

COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JOSEPH LEE CHRISTOPHERSON, as Personal
Representative of the Estate of MERCEDES LOUISE
CHRISTOPHERSON, and JOSEPH LEE
CHRISTOPHERSON, individually,

COURT OF APPEALS OF NEW MEXICO
FILED

SEP 08 2015

McB

Plaintiffs-Appellees,

v.

Ct. App. No. 33,784

ST. VINCENT HOSPITAL, a New Mexico
Non-Profit Corporation d/b/a CHRISTUS ST.
VINCENT REGIONAL MEDICAL CENTER,

Defendant-Appellant.

ANSWER BRIEF

Civil Appeal from the First Judicial District Court, County of Santa Fe
The Honorable Raymond Z. Ortiz, District Judge

Jane B. Yohalem
Law Office of Jane B. Yohalem
P.O. Box 2827
Santa Fe, NM 87504

(505) 988-2826

Katherine W. Hall
Katherine W. Hall PC
500 Don Gaspar Ave.
Santa Fe, NM 87505

(505) 983-0743

D. Diego Zamora
The Zamora Law Firm, LLC
2011 Botolph Rd. #200
Santa Fe, NM 87505

(505) 986-2845

Counsel for Plaintiffs-Appellees

ORAL ARGUMENT IS REQUESTED.

TABLE OF CONTENTS

	Page
CITATIONS TO TRANSCRIPT OF PROCEEDINGS	iv
STATEMENT OF COMPLIANCE	v
TABLE OF AUTHORITIES	vi
NATURE OF THE CASE	1
SUMMARY OF FACTS AND PROCEEDINGS	3
I. Background	4
II. The Evidence Which Supports the Jury's Finding that St. Vincent was Negligent	5
A. <u>December 2nd through December 5th: Mercedes improves</u>	5
B. <u>December 6th: Signs of infection and oversedation</u>	6
C. <u>December 7th and 8th: Blood tests confirm a probable intra-abdominal infection</u>	8
D. <u>Hypoxia at critical levels</u>	9
E. <u>Additional signs that Mercedes was not ready for discharge on December 8th</u>	10
F. <u>Dr. Kovnat takes Mercedes off intravenous antibiotics</u>	10
G. <u>Mercedes spikes a fever and is tachycardic</u>	11
H. <u>Dr. Kovnat discharges Mercedes</u>	11

I.	<u>Breach of the standard of care</u>	12
III.	The Evidence that St. Vincent’s Negligence Was a Cause of Mercedes’ Death	12
A.	<u>Plaintiff contends St. Vincent’s premature discharge of Mercedes caused her death</u>	12
B.	<u>The evidence supporting the jury’s verdict on causation</u>	13
C.	<u>St. Vincent’s defense on causation</u>	14
D.	<u>The trial court’s exclusion of Dr. Pike’s unreliable opinion that marijuana and Xanax contributed to Mercedes’ death</u>	14
IV.	The Relevant Proceedings	16
A.	<u>The First Trial: The jury finds St. Vincent negligent</u>	16
B.	<u>The Second Trial: Defense counsel’s egregious misconduct</u>	16
C.	<u>The Third Trial: Verdict for the Plaintiff on causation and damages</u>	17
	ARGUMENT	17
I.	The District Court Properly Excluded Dr. Pike’s Unfounded and Unreliable Opinion that Marijuana and Xanax Contributed to Mercedes Christopherson’s Death	18
A.	The Trial Court’s Gatekeeping Function	18

B.	Dr. Pike’s Testimony that Marijuana is a Respiratory Depressant Was Not Based on Reliable Scientific Knowledge, and Was, Therefore, Properly Excluded	19
C.	There Was No Evidentiary Foundation, Direct or Circumstantial, for Dr. Pike’s Opinion that Marijuana and Xanax Caused Mercedes’ Death	21
1.	<u>The governing principles of law</u>	21
2.	<u>Toxic tort cases do not establish a different standard for the admissibility of Dr. Pike’s testimony</u>	24
D.	The Suggestion that Marijuana or Xanax Caused Mercedes’ Death is No More Admissible on Cross-Examination Than It is on Direct	27
E.	Conclusion	28
II.	The Trial Court Properly Limited the Second and Third Trials to Causation and Damages	29
A.	Whether an Issue is Separate and Distinct Depends on a Close Analysis of the Particular Circumstances of the Case	30
B.	Causation and Damages Are Separate and Distinct from the First Jury’s Finding of Negligence	31
1.	<u>The contentions of the parties</u>	31
2.	<u>New Mexico law supports the trial court’s ruling</u>	34
C.	The Court Properly Found, in the Alternative, that St. Vincent Waived Its Right to Seek a Full Retrial	36

D.	Strong Policy Reasons Support a Partial Retrial	38
III.	The District Court Acted Well Within Its Discretion in Granting a New Trial Based on Defense Counsel’s Calculated and Highly Prejudicial Misconduct During the Second Trial	39
A.	The Standard of Review	39
B.	Defense Counsel’s Conduct was Highly Improper	40
C.	Defense Counsel’s Calculated Misconduct was Both Central to St. Vincent’s Trial Strategy and Prejudicial	49
	CONCLUSION	51
	REQUEST FOR ORAL ARGUMENT	51
	CERTIFICATION	52

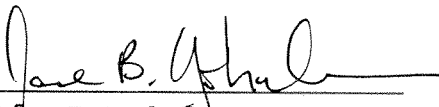
CITATIONS TO TRANSCRIPT OF PROCEEDING

Most citations are to the written transcript and record proper. They follow the format endorsed by our Supreme Court: The date of the hearing, followed by the abbreviation “**Tr**” followed by the page number. The record proper is cited to the volume number, followed by the abbreviation “**RP**”, followed by the page number. Citations to the *voir dire* are to the FTR disc, with the date, followed by “**CD**” followed by the time.

STATEMENT OF COMPLIANCE

The body of this *Answer Brief* exceeds the 35-page limit set forth in Rule 12-213(F)(3) NMRA.

As required by Rule 12-312(G) NMRA, I certify that this *Brief* uses a proportionally spaced typeface and that the body of the *Brief* contains 10,921 words, which is less than the 11,000 word maximum permitted by Rule 12-312(F)(3). This *Brief* was prepared using WordPerfect, Version X3, and the word count was obtained from that program.



Jane B. Yohalem

TABLE OF AUTHORITIES

	Page
NEW MEXICO STATUTES AND COURT RULES	
Rule 1-059(A) NMRA	30
Rule 11-705 NMRA	20
Rule 16-304(E) NMRA	42
NEW MEXICO CASES	
<i>Acosta v. Shell Western Exploration and Production, Inc.</i> , 2013-NMCA-009, 293 P.3d 917	27
<i>Andrews v. U.S. Steel Corp.</i> , 2011-NMCA-032, 250 P.3d 887	19, 22
<i>Apodaca v. U.S. Fidelity & Guaranty Co.</i> , 1967-NMSC-250, 433 P.2d 86	39, 51
<i>Baros v. Kazmierczwk</i> , 1961-NMSC-055, 362 P.2d 798	35
<i>Buffett v. Vargas</i> , 1996-NMSC-012, 914 P.2d 1004	30
<i>Chavez v. Valdez</i> , 1958-NMSC-034, 325 P.2d 919	49-51
<i>Four Hills Country Club v. Bernalillo County Property Tax Protest Bd.</i> , 1997-NMCA-141, 616 P.2d 422	20
<i>Grammar v. Kohlhaas Tank & Equip. Co.</i> , 1979-NMCA-149, 604 P.2d 823	40, 51
<i>Horany v. Paris</i> , 369 P.2d 636 (Okla. 1962)	51

<i>Martinez v. Ponderosa Products, Inc.</i> , 1988-NMCA-115, 772 P.2d 1308	31
<i>Parkhill v. Alderman-Cave Milling and Grain Co. of NM</i> , 2010-NMCA-110, 245 P.3d 585	18, 21, 25, 27
<i>Sanchez v. Dale Bellamah Homes of N.M., Inc.</i> , 1966-NMSC-040, 417 P.2d 25	30, 35
<i>Sanchez v. Wiley</i> , 1997-NMCA-105, 946 P.2d 650	35, 37
<i>Scott v. McWood Corp.</i> , 1971-NMSC-068, 487 P.2d 478	34-35
<i>State v. Alberico</i> , 1993-NMSC-047, 861 P.2d 192	18
<i>State v. Brown</i> , 1998-NMSC-037, 969P.2d 314	25
<i>State v. Downey</i> , 2008-NMSC-061, 195 P.3d 1244	18, 21
<i>State v. Frank</i> , 1979-NMSC-012, 589 P.2d 1047	37
<i>State v. Meadors</i> , 1995-NMSC-073, 908 P.2d 731	27
<i>State v. Torres</i> , 1999-NMSC-010, 976 P.2d 20	18
<i>Talbott v. Roswell Hosp. Corp.</i> , 2008-NMCA-114, 192 P.3d 267	39
<i>Zia Trust, Inc. v. Aragon</i> , 2011-NMCA-076, 258 P.3d 1146	21

FEDERAL AND OTHER STATES' AUTHORITIES

<i>Ahn v. Kim</i> , 678 A.2d 1073, 1079 (NJ 1996)	30
<i>Allen v. Pa. Eng'g Corp.</i> , 102 F.3d 194 (5 th Cir. 1996)	26

<i>Chicago, B. & O.R. Co. v. Kelley</i> , 74 F.2d 80 (8th Cir. 1934)	50
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993)	18, 20
<i>Gasoline Products Co. v. Champlin Refining Co.</i> , 283 U.S. 494 (1931)	30
<i>Green v. American Tobacco Co.</i> , 325 F.2d 673 (5 th Cir. 1963)	35
<i>Pritchard v. Liggett & Myers Tobacco Co.</i> , 370 F.2d 95 (3 rd Cir. 1966)	35
<i>Westberry v. Gislaved Gummi AB</i> , 178 F.3d 257 (4 th Cir. 1999)	26

NATURE OF THE CASE

This is an action for damages for the wrongful death of Mercedes Christopherson and for Joe Christopherson's loss of society, companionship and the special relationship he shared with his daughter.¹

Mercedes Christopherson was discharged by St. Vincent Hospital on December 8, 2008. St. Vincent's doctors and nurses ignored the signs of a deadly infection circulating throughout her body and of impaired breathing caused either by that infection, or oversedation, or both. Plaintiff's experts testified that these warning signs should have been evident to St. Vincent's doctors and nurses on December 8th.

St. Vincent sent Mercedes home at 4:30 p.m. without the supplemental oxygen, intravenous antibiotics, and monitoring she had been receiving in the hospital. Seventeen hours later, at 10:00 a.m. on December 9th, Mercedes was found comatose, without a heartbeat. She died the next day without regaining consciousness. She was 20 years old.

This case has been tried to a jury three times. After listening to the testimony of 16 doctors and nurses over ten days, the first jury found that St. Vincent had breached the standard of care and was negligent. After hearing St. Vincent's counsel argue improperly that Mercedes had caused her own death by consuming marijuana

¹The singular term "Plaintiff" is used to describe both the Estate and Mr. Christopherson individually.

and Xanax, the jury hung on the second question on the verdict form: Was St. Vincent's negligence a cause of Mercedes' death?

The trial court limited the Second Trial to causation and damages. The jury was instructed to accept the first jury's finding that St. Vincent had been negligent and to decide whether Mercedes' discharge by the hospital on December 8th in unstable condition and without support was the cause of her death. The court excluded as unreliable any claim that marijuana or Xanax caused Mercedes' death. Throughout the Second Trial, St. Vincent's counsel, in a demonstration of gross misconduct seldom seen in our courts, communicated to the jury his profound contempt for the Judge and for the court's rulings. Despite overwhelming evidence that Mercedes died because she was discharged by the hospital with an untreated infection in her bloodstream, complicated by oversedation from a powerful narcotic patch, the second jury returned a defense verdict. The court granted Plaintiff's motion for a new trial, finding that defense counsel intended to improperly influence the jury in favor of the defense and probably succeeded.

At the Third Trial, new counsel for St. Vincent respected the court's rulings and presented a hard-fought case on the merits of causation. The third jury found that Mercedes' discharge by St. Vincent's Hospital in violation of the standard of care caused her death.

St. Vincent has appealed on three issues: (1) the exclusion of the unfounded and unreliable opinion of its toxicology expert that marijuana and Xanax caused Mercedes' death; (2) the decision to retry the case on causation and damages alone; and (3) the grant of a new trial based on defense counsel's misconduct in the Second Trial. Plaintiff contends that each of the trial court's rulings was a proper exercise of the court's discretion. It took three lengthy and expensive trials, but the court made sure that the proceedings were fair and that the verdict was based on the evidence in the record. That verdict should be upheld by this Court.

SUMMARY OF FACTS AND PROCEEDINGS

Although St. Vincent concedes that the first and third juries' findings of negligence and causation are supported by substantial evidence, its statement of facts presents evidence favorable to the Defendant, improperly draws inferences favorable to the Defendant, and fails to present conflicting evidence which supports the verdict. Plaintiff, therefore, now presents the facts taking the appropriate standard of review into account.

I. Background.

Mercedes Christopherson became ill in November, 2008. She had two episodes of acute pancreatitis. This case focuses on her hospitalization at St. Vincent Hospital from November 25, 2008 through December 8, 2008. **11-28-11Tr16-17.**

Pancreatitis is an extremely painful disease. A blockage of a duct in the pancreas results in the release of highly caustic digestive enzymes which begin to digest the pancreas. **11-29-11Tr80-81.** In addition to causing extreme pain, pancreatitis creates a risk of a deadly infection from bacteria which can escape from the bowel into the abdominal cavity. **11-29-11Tr81, 83.** The standard of care requires doctors and nurses to be vigilant in identifying the signs of a developing infection because a pancreatic infection which is not treated with an extended course of intravenous antibiotics can quickly lead to death. **11-29-11Tr 84:24-25, 94.**

The Plaintiff's case focused primarily on St. Vincent's treatment of Mercedes from December 6th through her discharge on the afternoon of December 8th. Plaintiff claimed that St. Vincent's decision to discharge Mercedes on December 8th violated the standard of care and caused her death. **11-28-11Tr29-37.**

II. The Evidence Which Supports the Jury's Finding that St. Vincent was Negligent.

A. December 2nd through December 5th: Mercedes improves.

After a rocky course, Mercedes finally seemed to be showing some improvement December 2nd through the 5th. She was under the care of Dr. Kern, a hospitalist, who carefully documented a gradual decrease in Mercedes' temperature, heart rate, white blood cell count, and pain level. **Trial1, Ex.7CSVRMC/MC148, 150, 152, 155.**

Dr. Kern testified that a normal heart rate for Mercedes was below 100 beats/minute. 100 or above would be tachycardia, one of the warning signs of a developing infection. **KernTrial1Dep31-32.** According to Dr. Kern, Mercedes' oxygen saturation was normal at 91% on room air; 88% or below would be hypoxia, another warning sign of either infection, oversedation or both. **Id. 32, 107-09.** Dr. Kern testified she would consider a temperature reading of 100.5 degrees or higher a fever: a third warning sign of a deadly infection. **Id. 30-31.**

The Plaintiff's highly qualified infectious disease expert, Dr. Beck, agreed that the standard of care required careful evaluation of any reading reaching Dr. Kern's cut-off point. According to Dr. Beck, any such reading is a red flag warning

requiring careful investigation and treatment before Mercedes would be ready for discharge. **11-29-11Tr141:21-142:5.**

On December 2nd, Dr. Kern switched Mercedes' pain medication to Fentanyl. Fentanyl is a powerful narcotic pain medication administered through a patch placed on the skin. **KernTrial1Dep62, 64.** The very next morning, on December 3rd, Dr. Kern found that Mercedes had been placed on oxygen during the night by the nursing staff, something Mercedes had not previously needed. *Id.* **66.** Dr. Kern was worried about oversedation and made a point of regularly checking Mercedes' oxygen saturation on room air to be sure that she was not becoming hypoxic. *Id.* **67, 69.**

B. December 6th: Signs of infection and oversedation.

On December 6th, Mercedes' oxygen saturation on room air had dropped to 84%: below the 88% level Dr. Kern considered hypoxic. **KernTrial1Dep70-71, 101.** Dr. Kern noted that Mercedes was falling asleep in mid-sentence. *Id.* **107.** She concluded that Mercedes' shallow breathing, sleepiness, and hypoxia could well be due to oversedation from the narcotics used to control her pain. *Id.* Dr. Kern reduced the amount of supplemental pain medication and noted in Mercedes' chart that her oxygen saturation should be checked again the next day (December 7th) on room air and, if she was still hypoxic, her Fentanyl dosage should be cut in half, from 100 to 50 micrograms. *Id.* **113, 116** (100 micrograms of Fentanyl is equivalent to 200

milligrams of oxycodone or 300 milligrams of morphine – an extremely high dose of narcotics. **12-7-11Tr153**). Dr. Kern described Mercedes on December 6th as “the picture of hypoventilation.” Hypoventilation is the shallow breathing associated with oversedation from too much narcotic pain medication. **KernTrial1Dep127**.

Of equal concern to Dr. Kern was an increase in Mercedes’ temperature. It was above 101 degrees after having gradually decreased to normal levels between December 2nd and December 5th. *Id.* **99-100, 121**. Dr. Kern testified that she viewed even a low-level fever as a red flag signaling a possible infection. *Id.* She ordered a series of tests, including a blood test, to attempt to determine if Mercedes had developed an infection, and, if so, to identify its source. *Id.* **122-23**.

December 6th was the last day Dr. Kern was on duty that week. She handed Mercedes off to incoming hospitalist Dr. Daniel Kovnat. She left a note in Mercedes’ chart alerting Dr. Kovnat to her concerns. *Id.* **134-36**. She expected Dr. Kovnat to follow up, assessing the results of the tests she ordered; treating an infection if the results were positive; regularly checking Mercedes’ oxygen saturation on room air; and cutting the dose of Fentanyl in half if Mercedes remained hypoxic. She testified that only when all of these things were done would Mercedes be ready to go home. **KernTrial1Dep134-36, 142-44**.

C. **December 7th and 8th: Blood tests confirm a probable intra-abdominal infection.**

Dr. Kovnat first saw Mercedes on the morning of December 7th. **11-29-11Tr240.** The preliminary results for the blood tests drawn by Dr. Kern were positive for bacteria: Mercedes had a bloodstream infection. **11-29-11Tr243.** Recognizing that the source of the bacteria was most likely an intra-abdominal infection, a potentially deadly complication of pancreatitis, Dr. Kovnat started Mercedes on Zosyn, a broad-spectrum intravenous antibiotic (which must be continued for two weeks to cure an intra-abdominal infection) and postponed her discharge. **11-29-11Tr247-49, 92.**

On the morning of December 8th, Dr. Kovnat learned that the bacteria in Mercedes' blood were Group D Enterococcus. **11-29-11Tr137.** Group D Enterococcus is commonly found in the gut. **11-30-11Tr21.** These results confirmed Dr. Kovnat's initial hypothesis that the bacteria infecting Mercedes' blood came from a deadly intra-abdominal infection. *Id.*; **11-29-11Tr132.** Plaintiff's infectious disease expert, Dr. Beck, and hospitalist expert, Dr. Cheng, both testified that the test results should have ended any thought of discharging Mercedes on December 8th. **11-29-11Tr141-42; 11-30-11Tr34.**

D. Hypoxia at critical levels.

Early on the morning of December 7th, Mercedes' oxygen saturation on room air fell to 56%. On the morning of December 8th, it fell even lower – to 48%.

Trial1Ex7 (CSVPMC/MC 258). Mercedes was close to coding. **11-30-11Tr30.**

The nursing staff put Mercedes on supplemental oxygen, but did not call Dr. Kovnat to inform him of these near-panic levels. **12-7-11Tr123.** St. Vincent's nurses charted Mercedes' oxygen saturation levels in the wrong place. **12-1-11Tr23-24.** Because of these errors, (described by Plaintiff's nursing expert as violations of the standard of care), neither Dr. Kovnat nor Mercedes' day nurse learned of these critically low oxygen saturation levels. **11-29-11Tr259; 12-1-11Tr19-22, 124-26.**

By the time Dr. Kovnat examined Mercedes hours after these readings, her oxygen saturation had been brought up to near-normal levels with supplemental oxygen. **12-1-11Tr25.** Dr. Kovnat concluded that Mercedes was not hypoxic and could be discharged without supplemental oxygen. **11-29-11Tr260-61, 264-66.** Dr. Kovnat testified that he never evaluated whether Mercedes was oversedated on 100 micrograms of Fentanyl, as recommended by Dr. Kern, because he wrongly thought that Dr. Kern had resolved that issue. **11-29-11Tr276.**

E. Additional signs that Mercedes was not ready for discharge.

On the morning of December 8th, Mercedes' day nurse noted she was breathing shallowly and was pale. **12-1-11Tr18.** At 1:00 p.m., Mercedes was nauseous and unable to eat lunch. **12-1-11Tr36, 51.** Mercedes was in increasing pain that day. **12-1-11Tr37-38.**

F. Dr. Kovnat takes Mercedes off intravenous antibiotics.

After examining Mercedes on December 8th, Dr. Kovnat called Dr. Palestine, an infectious disease specialist (not an employee of St. Vincent) who had seen Mercedes earlier in her hospitalization. Dr. Kovnat told Dr. Palestine only two things about Mercedes' condition: (1) that her blood culture showed bacteria; and (2) that in all other respects Mercedes appeared well clinically and was "looking great" and was "chomping at the bit to go home." **12-5-11Tr94-95; 99-101, 99-103, 109.**

Based on the limited information provided to him by Dr. Kovnat, Dr. Palestine suggested that Dr. Kovnat remove the PICC line (an intravenous line providing nutrition), take another blood test, and then inject a single dose of Vancomycin, a short-acting antibiotic. **12-5-11Tr65.** Despite knowing that Dr. Palestine's suggestion was based on the incomplete information and made no sense in light of what Dr. Kovnat knew or should have known about Mercedes' condition, Dr. Kovnat took Mercedes off of the intravenous Zosyn he had appropriately started. **11-29-**

11Tr275; 11-30-11Tr110-11. Whether Mercedes' bloodstream infection came from the intravenous line, or from an abdominal infection, the standard of care required two weeks of intravenous antibiotics. **12-1-11Tr106; 11-29-11Tr92.**

G. Mercedes spikes a fever and is tachycardic.

At 4:30 p.m., the nurse called Dr. Kovnat. Mercedes' temperature was 100.9 degrees: she was running a fever. Her heart rate was 107: she was tachycardic. **12-1-11Tr38-40; 11-29-11Tr282-83.**

H. Dr. Kovnat discharges Mercedes.

Dr. Kovnat approved her discharge nonetheless. **12-1-11Tr46.**

St. Vincent put on a new 100 microgram Fentanyl patch just before Mercedes left the hospital. **12-1-11Tr65.** Mercedes was given a prescription for supplemental pain medication and for drugs to help her sleep, but no oxygen or antibiotics. **12-1-11Tr68-69; 11-29-11Tr263-64.**

Dr. Kovnat had drawn blood earlier in the day for another culture. He discharged Mercedes without waiting for the results, another violation of the standard of care. **11-30-11Tr36-37; 11-29-11Tr150.** The next day, after her cardiac arrest, all four cultures came back positive for bacteria. **12-7-11Tr83-84.**

I. Breach of the standard of care.

Expert testimony established that it was an egregious breach of the standard of care to send Mercedes home from the hospital on the afternoon of December 8th. If, for some reason, she was discharged, it was a breach of the duty of care to send her home without supplemental oxygen and intravenous antibiotics. **11-30-11Tr34-40.**

**III. The Evidence that St. Vincent's Negligence
Was a Cause of Mercedes' Death.**

A. Plaintiff contended that St. Vincent's premature discharge of Mercedes was a cause of her death.

Plaintiff contended that St. Vincent's discharge of Mercedes home on the afternoon of December 8th in a highly unstable condition, without determining whether she could survive without intravenous antibiotics and supplemental oxygen, caused Mercedes' death. Plaintiff did not ask the jury to decide whether the cause of death was sepsis or respiratory failure from oversedation, or both. Plaintiff contended that, in any case, Mercedes would not have died had she either remained hospitalized or gone home with intravenous antibiotics and supplemental oxygen. **12-12-13Tr111-12.** The jury in the Third Trial agreed. **15RP3464-16RP3465.**

B. The evidence supporting the jury's verdict on causation.

Dr. Reichard, the senior pathologist at New Mexico's Office of Medical Investigator (OMI) in charge of the investigation of Mercedes' death, testified that, to a reasonable degree of medical probability, Mercedes went into shock from septicemia on the morning of December 9th and that this was the cause of her death.

Trial3Ex20:5, 13. Dr. Reichard based his conclusion on micro-abscesses found on autopsy in Mercedes' heart tissue; the positive blood tests at St. Vincent before her discharge; and the entire hospital record. **Trial3Ex20: 30, 13-14, 9-10.** The federal Center for Disease Control confirmed the presence of micro-abscesses in Mercedes' heart tissue. **Trial3ReichardTestimony28.**

Dr. Beck, Plaintiff's infectious disease expert, agreed: Mercedes died from a "severe infection, that disseminated to various organs in her body." **12-3-13Tr137, 157.** In Dr. Beck's opinion, the intravenous antibiotics given to Mercedes in the hospital kept the infection temporarily in check. When the positive effect of these antibiotics wore off during the evening of December 8th, the infection quickly progressed to end-organ damage and cardiac arrest. **12-3-13Tr188-190.** Had Mercedes been kept hospitalized on intravenous antibiotics and supplemental oxygen, to a reasonable degree of medical probability, she would not have died. **12-3-13Tr187-88.**

Plaintiff's expert hospitalist, Dr. Cheng, testified that he had not formed a firm opinion as to whether Mercedes' death was caused by sepsis or by aspiration of vomit. He testified that in either event, the cause of death was St. Vincent's decision to release Mercedes from the hospital in an unstable condition, with a fever, low oxygen level, positive blood cultures, and pending blood tests. **12-4-13Tr57-58.**

C. St. Vincent's defense on causation.

Dr. Pike, a toxicologist and emergency medicine specialist, was St. Vincent's expert on causation. **12-11-13Tr152.** Dr. Pike testified that, in his opinion, Mercedes vomited unexpectedly on the morning of December 9th. She aspirated, obstructing her airway, stopped breathing, and only then went into cardiac arrest. **12-11-13Tr154, 168.** In his view, she was neither septic nor oversedated. **12-11-13Tr181, 229.** He was unable to explain why she failed to cough, turn over, or clear her airway: physiological reflexes which even Dr. Pike agreed would kick in to save anyone who was not already close to death. **12-11-13Tr229-30, 232-33.**

D. The trial court's exclusion of Dr. Pike's unreliable opinion that marijuana and Xanax contributed to Mercedes' death.

Dissatisfied with the strength of its defense on causation, St. Vincent honed in on the results of a blood test and urinalysis done at St. Vincent after Mercedes was brought back to the hospital in cardio-pulmonary arrest on the morning of December

9th. St. Vincent's laboratory identified alcohol in Mercedes' blood at a level of .226, nearly three times the legal limit, as well as unquantified amounts of marijuana and benzodiazepines in either her blood or urine. **CSVPMC/MC00468**. Relying on these test results was problematic for the defense. The urinalysis done at the same time as the blood test showed no trace of alcohol; OMI found no alcohol in four tests of the same blood. **Trial3ReichardDepEx20:18:13, 23**. St. Vincent's doctors uniformly testified that they smelled no odor of alcohol. **11-29-11Tr297; 12-7-11Tr260**.

Finally, all five witnesses in the Bustos home, where Mercedes spent the night of December 8th, consistently told whoever asked, whether it was a doctor fighting to save Mercedes' life or defense counsel, that Mercedes had not consumed alcohol, marijuana, or Xanax that night. *See e.g.* **12-10-13Tr104, 108; 11-28-11Tr136, 210, 216-17**.

Despite having no information on the timing or quantity of marijuana or Xanax allegedly consumed by Mercedes, Dr. Pike was prepared to testify that marijuana and Xanax, taken in combination with Fentanyl, contributed to Mercedes' death. **5RP937:178**.

Prior to the first trial, the Plaintiff filed a motion *in limine* asking the court to exclude Dr. Pike's opinion that marijuana and Xanax were a cause of death. **4RP900-**

5RP945. The trial court concluded that Dr. Pike’s opinion was without foundation and was unreliable pursuant to *Daubert/Alberico*, and on this basis, excluded it. **7RP1574-75.**

IV. The Relevant Proceedings.

A. The First Trial: The jury finds St. Vincent negligent.

The verdict form, agreed to by both parties, asked the jury, first, whether St. Vincent was negligent, and then whether that negligence was a cause of Mercedes’ death. The jury found St. Vincent negligent. The jury hung on the second special interrogatory: whether St. Vincent’s negligence was a cause of Mercedes’ death. **8RP1633, 1737-38.** The court ordered that causation and damages, but not negligence, be retried. **17RP1738.**

B. The Second Trial: Defense counsel’s egregious misconduct.

The facts concerning the egregious misconduct of defense counsel in the Second Trial are discussed in Argument, §III, below. The second jury came back with a defense verdict on causation. **10RP2305-07.** The trial court granted Plaintiff’s motion for a new trial, finding that defense counsel’s misconduct was intended to influence the jury and had almost certainly succeeded in doing so. **SuppRP4160-62.**

C. The Third Trial: Verdict for the Plaintiff on causation and damages.

In the Third Trial, causation and damages were retried by other defense counsel. The jury found that St. Vincent's negligence had caused Mercedes' death and awarded compensatory damages. **15RP3464-16RP3465.**

ARGUMENT

I. The District Court Properly Excluded Dr. Pike's Unfounded and Unreliable Opinion that Marijuana and Xanax Contributed to Mercedes Christopherson's Death.

St. Vincent contends that the trial court erred as a matter of law by failing to consider whether circumstantial evidence provided enough information to allow Dr. Pike, St. Vincent's toxicology expert, to give a reliable opinion that the ingestion of marijuana and Xanax caused Mercedes' death.² **BIC17, 21-24.**

The record shows that, contrary to St. Vincent's contention, the district court carefully considered both the direct and the circumstantial evidence in the record, properly applying the *Daubert/Alberico* factors to that evidence, before concluding

²Although St. Vincent includes alcohol, along with marijuana and Xanax, in its argument about exclusion of evidence (**BIC18-20**), St. Vincent was never prevented by the trial court from introducing Mercedes' alcohol test results and having Dr. Pike testify that alcohol consumption caused her death. **9RP2005.**

that Dr. Pike's opinion lacked foundation in the record and was unreliable. The proper standard of review here, therefore, is abuse of discretion. *State v. Torres*, 1999-NMSC-010, ¶27, 976 P.2d 20. The district court plainly did not abuse its discretion in excluding Dr. Pike's opinion on the impact of marijuana and Xanax as both unfounded and unreliable and, therefore, not helpful to the jury.

A. The Trial Court's Gatekeeping Function.

The United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the New Mexico Supreme Court in *State v. Alberico*, 1993-NMSC-047, 861 P.2d 192, agreed that it is error to admit expert testimony involving scientific knowledge unless the party offering such testimony first establishes the evidentiary reliability of that scientific knowledge.

To keep speculative and unfounded opinions disguised as science from reaching and potentially misleading the jury, *Alberico* and *Daubert* require the district court to act as a gatekeeper. The court's role is to screen expert testimony, admitting only testimony which is reliable. *State v. Downey*, 2008-NMSC-061, ¶25, 195 P.3d 1244; *Parkhill v. Alderman-Cave Milling and Grain Co. of NM*, 2010-NMCA-110, ¶12, 245 P.3d 585.

B. Dr. Pike's Testimony that Marijuana is a Respiratory Depressant Was Not Based on Reliable Scientific Knowledge, and Was, Therefore, Properly Excluded.

When a scientific theory is offered in evidence, the district court must first determine whether the theory is founded on reliable scientific knowledge. Our Supreme Court has adopted a number of factors for the trial court to consider, among them: (1) whether the theory has been tested; (2) whether it has been subjected to peer review and publication; (3) whether it has been generally accepted in the particular scientific field; and (4) whether it is capable of supporting opinions to a reasonable degree of probability, rather than conjecture. The party offering the expert testimony bears the burden of establishing the reliability of the testimony. *Andrews v. U.S. Steel Corp.*, 2011-NMCA-032, ¶¶11, 14-15, 250 P.3d 887.

In this case, Dr. Pike was prepared to testify as follows:

DR. PIKE: Marijuana, itself, has some degree of respiratory depression, not a very large degree, but certainly would be a contributing factor.

5RP930:58.

Dr. Pike's testimony that marijuana is capable of causing respiratory depression alone or in combination with other drugs was not supported by reference to published or unpublished scientific studies. Nor did Dr. Pike explain the methodology or reasoning by which he arrived at this conclusion. **5RP986.**

The only time a scientific conclusion can be accepted by our courts without an explanation of the methodology or scientific reasoning which supports the conclusion is when a proposition is so widely accepted by the scientific community and recognized by our courts that it has attained the status of scientific law justifying judicial notice. *Daubert*, 509 U.S. at 593 n. 11. That marijuana is a respiratory depressant is certainly not the kind of accepted truth that would permit judicial notice. The record reveals that Dr. Pike was alone among the many experts and treating physicians testifying at trial in describing marijuana as a respiratory depressant. Dr. Shaffer, a physician employed by St. Vincent and a witness for the hospital, testified definitively that marijuana is not a respiratory depressant. **5RP943:19-21**. Dr. Reichard, a senior pathologist for OMI, testified that he was not aware of any support for the proposition that marijuana is a respiratory depressant. He testified that OMI does not consider marijuana a cause of death. **5RP945**. Even Dr. Pike admitted that he is not aware of anyone who died from ingesting marijuana. **6RP1168**.

Dr. Pike's unsupported and unexplained conclusion does not satisfy the *Daubert-Alberico* standards. Nor does it comply with Rule 11-705, which provides that if an expert cannot give a satisfactory explanation of how he arrived at his opinion, that opinion is not competent evidence. *Four Hills Country Club v. Bernalillo County Property Tax Protest Bd.*, 1997-NMCA-141, ¶11, 616 P.2d 422.

C. There Was No Evidentiary Foundation, Direct or Circumstantial, for Dr. Pike's Testimony that Marijuana and Xanax Caused Mercedes' Death.

1. The governing principles of law.

The trial court did not abuse its discretion in also excluding Dr. Pike's opinion on marijuana and Xanax because the evidence in the record was not sufficient to allow Dr. Pike to form a reliable opinion. The court held that without any direct or circumstantial evidence of either the amount of these substances in Mercedes' blood, or of the time of consumption, or of the dose consumed, Dr. Pike's testimony was unfounded and unreliable. **7RP1573-75; 11-9-11Tr6.**

It is settled law that an expert must possess enough facts to allow the expert to arrive at "a reasonably accurate conclusion." *Zia Trust, Inc. v. Aragon*, 2011-NMCA-076, ¶19, 258 P.3d 1146. The facts can be established by either direct or circumstantial evidence. The important thing is that the expert's opinion be founded on reasonable assumptions from the evidence, not on mere speculation. *Zia Trust*, ¶¶19-22, *Downey*, ¶¶34-36; *Parkhill*, ¶¶35-37. Without sufficient facts to support the expert's conclusion, that conclusion is guesswork and cannot assist the jury. It is, therefore, inadmissible. *Id.*

Questions about the adequacy of the evidence to allow an expert to offer a reliable opinion often arise in cases like this one where an expert is asked to

determine whether exposure to or consumption of a drug or chemical is the cause of a plaintiff's illness, intoxication or death. In these cases, our courts require both competent scientific evidence of "general causation" – that a certain amount of the substance is capable of causing the particular injury or condition – and "specific causation" – that the substance, to a reasonable degree of probability, caused the plaintiff's injury. *Andrews*, 2011-NMCA-032, ¶9. In other words, reliable testimony about the quantity required to cause harm plus testimony that the plaintiff was exposed to that quantity, are minimal facts necessary to establish external causation.

Id.

Dr. Pike agreed that scientific reliability depends on these principles. He testified that the dosage or level of exposure is the key to whether a drug or chemical will be toxic and that whether a substance can cause death depends entirely on the dosage:

- It is all a question of dose. Dose determines the poison. [5RP931:110].
- So that dose response is what's operant.... You have to tell me what the dose is. [5RP931:111].
- In sufficient doses it will be [a respiratory depressant].... Again it's a question of dose. [5RP936:176].
- It depends on the dose, all of these drugs, in producing an untoward or unwanted toxic effect, it's a function of dose. [5RP937:177].

- All of those agents would have been contributory factors given an appropriate dose. [5RP937:177].

In this case, there was no evidence in the record, direct or circumstantial, which allowed Dr. Pike to reach a reasonable conclusion about the quantity of marijuana or Xanax in Mercedes' bloodstream during the early morning hours of December 9th, leading up to her cardiac arrest. The record contains absolutely no information about either the dose of marijuana or Xanax consumed. 5RP937:177-78 (Dr. Pike admitted "we have no data about how much she took of anything other than the Fentanyl"); 5RP936:174 (conceding that he does not know how much Xanax she had in her system).

The best Dr. Pike was able to do was to testify that the blood test results (showing some minimal amount of marijuana and Xanax) were consistent with the consumption of Xanax sometime in the previous 48 hours (5RP1001) and marijuana sometime in the previous 90 days (6RP1168). As to Xanax, he was unable to say whether Mercedes had consumed a handful of pills or merely one, or whether she had done so two days earlier, or just an hour before her cardiac arrest. *Id.*; 5RP936:175-76.

Even assuming that there was sufficient circumstantial evidence to allow him to tentatively conclude that Mercedes had taken Xanax after leaving the hospital, there was no evidence narrowing the time period from 4:30 p.m. on December 8th to

9:00 a.m. on December 9th. **5RP1001**. These time differences were significant. Dr. Pike conceded that Xanax is a short-acting drug which reaches maximum absorption in one hour and which metabolizes relatively quickly thereafter. **5RP936:173**. The time of consumption (as well as the dose) was therefore essential to determine whether Xanax could have depressed Mercedes' breathing on the morning of December 9th.

2. Toxic tort cases do not establish a different standard for the admissibility of Dr. Pike's testimony.

In its BIC at 21-24, St. Vincent argues that the district court should have excused Dr. Pike's failure to quantify the dosage and timing of marijuana and Xanax because the evidence was impossible to obtain or was within the control of "hostile" witnesses. St. Vincent turns to toxic tort cases to support its argument, claiming that these cases provide an alternative method of proof when evidence of timing and dosage is impossible to obtain.

St. Vincent's argument is not supported by either the law or the facts. First, St. Vincent provides no support whatsoever for its claim that the five witnesses in the Bustos home on the night of December 8th lied when they testified consistently that Mercedes did not consume alcohol, marijuana or Xanax on the night of December 8th. **BIC21**. Consistent statements, made first to the doctors fighting to save Mercedes' life and then to defense counsel at deposition and at trial (*supra* at 16), do not support

St. Vincent's argument that it is entitled to assume that these witnesses are lying: consistency is commonly understood to prove that witnesses are telling the truth. *State v. Brown*, 1998-NMSC-037, ¶43, 969P.2d 314.

Second, even if the impossibility of obtaining the necessary evidence could justify a different standard, St. Vincent's claim that it was "impossible" to quantify the dosage of either marijuana or Xanax is not supported by the record. Blood and tissue samples were retained by OMI for two years after Mercedes' death. St. Vincent waited – until after discovery had closed and after OMI had destroyed its samples – to subpoena those samples for further testing. **5RP1098, 1107, 1110; 11-7-11Tr62-63**. Where it is possible to quantify dosage or concentration and a party fails to do so, our courts will not allow that party's expert to substitute imprecise inferences of dosage or concentration for direct evidence of the quantity consumed. *Parkhill*, ¶43 (“[t]hese cases are not applicable to the circumstances before us because direct evidence of the ... dosage could have been obtained”).

Finally, the criteria used in toxic tort cases, even if applicable, do not help St. Vincent here. These cases have allowed external causation to be proved by scientific evidence establishing: (1) the general toxicity of the substance; (2) “substantial exposure” to the substance over a particular time period; (3) symptoms or injury which are consistent with exposure to that substance; (4) a strong temporal

relationship between the onset of symptoms and the exposure; and (5) an absence of any other plausible explanation for the symptoms. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 264-66 (4th Cir. 1999).

The evidence in this case does not satisfy these criteria any more than it does the traditional standard. Proof of “substantial exposure” with “a strong temporal relationship to the symptoms” must still be established. *Id.* at 264-65, quoting *Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996). As set forth above, the evidence in the record here, direct and circumstantial taken together, does not establish either that there was “substantial exposure” to marijuana or Xanax or that there was a “strong temporal relationship” between the exposure and the onset of symptoms.

Finally, it is settled law that the absence of available facts does not loosen the requirement that “[e]xpert testimony may be received if, and only if, the expert possesses such facts as would enable him to express a reasonably accurate conclusion, as distinguished from mere conjecture.” *Acosta v. Shell Western Exploration and Production, Inc.*, 2013-NMCA-009, ¶32, 293 P.3d 917; quoting *Parkhill*, ¶37. Because neither the direct nor the circumstantial evidence here allows an expert to reach a reasonably accurate conclusion, Dr. Pike’s opinion was properly excluded.

D. The Suggestion that Marijuana or Xanax Caused Mercedes' Death is No More Admissible on Cross-Examination Than It is on Direct.

Finally, St. Vincent argues that, even if Dr. Pike's opinion that marijuana and Xanax causing Mercedes' death was properly excluded, the trial court should have permitted defense counsel to cross-examine Plaintiff's experts about how they could rule out marijuana and Xanax as a cause of Mercedes' death. **BIC26.**

St. Vincent's argument assumes that the test of admissibility is different depending on whether evidence is offered on direct or cross-examination. St Vincent is mistaken: cross-examination must be designed to elicit relevant evidence, just like direct examination. *State v. Meadors*, 1995-NMSC-073, ¶¶26-33, 908 P.2d 731. A question on cross-examination must be reasonably calculated to elicit evidence which is either relevant to a substantive issue in the case or relevant to impeach the witness. *Id.* St. Vincent's proposed cross-examination serves neither legitimate purpose.

Any question on why Plaintiff's experts had excluded marijuana and Xanax as a cause of death could be expected to elicit testimony, as to marijuana, that it is definitively not a cause of death, and, as to Xanax, that the witness could only speculate. Such cross-examination serves no legitimate purpose. It is plainly intended to get in front of the jury information which the court determined is irrelevant, inadmissible, and highly prejudicial, and to encourage the jury to speculate

about causes of death not supported by the evidence. This is not good faith cross-examination.

The court did not abuse its discretion in determining that any such cross-examination would introduce evidence which is more prejudicial than probative.

15RP3403-04; 7-27-12Tr15-17.

E. Conclusion.

The trial court's exclusion of Dr. Pike's opinion that marijuana and Xanax were a cause of Mercedes' death and the court's refusal to allow cross-examination of Plaintiff's experts on that same issue was a proper exercise of the court's discretion as gatekeeper to exclude scientific evidence which is not sufficiently scientifically valid to be of assistance to the jury. The court's conclusion that any marginal relevance of cross-examination did not outweigh the prejudice of allowing St. Vincent to suggest an unsubstantiated and highly inflammatory alternative cause of death was also a proper exercise of the court's discretion.

II. The Trial Court Properly Limited the Second and Third Trial to Causation and Damages.

St. Vincent contends that the district court abused its discretion in granting a partial retrial on causation and damages after the first jury determined that St. Vincent was negligent, but hung on causation. **BIC26.**

St. Vincent's argument is based on a fundamental misunderstanding of how our courts determine whether two issues are sufficiently "separate and distinct" to permit a partial retrial. This determination is not a question of law; it turns on the facts and circumstances of this case. **15RP3265; 4-9-12Tr23-24; 4-11-14Tr 11-13; -13Tr26** (the court finds that, in this particular case, the issues of negligence on the one hand and causation and damages on the other are separate and distinct and agrees that St. Vincent waived its objection to a partial retrial). Under the particular circumstances of this case, the trial court did not abuse its discretion in finding that the issue of causation was "separate and distinct," making partial retrial a viable choice. The trial court also did not abuse its discretion in holding that St. Vincent waived any claim of prejudice. **4-11-14Tr12.**

A. Whether an Issue is Separate and Distinct Depends on a Close Analysis of the Particular Circumstances of the Case.

It is settled law that a partial retrial is permitted when an issue is correctly determined by a jury so long as the issue to be retried is separate and distinct enough from the issue already resolved that the opposing party will not be prejudiced. Rule 1-059(A); *Buffett v. Vargas*, 1996-NMSC-012, ¶32, 914 P.2d 1004; *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 499 (1931).

In deciding whether to grant a partial retrial, a trial court must examine closely the contentions of the parties, the evidence, and the questions presented to the jury. *Ahn v. Kim*, 678 A.2d 1073, 1079 (NJ 1996) (holding that, although negligence and causation often intertwine, [“w]hether issues are sufficiently separable to warrant a partial retrial ultimately depends on the circumstances of each case”); *Sanchez v. Dale Bellamah Homes of N.M., Inc.*, 1966-NMSC-040, ¶12, 417 P.2d 25 (noting that the court “carefully reviewed the record in the case” before concluding that a partial retrial would be prejudicial because “much of the testimony respecting liability” would need to be repeated).

This Court does not second-guess the trial court’s decision to grant a partial retrial. This decision is committed to the sound discretion of the trial court and will not be disturbed on appeal in the absence of a clear abuse of that discretion, taking

into account all of the circumstances before the trial court. *Martinez v. Ponderosa Products, Inc.*, 1988-NMCA-115, ¶5, 772 P.2d 1308.

When the circumstances of this case are carefully considered, it is readily apparent that the trial court did not abuse its discretion in limiting the retrial in this matter to causation and damages.

B. Causation and Damages Are Separate and Distinct from the First Jury's Finding of Negligence.

1. The contentions of the parties.

Plaintiff's claim of negligence was that St. Vincent had breached the standard of care by discharging Mercedes home on the afternoon of December 8, 2008, without having adequately evaluated her condition to be sure that she was stable and could survive without the oxygen, intravenous antibiotics and supportive care she could receive in the hospital. In retrying causation, Plaintiff did not have to prove which doctor or nurse did what: all of the doctors and nurses whose provision of care remained in issue were employees of St. Vincent. **12-12-13Tr1-2, 92, 111-12.** Plaintiff's 302 instruction summarized and reminded the jury of the evidence of those acts and omissions which the Plaintiff contended individually and collectively led to Mercedes' discharge home in unstable condition on the afternoon of December 8th. **7RP1482.**

In closing argument after the Third Trial, the Plaintiff told the jury that it need not decide whether Mercedes had an abdominal infection or a line infection at the time of her discharge, or whether she was oversedated: regardless of which condition or conditions Mercedes actually had on the afternoon of December 8th, St. Vincent was negligent in discharging her home before it had fully evaluated her and ruled out both infection and oversedation. **12-12-13Tr2, 92, 111-12.**

St. Vincent's defense to Plaintiff's allegations of negligence in the First Trial focused on the overall quality of care provided throughout Mercedes' hospitalization. St. Vincent relied on evidence from the entire 40-plus days of Mercedes' illness, exhaustively reviewing every test done and the care provided by each member of its medical staff over her entire hospitalization. It explained the decision of its medical staff to discharge her on December 8th as justified by Mercedes' relatively healthy appearance at the end of her hospitalization. The defense, in sum, was that she had been provided good care by St. Vincent and there were no warning signs sufficient to merit either delaying her discharge or sending her home with oxygen and intravenous antibiotics. **11-28-11Tr57.**

In the First Trial, both sides agreed to a special verdict form that asked the jury to answer two special interrogatories: (1) whether St. Vincent's doctors and nurses

were negligent; and (2) whether St. Vincent's negligence was a cause of Mercedes' death. **8RP1633.**

The battle on causation was drawn around whether Mercedes had succumbed to unexpected vomiting, leading to aspiration and suffocation, as St. Vincent contended, or had died from sepsis or from oversedation by Fentanyl or both, as the Plaintiff contended.

Once St. Vincent's negligence³ had been established in the First Trial by the jury's answer to the first special interrogatory, the determination of causation at retrial turned on whether Mercedes: (1) succumbed to sepsis or hypoxia due to oversedation by Fentanyl, or to a combination of both, as contended by the Plaintiff; or (2) vomited unexpectedly, aspirated, stopped breathing and went into cardiac arrest, as contended by St. Vincent. If she succumbed to sepsis or oversedation, then the cause of death was St. Vincent's negligence in prematurely discharging her; if the cause of death was unexpected vomiting followed by aspiration, then St. Vincent's negligence was not a cause of her death. It simply did not matter which act or omission or combination of acts or omissions was the basis of the first jury's finding of negligence.

³Comparative negligence was also ruled out by the first jury. **8RP1633.**

Given the contentions of the parties, the district court reasonably found that causation could be retried separately from negligence. The issues in the Second and Third Trials were limited to Mercedes' condition on December 8th when she was discharged; the events of the night of December 8th (where St. Vincent continued to suggest to the jury that the Plaintiff was hiding information); the various experts' analyses of the cause of Mercedes' death; the testimony of the witnesses present when Mercedes went into cardio-pulmonary arrest on the morning of December 9th (this testimony focused on whether Mercedes vomited first, and then aspirated and stopped breathing, as St. Vincent's expert contended, or stopped breathing, went into cardiac arrest, and vomited only when CPR was started, as the Plaintiff contended); and damages. 7-31-12Tr39, 52; 11-22-13Tr26-30.

2. New Mexico law supports the trial court's ruling.

New Mexico case law supports the trial court's decision to limit retrial to causation and damages.

In *Scott v. McWood Corp.*, 1971-NMSC-068, ¶10, 487 P.2d 478, perhaps the case closest to this on its facts, our Supreme Court ordered a partial trial of contributory negligence over the defendant's objection. The Court held that where the defendant's "primary negligence had already been determined by properly submitted interrogatories ... there is no need to relitigate" negligence.

The *McWood* Court relied on two federal tobacco cases holding that a partial retrial on negligence alone was appropriate where causation had been established by the first jury's interrogatory answers. *Id.*, citing, *Pritchard v. Liggett & Myers Tobacco Co.*, 370 F.2d 95, 95-96 (3rd Cir. 1966) and *Green v. American Tobacco Co.*, 325 F.2d 673, 678 (5th Cir. 1963) (finding that the parties are bound by the first jury's answers to the interrogatories on the verdict form). *See also Baros v. Kazmierczuk*, 1961-NMSC-055, ¶39, 362 P.2d 798 (“[n]o purpose would be served by a retrial of [negligence] ” where there was no error in the jury's determination of negligence).

In *Sanchez v. Wiley*, 1997-NMCA-105, ¶10, 946 P.2d 650, this Court approved a partial retrial, holding that the focus of the second trial would be different from the first trial, even though there would be some overlap in the evidence. *Id.* (holding that “[p]rejudice does not result merely because there may be overlap in the evidence”). Only where the evidence necessary to establish the remaining claim requires that virtually the entire trial be repeated is overlap in the evidence a sufficient basis to require a full retrial. *Sanchez v. Dale Bellamah Homes*, 1966-NMSC-040, ¶12 (partial trial is prejudicial where “much of the testimony respecting liability and compensatory damages” would need to be repeated). Here, many days of trial were able to be avoided by limiting the retrial to causation and damages.

C. The Court Properly Found, in the Alternative, that St. Vincent Waived Its Right to Seek a Full Retrial.

In addition to finding that the issues were separate and distinct, the trial court also relied, in the alternative, on St. Vincent's waiver of its right to seek a full retrial. **4-11-14Tr12; 11-12-13Tr.15-16.** The trial court's decision is well supported by the record.

The record shows that St. Vincent did not oppose the special verdict form prepared by Plaintiff's counsel and adopted by the court. **12-8-11Tr211-12.** That verdict form asked the jury whether St. Vincent had been negligent, and then, separately, whether St. Vincent's negligence was a cause of Plaintiff's injury. **8RP1633.** If St. Vincent's theory of the case had turned on which particular acts or omissions the jury found negligent, St. Vincent could have requested a special verdict form which asked, separately, as to each act or omission, whether the jury found that act negligent and whether that negligence was a cause of the injury. St. Vincent did not request such a special verdict form. It accepted a verdict form which required that ten jurors agree only that St. Vincent was negligent. No agreement was required on any one or more of the factual contentions in the 302 instruction. On causation, the jury was asked to determine simply whether "the negligence of St. Vincent" was a cause of Plaintiff's injury. **12-12-11Tr6** (defense counsel acknowledges that the 302

instruction does not require a vote on each contention: the jury should read it as a whole).

It was also appropriate for the district court to take into account in finding waiver by St. Vincent the fact that it was St. Vincent's wilful misconduct which likely led to the mistrial on causation and created the necessity for retrial. During the First Trial, St. Vincent repeatedly presented evidence and argument intended to suggest to the jury that marijuana and Xanax had caused Mercedes' death⁴, in violation of the court's order specifically excluding such evidence and argument. **12-8-11Tr198**. Although St. Vincent's strategy did not get the defense verdict on causation it hoped for, it succeeded in avoiding a full Plaintiff's verdict. As this Court held in *Sanchez v. Wiley*, 1997-NMCA-105, ¶13, this Court will not view with favor a defendant's

⁴The court found that St. Vincent's conduct during the First Trial had improperly left the jury with the impression that marijuana and Xanax had caused Mercedes' death. The court stated that St. Vincent's questioning:

clearly leads to the impression with the Jury that Xanax and marijuana contributed to the death. Not in and of itself, but in my view, the context of this is important, the context of other rulings of the Court and the context of the statements made in opening by [St. Vincent's counsel].

12-8-11Tr198. The court gave a curative instruction (*Id.* **204B**) which proved insufficient to avoid a hung jury on causation. *See State v. Frank*, 1979-NMSC-012, ¶25, 589 P.2d 1047 (recognizing that even a curative instruction is often insufficient to prevent prejudice).

claim on appeal that a partial retrial on a single issue is prejudicial when that defendant's own trial strategy necessitated the retrial.

Under these circumstances, the trial court did not abuse its discretion in holding that St. Vincent waived any claim of prejudice arising from the denial of a full retrial.

D. Strong Policy Reasons Support a Partial Retrial.

Finally, in a trial as lengthy and complex as this one, strong policy considerations support partial retrial. The first jury heard the testimony of 16 doctors and nurses over a ten-day period. The resources of both the court and the Plaintiff were stretched thin by such a lengthy and expensive trial. By allowing the finding of the jury on negligence to stand and limiting retrial to causation and damages, the court was able to avoid repeating eight or nine days of testimony on virtually every test, examination, and treatment provided by St. Vincent during Mercedes' hospital stay, along with evidence of the tests and treatment provided during a previous hospital stay at Presbyterian Hospital. **BIC1-2** (summarizing St. Vincent's defense).

The interest of the judicial system in not repeating such a grueling trial should be paramount when St. Vincent had a full and fair opportunity to present its defense and a jury found it negligent.

III. The District Court Acted Well Within Its Discretion in Granting a New Trial Based on Defense Counsel's Calculated and Highly Prejudicial Misconduct During the Second Trial.

The trial court granted Plaintiff's request for a new trial following the defense verdict on causation in the Second Trial. It did so applying the standard set forth in *Apodaca v. U.S. Fidelity & Guaranty Co.*, 1967-NMSC-250, ¶8, 433 P.2d 86. *Apodaca* holds that our appellate courts will reverse and remand for a new trial when: (1) the conduct of counsel was improper, and (2) the misconduct was reasonably calculated to cause and, probably did cause, the rendition of an improper judgment. Where the district court has granted a new trial, this Court applies a deferential abuse of discretion standard.

The record of the Second Trial provides overwhelming support for the district court's decision granting a new trial. Not only was there egregious misconduct by defense counsel, but defense counsel's misconduct was calculated to, and probably did improperly influence the jury to render a defense verdict.

A. The Standard of Review.

The rule in New Mexico has long been that our appellate court "will not disturb a trial court's exercise of discretion in granting or denying a motion for a new trial unless there is a manifest abuse of discretion." *Talbott v. Roswell Hosp. Corp.*, 2008-

NMCA-114, ¶29, 192 P.3d 267. In *Grammar v. Kohlhaas Tank & Equip. Co.*, 1979-

NMCA-149, ¶40-41, 604 P.2d 823, this Court stated in relevant part:

It is for the trial judge within his sound discretion, to determine if lawyers have transgressed the grounds of professional duty or whether there has been prejudicial misconduct....

The trial court can best judge the effect of ... argument upon the minds of the jury, especially in long and tedious trials.

B. Defense Counsel's Conduct was Highly Improper.

In concluding that the *Apodaca* standard was met, the trial court focused on some 20 examples of misconduct, culled from nearly 100 identified by the Plaintiff.

(The court found the remaining examples well-taken.) **SuppRP4020-82, 4159-62.**

The cumulative impact on the jury of the near-constant disregard of the court's rulings and the disrespect shown the court by defense counsel is evident from the record. St. Vincent attempts to minimize the misconduct of defense counsel by discussing the merits of each improper question asked or objection made in isolation.

BIC36-52. This analysis misses the point.

Defense counsel, from *voir dire* to concluding argument, communicated to the jury his disrespect for the court and for the court's authority. During *voir dire*, defense counsel expressed his personal disagreement with the court's ruling limiting the retrial to causation directly to the jury *venire*. He faced the jury and spoke loudly and disrespectfully to the court in contentious bench conferences both during *voir*

dire and during trial. Even after being admonished repeatedly by the court to lower his voice and face away from the jury, he failed to do so. He openly ignored the court's rulings sustaining objection after objection, asking the same objectionable question four, five, six or seven times in succession; he read into the record highly prejudicial questions asked of a key witness, even though he knew these questions had been excluded by the court; he argued in opening and closing matters the court had emphatically excluded. Counsel's conduct was not inadvertent: the court found that defense counsel purposely undermined the authority of the court for the improper advantage of his client. **SuppRP4160-61; 6-18-13Tr52, 54.** There can be no question that the district court's decision to grant a new trial under these circumstances was well within the court's discretion.

The first example of misconduct relied on by the district court in granting a new trial occurred even before *voir dire* began. Defense counsel led the court to believe that a proposed supplemental jury questionnaire had been approved by Plaintiff's counsel. **6-18-13Tr7; 12RP2680; SuppRP4069-4072.** Relying on this representation, the court mailed the questionnaire to the jury *venire*. ***Id.*; 8-2-12Tr10-13; Ct's Ex. 8.** In fact, the questionnaire had neither been shown to nor approved by Plaintiff's counsel. **SuppRP4072.** The court found that the questionnaire improperly suggested to the jury *venire* that the comparative negligence remained at issue in the

case when, in fact, the trial court had properly ruled that comparative negligence was no longer at issue. **6-18-13Tr50**.

During *voir dire*, with the entire jury panel present and listening, defense counsel responded to a potential juror's concern about the court's instruction that causation would be tried separately from negligence by telling the juror that he disagreed with the court's ruling: "Sir, I cannot agree with the process, so I'm not a good person to [ask]...." **7-30-12CD3:32:13**. Defense counsel's comment, which drew an immediate objection from Plaintiff's counsel, was phrased as his own personal opinion, something in itself improper. *See* Rule 16-304(E). More importantly, however, defense counsel directly contradicted a settled ruling of the court and did so to the panel from which the jury would be selected. His comment was intended to fuel the concern expressed by some members of the panel about the court-imposed limitations on the issues to be decided by the second jury. **7-30-12CD3:32**. The court sustained Plaintiff's objection, privately admonishing defense counsel that "when you make comments like that you are directly impugning the integrity of the court and the judicial system." **7-30-12CD3:33:15**.

Prior to bringing the jury in at the start of the Second Trial, the court explained his ruling once again, stating definitively: "I'm not going to allow issues of negligence to be presented during this trial." **7-31-12Tr10-11**. The jury had already

been informed that the trial would address only causation and damages and that the jury would be instructed by the court to accept the finding of negligence by the first jury. **7-30-12CD2:28:15; 2:50:00**. Plaintiff's counsel reminded the jury of this ruling in her opening statement. **7-3-12Tr20**. Moments later, defense counsel blatantly disregarded this explicit ruling of the court. Twice in opening argument, Plaintiff's counsel was compelled to take the unusual step of interrupting with an objection. Both objections were to defense counsel's claim that the jury would hear evidence about the quality of treatment St. Vincent and its medical staff had provided to Mercedes during her long illness: evidence relevant only to negligence. The court noted that defense counsel was improperly bringing standard of care into the case in derogation of the court's ruling. **SuppRP4020-23** (excerpts 1 and 2).

Defense counsel's disrespect for the court's rulings in general, and for the ruling limiting the trial to causation and damages, in particular, became more apparent as the trial proceeded and witnesses were called. In granting the motion for a new trial, the court focused on defense counsel's questioning of several key witnesses: Dr. Kovnat, Mrs. Bustos, Dr. Cheng, and Dr. Reichard.

The court pointed first to a series of seven improper questions asked in "immediate succession" of Dr. Daniel Kovnat (the St. Vincent doctor who discharged Mercedes). **SuppRP4160; 6-18-13Tr51-52**. The seven questions identified by the

court followed a lengthy examination by defense counsel punctuated by objections from Plaintiff which were followed by repeated bench conferences where defense counsel was admonished to avoid asking for Dr. Kovnat's opinion on the standard of care. **SuppRP 4036-47**. At the end of his examination of Dr. Kovnat, Defense counsel asked the seven questions identified by the court in quick succession, proceeding with the next question on the heels of the court's ruling sustaining the objection to the question before it. Every question in defense counsel's seven-question chain was designed to defend the quality of care Dr. Kovnat had provided during Mercedes' hospitalization, in violation of the court's repeated rulings. **SuppRP4047-48**.

In granting the motion for a new trial, the court rightly concluded that there could be no good faith basis for asking seven questions in a row "in a very short amount of time" in direct defiance of the rulings of the court. **6-18-13Tr52** ("with seven times in succession, there's no good faith basis here"); **SuppRP4160**. The court found that the purpose for these questions was "to undermine or call into question the previous jury's verdict in this case, or to undermine or call into question the Court's ... proper rulings." *Id.*

The court relied as well on defense counsel's repeated improper impeachment of Renee Bustos. **6-18-13Tr52; SuppRP4160**. Defense counsel persisted in asking

Mrs. Bustos over and over again about a conversation with the EMT's as they attempted to resuscitate Mercedes on the morning of December 9th. Mrs. Bustos consistently testified she had neither participated in that conversation nor heard it. Once the question had been asked and answered one time, Plaintiff's counsel timely objected to counsel's repetition of the same question: "Objection, Your Honor. She didn't hear. It's speculation. He's asking her to speculate what she didn't hear." **SuppRP4026**. The court sustained the objection. *Id.*

Defense counsel proceeded as if there had been no ruling, putting up in front of the jury the EMT report documenting the conversation Mrs. Bustos had repeatedly testified she had not heard. *Id.* Plaintiff's counsel again objected. **SuppRP4027**. The court directed that the document be taken down. *Id.* A lengthy and contentious bench conference followed, with the jury observing the demeanor of defense counsel and picking up the tone of the exchange between defense counsel and the court. **SuppRP4027**. Four times the court sustained the same objection. **SuppRP4023-4034**.

The court also relied on at least five objections raised during Dr. Cheng's testimony. **6-18-13Tr53; SuppRP4053-4059**. Dr. Cheng was Plaintiff's sole expert on causation in the Second Trial and, therefore, he was a very important witness for the Plaintiff. Defense counsel's objection was not to a particular question, but to Dr.

Cheng testifying at all as to causation. **1-12Tr119-121**. Although the court had given both counsel ample opportunity to file motions *in limine* and had asked for objections to Dr. Cheng's testimony before the jury was brought in, defense counsel raised no timely objection to Dr. Cheng's testimony. **8-1-12Tr118:11-13; 88-1-12Tr121; SuppRP4053**. He waited until Dr. Cheng had started to testify and then interrupted the doctor's direct examination five times in a row with the same objection – that Dr. Cheng should not be allowed to testify in the Second Trial because he had not previously testified to causation in the First Trial. **SuppRP4053-56**. The court overruled the objection and noted that “for you to bring it up at this juncture [given the opportunities provided by the court to raise this earlier] is completely inappropriate.” **8-1-12Tr121**. Defense counsel ignored the court's ruling, continuing to disrupt Dr. Cheng's testimony with the very same objection. **6-18-13Tr52; SuppRP4053-62**.

In reading Dr. Reichard's cross-examination to the jury from a prior trial transcript, defense counsel read two cross-examination questions which had been previously excluded by the court. **SuppRP4161**. The questions improperly impeached Dr. Reichard's conclusion on the cause of Mercedes' death, the central issue before the jury. *Id.* When each of the improper questions was read, Plaintiff's counsel promptly objected. The court sustained the objection and admonished

defense counsel to be more careful. These rulings and the court's admonition, however, came too late to keep defense counsel from getting the prejudicial questions before the jury. **SuppRP4074; 6-18-13Tr53.**

In addition to defense counsel's disregard of the rulings of the court on the parameters of the trial and on the admissibility of evidence, the court relied on two particularly inappropriate outbursts by defense counsel in granting the motion for a new trial. **SuppRP4161.** Both of these outbursts occurred during a particularly effective cross-examination by Plaintiff's counsel of one of St. Vincent's key experts on causation, Dr. Allen. **8-3-12Tr100.** Dr. Allen concluded what had been a difficult cross-examination for the defense with a comeback: "I'm looking at Mercedes Christopherson and I don't believe she was septic when she left the hospital. I don't believe she died of sepsis ... and she was stable." **SuppRP4076.** The court noted that the juror's eyes were glued to defense counsel who said, loudly enough to be heard throughout the courtroom, "Right on, Sister!" **SuppRP4077, 8-3-12Tr101:4.** This comment broke the tension created by Plaintiff's cross-examination and highlighted Dr. Allen's retort.

Finally, the court pointed to two instances in closing argument when defense counsel once again interjected negligence and standard of care into its argument to

the jury, in violation of the court's "express and repeated rulings." **SuppRP4161; 6-18-13Tr54-56.**

These examples of misconduct cited by the court in granting Plaintiff's motion for a new trial, extreme as they are, cannot, standing alone, convey the impact of defense counsel's misconduct on the jury. The transcript shows that most of the many objections made by Plaintiff's counsel was followed by a bench conference. *See SuppRP4020-82.* The tone of defense counsel in the bench conferences was almost always combative and, many times, crossed into being disrespectful to the Judge. At least thirteen times, the court was forced to admonish defense counsel to lower his voice and to face away from the jury during a bench conference. **7-31-12Tr112, 215-17, 222; 8-1-12Tr21, 52, 77, 116, 118; 8-3-12Tr102-03.** Even if the jury could not hear the content of the discussions, the jurors could plainly see the demeanor of defense counsel.

A particularly egregious example from *voir dire* was played for the court during argument on the motion for a new trial. **6-18-13Tr12.** Defense counsel objected to the court's questioning of potential jurors. He approached the bench. **7-30-12CD10:35.** His voice strained, his finger pointed at the Judge, he said:

MR. SLATTERY: You have done exactly what I repeatedly asked the lawyers not to do You did it yourself..... You didn't need to do it.... You have done exactly what [Court interrupts: All

right.] You have attacked my client's right to a fair trial.
You in your robes.....

7-30-12CD11:00:34-11:02.

Although it is not possible to be sure that the jury heard every word, the demeanor of counsel as he addressed the court could not be missed by anyone in that courtroom. Nor could the attitude and tone in many other bench conferences be missed. *See e.g. SuppRP4030.* The court's comment on the repeated need to bring inappropriate demeanor to the attention of defense counsel was well-taken. **SuppRP4161.**

C. Defense Counsel's Calculated Misconduct was both Central to St. Vincent's Trial Strategy and Highly Prejudicial.

St. Vincent attempts to argue that defense counsel's conduct was justified to "make a record" or to "preserve error." **BIC45.** But it is settled law that there can be no justification for statements made to a jury "in clear violation of and in defiance of a ruling of the court." *Chavez v. Valdez*, 1958-NMSC-034, ¶8, 325 P.2d 919. In *Chavez*, the trial court ruled prior to opening statements that the contract in issue in that case was unambiguous and that oral testimony to vary its terms would not be permitted. *Chavez*, ¶3. Moments later, in his opening statement to the jury, plaintiff's counsel presented testimony which plainly conflicted with the court's ruling. Although the Court acknowledged that plaintiff's opening argument would

have been permissible, “had it not been for the previous rulings,” the Court stated that there can be “no lawful justification” for conduct of counsel which is “in apparent defiance of the Judge.” *Chavez*, ¶8. Our Supreme Court ordered the case remanded for a new trial.

Similarly, in *Chicago, B. & O.R. Co. v. Kelley*, 74 F.2d 80, 85-86 (8th Cir. 1934) the Eighth Circuit held that asking a question again (or a similar question), after the court has sustained an objection, is “highly improper and reprehensible.” The court noted in that case, where a question was asked only twice rather than five or six or seven times, that “[t]he asking of the second question could scarcely have been in good faith, and its manifest purpose was to prejudice the jury.” *Id.*

Preservation for appeal does not require defiance of the court’s rulings. One objection is enough. The sole purpose of openly defying the court’s rulings is to gain unfair advantage. Defense counsel here: (1) encouraged the jury to doubt the court’s instructions; (2) forced Plaintiff’s counsel to object so often that the Plaintiff appeared to be hiding something from the jury; (3) created a false impression that a witness was being evasive or dishonest by badgering the witness with improper question after improper question. None of these are proper purposes; all are “reasonably calculated to cause; and, as the trial court found, probably did cause, the

rendition of an improper judgment.” *Apodaca*, ¶¶8; *Chavez*, ¶¶8; *Horany v. Paris*, 369 P.2d 636, 638 (Okl. 1962); **SuppRP4161**, ¶15.

This court has long recognized that the trial court is in the best position to judge how the jury reacted to events in the courtroom. *Grammar*, ¶41. Judge Ortiz plainly did not abuse his discretion in finding defense counsel’s conduct “extraordinary” and granting a new trial. *Id.* His decision should be upheld by this Court.

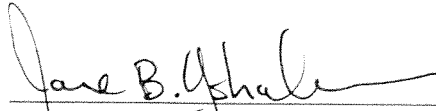
CONCLUSION.

For the reasons stated above, this Court should uphold the district court’s exercise of its discretion on all three issues raised by St. Vincent, and affirm the verdict for the Plaintiff.

REQUEST FOR ORAL ARGUMENT.

Oral argument is requested to address the Court’s questions and concerns in what is a relatively complicated case.

Respectfully submitted,



Jane B. Yohalem
Law Office of Jane B. Yohalem
P.O. Box 2827
Santa Fe, N.M. 87504
(505) 988-2826

Katherine W. Hall
Katherine W. Hall PC
500 Don Gaspar Ave.
Santa Fe, NM 87505
(505) 983-0743

D. Diego Zamora
The Zamora Law Firm, LLC
2011 Botolph Rd. #200
Santa Fe, NM 87505
(505) 986-2845

Counsel for Plaintiffs-Appellees

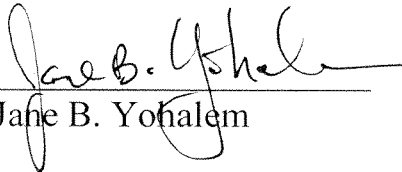
CERTIFICATION

I hereby certify that a true and correct copy of the foregoing was sent by first class mail, postage prepaid to:

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Emil J. Kiehne
Susan M. Bisong
Tim L. Fields
Elizabeth A. Martinez
P.O. Box 2168
Albuquerque, NM 87103

HINKLE SHANOR LLP
William P. Slattery
David B. Lawrenz
218 Montezuma Ave.
Santa Fe, NM 87501

on this the 8th day of September, 2015.



Jane B. Yohalem