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,

v.

Ct. App. No. 32,147

ST. VINCENT HOSPITAL,

Defendant-Appellant.

PLAINTIFFS-APPELLEES' ANSWER BRIEF

APPEAL FROM
FOURTH JUDICIAL DISTRICT COURT
THE HONORABLE ABIGAIL ARAGON
No. D-412-CV-2008-00116

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I.
INTRODUCTION:
ST. VINCENT MUST LIVE WITH ITS DECISIONS ON APPEAL.

In 1989, Alfred Gonzales, who had worked his adult life at the cemetery in Raton, discovered he had a brain tumor. [Tr.V.II 189, Tr.V.III 84-86] The surgery to remove it left him deaf and with spastic paralysis. [Tr. V.II 189] His disability did not rob him of his desire to be self-reliant. He would chop wood and bring it inside his home. [Tr.V.II 87] He would feed himself. [Tr.V.II 87]

On July 8, 2006, Alfred Gonzales entered St. Vincent Hospital because he had broken his hip. [Tr.V.II 189; Ex. A, p. SVH/AG 00004] St. Vincent was to provide Mr. Gonzales a higher level of care than he could have received in Raton. [Tr.V.II 189] On July 9, 2006, a St. Vincent surgeon repaired his hip and gave him a prosthesis. [Tr.V.II 189; Ex. 1, p. SVH/AG 00008-9]

St. Vincent assessed Alfred Gonzales as vulnerable to pressure ulcers under its own protocols and policies throughout his stay. Nevertheless, day after day Mr. Gonzales went without the care he needed and could not provide for himself. St. Vincent's recklessness set him on a course to spend months in hospitals and nursing homes, much of the time suffering from infected, bone-deep pressure ulcers on his heels.

St. Vincent had to confront these difficult facts at trial. Its counsel made decisions before and during trial to attempt to minimize their effect on the jury. Still, the jury returned a compensatory damages award of $595,000 and a punitive damages award of $9,750,000 grounded in St. Vincent's reprehensible treatment of Mr. Gonzales.

St. Vincent now asks this Court to rescue it from its own decisions. Appellate courts, however, do not second-guess the tactical choices of litigants. *State v. Gonzales*, 2013-NMSC-016, ¶ 33, 301 P.3d 380. A rescue would allow St. Vincent all the benefits and none of the risks of its trial strategy. *Id.* Mr. Gonzales's family would assume all the risks of St. Vincent's decisions and forfeit the benefits of its own strategy. *See id.*

St. Vincent masks its request under a veil of exaggeration, selective memory and rhetoric. Take for example St. Vincent's first issue. St. Vincent asserts the district court "precluded" a comparative fault defense. In truth, the trial court never barred the comparative fault defense. St. Vincent abused discovery and limited its own ability to put on the defense. At other times, it made tactical decisions not to pursue it.

St. Vincent may mask its request for a rescue, but it cannot hide from reality. Its lawyers made choices they thought best, but the jury saw the truth about St. Vincent's callous treatment of Alfred Gonzales and acted on

the instructions given. This brief lifts St. Vincent's veil and shows why the verdict should be affirmed.

II.
STATEMENT OF FACTS: ST. VINCENT'S RECKLESSNESS AND MR. GONZALES'S SUFFERING.

A. A Man At Risk Of Pressure Ulcers.

Mr. Gonzales came to St. Vincent especially vulnerable to pressure ulcers. [Tr.V.II 189] The 1989 brain tumor surgery had left him deaf. [Tr.V.II 189] Pressure ulcers come about through unrelieved pressure from a hard surface or bone on the skin. [Tr.V.I 201] His deafness meant that he could not communicate with his nurses on how to move and shift his body to relieve pressure, [Tr.V.II 220] and this compounded his risk of skin breakdown. [Tr.V.II 220] He had no pressure ulcers on admission. [Tr.V.II 30]

The tumor surgery had a side effect of spastic paralysis, which meant his extremities were stiff and unreliable. [Tr.V.II 220] Spastic paralysis also increased his pressure ulcer risk. [Tr.V.II 189] He could not turn or move a body part to get pressure off. [Tr.V.II 17] His fractured hip left him immobile. [Tr.V.II 220] The fracture presented the gravest risk of pressure ulcers. [Tr.V.II 220]

St. Vincent knew of the risks to Mr. Gonzales upon assessing him under the hospital's Skin at Risk Policy at admission. [Tr.V.II 7, 30-32, 191, 223] When the hospital reassessed him each day, he remained at risk. [Tr.V.II 191]

B. Prevention Of Pressure Ulcers Is Goal Number One.

Prevention of pressure ulcers should have been the number one goal in Mr. Gonzales's treatment. [Tr.V.II 190] Pressure ulcers are far more difficult to treat than to prevent. [Tr.V.II 190-91] Plaintiffs' medical expert, Dr. Mansfield, explained: "[I]t's so much easier to prevent skin damage, a wound or a bed sore . . . than it is to try to fix it after the fact." "So that's why it's so important to assess the risk and to use the protocols that are in place to try and prevent any damage in the first place." [Tr.V.II 190]

Suzanne Frederick, plaintiffs' nursing expert, testified, "A number one goal is prevention." "You do not want these to get started." "They drain the body of nutrients." "They are painful." "They cause—depending on where they are, will cause further limitations of movement on the patient." "Prevention is absolutely the name of the game." [Tr.V.I 71] Basic nursing principles and the National Pressure Ulcer Advisory Panel both emphasize prevention of pressure ulcers. [Tr.V.I 204]

In theory, St. Vincent had the policies and protocols in place to prevent Alfred Gonzales's pressure ulcers. The St. Vincent Skin-at-Risk Policy told the nurses how and when to assess Mr. Gonzales's skin integrity and begin a plan to intervene with a doctor or wound care specialist. [Tr.V.II 10] St. Vincent's pressure ulcer protocols met the standard of care. [Tr.V.II 192]

Assessment, however, is only as good as the treatment that follows it. Alfred Gonzales would learn a torturous lesson: St. Vincent's pressure ulcer policies and protocols were nothing more than paper, covered with false promises.

C. A Catastrophe of Recklessness: St. Vincent's Systemic Failure To Prevent Mr. Gonzales from Developing Pressure Ulcers.

1. St. Vincent Should Have Had A Care Plan for Alfred Gonzales.

Under the Skin at Risk Policy, St. Vincent should have implemented its Pressure Ulcer Prevention Protocol. [Ex. 28, p. SVH/AG 00377] That protocol required a care plan for Mr. Gonzales. [Ex. 28, p. SVH/AG 00377-00377-00386; Tr.V.II 21-22] A care plan should create continuity and coordination of nursing care in three areas: [Tr.V.II 37]

- **Movement.**

St. Vincent needed to change Mr. Gonzales's position at least every two hours. [Tr.V.II 22] The hospital should have gotten Mr. Gonzales out of bed and moving as much as possible after surgery. [Tr.V.II 22-23]

- **Heel Protection And Inspection.**

Heels are prime sites for pressure ulcers, and therefore St. Vincent had to protect Mr. Gonzales's heels. [Tr.V.II 23] His limited mobility meant his heels might remain under pressure even with movement and remobilization. [Tr.V.II 23] Offloading is the simplest way to protect a patient's heels. [Tr.V.II 24] St. Vincent could have offloaded Mr. Gonzales's heels by placing a pillow under the calves that elevates the heels and feet off the bed. [Tr.V.II 24] A nurse can also use a Podus boot, a device that suspends the heel and offloads pressure. [Tr.V.II 26-27] St. Vincent could have also given Mr. Gonzales a pressure reduction mattress. [Tr.V.II 29]

St. Vincent must detect early signs of skin changes to prevent them from getting worse. [Tr.V.II 11] Every shift, nurses must inspect the skin for signs of unrelieved pressure. [Tr.V.II 11] If the beginning of a breakdown is seen, the nurse should then coordinate care with a physician or wound care specialist. [Tr.V.II 12-13]

- **Nutrition.**

St. Vincent should have included a nutritionist in its care plan. [Tr.V.I 184] The malnourished are at risk for pressure ulcers because of a lack of nutrients to maintain the skin. [Tr.V.I 201-02] Mr. Gonzales fit this profile. [Tr.V.I 184]

St. Vincent had the tools to implement a care plan with these components, [Tr.V.II 55-56, 191-92] but it did not have the systems and staff to make those tools work for Mr. Gonzales. A well-implemented care plan never materialized, and St. Vincent's care became a catastrophe of recklessness.

2. St. Vincent Systematically Failed To Prevent Mr. Gonzales From Developing Pressure Ulcers.

St. Vincent failed globally to follow its own pressure ulcer policies and protocols. "I would say that the pattern is haphazard care, just not paying attention to it, and which . . . raises concerns about the training of these nurses, the supervision of these nurses and possibly the staffing, the number of . . . nurses." "But more importantly, the training and consistent care he got." [Frederick, Tr.V.II 71] "So there's a systems problem here." "The training of nurses, the supervision of the nurses, it does as a nurse administrator make you wonder, do they have enough nurses working?"

"What is going on that this basic nursing is not getting done?" [Tr. V. II 54-55, 71] "There is evidence of lack of training." [Tr.V.II 55]

Dr. Mansfield called the pressure ulcer prevention care for Alfred Gonzales "indifferent" and noticed St. Vincent did not offload his heels, which "speaks to a sort of disorganized system." [Tr.V.II 196] "There [was] obviously not enough training or not enough emphasis on pressure ulcer prevention at the hospital." [Tr.V.II 196] ". . . [T]hey just didn't have a system in place for someone that they knew was at risk every single day they assessed and found him to be at risk for pressure ulcer development, but yet never until . . . July 13th [did St. Vincent take] the protocols and appl[y] them to Mr. Gonzales, which would have prevented this pressure ulcer." [Tr.V.II 196-97] St. Vincent violated the standard of care and its own protocols in Alfred Gonzales's case. [Tr.V.II 192].

St. Vincent's care became inconsistent, disorganized and dangerous. [Tr.V.II 37-39, 49, 71] The absence of a care plan demonstrated a reckless indifference to Mr. Gonzales's safety. [Tr.V.II 36-37] St. Vincent's lapses encompassed all three areas that should have been in the care plan.

- **Movement.**

St. Vincent repeatedly failed to turn Mr. Gonzales at least every two hours. [Tr.V.II 39] The hospital turned and repositioned him only about 50 percent of the time. [Tr.V.II.194]

- **Heel Protection And Inspection.**

St. Vincent never off-loaded his heels through the use of a pillow. [Tr.V.II 193-94] St. Vincent first offloaded one heel on July 13th when it placed one Podus boot, but it never placed a boot on the other heel. [Tr.V.II 194-95] St. Vincent never gave Mr. Gonzales a pressure reduction mattress. [Tr.V.II 35]

Mr. Gonzales received compression hose to prevent a blood clot. A nurse must remove the hose to inspect the heels. [Tr.V.II 46-47] The hose should be removed for thirty minutes each shift to allow the skin to breathe and to inspect the heels for changes. [Tr.V.II. 46-47] St. Vincent should have placed compression hose on Mr. Gonzales before July 12th; however, you cannot tell from Mr. Gonzales's chart whether St. Vincent did this. [Tr.V.II 68-69] On the 12th, St. Vincent never removed his compression hose during any shift. [T.V.II 68-70]

- **Nutrition.**

When Mr. Gonzales assessed as high risk for ulcers, the protocol called for a nutritional consult. [Tr.V.II 70] St. Vincent violated its policies and the standard of care by never having this consult. [Tr.V.II 57-58]

St. Vincent's care did not improve after Mr. Gonzales's surgery, even though the danger of skin breakdown increased. [Tr.V.II 42] After surgery St. Vincent still failed to protect his heels. [Tr.V.II 42-43] His records show eight separate violations of the standard of care over 3 different shifts on July 10th alone. [Tr.V.II 52-55.] Every shift on the 10th displayed a pattern: lack of a care plan, an absence of continuity and coordination of care and repeated violations of physicians' orders. [Tr.V.II 49, 52-55] On July 11th and 12th, St. Vincent's aggravated neglect continued: inconsistent turning and repositioning, no turn clock (a clock that allows a nurse to keep track of when Mr. Gonzales had been turned), no boots or heel protectors, and no specialty bed. [Tr.V.II 66-70]

3. St. Vincent's Recklessness Caused A Pressure Ulcer; St. Vincent Falsified The Chart.

By July 13th, St. Vincent's recklessness visited its inevitable consequence on Mr. Gonzales—he had developed a large pressure ulcer. [Tr.V.II. 62-63] The absence of a care plan caused Mr. Gonzales to develop

this sore. [Tr.V.II 39] St. Vincent at last implemented its pressure ulcer protocol after a reckless delay. [Tr.V.II 147] Alfred Gonzales did get the one boot on the 13th, too late to prevent an ulcer, but new violations would supplement the old. [Tr.V.II 72-73] A pressure ulcer, once discovered, should be staged, photographed and recorded. [Tr.V.II 73] St. Vincent did none of this. [Tr.V.II 73]

St. Vincent's July 14th records would prove to be false. St. Vincent assessed Mr. Gonzales as at low risk and in need of little pressure ulcer care after he had already developed a larger pressure ulcer. [Tr.V.II 63-64] St. Vincent should not record that it observed and assessed Mr. Gonzales for pressure ulcers while not having actually done it. [Tr.V.II 63-64] Medical records have to tell the truth or they mislead the next nurse or doctor who reads them. [Tr.V.II 55, 64] Misleading records amount to false charting, and false charting is illegal. [Tr.V.II 63-64]

July 14th brought the end of Mr. Gonzales's first stay at St. Vincent, and more neglect: His chart shows no turning, repositioning, hose removal or assessment on that day. [Tr.V.II 74-76] Alfred Gonzales's first hospitalization at St. Vincent ended as it began—with the hospital "not caring for him properly despite knowing that he is at risk." [Frederick, Tr.V.II 76]

4. At Trial St. Vincent Admitted to Its Own Recklessness and Illegal Charting.

The same St. Vincent nurses who cared for Mr. Gonzales confessed that the hospital knew of Mr. Gonzales's vulnerable state, ignored it, and then created false charts about it. The depth and breadth of St. Vincent's confessions are stunning:

- The hospital never instituted the pressure ulcer prevention protocol. [Karen Chadwick, Tr.V.II 161-162]
- Nobody turned Mr. Gonzales according to the protocol. [Chadwick, Tr.V.II 162-163]
- St. Vincent nurses do not review the pressure ulcer protocol consistently in providing care. [Carla Glidewell, Tr.V.III 22]
- Nobody monitored Mr. Gonzales's nutritional intake. [Chadwick, Tr.V.II 162-163]
- St. Vincent did not photograph the wounds as it should. [Glidewell, Tr.V.III 49]
- On multiple shifts, St. Vincent did not remove Mr. Gonzales's hose. [Glidewell, Tr.V.III 59-62]
- St. Vincent had no wound care nurse when its protocol called for one. [Patricia Collins, Tr.V.II 70, 248-249]

- The heel ulcers started at St. Vincent. [Collins, Tr.V.II 234-235]
- St. Vincent's nursing failures, in combination with Mr. Gonzales's vulnerable condition, caused his pressure ulcers. [Collins, Tr.V.II 238-239]
- Nurse Glidewell spoke with a colleague about how St. Vincent's nursing failures had combined with Mr. Gonzales's condition to cause "dark areas" on his heels. [Tr.V.II 238-239]
- Someone at St. Vincent illegally falsified part of the chart. [Glidewell, Tr.V.III 39]

The St. Vincent nurses did not do their job for Mr. Gonzales. [Collins, Tr.V.II 250] He did not get the care he deserved—care mandated by St. Vincent's own protocols. [Chadwick, Tr.V.II 164] If Nurse Chadwick could, she would go back and give better care to Alfred Gonzales. [Chadwick, Tr.V.II 164]

5. Mr. Gonzales's Second Stay Continued The Reckless Care That Marked His First.

On July 14th, Mr. Gonzales transferred from St. Vincent to Casa Real nursing home. [Tr.V.II 76] St. Vincent did not assess his pressure ulcers or remove his hose to look at his heels before discharge. [Tr.V.II 76] Mr. Gonzales returned to St. Vincent on July 21st with cellulitis at his surgical

site and wound pain altering his mental status. [Tr.V.IV 50-51] Wound photographs taken on July 22 show black heels. [Ex. 25] The ulcers were very deep and should have been a cause for great concern. [Tr.V.II 79-80] These ulcers absolutely caused Mr. Gonzales pain. [Tr.V.II 80]

Defects in St. Vincent's care still plagued Mr. Gonzales: failure to reposition him, to photograph and document his wounds, to monitor his nutrition, to assess him and to follow doctors' orders. [Tr.V.II 84-86] St. Vincent had again violated its own policies and protocols. [Tr.V.II 86]

Mr. Gonzales discharged from St. Vincent on August 4, 2006 to Vida Encantada nursing home. [Ex. 1, SVH/AG 00322] His discharge summary for August 4, 2006 told how St. Vincent had not met goal number one—prevention of pressure ulcers: "Heel decubitus with black heels (sic) was noted throughout the hospital stay . . . without progression and with no sign of infection." [Ex. 1 SVH/AG 00124-25] St. Vincent's breaches of the standard of care caused both of his heel pressure ulcers. [Tr.V.II 193-97]

Alfred Gonzales's pressure ulcers did not arise from the incompetence of a few nurses. St. Vincent's nursing system had imploded. Nurse Frederick does root-cause analysis for the United States Department of Justice, a process that attempts to find the deep reasons for a failure in medical care. [Tr.V.II 193-94] Root-cause analysis will separate the

mistakes of a few from an institution's failures. [Tr.V.II 194] Nurse Frederick applied root-cause analysis to St. Vincent's care of Mr. Gonzales: "[I] would characterize [the care] as reckless, but in doing root cause analysis, you begin to wonder what in the world is going on here because every nurse does have the opportunity to step in and get it right and get that ball rolling in the right direction. . . ." [Tr.V.II 54-55] She found extraordinary indifference: "No, this is not according to basic nursing care." "No, this is not common, thank goodness." [Tr.V.II 74]

D. St. Vincent's Recklessness Caused Infected, Deep Pressure Ulcers And Sepsis.

Mr. Gonzales went to Vida Encantada for skilled nursing care of his hip and the pressure ulcers. [Tr.V.II 198] He discharged from there to the care of his brother Jose in the middle of December, 2006. [Ex. 7, p. 23]

On December 31, 2006, Jose brought Alfred to the emergency room at Miners Colfax hospital in Raton with fever and lethargy. [Ex. 7, p. 23] He had become septic, and the pressure ulcers now lay open and deep, with purulent green discharge. [Ex. U, p. 2] The infected pressure ulcers had caused the sepsis. [Ex. U, p. 2; Tr.V.II 219] Exhibit 26, a photo of Mr. Gonzales's heels on December 22, 2006 shows the heels eroded to the bone, green-white with pus and black with dead tissue. These horribly painful

ulcers drained his system and made it impossible for him to walk, contributing to his long-term immobility. [Tr.V.II 80-83]

Mr. Gonzales spent from December 31 until January 5, 2007 at Miners Colfax. [Ex. 14, p. 3] From there he then went to Specialty Hospital Albuquerque for treatment of his infected pressure ulcers. [Tr.V.II 203-04; Ex. 7, p. 24-25] He discharged from the hospital on March 14, 2007 with orders for a hospital bed, home health care, a physical therapy evaluation and treatment. [Ex. 7, p. 914] Mr. Gonzales's pressure ulcers took until September of 2007 to heal. [Tr.V.II 211]

Mr. Gonzales had spent over a year coping with his heel ulcers, much of it in hospitals or nursing homes and in a vale of pain from heel pressure ulcers. [Tr.V.II 210-12] During the year the pressure ulcers were a cause of him going from mobile to debilitated. [Tr.V.II 210-212] St. Vincent's recklessness was a cause of it all: had it only prevented the pressure ulcers in the first place, Mr. Gonzales would have avoided agony, sepsis and immobility. [Tr.V.II 210-12]

ARGUMENT

III.
ST. VINCENT'S DECISIONS, NOT THOSE OF THE TRIAL COURT, PRECLUDED A COMPARATIVE FAULT DEFENSE.

The trial court never "precluded" St. Vincent's comparative fault defense. [BIC 9-16] St. Vincent's own decisions kept it from receiving an instruction on the defense. Its loss of its comparative fault defense flowed from discovery abuse and the tactical choices it made.

A. St. Vincent's Discovery Abuse Prevented It From Meeting Its Burden of Proof On Comparative Fault.

Comparative fault is an affirmative defense upon which St. Vincent carried the burden of proof. See NMSA 1978, § 41-3A-1(B) (1987) [RP 2241] St. Vincent disclosed its expert physician, Dr. Weiland, and his opinions on July 23, 2009, [RP 581-82] but did not disclose his comparative fault opinion until February 9, 2011 [RP 2337-38] with trial beginning on February 14, 2011. [RP 2258-59; Tr.V.I 1] St. Vincent disclosed no other witness qualified to testify that Vida Encantada bore responsibility for Mr. Gonzales's injuries. [RP 2337-38]

Plaintiffs filed a motion to limit Dr. Weiland's testimony to his timely disclosed opinions. [RP 2330-38] The district court granted the motion and limited his testimony to those opinions in his original disclosure,

including permitting him to respond to the opinions offered by Dr. Mansfield. [Tr.V.I 132-33] The district court's ruling, which did not bar Dr. Weiland's testimony altogether or strike the comparative fault defense, held St. Vincent to its discovery obligations and assured a fair trial. *See Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 12, 131 N.M. 317, 35 P.3d 972 (party must seasonably supplement expert witness disclosures or face sanctions in Rule 1-037(B)(2)); *see also State v. Ruiz*, 119 N.M. 515, 521, 892 P.2d 962, 968 (Ct. App. 1995) (witness disclosure rules give fair opportunity to test witness credibility and eliminate surprise, gamesmanship).

St. Vincent had no witness on comparative fault other than Dr. Weiland. It had foreclosed its own comparative fault defense. The district court could have barred the defense but chose a lesser sanction and held St. Vincent to its original disclosure. *See Lewis*, 2001-NMSC-035, ¶¶ 13, 15 (discovery sanctions short of dismissal entrusted to sound trial court discretion) (trial court may respond to discovery abuse by refusing to allow the disobedient party to support or oppose designated defenses or by prohibiting that party from introducing designated matters in evidence, citing Rule 1-037(B)(2)(b)). St. Vincent wants this Court to rescue it from

the consequences of its unsuccessful attempt to surprise plaintiffs with Dr. Weiland's comparative fault testimony.

This Court should not honor the request. Should this Court reverse for a new trial, St. Vincent will place Dr. Weiland or another expert on its witness list and designate that expert to testify about Vida Encantada's comparative fault. It will say that the plaintiffs suffer no prejudice because now they now have time to do discovery on the late-disclosed opinion. St. Vincent will have escaped the consequences of its discovery abuse and defeated a fair verdict at the same time. *See Gonzales*, 2013-NMSC-016, ¶ 33 (appellate court should not revisit tactical decisions to detriment of prevailing party).

B. St. Vincent Failed to Preserve This Issue Through An Offer of Proof.

St. Vincent claims that it should have been permitted to get comparative fault testimony on cross-examination from Dr. Mansfield that it could not elicit from Dr. Weiland. [BIC 9-16] In support, it cites excerpts from Dr. Mansfield's deposition attached to its motion for new trial. [BIC 11; RP 2902-09] St. Vincent never made the same offer of proof to the district court during trial (its counsel never mentioned comparative fault

during cross-examination of Dr. Mansfield). [Tr.V.II 210-23] St. Vincent chose to forgo an offer of proof, precluding appellate review.

"An offer of proof is essential to preserve error where evidence has been excluded." *Nichols Corp. v. Bill Stuckman Const., Inc.*, 105 N.M. 37, 39, 728 P.2d 447, 449 (1986) (citation omitted). An offer of proof informs the district court so that it may make a reasoned and intelligent decision. *State v. Rosales*, 2004-NMSC-022, ¶ 19, 136 N.M. 25, 94 P.3d 768. It also enables this Court to determine whether exclusion of the particular evidence was reversible error. *Id.* The offer of proof must be sufficiently specific to allow the district court to determine whether the evidence is admissible and this Court to review the district court's determination. *Id.* No offer of proof means St. Vincent has not preserved the exclusion of evidence for appeal. *Nichols*, 105 N.M. at 39, 728 P.2d at 449.

This Court sometimes excuses the absence of an offer of proof on cross-examination but should not do so here. *Empire West Cos., Inc. v. Albuquerque Testing Lab., Inc.*, 110 N.M. 790, 793 n.2, 880 P.2d 725, 729 n.2 (1990). St. Vincent at times says the Mansfield cross-examination would have only tested the basis of his opinions. [BIC 12] As St. Vincent also says in another part of the brief, it wanted to use its cross-examination to produce evidence supporting an affirmative defense. [BIC 10-11]

However, St. Vincent's counsel never told the district court any of this. Its silence deprived the district court of the benefits of an offer of proof.

This Court cannot decide whether the district court abused its discretion in limiting Dr. Mansfield's cross-examination because St. Vincent never told that court the basis for its need to cross-examine him. *See, e.g.*, *Empire West*, 110 N.M. at 792, 800 P.2d at 727 (extent of cross-examination within discretion of trial court). St. Vincent cannot make its offer of proof for the first time in its brief in chief. *See id.* (rejecting "long list of areas" for pursuit on cross-examination in brief in chief as substitute for offer of proof). St. Vincent had to make its desire to cross-examine Dr. Mansfield to support its comparative fault defense known to the district court; otherwise, the court could not know whether it had foreclosed a legitimate area for cross-examination. *Id.* "On appeal, [this Court] will not review such an allegation for abuse of discretion." *Id.*

C. The District Court Relied Upon Proper Objections During Dr. Mansfield's Cross-Examination And Did Not Abuse Its Discretion In Ruling On Them.

St. Vincent argues that plaintiffs' "advanced several grounds for preventing the cross-examination, all of which lack merit." [BIC 13] The hospital wants to uncouple the district court's evidentiary rulings from its ruling limiting St. Vincent to Dr. Weiland's timely disclosed opinions, but

the later rulings intertwine with the earlier one. When these are considered together, it becomes clear that the district court did not abuse its discretion. *See State v. Martinez,* 2007-NMSC-025, ¶ 7, 141 N.M. 713, 160 P.3d 894 (alleged error in the admission of evidence reviewed for abuse of discretion, meaning the facts and circumstances of the case do not support the ruling's logic and effect).

St. Vincent asked two questions arguably aimed at comparative fault. [Tr.V.II 212-13] Counsel objected because the questions went beyond the scope of direct examination and attempted to circumvent the ruling holding St. Vincent to its timely disclosure of Dr. Weiland's opinion. [Tr.V.II 213]

St. Vincent did not respond to the objection by arguing as it does in the brief in chief. It now claims that the line of questions was proper to prove comparative fault of Vida Encantada. [BIC 13] At trial, St. Vincent's counsel said only that the questions were proper because plaintiffs' damages included prolonged pressure ulcers and immobility. [Tr.V.II 213] The district court sustained the objection. [Tr.V.II 213-14]

St. Vincent did not have the right to go beyond the scope of direct to elicit evidence of comparative fault. Rule 11-611(B) NMRA; *accord State v. Smith,* 2001-NMSC-004, ¶ 23-24, 130 N.M. 117, 19 P.3d 254 (no abuse of discretion). The district court also acted within its discretion when it

sustained the objections to prevent St. Vincent from circumventing its earlier limitation on testimony. The district court must have the discretion to enforce its sanctions for discovery abuse to protect plaintiffs' right to a fair trial and to prevent future abuses. *See Gonzales v. Surgidev Corp.*, 120 N.M. 151, 157-58, 899 P.2d 594, 600-01 (1990). In sustaining objections to two narrow questions, the district court did not abuse its discretion by making a ruling "without logic or reason or clearly unable to be defended." *Id.*

St. Vincent further complains that plaintiffs' counsel misstated New Mexico law by saying the hospital had no witness to "sponsor" evidence of comparative fault. [BIC 13-14] St. Vincent misunderstands the argument. St. Vincent had no expert witness other than Dr. Weiland qualified to testify that Vida Encantada had fallen below the standard of care in treating pressure ulcers. *See Lopez v. Southwest Cmty. Health Servs.*, 114 N.M. 2, 7, 833 P.2d 1183, 1188 (Ct. App. 1992) (in medical malpractice case, because of technical, specialized subject matter, expert medical testimony usually required to establish departure from standard of care). The objection spoke to St. Vincent's discovery abuse in this case: It could not use Dr. Mansfield to substitute as expert witness for Dr. Weiland on comparative fault. To permit St. Vincent to do so would have been an end

run around the district court's limitation of Dr. Weiland's testimony to the original disclosure.

D. St. Vincent Did Not Preserve Its Successive Tortfeasor Liability Objection; It Made A Tactical Decision Not To Press Comparative Fault During Cross-Examination Because of Joint And Several Liability.

The district court never prohibited St. Vincent from examining Dr. Mansfield, instead permitting counsel to proceed but also reminding him that his questions may also require the court to instruct the jury on successive tortfeasor liability. [Tr.V.II 215-216; 218-19] The district court said, "Go ahead and proceed and then we'll address successive tortfeasor liability." [Tr.V.II 218: 25; 219: 1] St. Vincent's counsel then decided not to ask any questions about Mr. Gonzales's medical bills and curtailed his cross-examination to a few more questions (plaintiffs' counsel objected to none of them). [Tr.V.II 219-23] St. Vincent made a tactical decision to limit its cross-examination of Dr. Mansfield.

St. Vincent now argues that the district court erred in warning St. Vincent because "[s]uccessive tortfeasor liability and comparative fault are distinct theories." [BIC 14] St. Vincent, so its argument goes, had foreclosed successive tortfeasor liability through its motion for summary judgment on plaintiffs' settlement with Vida, but it nevertheless had a right

to present a comparative fault defense through the Mansfield cross-examination. [BIC 15] The position misstates the law, but it also contains a more basic flaw: St. Vincent never made the argument during trial.

"To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked . . . ." Rule 12-216(A) NMRA. St. Vincent's must have stated the grounds for claimed error with enough specificity to alert the mind of the trial court, and its statement must invoke a ruling. *State v. Nichols*, 2006-NMCA-017, ¶ 27, 139 N.M. 72, 128 P.3d 500. This requirement serves two purposes: 1) to alert the district court to the claim of error so that it may correct a mistake, and 2) to give the plaintiffs a fair opportunity to respond. *Id.*

Though St. Vincent at times argued that successive tortfeasor liability did not apply, it never made the argument it makes now on appeal: Summary judgment precluded a jury instruction on successive tortfeasor liability, but it nevertheless should be allowed to elicit proof of comparative fault on cross-examination. [Tr.V.II 206-22] This lack of preservation is fatal to St. Vincent's claim that the district court "erred" in warning the hospital about reintroducing successive tortfeasor liability to the case. *Id.* ¶ 29.

St. Vincent also chose not to cross-examine Dr. Mansfield further for tactical reasons, providing yet another reason to deny relief. *Gonzales*, 2013-NMSC-016, ¶ 33. The district court was correct. Cross-examination could reintroduce successive tortfeasor liability, and St. Vincent knew it. Mr. Gonzales had developed uninfected ulcers by his final St. Vincent discharge date, August 4, 2006. At Vida, his pressure ulcers became infected, and that infection caused him to become septic. He also developed contractures, which increased his immobility. II.D., *supra*. [Tr.V.II 211-12] Mr. Gonzales's ordeal presented a classic jury question: did St. Vincent's negligence cause a distinct original injury to Mr. Gonzales? *See Payne v. Hall*, 2006-NMSC-029, ¶ 19, 139 N.M. 659, 137 P.3d 599 ("When the claim is brought against the original tortfeasor, it is up . . . [to] the jury to decide, whether the plaintiff suffered a distinct original injury caused by the original tortfeasor's negligence.").

If the jury had found St. Vincent to have caused a distinct original injury, the successive tortfeasor doctrine would have imposed "joint and several liability on the original tortfeasor for the full extent of the injuries[:]" those caused by St. Vincent and the distinct enhancement of those injuries—sepsis and contractures—caused by Vida's alleged negligence. *Id.* ¶ 13 (citing *Lujan v. Healthsouth Rehab. Corp.*, 120 N.M.

422, 426, 902 P.2d 1025, 1029 (1995) and *Lewis*, 2001-NMSC-035, ¶ 34). St. Vincent had obtained summary judgment against the plaintiffs on successive tortfeasor liability. [RP 2051-54] The district court understood, however, that the affirmative defense of comparative fault of Vida might require reconsideration of the summary judgment and submission of the question of a distinct original injury to the jury. *See id.* ¶ 49 (where both successive and concurrent facts exist, counsel, with review of trial judge, will divide the claims appropriately for presentation to the jury). *See Tabet Lumber Co., Inc. v. Romero*, 117 N.M. 429, 431, 872 P.2d 847, 849 (1994) (summary judgment an interlocutory order, which district court should reconsider to avoid error).

Why, then, did St. Vincent curtail its cross-examination after the district court's warning? The hospital could have told the court that it wanted to elicit comparative fault from Dr. Mansfield and argue to keep its summary judgment, or even conceded that the original injury question must go the jury. UJI 13-1802E NMRA. It could have revived its third-party complaint for indemnification if faced with joint and several liability for Vida's negligence. *Lujan*, 120 N.M. at 427, 902 P.2d at 1030.

St. Vincent's counsel made a tactical decision grounded in St. Vincent's own discovery abuse. St. Vincent created a dilemma with its late

disclosure of Dr. Weiland's comparative fault opinion: the jury might receive a successive tortfeasor instruction, leading to joint and several liability for Vida's alleged negligence, but the discovery sanction left it with no testimony to support comparative fault. Insisting on comparative fault cross-examination introduced high risk but little possible reward—so St. Vincent moved on. St. Vincent must live with the consequences of its decision even if it dislikes the result. *See State ex rel. Children, Youth & Families Dep't. v. David F.*, 1996-NMCA-018, ¶ 31, 121 N.M. 341, 911 P.2d 235 (failure to ask specific questions on cross-examination concerns tactical decisions that this Court will not second-guess on appeal).

IV.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LIMITING MR. RUZICKA'S OPINION.

On May 22, 2009, St. Vincent disclosed Robert Ruzicka as an expert witness and represented that he was a registered nurse. [RP 511-12] Less than a week before trial, counsel received a CV from St. Vincent revealing that Mr. Ruzicka was a licensed practical nurse, not an RN. [Tr.V.III 94]

Plaintiffs' moved to strike him as a witness. [Tr.V.III 8-10] Plaintiffs argued that Mr. Ruzicka as an LPN could not assess pressure ulcer risk or prepare or implement a pressure ulcer care plan, functions reserved for an RN. [Tr.V.III 90-99] Therefore, he could not opine on the RN standard of

care. [Tr.V.III 90-99] The district court denied the motion to strike and permitted Mr. Ruzicka to testify "as to what is normally done in the scope or course of caring for an individual." [Tr.V.III 100: 7-8] The court did not allow him to give an ultimate opinion on the standard of care of an RN. [Tr.V.III 99-100] St. Vincent's counsel assented to the ruling and made no offer of proof. [Tr.V.III 100: 16-17]

The absence of an offer of proof dooms St. Vincent's appeal of the district court's ruling on Mr. Ruzicka. *Nichols*, 105 N.M. at 39, 728 P.2d at 449. Even with an offer of proof, the admission of expert testimony lies peculiarly within the sound discretion of the trial court. *Baerwald v. Flores*, 1997-NMCA-002, ¶ 6, 122 N.M. 679, 930 P.2d 816 (expert testimony ruling reviewed for abuse of discretion); *see State v. Moreland*, 2008–NMSC–031, ¶ 9, 144 N.M. 192, 185 P.3d 363 (no abuse of discretion where reasons both support and detract from decision).

The district court limited Mr. Ruzicka's ultimate opinion because as an LPN he was unqualified to opine on the standard of care of an RN. *See* NMSA 1978, § 61-3-3(J) (2005); 16.12.2.12(I) NMAC (1/1/1998) (Nursing Practice Act and related regulations). The district court properly exercised its discretion to exclude Mr. Ruzicka based on his lack of proper qualifications. *See Lopez v. Reddy*, 2005-NMCA-054, ¶ 22, 137 N.M. 554,

113 P.3d 377 (no abuse of discretion in excluding medical expert for lack of qualifications to perform task upon which he would opine); *see also Baerwald*, 1997-NMCA-002, ¶¶ 9-10 (trial court has discretion to decide whether expert is qualified because of experience rather than licensure).

V.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING ST. VINCENT'S MOTION FOR NEW TRIAL ON ALLEGED JUROR BIAS.

The district court did not abuse its discretion by denying St. Vincent's motion for a new trial for the alleged bias of one juror, Mr. Mares. [BIC 22-29] [RP 3297-98] *Moreland*, 2008–NMSC–031, ¶ 9 (denial of motion for new trial reviewed for manifest abuse of discretion) The district court denied the motion in part because of St. Vincent's lack of diligence in pursuing an evidentiary hearing on its allegation of jury bias. It also went beyond that, evaluating the evidence and concluding that the law did not support a new trial. [RP 3297-98]

St. Vincent's lack of diligence provides a logical basis for denying the motion. The district court granted St. Vincent permission to conduct discovery and have an evidentiary hearing to receive Mr. Mares's testimony in April 2011. [Tr., 4/18/11, 34] On June 6, 2011, St. Vincent admitted that it had not been able to serve a subpoena on Mr. Mares on its own. [Tr., 6/6/11, 28-29] The district court gave instructions to St. Vincent on

preparing and serving the subpoena. [Tr., 6/6/11, 31-32] The district court said, "I have granted that motion for an evidentiary hearing limited only to discovery issue as to Mr. Mares." "Now, let's go ahead and set that up." When the court proposed June 27th for the evidentiary hearing, St. Vincent accepted. [Tr., 6/6/11, 31: 3-12]

June 27th arrived but no subpoena had been served. St. Vincent neglected to pay the $40.00 service fee charged by the sheriff's office. [Tr., 6/27/11, 10-11] The district court admitted St. Vincent's exhibits related to Mr. Mares. [Tr., /6/27/11, 12-15] St. Vincent never asked for a continuance of the evidentiary hearing. [RP 3297] Later, the district court heard a motion to reconsider in which St. Vincent pressed the same excuses for its lack of diligence found in its brief in chief. [BIC 26; RP 3503-05]

On appeal the question is this: Did the district court abuse its discretion by relying on St. Vincent's lack of diligence as one of its reasons for denying the motion for new trial? The answer is no. "It is elementary that due diligence requires an attempt to compel [a witness's] attendance." *State v. Case*, 100 N.M. 714, 718-19, 676 P.2d 241, 246-47 (1984) (no abuse of discretion in denying continuance for lack of diligence in securing witness attendance).

The district court also acted within its discretion when it denied the motion on the substance. [RP 3297-98] St. Vincent built its juror bias argument around an inadmissible affidavit from a single juror about another juror's statement in deliberations. [BIC 21-28] St. Vincent never proved that Mr. Mares "misled" the court and counsel during voir dire or "falsely answered" his juror questionnaire. [BIC 23] Mr. Mares checked "no" on his questionnaire about having ever been sued. [RP 2524] After the verdict, St. Vincent came forward with some documents proving Mr. Mares had had some garnishment actions against him, including one by Alta Vista Hospital in Las Vegas. [Tr., /6/27/11, 12-15]

St. Vincent's counsel never asked in voir dire about whether anyone had been a defendant in a lawsuit. [Tr.V.I 83-107] Counsel questioned Mr. Mares individually about his questionnaire but never asked about the garnishments. [Tr.V.I 98-99] The district court could have denied the motion for new trial because of lack of diligent voir dire alone. *Lamphere v. Agnew*, 94 N.M. 146, 148, 607 P.2d 1164, 1166 (Ct. App. 1979). Mr. Mares may also have misunderstood or misapprehended what was being asked of him in the questionnaire. Misunderstanding whether a garnishment is a "suit" would not prove actual bias. *Cf. State v. Baca*, 99 N.M. 754, 755-56, 664 P.2d 360, 361-62 (1983) (even lack of candor in voir

dire will not prove impartiality). The district court decided that the garnishments did not prove bias on their face. [RP 3297-98]

The district court also concluded, correctly, that it could not rely on the juror affidavit. In an inquiry about the validity of a verdict, "[a] juror may not testify about any . . . statement . . . made . . . during the jury's deliberations[.]" Rule 11-606(B)(1) NMRA. A juror may not testify about the effect of anything upon another juror's vote or the other juror's mental processes concerning the verdict. *Id.* The district court may not receive a juror affidavit on these matters. *Id.*; *Kilgore v. Fuji Heavy Indus.*, 2010-NMSC-040, ¶ 12, 148 N.M. 561, 240 P.3d 648 (juror may testify on limited circumstances of whether extraneous prejudicial information improperly before jury; otherwise, Rule 11-606(B) prohibits juror testimony about statement in deliberations). St. Vincent did not assert that extraneous prejudicial information reached the jury—it claimed, as it does now, that the statement supposedly made during deliberations proved bias. [BIC 22-24; RP 3298] The district court correctly ruled that one juror cannot testify about another juror's statements during deliberations to prove bias. *Id.*

St. Vincent received due process on its jury bias claim. [BIC 28-29] "[T]he remedy for allegations of jury . . . bias is not an automatic new trial but rather a hearing in which [St. Vincent] has the opportunity to prove

actual bias." *Id.* ¶ 16 (citation, internal punctuation omitted). St. Vincent could not prove bias and through lack of diligence did not get a subpoena served. St. Vincent received due process. Any failures of proof are its own.

The district court even assumed St. Vincent presented the juror affidavit as proof of extraneous material reaching the jury and decided the juror statements had not affected the verdict. [RP 3298] *See id.* ¶ 21 (district court applies objective test, which probes probability of prejudice, to ascertain the impact extraneous material had on jury). St. Vincent had its jury bias claim heard at a meaningful time, in a meaningful manner. The district court, exercising sound discretion, disagreed.

VI.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REJECTING FALSE ALLEGATIONS OF MISCONDUCT BY MR. GONZALES'S COUNSEL.

In St. Vincent's distorted worldview, everyone commits misconduct but its own nurses, lawyers and executives. Having attacked the district court and a juror, St. Vincent turns to opposing counsel. [BIC 29-32] St. Vincent makes a false allegation: Mr. Gonzales counsel "removed" co-personal representative Edith Lucero before trial to prevent St. Vincent from calling her to testify about Vida's comparative fault. [BIC 31-32] The district court rejected this argument in ruling on a motion for new trial. [RP 3048-66, 3069-3170, 3320-67, 3682-85] This Court has no reason to

consider that decision an abuse of discretion. *Moreland*, 2008-NMSC-031, ¶ 9.

Jose Gonzales substituted for Ms. Lucero as personal representative before trial at her request and for her convenience. [RP 3077] St. Vincent counsel did not object to the amendment of the complaint to substitute parties. [RP 2377-78] However, nothing prevented St. Vincent from calling Ms. Lucero as a trial witness. St. Vincent had Edith Lucero's testimony as personal representative available for trial but decided not to use it. [RP 592-94, 1673-74]

St. Vincent knew Ms. Lucero's potential testimony long before trial, having deposed her in September 2009. [SM RP 592-94, 1673-74] It could have read her deposition to the jury or subpoenaed her for trial. St. Vincent is responsible for its own decision not to call Ms. Lucero. *Case*, 100 N.M. at 718, 676 P.2d at 246.

VII.
THE JURY RENDERED A CONSTITUTIONALLY REASONABLE PUNITIVE DAMAGES AWARD.

St. Vincent challenges the punitive damages award on procedural and substantive due process grounds. [BIC 32-47] Appellees answer the procedural due process question first and then demonstrate that the jury returned a punitive damages award, rooted in St. Vincent's reprehensible

conduct, within the bounds of the Due Process Clause. U.S. Const. amend. XIV.

A. The Punitive Damages Award Came About Through Fair Procedures And Equal Application Of The Law.

The punitive damages award came about through fair procedures as guaranteed by the Due Process Clause, and the district court equally applied the Rules of Civil Procedure and Rules of Evidence in conducting the trial. The Court should not reverse on procedural due process grounds. [BIC 40-42]

St. Vincent notes, correctly, that procedural regularity underpins the substantive due process analysis of Mr. Gonzales's punitive damages award. *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶ 12, 132 N.M. 401, 49 P.3d 662. Procedural regularity, St. Vincent also correctly states, creates a strong presumption of validity in Mr. Gonzales's punitive damages award. *Id.* From there, St. Vincent's procedural due process argument wanders into confusion. [BIC 41-42]

St. Vincent's confusion comes from its misunderstanding of procedural regularity. Procedural regularity flows first from the jury instructions. Those instructions should enlighten the jury as to punitive damages' nature and purpose, identify the damages as punishment for civil

wrongdoing of the kind involved, and explain that their imposition is not compulsory. *Id.* ¶ 13 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20 (1991)). The court gave UJI 13-1827, which informs the jury in all three areas. [RP 2406] The instructions guaranteed St. Vincent the procedural regularity due process demands. *See id.* (no procedural due process violation when instruction informs jury as described).

St. Vincent has availed itself of the last two guarantees of procedural regularity: trial and post-trial review of punitive damages by the district court, and appellate review. *Id.* ¶¶ 14-15. The court ruled on a motion for judgment as a matter of law on punitive damages and on a motion for new trial. [Tr.V.IV 77; RP 3682-85] St. Vincent has no genuine claim of procedural irregularity. *Id.*

Common sense answers the argument that unequal application of the law marked the trial. [BIC 41-42] A series of decisions within the district court's discretion cannot aggregate into a violation of procedural due process.

In what seems to be a procedural due process argument, St. Vincent asserts the district court refused "de novo review" by saying, "I must not substitute my judgment for that of the jury." [BIC 39] The point makes no sense: de novo review is an appellate standard. Also, the district court

made the statement in the context of all of the numerous motions for new trial and post-trial motions. [Tr., 3/5/12, 70] The district court reviews those motions, even the constitutional punitive damages motion, with deference to the verdict. *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, ¶ 48, 150 N.M. 283, 258 P.3d 1075, *cert. denied*, 2011-NMCERT-002, 150 N.M. 617, 264 P.3d 129.

Due process requires that St. Vincent have "an opportunity to present every available defense" affecting the punitive damage award. *Philip Morris v. Williams*, 549 U.S. 346, 354 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). [BIC 35] It did. "Every available defense" does not mean every defense it wished. *See id.* The district court declined only to give the comparative fault instruction, [Tr.V.IV 5] and that because of St. Vincent's discovery abuse, tactical decisions, and failures of proof. *See McWilliams v. Exxon Mobil Corp.*, 2012-1288, pp. 16-17 (La. App. 3d Cir. 4/3/13), 111 So.3d 564, 577 (no violation of right to every available defense affecting punitive damages where defenses lost to discovery sanctions).

B. The Verdict Is Constitutionally Reasonable.

In substantive due process analysis, this Court in effect "review[s] the award for reasonableness." *Littel v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 63, 143 N.M. 506, 177 P.3d 1080. The analysis respects the parties' right to

have the jury decide the case and determines only whether Mr. Gonzales's award is grossly excessive and therefore beyond the outer limits of due process. *Jolley v. Energen Resources Corp.*, 2008-NMCA-164, ¶ 31, 145 N.M. 350, 198 P.3d 376, *cert. denied*, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124 & *cert. denied*, 129 S.Ct. 1633 (2009). This Court assesses the record independently, but any doubts "concerning the question of what appropriate damages may be in the abstract, or owing to the coldness of the record, should be resolved in favor of the jury verdict." *Aken*, 2002-NMSC-021, ¶ 19 (citation and internal punctuation omitted).

This Court uses three guideposts to assess reasonableness: 1) the degree of reprehensibility of St. Vincent's misconduct; 2) the disparity between the harm or potential harm suffered by Mr. Gonzales and the punitive damages award; and 3) the difference between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases. *Id.* ¶ 20 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996)). Viewing the punitive damages award through the lens of these standards dispels "any general concern of reasonableness." *Id.* ¶ 19 (inquiry a fluid one, guided by "[a] general concern of reasonableness") (quoting *BMW*, 517 U.S. at 582-83).

1. St. Vincent's Reprehensible Mistreatment of Mr. Gonzales Justifies The Punitive Damages Award.

St. Vincent's reprehensible conduct provides "[t]he most important indicium of the reasonableness of [the] punitive damages award." *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 37, 140 N.M. 476, 143 P.3d 717, *cert. denied*, 2006-NMCERT-009, 140 N.M. 476, 143 P.3d 717 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)). This guidepost compares the damages to the enormity of St. Vincent's wrong apart from Mr. Gonzales's actual injuries. *Jolley*, 2008-NMCA-164, ¶ 32. These tests measure reprehensibility: whether Mr. Gonzales suffered physical rather than economic harm; whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; whether Mr. Gonzales had financial vulnerability; whether the conduct involved repeated actions or was an isolated incident; and whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Grassie*, 2011-NMCA-024, ¶ 50.

St. Vincent claims that none of these factors support the verdict; in fact, all of them do. [BIC 43-45] St. Vincent still does not comprehend the enormity of its wrong: near total abandonment of its responsibility to prevent a helpless from man developing pressure ulcers. Day after day,

shift after shift, St. Vincent's nurses did not follow the hospital's own protocols and policies. Basic nursing went undone. II.C., *supra*.

St. Vincent's failures showed an indifference to, and reckless disregard for, Mr. Gonzales's health and safety. Pressure ulcers must be prevented because once they arrive, they stay for a long time. Mr. Gonzales's ordeal with pressure ulcers proves how much they threaten health and safety. He suffered untold pain over months. He lost his mobility. He became septic from infected ulcers. II.C-D., *supra*.

Yet, St. Vincent acted as if pressure ulcer prevention should be left to luck. Nurse Frederick called the care reckless; Dr. Mansfield testified to St. Vincent's indifference. St. Vincent nurses, however, spoke loudest about the enormity of the wrong visited upon Alfred Gonzales: he deserved better. II.C.1-4., *supra*. *See Id.* ¶ 52 ("aggravated patient neglect" by nurses supported conclusion of reckless disregard for patient safety by hospital).

One could hardly find a more vulnerable person than Mr. Gonzales—deaf, poor, paralyzed, and hobbled by a broken hip. That vulnerability made St. Vincent's conduct more reprehensible. Where a victim such as Mr. Gonzales is so vulnerable that the risk of danger to him is enhanced, St. Vincent becomes more culpable. *See Cross v. City of Clovis*, 107 N.M. 251, 254, 755 P.2d 589, 592 (1988) (as the risk of danger increases, duty of care

also increases). The breach of that increased duty is also more likely to demonstrate a culpable mental state and increase the enormity of the wrong. The circumstances define the conduct: St. Vincent's cavalier attitude about pressure ulcer care given to one of its most vulnerable patients raised the level of its misconduct to recklessness. *See Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 269, 881 P.2d 11, 14 (1994), *cert. denied*, 513 U.S. 1151 (1995) (breach of duty more culpable when risk of harm is high). Mr. Gonzales's vulnerability made St. Vincent's wrong all the more enormous.

Mr. Gonzales needed St. Vincent to do its job and prevent pressure ulcers. He could not help himself or afford private nurses to do what St. Vincent would not. Reprehensibility analysis examines "the social odium that should attach to St. Vincent's conduct." *Grassie*, 2011-NMCA-024, ¶ 50. Society attaches great odium to a hospital that would forsake its duty to care for a disabled man. *See generally Yeskey v. Commonwealth of Pa. Dep't of Corrections*, 118 F.3d 168, 174 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998) (Americans with Disabilities Act condemns discrimination against the disabled as odious).

St. Vincent did not mistreat Mr. Gonzales by accident. Root-cause analysis discovered a system in which basic nursing just did not happen.

Nurse Frederick found several possible causes—lack of training, poor charting, inadequate staffing—none an accident. St. Vincent's wrong reflected not a single instance but a dysfunctional nursing system that would visit recklessness on patient after patient. II.C.1-2., *supra*. The punitive damages award meets the test for repeated instances of misconduct.

The jury even heard evidence of deceit. St. Vincent nurses charted that they had cared for Mr. Gonzales when they had not. This amounted to illegal false charting—and evidence of deceit. II.C.3., *supra*. St. Vincent's conduct is reprehensible on every level that matters. *See Chavarria*, 2006-NMSC-046, ¶ 37 (deceit more reprehensible than mere negligence).

2. The Punitive Damages Award Stands In Reasonable Proportion To The Damages Mr. Gonzales Suffered.

The second inquiry turns from conduct to consequences. This Court compares the award to the actual or potential harm Mr. Gonzales suffered. *Id.* ¶ 38. This "fluid analysis" sets a high standard for St. Vincent: "[I]t must be apparent that the amount of the award is so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice." *Id.* No particular ratio marks the constitutional line; no mathematical formula defines it. *See id.* This

inquiry calls for flexibility, not rigidity. *Id.* This proves especially true in a case like this one, marked by egregious behavior and non-economic harm—Mr. Gonzales's pain and suffering—both hard to detect and not easily converted to a dollar value. *Id.*

Punitive damages should relate reasonably to the harm that is likely to occur from defendant's conduct as well as to the harm that actually occurred. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993). St. Vincent's recklessness could have killed Mr. Gonzales. His pressure ulcers became infected, causing sepsis. II.D., *supra.* St. Vincent says this is a case about a few days of care, not a death case. [BIC 44] That sepsis did not kill Mr. Gonzales is not a testament to St. Vincent's care but a reason to affirm the award. *Id.* Had St. Vincent done its job and prevented the pressure ulcers, Mr. Gonzales would never have faced an often lethal condition. Other St. Vincent patients at risk of pressure ulcers, caught in a collapsed nursing system, could die from sepsis, or become immobile, or spend months in unspeakable pain from ulcers down to the bone. The punitive damages award bears a rational relationship to the harm Mr. Gonzales suffered, to the potential harm to Mr. Gonzales from St. Vincent's recklessness, and to the possible harm to other patients that might occur if

similar behavior is not deterred. *See id.* at 460-61 (possible harm to public appropriate consideration).

The ratio between the actual harm and the punitive damages verdict further illustrates that rational relationship. Single digit multipliers fall within the range of the presumptively acceptable; higher multipliers may comport with due process in egregious cases. *See Grassie*, ¶¶ 56-57; *see also Campbell*, 538 U.S. at 425 (few awards exceeding single digits "to a significant degree" will satisfy due process) (ratio of 145/1 excessive in insurance bad faith case). The ratio being just one part of proportionality review, *Chavarria*, 2006-NMSC-046, ¶ 36, this Court must always consider the punitive purposes of the award. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003).

For purposes of calculating the ratio, the harm and potential harm to Mr. Gonzales includes the compensatory damages awarded by the jury, costs of prosecuting the action and prejudgment interest. *See Cont'l Trend Res., Inc., v. OXY USA Inc.*, 101 F.3d 634, 642 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997) (litigation costs to vindicate rights part of potential harm for calculating ratio); *Goddard v. Farmers Ins. Co. of Or.*, 344 Or. 232, 269, 179 P.3d 645, 667 (2008) (same for prejudgment interest). Costs become part of potential harm because a wealthy defendant such as St.

Vincent may oppressively force or prolong litigation because it can afford to do so, and a plaintiff may not be able to bear the costs and the delay. *Cont'l*, 101 F.3d at 642. Considering prejudgment interest with compensatory damages is consistent with the directive in *Campbell* to assure punitive damages are proportional to both the actual and potential harm suffered by Mr. Gonzales. *Goddard*, 344 Or. at 269, 179 P.3d at 667.

The harm and potential harm to Mr. Gonzales therefore includes $595,000.00 in compensatory damages [RP 2741], $191,373.74 in prejudgment interest [RP 2741] and $60,987.24 in verified costs ($40,000 of which were granted). [RP 2471-75; 2742] These total $847,360.98, a conservative number given the limited costs taxable under Rule 1-068 NMRA. With the punitive damages award at $9,750,000, the ratio is 11.5/1. This ratio is just slightly over single digits; therefore, as with the punitives award in *Grassie*, it lies on the outer edge of that which is perhaps presumptively acceptable but is not so high as to raise a concern of constitutional dimension. *Grassie*, 2011-NMCA-024, ¶ 57.

3. Comparable Penalties Confirm The Award's Reasonableness.

The third inquiry examines civil or criminal penalties that could be imposed for conduct comparable to the misconduct that led to the punitive damages award. *Aken*, 2002-NMSC-021, ¶ 25. New Mexico has joined the

many critics who find the factor "ineffective and very difficult to employ." *Id.* Consideration of statutory penalties does little to aid in a meaningful review of excessiveness, *Id.*, and a civil penalty—even for comparable conduct—may be too low to have a reasonable deterrent effect. *Grassie*, 2011-NMCA-024, ¶ 58; *see Aken*, 2002-NMSC-021, ¶ 25 (other penalties least important indicium of reasonableness). Where reprehensibility and proportionality weigh in favor of the award, this Court may disregard the factor as unhelpful. *See id.* Given St. Vincent's reprehensible conduct and the proportionality of the award to the harm and potential harm suffered, this Court could uphold the award without resort to the third factor. *Id.* Were this Court to employ it, the guidepost further confirms the award's reasonableness.

The Resident Abuse and Neglect Act gave St. Vincent fair notice that its wrongful conduct could elicit substantial punitive damages. [BIC 46-47] NMSA 1978, § 30-47-5 (1990). St. Vincent is a "care facility" under the Act. Section 30-47-3(B). Mr. Gonzales was a "resident" because he "receive[d] treatment from a care facility. Section 30-47-3(I). St. Vincent violated the Act when, with gross negligence, it failed to take "reasonable precautions" to prevent damage to his health and safety. Section 30-47-3(F)(2). The hospital also violated the Act by, again with gross negligence, failing "to

carry out a duty to supervise properly or control the provision of any treatment, care, good . . . [or] service" to Mr. Gonzales. Section 30-47-3(F)(3).

St. Vincent committed felony criminal negligence under the Act. It recklessly failed to take reasonable precautions to prevent Mr. Gonzales's pressure ulcers and to supervise and control its nurses in providing his care. Criminal neglect causing physical harm or great psychological harm to Mr. Gonzales is a fourth degree felony, and causing great physical harm is a third degree felony. Section 30-47-5(B)(C). A third degree felony carries a sentence of three years imprisonment, and a fourth degree felony a term of 18 months. NMSA 1978, § 31-18-15(A)(9) & (10) (1977 as amended through 2007).

A conviction for patient abuse also carries a draconian civil penalty: mandatory exclusion from participation in Medicare and Medicaid. *See* 42 U.S.C.A. § 1320a-7(a)(2) (West 2003 & Suppl. 2011). The criminal and civil penalties gave St. Vincent fair notice of the punitive damages award and weigh in favor of the award.

C. This Court Should Not Reverse The Punitive Damages Award Because Of A Constitutional Challenge To Closing Argument.

St. Vincent argues that comments in closing argument aroused the jury's passion and prejudice, causing a punitive damages award that violated due process. [BIC 34-39] In the absence of proper objection in closing, St. Vincent asks for review under the fundamental error doctrine. [BIC 34] St. Vincent, however, has waived remittitur as grounds on appeal, making its fundamental error argument moot. Due process analysis does not scrutinize counsel's comments in closing other than as part of the overall review of reasonableness.

St. Vincent filed a motion for new trial asserting the same comments of counsel it raises here as a basis for remittitur of punitive damages. [RP 2762-70] *Allsup's Convenience Stores v. North River Ins. Co.*, 1999-NMSC-006, ¶ 51, 127 N.M. 1, 976 P.2d 1. The district court denied the motion, [RP 3682-85] and St. Vincent included the issue in its docketing statement. [DS 16, 48-51] Now St. Vincent argues for reversal because of counsel's closing only as part of its position that the punitive damages verdict is unconstitutionally excessive under the Due Process Clause. [BIC 32-40] "All issues raised in the docketing statement, but not argued in the brief in chief are deemed abandoned." *Fleming v. Town of Silver City*,

1999-NMCA-149, ¶ 3, 128 N.M. 295, 992 P.2d 308. St. Vincent has abandoned the issue that the district court abused its discretion by denying its motion for remittitur. *See North River*, 1999-NMSC-006, ¶ 51 (remittitur standards).

St. Vincent, then, is left only with its argument over whether the punitive damages verdict meets the standards of reasonableness of the Due Process Clause. [BIC 42-48] *Littel*, 2008-NMCA-012, ¶ 63 (passion or prejudice influenced punitive damages award and therefore violated Due Process Clause). Under the Due Process Clause, this Court analyzes counsel's comments in closing as part of its general inquiry into reasonableness. *See Aken*, 2002-NMSC-021, ¶ 23, (passion and prejudice affecting punitive damages verdict analyzed under second guidepost). This constitutional review is de novo, *Id.* ¶ 19, making the fundamental error doctrine moot.

De novo due process review, however, does not permit St. Vincent to ask for reversal of the punitive damages award solely because of counsel's comments during closing. [BIC 34-39] Such a rule would absolve St. Vincent's of its obligation to object during closing argument. *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 29, 766 P.2d 280, 289 (1988) (objections during closing necessary to permit correction by district court). St. Vincent

must demonstrate that the comments of counsel, together with other factors used to evaluate constitutional excessiveness, show an award so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice. VII.B.2., *supra*. St. Vincent has demonstrated no such thing.

In each instance about which St. Vincent complains, counsel aimed his argument to the purposes of punitive damages: punishment and deterrence of others from the commission of like offenses. UJI 13-1827 NMRA. St. Vincent's brief tends to forget the portions of closing tying the argument to the purposes of punitive damages. [BIC 35-40] [Tr.V.IV 144-55 (conduct unacceptable; people deserve better care; deterrence of inadequate funding of nursing; St. Vincent remorseless about neglect of Mr. Gonzales)] *See Campbell v. State Farm Mut. Auto Ins. Co*, 98 P.3d 409, 417 (Utah 2004), *cert. denied*, 543 U.S. 874 (2004) (punitive damages in upper range of due process justified because a lack of remorse increases the likelihood of recidivism).

St. Vincent complains that counsel referred to "thousands of Alfred Gonzales" in closing but removes the statement from its context. [BIC 36-37] Counsel did not make the statement to tell the jury to punish St. Vincent for the conduct of non-parties as prohibited by *Philip Morris*.

Counsel referred to "thousands of Alfred Gonzaleses" as a comment on the reprehensibility of St. Vincent's conduct and the need for strong deterrence. [Tr.V.IV 146-47] *See Grassie*, 2011-NMCA-024, ¶ 54 (remarks of counsel in closing did not run afoul of *Philip Morris* because aimed at larger context of deterrence and public safety).

Counsel did not discuss St. Vincent's revenue to invoke passion and prejudice against a large corporation. [Ex. 35; Tr.V.III 80-81; Tr.V.IV 147-48] Counsel linked evidence of St. Vincent's revenue and non-profit status to its unwillingness to spend enough to train its nurses. [Tr.V.III 79; Tr.V.IV 147-50] [BIC 37] He discussed the amount of revenue to suggest that the punitive damages award must be high enough to encourage St. Vincent to change its ways. [Tr.V.IV 150] *See Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159, 1184-85, 29 Cal. Rptr. 3d 379, 397, 113 P.3d 63, 78-79 (Cal. 2005) (financial condition one factor in fixing punitive damages award that serves goals of punishment and deterrence).

VIII.
CONCLUSION.

St. Vincent received a fair trial. The jury followed the instructions and responded reasonably to St. Vincent's reprehensible treatment of Mr. Gonzales. This Court should affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2013, I served a true and correct copy of the above and foregoing to the following via first class mail:

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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) NMRA. According to Microsoft Office Word 2010, the body of Plaintiffs-Appellees' Answer Brief, as defined by Rule 12-213(F)(1), contains 10,935 words.

DATED this 30th day of July, 2013.

JERRY TODD WERTHEIM

STATEMENT ON ORAL ARGUMENT

Plaintiffs request oral argument under Rule 12-214(B)(1). Oral argument would help the Court in resolution of the issues, particularly in the areas of the record on reprehensibility and St. Vincent's tactical decisions.