of this case do not support this unprecedented award.

Plaintiffs rely on *Continental Trend Res., Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996), to assert that verified costs may be used to calculate the punitive to compensatory ratio. But the Tenth Circuit only said it has "held that the cost of litigation to vindicate rights is an appropriate element to consider in justifying a punitive damages award." *Id.* (emphasis added). The court found evidence that the defendant thought it could impose its corporate will on the plaintiffs. Because the plaintiffs' legal costs likely exceeded compensatory damages, the court determined that "[n]othing in *BMW* would appear to prohibit consideration of the cost of those legal proceedings in determining the constitutionally permissible limits on the punitive damages award." *Id.* (emphasis

added). The court did not hold that legal costs could be used to calculate the ratio between punitive and compensatory damages. Notably, the court reduced the punitive damages award as unconstitutionally excessive.

c. Comparison to Civil Penalties

Plaintiffs do not dispute that the closest comparable civil penalties are for nursing home neglect, or that the maximum fine for neglect of a nursing home resident that results in death is $12,500. *See* NMSA 1978, §30-47-5(D). SVH's conduct did not cause Mr. Gonzales' death, yet the punitive damage award is $9,750,000 – 780 times the $12,500 maximum fine for nursing home negligence resulting in death.

Although Plaintiffs contend that SVH's conduct constitutes a felony under the Resident Abuse and Neglect Act, "The remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003). This case involves medical negligence causing pressure sores, not malicious conduct causing death. Thus, the punitive damages award of 780 times the maximum comparable fine is unconstitutionally excessive.

II. CONCLUSION

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

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

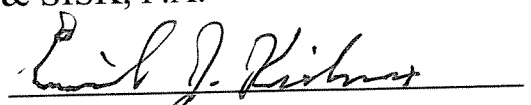
WE HEREBY CERTIFY that the foregoing document
was served on the following persons this
19th day of September 2013 by first-class mail:

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

J. Thomas Rhodes, III
Laura Pazin Porter
Mark D. Wolfe
Tom Rhodes Law Firm, P.C.
126 Villita Street
San Antonio, Texas 78205

Ethan Shaw
John Cowart
Shaw Cowart, LLP
1609 Shoal Creek Blvd., Suite 100
Austin, Texas 78701

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

By: 
Emil J. Kiehne

Y:\dox\client\84724\0001\PLEADING\W1999007.DOC