IN THE NEW MEXICO COURT OF APPEALS

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

Plaintiffs-Appellees,

vs.

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

Defendant-Appellant.

Ct. App. No. 33,784

BRIEF-IN-CHIEF OF APPELLANT ST. VINCENT HOSPITAL

Appeal from the
First Judicial District Court, Santa Fe County
The Honorable Raymond Z. Ortiz
No. D-101-CV-2009-04090

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ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE

As required by Rule 12-213(G), we certify that this Brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word, the body of the Brief-in-Chief, as defined by Rule 12-213(F)(1), contains 10,987 words.

DATED this 20th day of April 2015.

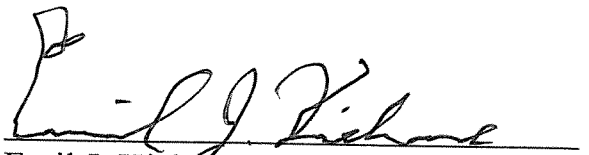

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TABLE OF AUTHORITIES

New Mexico Cases

Cases From Other Jurisdictions

Constitutional Provisions

Rules

Other Authorities

SUMMARY OF FACTS AND PROCEEDINGS.

I. Introduction.

This is a wrongful death case in which three trials have already occurred. Before Trial One, the District Court erroneously excluded critical defense evidence that the decedent caused her own death by combining Xanax and marijuana with her prescription medicine. After the jury hung in Trial One on the issue of causation, the District Court erred by denying a full retrial of the negligence claim in Trials Two and Three, although the issues of negligence and causation could not be decided separately. The District Court also erred by overturning a defense verdict and granting a new trial after Trial Two, based on alleged misconduct by defense counsel, which consisted in large part of defense counsel's attempt to navigate the non-existent line between negligence and causation.

II. Ms. Christopherson's hospitalization and death.

Mercedes Christopherson, age 20, presented to St. Vincent on November 25, 2008. Tr.11/28/2011:188-189. She was diagnosed with pancreatitis, and treatment began immediately. Tr.12/6/2011:9-11. She had an elevated white blood cell count, which possibly indicated the presence of a dangerous intra-abdominal infection. Tr.11/29/2011:97-98; Tr.12/6/2011:11, 58. As a precaution, St. Vincent started her on a broad-spectrum antibiotic, Tr.12/6/2011:11; Tr.11/29/2011:102, and conducted a CT scan to determine whether an intra-abdominal infection was

developing. Tr.12/6/2011:20-21. A "PICC line" was inserted so that she could receive nutrition and pain medication intravenously. Tr.12/6/2011:23; Tr.12/1/2011:32.

The next day, St. Vincent switched Ms. Christopherson to another antibiotic, Primaxin, which targets intra-abdominal infections. Tr.12/6/2011:10-11. But she did not improve. Her white blood cell count and fever went up, and she had severe diarrhea. Tr.12/6/2011:36-39; Tr.12/7/2011:17-18.

An infectious disease specialist, Dr. Palestine, was called in to evaluate Ms. Christopherson. Tr.12/6/2011:39-40. He suspected that she did not have an intra-abdominal infection, but a dangerous infection called C. Diff. Tr.12/5/2011:45-47, 56. Dr. Palestine ordered that the Primaxin be stopped, and that she be given Flagyl, an antibiotic that targets C. Diff. Tr.12/5/2011:92-93. Over the next several days, she improved – her fever disappeared, her white blood cell count returned to normal, and she felt much better. Tr.12/2/2011:172; Tr.12/7/2011:20-22; Tr.12/5/2011:55-56.

On December 6, however, she developed a fever, and her pulse increased. Tr.12/10/2013:70. Dr. Kern, the treating hospitalist, believed she might have an infection associated with the PICC line, and ordered blood tests. Depo. Desig. Binder, Kern Trial One at 121-122. Ms. Christopherson was taking several pain medications, and had trouble staying awake while talking, so one of the

medications was discontinued. Depo. Desig. Binder, Kern Trial One at 96-97, 107, 113-114; Tr.12/4/2013:32-33. Finally, Ms. Christopherson's blood oxygen level was 84%. Tr.12/4/2013:12. The normal minimum is 88%-90%; anything below that means the patient lacks sufficient oxygen, a condition called "hypoxia." Tr.12/4/2013:12-15. Dr. Kern believed that the low oxygen level was caused in part by her low level of physical activity in the hospital. Tr.12/7/2011:30-31; Tr.12/4/2013:17-18, 34. Dr. Kern told Ms. Christopherson to walk around more, Depo. Desig. Binder, Kern Trial One at 125-126, and had blood samples drawn to look for bacteria, *id.* at 129-130. Dr. Kern believed she likely would be ready for discharge the following day. *Id.* at 131-133.

The next morning, December 7, Ms. Christopherson's oxygen level was recorded as 56% at one point, and she was given supplemental oxygen, which returned her to normal. Tr.11/29/2011:259; 7/31/2012:183-184. Another hospitalist, Dr. Daniel Kovnat, took over her care, Tr.12/7/2011:15-16, and received the results of the previous day's blood tests, which were positive for gram positive cocci bacteria (later identified as Group D enterococcus). Tr.11/29/2011:242-243, 283. Dr. Kovnat diagnosed Ms. Christopherson with bacteremia and cancelled her discharge to evaluate her further. Tr.12/7/2011:45-47. He also reduced her pain medication, oxycodone, in half. Tr.12/10/2013:23-24.

Dr. Kovnat noticed several signs that she did not have an intra-abdominal infection or sepsis. A CT scan showed no significant change since the previous one. Tr.12/7/2011:45-46; Tr.8/3/2012:35-36. Ms. Christopherson was not in pain, had no fever, had a normal white blood count, was able to eat solid food, and was alert and talkative. Tr.12/6/2011:86-90; Tr.7/31/2012:192-193, 238; Tr.12/7/2011:20-21.

The next morning, December 8, Ms. Christopherson's oxygen level was recorded as 48% at one point; she was given supplemental oxygen and returned to normal. Tr.12/6/2011:103. After consulting with Dr. Palestine, Dr. Kovnat concluded that she had a line infection, and that she was ready for discharge. Tr.12/7/2011:67-75; Tr.12/5/2011:8-10. According to him and to Nurse Ann Gallagher, Ms. Christopherson looked good, was walking, talking, and eating solid foods, and wanted to go home. Tr.7/31/2012:192-193, 238; Tr.12/6/2011:86-87. She did not have a fever that morning, Tr.12/6/2011:90, and Dr. Kovnat prescribed a dose of an antibiotic, vancomycin, to deal with the line infection. Tr.12/7/2011:71-72; Tr.12/5/2011:8. Dr. Kovnat ordered another Fentanyl patch (a powerful pain medication that's absorbed through the skin), which Ms. Christopherson had been receiving for seven days. Tr.8/2/2012:234-237; Tr.8/3/2012:136-138. Dr. Kovnat gave her prescriptions for replacement Fentanyl patches; and medications for breakthrough pain and nausea. Tr.11/29/2011:289-

290. He ordered another blood test, but would not have the results till the next day. Tr.12/1/2011:33-34.

Around noon, Ms. Christopherson's oxygen level was 88%. Tr.12/6/2011:97. Around 4:00 or 4:30 p.m., she had a slightly elevated temperature and heart rate. Tr.12/6/2011:96-97, 111-112; Defendant's Trial One Ex. B at 101. She was not oversedated. Tr.12/9/2013:34. Her girlfriend, Adrianna Bustos, came to pick her up. Tr.11/28/2011:196. Nurse Gallagher went over the discharge instructions with them, explaining that because Ms. Christopherson was on Fentanyl and other medications, it was important that she not drink alcohol. Tr.12/6/2011:105-108. Nurse Gallagher also explained that they needed to call St. Vincent if she had a temperature of over 101, shortness of breath, nausea, vomiting, or sudden severe weakness. Tr.8/2/2012:234; Tr.7/31/2012:140; Defendant's Trial One Ex. B at 101.

The two women left around 4:30 p.m. and, according to Ms. Bustos, drove to Ms. Christopherson's apartment to obtain her prescription card to fill the prescriptions, but were unsuccessful. Tr.11/28/2011:206-207; 11/29/2011:55, 151. At around 7:00 p.m., Tr.12/8/11:27-28, Adrianna and Mercedes arrived at the Santa Fe home of Adrianna's parents, Harold and Renee Bustos. Tr.7/31/2012:133. Adrianna's sister was also present with her girlfriend, Shana Lewis. Tr.11/28/2011:127. According to the Bustos family, Ms. Christopherson spent a

quiet evening, eating a small meal and then going to sleep in her girlfriend's bedroom around 9:00 p.m. Tr.11/28/2011:208-209, 211. Ms. Christopherson did not have the symptoms that Nurse Gallagher warned about, so no one thought it necessary to call for medical attention. Tr.11/28/2011:151-152, 235-238.

Around 7:00 a.m., Adrianna left for work and asked Renee to check on Ms. Christopherson. Tr.11/28/2011:128, 213. Renee did so, but at 10:00 a.m. she discovered that Ms. Christopherson was not breathing. Tr.11/28/2011:128-130. Renee called 911 and Shana Lewis began performing CPR. Tr.11/28/2011:131-133. Before Ms. Lewis began, she observed vomit or bile in her mouth and on the bed, and cleared her airway. Tr.8/2/2012:197-201. EMTs arrived and took Ms. Christopherson to St. Vincent. Tr.11/28/2011:133-135. The EMT report noted that the family said she had been found vomiting in bed. Tr.12/8/2011:105; Defendant's Trial One Ex. H at 3.

At the hospital, Ms. Christopherson was placed on life support. Tr.12/7/2011:91-92. Just before she arrived, Dr. Kovnat received the results of the previous day's blood cultures, which were positive for coag negative staph, a bacterium that resides on human skin. Tr.12/7/2011:83; 12/2/2011:190-191.

Testing revealed Ms. Christopherson's blood alcohol content was 0.226%, though a urine test did not find any alcohol above that test's threshold level. Tr.11/29/2011:296-297; Tr.12/7/2011:129-130; RP5:938. Ms. Christopherson also

tested positive for benzodiazepines (a well-known variety is Xanax) and marijuana. Tr.12/7/2011:245. Ms. Christopherson had not been prescribed alcohol, Xanax, or marijuana while at St. Vincent. RP5:1000, 1080; RP6:1344, 1349; Tr.12/1/2011:86.

Plaintiff arrived at St. Vincent, where, according to him, Dr. Kovnat said his daughter appeared to have overdosed on alcohol. Tr.12/2/2011:61, 64-65. Plaintiff relayed this news to Nurse Gallagher. Tr.12/2/2011:68; 12/1/2011:77. Another nurse then told Nurse Gallagher that this situation could result in a lawsuit, and that she should write down anything she remembered about her interactions with Ms. Christopherson. Tr.12/1/2011:78. Nurse Gallagher added a note to the chart describing her warning at discharge not to use alcohol. Tr.12/1/2011:83-84, 97; Pl.'s Trial One Ex. 11. Ms. Christopherson died the next day. Tr.12/7/2011:106-107.

The Office of the Medical Examiner (OMI) conducted an autopsy, which was performed by a relatively inexperienced fellow, Dr. Jackson. Tr.11/30/2011:161, 213-214, who believed that Ms. Christopherson died of sepsis, which he attributed to an intra-abdominal infection. Tr.11/30/11:38, 250. In support of this theory, OMI cited microabscesses found on her heart. Tr.11/30/2011:171-172, 199-200. OMI sent tissue samples to the Centers for Disease Control, which did not find any bacteria consistent with this theory.

Tr.11/30/2011:238-239, 257-258. OMI rejected the theory that an alcohol overdose caused her death, because its test of the blood samples from St. Vincent, performed over a month later, detected no alcohol. Tr.11/30/2011:201-202; Tr.8/2/2012:31-32; Tr.12/4/2013:221. An employee of the state testing laboratory admitted that the cap was off the blood vial, and the alcohol could have evaporated. Tr.12/4/2013:225-28.

III. The lawsuit, and the parties' basic theories.

Plaintiff filed this wrongful death lawsuit against St. Vincent and Dr. Palestine. RP1:1-18, 120-129. The parties had opposing theories of how Ms. Christopherson died:

A. Plaintiff's theory of the case.

Plaintiff contended that Ms. Christopherson had an intra-abdominal infection, that St. Vincent and Dr. Palestine failed to properly treat it, and that St. Vincent was negligent for concluding that she had a less-serious line infection. Tr.11/28/2011:16; Tr.12/9/2011:39, 61-62.

According to Plaintiff, when Ms. Christopherson's condition deteriorated due to C. Diff., Dr. Palestine should not have discontinued Primaxin in favor of Flagyl, but should have given both. Tr.11/28/2011:27-28; Tr.12/9/2011:58-59. Although she improved on Flagyl, Plaintiff's expert, Dr. Beck, said an intra-

abdominal infection was likely still present and smoldering. Tr.11/29/2011:96-97, 118-119, 151-153.

The blood culture on December 6, when combined with her renewed fever and low oxygenation, was proof that the intra-abdominal infection existed. Tr.11/29/2011:121-122, 132, 141-142; 12/9/2011:40. Dr. Kovnat's belief that she had a less-serious line infection was wrong. Tr.11/28/2011:36. Ms. Christopherson's sleepiness on December 6, and her low oxygen levels on December 7-8, showed she was getting too much pain medication. Tr.11/28/2011:29-32.

Plaintiff contended that St. Vincent committed critical errors on the date of discharge. Tr.11/28/2011:36-37. First, Dr. Palestine and Dr. Kovnat negligently communicated with each other. Tr.12/9/2011:43, 45-46, 59-60. Second, given her low oxygen levels on the mornings of December 7-8, Dr. Kovnat should have expected them to reoccur on December 9, but he failed to send her home with supplemental oxygen. Tr.11/28/2011:37; Tr.12/9/2011:51-53. Third, he gave her one dose of vancomycin, which was insufficient. Tr.12/9/2011:46-47. Fourth, although she was oversedated on December 6, Dr. Kovnat gave her a new Fentanyl patch. Tr.12/9/2011:23; Tr.7/31/2012:30. Fifth, Dr. Kovnat discharged her without waiting for the blood test results. Tr.11/28/2011:36-37. Sixth, given her fever and

high pulse that afternoon, Dr. Kovnat should have recognized that she was unstable and cancelled her discharge. Tr.11/28/2011:34-37.

Plaintiff further contended that the intra-abdominal infection, and resulting sepsis, flared up on the morning of December 9, and, when combined with her low oxygen level and oversedation, caused her to stop breathing; she did not vomit. Tr.12/9/2011:61-62; Tr.8/1/2012:142-143; Tr.8/7/2012:27; Tr.12/4/2013:90-91. OMI concluded that Ms. Christopherson died of sepsis resulting from an infection. Tr.12/9/2011:61-63. And even if she died from respiratory depression and aspiration, as St. Vincent contended, Plaintiff argued that the hospital's alleged negligence caused that to happen. Tr.12/4/2013:89.

Plaintiff denied that Ms. Christopherson had any role in causing her own death, relying on the negative urine test for alcohol and on OMI's negative test. Tr.11/28/2011:38-41. The Bustos family denied that she drank any alcohol, because Mr. Bustos was on probation and was barred from having alcohol at home. Tr.12/3/2013:63-64. Ms. Christopherson's girlfriend admitted there was a bottle of Xanax (a benzodiazepine) in the bedroom where Ms. Christopherson slept, but denied that she took any. RP13:2974. Although Mr. Bustos had a prescription for medical marijuana and smoked some that evening, the Bustos family denied that anyone else had. Tr.11/28/2011:123-124, 210-211.

Finally, Plaintiff claimed that St. Vincent engaged in a cover-up. Dr. Kovnat told him that his daughter likely drank herself to death, without disclosing the negative urine test, or that the previous day's blood tests were positive for bacteria. Tr.12/9/2011:63-65. Plaintiff alleged Nurse Gallagher's note summarizing her conversation with Ms. Christopherson about alcohol was also part of the cover-up. Tr.12/9/2011:65-66.

B. St. Vincent's theory of the case.

The defense St. Vincent planned to present was that no intra-abdominal infection existed, and that Ms. Christopherson died due to respiratory depression and vomiting caused by her consumption of alcohol, Xanax, and marijuana, which, when combined with Fentanyl, had a powerful sedative effect. Tr.11/28/2011:57, 90-91; RP5:982-987; 930, 936-937, 993.

The evidence did not show an intra-abdominal infection existed. Tr.12/9/2011:109-110. The CT scans did not detect one. Tr.11/28/2011:80; Tr.12/9/2011:113. If Ms. Christopherson had had such an infection, its symptoms would have manifested soon after Primaxin was stopped. Tr.12/5/2011:12-13. Her white blood cell count had steadily improved, and she lacked symptoms of sepsis. Tr.11/28/2011:92; Tr.12/9/2011:114, 117, 127-128. Although Plaintiff argued that the Group D enterococcus found on December 6 was a smoking gun, it is a

relatively common and less virulent bacterium, and it did not grow out of the December 8 blood samples. Tr.12/2/2011:192, 216-217.

Ms. Christopherson was not oversedated. Her pain medications had been reduced in the days before discharge. Tr.12/10/2013:22-24. She had been using Fentanyl for seven days and was tolerant of it. Tr.12/8/2011:150, 156-157. On the date of discharge, she was alert and oriented. Tr.12/9/2011:117.

Nor was she hypoxic. Although isolated tests recorded low oxygen levels on December 7-8, Dr. Kovnat believed they were erroneous. Tr.12/10/2013:86-87. A person with oxygen levels of 56% and 48% would be non-responsive and in need of immediate emergency care, but Ms. Christopherson was walking, eating, and alert and responsive. Tr.8/1/2012:24-25.

The OMI autopsy was conducted by an inexperienced doctor. Tr.11/28/2011:89-90; 12/9/2011:124-127. The CDC blood tests did not support OMI's theory, and the chief medical examiner waited months before signing the death certificate, indicating a lack of confidence in OMI's theory that sepsis caused her death. Tr.12/12/2013:120-121.

When Ms. Christopherson left St. Vincent she was not unstable. Tr.12/9/2011:117. Thus, some intervening event must have changed her condition. Tr.11/28/2011:64-65, 68. Testing showed the presence of alcohol, Xanax, and marijuana in her system. Tr.11/28/2011:65-67; Tr.12/7/2011:245. In his deposition,

Dr. Steven Pike, an expert toxicologist, opined that the potent mixture of Fentanyl, alcohol, Xanax, and marijuana likely caused her death. RP5:937.

The Bustos family strenuously denied that anything untoward occurred on the evening of December 8, Tr.11/28/2011:122-124, but their denials were contradicted by scientific tests, and the family had a strong motive to deny that Ms. Christopherson consumed these substances while under their watch, lest they face uncomfortable questions about their actions that evening. Tr.11/7/2011:70-71; RP15:3385-3386. Finally, St. Vincent denied any cover-up. Tr.11/28/2011:59-61.

This was St. Vincent's theory of the case, but as we will see, the District Court excluded critical parts of this defense.

IV. The District Court excludes evidence that Ms. Christopherson's consumption of Xanax and marijuana helped cause her death.

Before Trial One, Plaintiff moved to exclude Dr. Pike's testimony that Xanax and marijuana had a causal role in Ms. Christopherson's death. RP4:900-902, 920-923. Plaintiff argued that his opinion lacked foundation because he did not know exactly *when* Ms. Christopherson consumed Xanax and marijuana, or *how much* she consumed. RP4:920-923, RP5:936-37, 1000-1001, 1147-1151. St. Vincent argued that circumstantial evidence provided a sufficient foundation, and that Dr. Pike lacked information on dosage and timing because the eyewitnesses refused to provide it. Tr.11/7/2011:70-71; RP5:982-987; RP15:3385-3386.

The District Court agreed with Plaintiff, and precluded Dr. Pike from opining that Xanax and marijuana played any part in causing Ms. Christopherson's death. RP7:1573-1575. The District Court allowed limited mentions of Xanax and marijuana in Trial One for other, non-causation purposes. Tr.11/22/2011:57-67.

V. Trial One and the hung jury.

Trial One was held in December 2011. The jury found that St. Vincent breached the standard of care, but deadlocked on causation. RP8:1737-1738. The jury found in Dr. Palestine's favor on the medical negligence claim. RP8:1737-1738.

VI. The District Court orders a partial retrial limited to causation.

St. Vincent argued that a full retrial of the negligence claim was required in Trial Two. RP8:1773-1776, RP9:1936-1939. Plaintiff argued that the issue of negligence was distinct and separable from the issue of causation, and that the new trial should be limited to causation. RP9:1900-1902; Tr.4/9/2012:3-6. The District Court agreed with Plaintiff. Tr.4/9/2012:23-24.

VII. St. Vincent prevails in Trial Two, but the District Court overturns the verdict based on supposed "misconduct" by defense counsel.

Trial Two was held in 2012. St. Vincent tried to show that Ms. Christopherson did not have an intra-abdominal infection, and was not hypoxic or oversedated, because if these conditions did not exist, then any supposed

negligence on its part could not have caused her death. Tr.7/31/2012:43, 50-55; 12/7/2012:64-65.

Plaintiff, however, argued throughout the trial that St. Vincent should not be able to present much of its argument and evidence, because it was "standard of care" or "comparative fault" evidence that was improper because the First Jury had decided the negligence issue against St. Vincent. *E.g.*, Tr.7/31/2012:101-102; Tr.8/1/2012:12-14, 191-196, 210-212; Tr.8/2/2012:275. The District Court sustained most of Plaintiff's objections, and repeatedly instructed defense counsel to confine themselves to "causation" evidence and to avoid "standard of care" evidence and argument. *E.g.*, Tr.7/31/12:101-102; Tr.8/1/12:192, 195-196, 210-211.

But much of the evidence was relevant to *both* negligence and causation. The issues were inextricably intertwined. For example, in closing argument, defense counsel spoke about Dr. Kovnat's review of the last CT scan and his conclusion that it did not indicate the presence of an intra-abdominal infection, and referred to Nurse Gallagher's observations of Ms. Christopherson's condition on December 8, which were inconsistent with the presence of an intra-abdominal infection, hypoxia, or oversedation. Tr.8/7/2012:45, 62-63. This was all relevant to the issue of causation – if Ms. Christopherson did not have those conditions, then the alleged negligence did not harm her. But Plaintiff's counsel objected because

these facts implied that Dr. Kovnat and Nurse Gallagher properly evaluated her, which was relevant to the already-decided issue of negligence. Tr.8/7/2012:46, 63.

At the end of Trial Two, the jury nevertheless found in St. Vincent's favor. RP10:2305-2307. Plaintiff moved for a new trial, alleging that defense counsel had committed misconduct by referring to "standard of care" evidence and committing other supposed misconduct. Supp.RP:3825-3869.

The District Court found that every single instance of conduct alleged by Plaintiff constituted misconduct that had affected the jury's verdict, and granted a new trial. Supp.RP:4160-4162; Tr.6/18/2013:50-58.

VIII. The District Court denies St. Vincent's motion asking that Trial Three be a full retrial of the negligence claim.

Before Trial Three, St. Vincent asked for a full retrial of the negligence claim, rather than a partial one limited to causation. RP12:2751-2761. St. Vincent argued that no one knew the basis of the First Jury's finding that St. Vincent had breached the standard of care, but that the Third Jury would need to know what the breach consisted of to determine whether it caused Ms. Christopherson's death. RP12:2755-2757. The District Court rejected St. Vincent's request. Tr.11/12/2013:26-27; RP14:3150-3151.

IX. Trial Three.

Trial Three was held in December 2013. The jury found in Plaintiff's favor, and awarded $2,250,000 in compensatory damages. RP15:3464-16:3465. The

District Court entered judgment, RP16:3483, and awarded pre-judgment interest and costs. RP17:3703-3708.

ARGUMENT

I. The District Court erred by excluding evidence of the causal role of Xanax and marijuana in Ms. Christopherson's death.

Preservation of Issue. St. Vincent opposed Plaintiff's motion to exclude expert testimony that Xanax and marijuana contributed to Ms. Christopherson's death (RP4:915-923; RP5:924-945, 967-1080, 1138-1154; RP6:1155-1173; Tr.11/7/2011:69-75); and Plaintiff's motions in limine to exclude all evidence about Xanax and marijuana at trial (RP6:1260-62; 1324-1366; RP7:1418-1435; RP9:1981-1986, 2007-2016). St. Vincent asked the Court to reconsider those rulings. RP9:2075-RP10:2085; RP15:3383-3400.

Standard of Review. The exclusion of expert testimony is generally reviewed for an abuse of discretion. *Lopez v. JMAR*, 2013-NMCA-098, ¶18, 311 P.3d 1184. But "when the trial court applies a wrong legal standard in determining whether evidence is admissible, an abuse of discretion results." *Id.*

A. Dr. Pike's opinions had sufficient evidentiary foundation.

The District Court's exclusion of Dr. Pike's testimony on the causal role of Xanax and marijuana was error. Rule 11-702 provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," an expert "may testify thereto in the

form of an opinion or otherwise." "[A]ny doubt regarding the admissibility of expert opinion evidence 'should be resolved in favor of admission, rather than exclusion.'" *Lopez*, 2013-NMCA-098, ¶18.

Here, the District Court excluded Dr. Pike's opinion as lacking a proper foundation because he did not know the quantity of Xanax and marijuana in Ms. Christopherson's system, or when she consumed them. RP7:1573-75; Tr.11/9/2011:6. New Mexico law, however, does not require direct evidence of causation because it is not always available. Rather, causation can be established by circumstantial evidence. *See Carter Farms Co. v. Hoffman-Laroche, Inc.*, 1971-NMCA-178, ¶¶12-18, 83 N.M. 383 (plaintiff claimed that drug killed sheep into which it was injected; trial court directed verdict for defendant on ground that no direct evidence of defect had been established; this Court reversed, holding that "it is not necessary that proof [of defect or causation] be shown by direct evidence, proof may be by circumstantial evidence alone"); *Richards v. Upjohn Co.*, 1980-NMCA-062, ¶¶8-11, 95 N.M. 675 (plaintiff alleged that drug capable of causing deafness actually caused his deafness; this Court said plaintiff's claim could "be established by circumstantial evidence.") *Lopez*, 2013-NMCA-098, ¶¶39-43 (circumstantial evidence rendered expert's causation opinion admissible).

Abundant and powerful circumstantial evidence provided sufficient foundation for Dr. Pike's opinions that a combination of Fentanyl, Xanax,

marijuana, and alcohol caused Ms. Christopherson's death. First, there was direct evidence that these substances, in combination, are capable of causing respiratory depression:

- Dr. Pike testified that Xanax alone will not produce substantial respiratory depression, but that the presence of any other drug "changes that parameter substantially," and "[o]nce you add opiates or opioids or any other drug in the mix, including alcohol, all bets are off"; in the presence of other drugs, benzodiazepines like Xanax "become extremely potent respiratory depressants." RP5:936, at 174.

- Plaintiff's expert admitted that Xanax is a respiratory depressant. RP13:2946, 2965.

- Marijuana is also a respiratory depressant to some degree, and "certainly would be a contributing factor." RP15:3387, 3391-93.

- Benzodiazepines (Xanax), marijuana, and pain medication (Fentanyl) are among the factors that could lead to vomiting. RP13:2946, 2968 at 78.

- Fentanyl alone would not have caused her respiratory depression: "What was a problem, however, was the added use of Xanax and the added use of alcohol which certainly would have been a very dangerous thing to do with the use of Fentanyl." RP15:3399-3400.

The above facts also provide sufficient foundation for an opinion that the interaction between these substances has a depressant effect on the respiratory system, a foundation that the court believed was lacking. Tr.11/9/2011:6; RP7:1573-75, at ¶5.D.

Second, powerful circumstantial evidence existed that Ms. Christopherson ingested alcohol, Xanax, and marijuana at the Bustos home on the evening of December 8-9 after she was discharged from St. Vincent:

- Ms. Christopherson was not prescribed Xanax, marijuana, or alcohol while hospitalized at St. Vincent from November 25 through December 8. *See* RP5:1000, 1080; RP6:1344, 1349.

- A bottle of Xanax was in the bedroom where Ms. Christopherson slept on the evening of December 8-9. RP13:2974.

- Marijuana was present at the Bustos home, and Mr. Bustos smoked marijuana the evening of December 8-9. RP13:2973-74.

- The EMT report says the Bustos home "smell[ed] strongly of marijuana" on the morning of December 9 when they arrived to treat Ms. Christopherson. RP3:596

- Ms. Christopherson's urine test could not have been positive for marijuana from mere passive inhalation. RP5:929, at 53.

- Scientific tests at St. Vincent detected that Ms. Christopherson had a 0.226% blood alcohol content, and tested positive for benzodiazepines and marijuana. Tr.11/29/2011:300; Tr.12/7/2011:101, 245; RP5:938.

- The State Laboratory Division confirmed that the benzodiazepine in her system was Alprazolam, the generic name for Xanax. *See* RP5:1076; St. Vincent Trial One Exhibit J, at 11.

- There was a strong temporal link between her exposure to these substances and her resulting symptoms. According to St. Vincent's witnesses, Ms. Christopherson was discharged in good condition and without respiratory depression. But she was found vomiting and not breathing 18 hours later, exactly the symptoms that can be caused by mixing Fentanyl with alcohol, Xanax, and marijuana.

Reliance on circumstantial evidence is particularly appropriate here because members of the Bustos family, the only people who likely knew what Ms. Christopherson ingested that evening, gave self-serving testimony denying that she took *any* alcohol, Xanax, and marijuana, despite the scientific tests showing otherwise. They had every motive to deny all such knowledge to avoid responsibility for any role they might have played in her death. New Mexico law recognizes that reliance on circumstantial evidence is justified when direct evidence is solely in the possession of persons who are unlikely to admit unfavorable facts. *E.g., Meiboom v. Carmody*, 2003-NMCA-145, ¶20, 134 N.M. 699 (circumstantial evidence is relied upon in fraud cases because perpetrators usually don't admit to fraud).

To be sure, no one (other than, perhaps, the Bustos family) can say with certainty when, and how much, Xanax and marijuana Ms. Christopherson ingested. But that is fodder for cross-examination, and goes to the weight of Dr. Pike's testimony, not its admissibility.

B. The District Court's decision to exclude Dr. Pike's causation opinion was based on a misinterpretation of New Mexico law.

The District Court's rationale for excluding the evidence was based on a legal error. The District Court accepted Plaintiff's argument that *Parkhill v. Alderman-Cave Milling and Grain Co.*, 2010-NMCA-110, 149 N.M. 140 held that

an expert *must always* have exact dosage and timing information to opine that a drug caused injury. Tr.11/9/2011:6; RP7:1573-75.

But *Parkhill* establishes no such rigid rule. Rather, *Parkhill* held that an expert must consider such information *where it is available.* This Court affirmed the exclusion of an expert's opinion that Monensin in animal feed harmed the plaintiffs, observing that the expert had not "attempt[end] to quantify the dose of Monensin" received by the plaintiffs, "nor did he make any statement to the effect that it was not possible to quantify the dose of Monensin" to which the plaintiffs were exposed. 2010-NMCA-110, ¶38. This Court said it was possible to "give a reasonable estimate" of the plaintiffs' exposure "under the circumstances" of the case. *Id.* at ¶¶39-40. Despite the availability of this information, the plaintiffs' expert made no effort to quantify the amount of exposure, although the defense expert did so. *Id.* at ¶¶40-42. This Court cited cases holding that where information regarding the exact degree of exposure is unavailable, then experts are still entitled to offer their conclusions, and can rely on a strong temporal connection between exposure and effect, but held that this principle did not apply "because direct evidence" of the exposure was available. *Id.* at ¶43; *citing, e.g., Wisner v. Illinois Cent. Gulf R.R.*, 537 So.2d 740, 747-48 (La. Ct. App. 1988) (where level of exposure to chemical is unknown, experts may still opine based on circumstantial evidence and their expertise).

Thus, *Parkhill* stands only for the proposition that where evidence of dosage is available, then an expert must consider it. But where evidence of the exact dosage is not available – as is often the case – then an expert may rely on his or her experience, training, skill, education, or knowledge, and apply it to the circumstantial evidence available. Other courts have also rejected a rigid requirement that evidence of dose and timing is always required. *See Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 264-65 (4th Cir. 1999) ("[o]nly rarely" are people exposed to chemicals in precisely measurable amounts; expert can rely on circumstantial evidence, including temporal proximity of exposure to onset of symptoms); *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 589-90 (5th Cir. 2003) (expert could testify although dosage unknown; "If all variables were required to be eliminated in a case where an actor has used marijuana or another drug and then been involved in an accident, evidence of drug would never be presented to the fact-finder. Without evidence of [driver's] marijuana use in this case, the evidence presented at trial bore little resemblance to what actually happened. *Daubert* and its progeny do not compel such a result."); *Alder v. Bayer Corp.*, 61 P.3d 1068, 1086-90 (Utah 2002) (exact dosage not required; toxicologist can rely on patients' symptoms, and temporal proximity of exposure to symptoms, as a proper foundation for causation opinion).

Plaintiff also relied on *Andrews v. U.S. Steel Corp.*, 2011-NMCA-032, 149 N.M. 461, which says "[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort case." *Id.*, ¶9 (quoting *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996)). This broad statement, however, was *dicta* because *Andrews* did not consider whether circumstantial evidence can support an expert opinion on causation, and did not criticize *Parkhill*'s recognition that dosage information is not necessary where it is unavailable.

Here it was impossible to quantify the amounts of Xanax and marijuana in Ms. Christopherson's system absent eyewitness testimony about how much she took. RP5:936, at 175. Circumstantial evidence provided more than sufficient foundation for Dr. Pike's opinion. The Court's orders excluding Dr. Pike's opinions and other evidence concerning Xanax and marijuana were erroneous.

C. St. Vincent's defense was unfairly prejudiced by the improper exclusion of Dr. Pike's causation opinions.

St. Vincent was unfairly prejudiced by the exclusion of Dr. Pike's opinions from all three trials, and the Court's order preventing *any* evidence of Xanax or marijuana from being introduced at Trial Two or Three (*see* RP11:2332-33), which extended even to redacting all references to benzodiazepines and marijuana from the trial exhibits and medical records. *Compare, e.g.,* St. Vincent's Trial One Exh.

I, at 8 (OMI report referencing positive benzodiazepine test), *with* St. Vincent's Trial Three Exh. I, at 8 (redacting reference).

First, these orders prevented St. Vincent from presenting its defense on breach of duty, causation, and comparative fault. Had the First Jury heard Dr. Pike's opinions, it could have concluded that St. Vincent was not negligent, and all three juries could have concluded that St. Vincent did not cause her death. The juries could also have concluded that Ms. Christopherson did not act with reasonable care for her own safety. *See* UJI 13-1110. With St. Vincent's defense crippled, it was more likely that the Third Jury would accept Plaintiff's theory that St. Vincent's alleged negligence must somehow have caused her death.

Second, by expunging the trial exhibits and medical records of any evidence of Xanax and marijuana, the Third Jury was presented with an artificially sanitized account of the evening at the Bustos home and Ms. Christopherson's medical history, which bore little resemblance to what actually happened. Preventing the jury from having a complete and accurate picture of the drugs in Ms. Christopherson's system was especially prejudicial because one of Plaintiff's key contentions was that St. Vincent caused her death by giving her too much pain medication.

Third, St. Vincent was prevented from impeaching the credibility of the Bustos family with the positive tests.

Fourth, St. Vincent was prevented from cross-examining Plaintiff's experts about the Xanax and marijuana. *See* RP13:2936-74; RP14:3081-88; RP15:3403-04. It was Plaintiff's burden to prove that Ms. Christopherson died as a result of oversedation from medications prescribed by St. Vincent, as opposed to other drugs. Thus, St. Vincent was entitled to ask Plaintiff's experts how they could *exclude* Xanax and marijuana as contributing factors in her death, since they also did not know how much she had consumed. The District Court refused to permit this cross-examination. RP15:3403-04. This improperly shifted the burden of proof on causation to St. Vincent.

A new, full retrial should be granted.

II. The District Court improperly limited Trial Three to the issue of causation, when a full retrial of the negligence claim was required.

In Trial One, the jury found against St. Vincent on negligence, but hung on the issue of causation. Because those issues are inextricably intertwined, a full retrial of Plaintiff's negligence claim was required. The District Court, however, ordered that Trial Three be limited to issues of causation and damages. This error unfairly prejudiced St. Vincent, and a new trial is required.

Preservation of Issue. St. Vincent preserved this issue by asking for a full retrial before Trial Three, and a new trial afterward. RP12:2751-2771; RP13:2798-2820; RP14:3144-3145; Tr.11/12/2013:3-34; RP16:3552-62, 3669-74; Tr.4/11/2014:5-13.

Standard of Review. A district court's grant of a new trial is reviewed for an abuse of discretion. *Talbott v. Roswell Hospital Corp.*, 2008-NMCA-114, ¶29, 144 N.M. 753. New Mexico has not yet determined what standard of review applies to a decision that a new trial is proper under the "distinct and separable" test, but it appears that other courts apply an abuse of discretion standard. *See, e.g., Liodas v. Sahadi*, 562 P.2d 316, 320 (Cal. 1977). All doubts should be resolved in favor of a full retrial, and "[w]hen a limited retrial might be prejudicial to either party, the failure to grant a new trial on all of the issues is an abuse of discretion." *Id.*

A. The issues of causation and breach of duty were not "distinct and separable." The District Court erred in refusing a full retrial of Plaintiff's negligence claim.

At common law, there were no partial retrials. Rather, new trials were always full retrials. *See Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 497 (1931). The U.S. Supreme Court, however, recognized that a limited exception to the common-law rule would benefit justice and judicial economy. In some cases there's no need to retry "an issue once correctly determined" merely because "another distinct issue" must be retried. *Id.* at 498. But in many cases, a partial retrial will cause confusion, uncertainty, and unfairness to one or both parties. Thus, partial retrials are only allowed when the issue to be retried is "distinct and separable" from the other issues. *Id.* at 500-01.

The facts of *Gasoline Products* illustrate why a full retrial was required in this case. A jury found liability on a counterclaim for breach of a construction contract, but the trial court erroneously instructed the jury on the measure of damages, which required a new trial. *Id.* at 496. The counterclaim plaintiff, understandably wanting to preserve the favorable verdict on liability, asked that the trial be limited to damages alone, and the lower courts agreed. *Id.* at 496-97.

The Supreme Court reversed, holding that a partial retrial would be unfair to the counterclaim defendant. The first jury's verdict established only that the construction contract had been breached. *Id.* at 499. To properly fix the amount of damages resulting from the breach, the second jury would need to know how the first jury had resolved a number of contested issues: When was the contract formed? What was the deadline for performance? How many buildings were to be constructed? Had the counterclaim plaintiff mitigated its damages? *Id.* at 499-500. But the verdict did not explain how the first jury had resolved these issues.

The Supreme Court explained that a partial retrial "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. A full retrial was required, because the issue of damages "is so interwoven with that of liability that the former cannot be submitted to the jury independently

of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* 500-01.

Our Supreme Court has incorporated the "distinct and separable" standard into New Mexico law. *Vivian v. A.T. & S.F. Railway Co.*, 1961-NMSC-093, ¶23, 69 N.M. 6; *compare* Rule 1-059(A) (allowing new trial "on all or part of the issues" tried to a jury). The issue to be retried must not only be distinct and separable, "but it must likewise appear that such single issue can be determined without reference to other issues and without prejudice to either party." *Sanchez v. Dale Bellamah Homes*, 1966-NMSC-040, ¶12, 76 N.M. 526.

Under this standard, a full retrial was required in Trial Three because the question of causation was not "distinct and separable" from that of negligence. To determine causation, a jury must decide whether the negligent "act or omission" "contribute[d] to bringing about the injury or harm," and whether "injury would not have occurred without it." UJI 13-305. Thus, to properly determine causation, the Third Jury needed to know *what negligent "acts or omissions"* the First Jury had found against St. Vincent.

But that was not possible here. At Trial One, Plaintiff asserted seven negligence theories against St. Vincent. RP10:2244. The First Jury was instructed to find St. Vincent negligent if Plaintiff prevailed on even *one* of them:

> To establish medical negligence on the part of Defendant St. Vincent Hospital, the Plaintiff has the burden of proving that St. Vincent Hospital,

acting through Dr. Kovnat, Nurse Gallagher or other nurses, failed to use the skill and care required in at least one of the following ways:

1) By failing to properly communicate observations and concerns about Mercedes Christopherson's condition among Dr. Kovnat, Dr. Palestine, Nurse Gallagher or other nurses; or

2) By failing to rule out intra-abdominal infection as the cause of Mercedes Christopherson's blood stream infection; or

3) By inadequately treating Mercedes Christopherson's blood stream infection; or

4) By failing to assess and evaluate Mercedes Christopherson's hypoxia before discharging her without supplemental oxygen; or

5) By failing to assess and evaluate Mercedes Christopherson for oversedation before discharging her; or

6) By failing to obtain pertinent medical information, including the December 8, 2008 blood culture results, prior to discharging Mercedes Christopherson home on December 8, 2008; or

7) By discharging Mercedes Christopherson home on December 8, 2008, without ongoing antibiotics.

RP10:2243-45.

The verdict form did not, however, ask the First Jury to identify which of the seven theories it found against St. Vincent, and which it may have rejected or hung upon. The form simply asked whether St. Vincent was negligent, and the jury checked "yes." RP8:1633.

The factual basis of the First Jury's negligence verdict is therefore unknown and unknowable. That verdict could have been based on any one or more of the

seven theories. Like in *Gasoline Products*, no one, including the Third Jury, had any idea what negligent "acts or omissions" the First Jury had found against St. Vincent. Under the "distinct and separable" standard, a full retrial of the negligence claim was required.

Although no New Mexico court appears to have specifically addressed whether a limited retrial on causation can be held when a previous verdict does not identify the defendant's allegedly wrongful acts, other courts have held that causation is not "distinct and separable" under those circumstances. *See Ahn v. Kim*, 678 A.2d 1073, 1079 (N.J. 1996) (retrial could not be limited to causation in negligence case, because first jury found only that nurses had breached standard of care, without specifying how it was breached); *Lewis v. City of Benicia*, 224 Cal.App.4th 1519, 1540 (2014) (retrial could not be limited to causation, because second jury would need to know "which of the City's allegedly retaliatory acts ... the first jury determined were retaliatory"); *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 708-09 (2d Cir. 1983) (argument that new trial could be limited to causation rejected as "frivolous," where first jury's verdict didn't identify acts constituting antitrust violations).

B. The partial retrial unfairly prejudiced St. Vincent.

Here, the limitation of Trial Three to issues of causation and damages prejudiced St. Vincent in several ways:

1. No one, including the Third Jury, knew what acts or omissions the First Jury found against St. Vincent. The Third Jury's verdict on causation was therefore necessarily based on speculation about the basis of the First Jury's negligence verdict. A jury's verdict, however, may not be "based on speculation, guess or conjecture." UJI 13-2005.

2. Because the Third Jury had no idea which acts of negligence the First Jury found against St. Vincent, limiting the retrial to causation meant that St. Vincent could be held liable for causing Ms. Christopherson's death based on all seven negligence theories, even though the First Jury may have found in St. Vincent's favor on some of them. That risk was exacerbated here, because during its deliberations the First Jury sent out a note stating that it had determined *only* the first theory of negligence against St. Vincent. RP8:1707.

3. Plaintiff was allowed to proceed as if all seven acts or omissions had been found to constitute negligence, and present evidence that each of them caused Ms. Christopherson's death, when there was no evidence that St. Vincent had ever been found negligent for any particular act or omission. Over St. Vincent's objection, Plaintiff's experts were told to assume that each of the seven alleged

breaches of the standard of care had been found against St. Vincent, and then asked whether each alleged breach caused Ms. Christopherson's death. Tr.12/3/2013:180-191; Tr.12/4/2013:77-91. Again over objection, the Third Jury was instructed that it could find causation if it believed that any one of the seven alleged breaches caused Ms. Christopherson's death. RP15:3457.

4. The unfair risk of being held liable for conduct that the First Jury may have found to be non-negligent is the sort of "injustice" that prohibits a partial retrial, and violated St. Vincent's right to a jury trial under Article II, §12 of the New Mexico Constitution. In addition, granting effect to the First Jury's verdict on negligence deprived St. Vincent of its property without any assurance that any particular theory of negligence was ever decided against it, thus violating the Due Process Clauses of the federal and state constitutions. *See* U.S. Const., Amdt. XIV; N.M. Const., Art. II, §18; *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904) (due process prohibits giving issue-preclusive effect to prior judgment if it is unknown what issues were actually decided).

C. The District Court's reasons for refusing a full retrial lack merit.

The District Court found, without explanation, that the issues of causation and negligence were distinct and separable. Tr.11/12/2013:26-27. As we have seen, however, those issues are intertwined.

The District Court also rejected a full retrial because it accepted Plaintiff's argument that St. Vincent had agreed to trials limited to causation in two other cases. RP13:2781; RP14:3150-51. In one of those cases, St. Vincent conceded negligence, and in the other, the plaintiff obtained summary judgment on negligence. *Id.* Thus, in both cases the facts constituting negligence were *known*, and the jury could determine causation. RP13:2798-2801. Those two cases are irrelevant here, where the Third Jury had no idea what acts or omissions the First Jury had found against St. Vincent. Plaintiff cited no authority to support the notion that St. Vincent's decisions in other cases, which involved entirely different facts and issues, could somehow have preclusive legal effect in this one.

Finally, the District Court agreed with Plaintiff's argument that St. Vincent "waived" its argument for a full retrial because it did not propose a verdict form, or ask to poll the First Jury, to identify which of the negligence theories were found against St. Vincent. Tr.11/12/2013:15-16; Tr.4/11:2014:12. But St. Vincent is not claiming that the verdict form was defective. The error was in the District Court's decision that the verdict form could support a partial retrial, when it could not. That issue was timely preserved. Moreover, when the First Jury sent out a note saying it might be hung on causation, the District Court sent a note back saying that "[i]f there is truly a hung jury," then "a mistrial would be declared as to the negligence claims" against St. Vincent, and said it would *not* poll the jury on the

seven negligence theories in Instruction No. 2. RP8:1708; Tr.12/12/2011:59. Thus, St. Vincent had no reason to think that a new trial would be a partial one.

If any party has "waived" the issue, it is Plaintiff. As we have seen, the presumption is that a new trial will be a full retrial; partial retrials can be held only when certain conditions are satisfied. *Gasoline Products.* St. Vincent did not *want* a partial retrial, so it had no obligation to ask for a more specific verdict form or to poll the jury. If Plaintiff wanted a partial retrial, then it was up to Plaintiff to ensure that the verdict form was constructed in a way that could allow a partial retrial to be held. Plaintiff never cited any authority that supports his "waiver" theory, and St. Vincent has found none that supports it.

III. St. Vincent's counsel did not commit misconduct in Trial Two.

St. Vincent's trial counsel committed no misconduct, and nothing they did caused an improper verdict.

Preservation of Issue: St. Vincent preserved this issue by opposing Plaintiff's motion for new trial based on alleged misconduct by counsel. Supp.RP:3823-3869, 3870-4002, 4003-4106, 4112-4146, 4157; Tr.6/18/2013:19-46.

Standard of Review: A trial court's decision to grant a motion for new trial is reviewed for abuse of discretion and will be reversed upon a showing of a clear abuse. *Rhein v. ADT Automotive, Inc.*, 1996-NMSC-66, ¶18, 122 N.M. 646.

A. Legal Standard.

A jury verdict will not be overturned based on alleged misconduct by counsel unless (1) the conduct was improper, and (2) the conduct "was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case." *Apodaca v. U.S. Fid. & Guar. Co.*, 1967-NMSC-250, ¶8, 78 N.M. 501. The complaining party bears the burden of showing "how [counsel's] statements caused an improper judgment; in other words, to show prejudice." *Benavidez v. City of Gallup*, 2007-NMSC-26, ¶16, 141 N.M. 808.

B. Supposed "standard of care" and "comparative fault" evidence and argument did not warrant a new trial.

After Trial Two, Plaintiff complained that defense counsel presented argument and evidence that St. Vincent didn't breach the standard of care, Supp.RP:3830-3835, 4005-4011, in defiance of the District Court's order limiting Trial Two to causation. RP8:1737-1738. But the issues of standard of care and causation were inextricably intertwined, and much of the evidence in Trial Two was relevant to both.

1. Jury Questionnaire.

The District Court ruled that a new trial should be granted because the supplemental juror questionnaire submitted by St. Vincent before Trial Two supposedly injected "comparative fault" into the case because it said "one of the defendants in the case is St. Vincent Hospital." Supp.RP4160, RP9:2056. The

same questionnaire had been used before Trial One, and St. Vincent explained that the statement had been inadvertently retained. Tr.8/2/2012:10; RP6:1223.

This type of mistake is not "improper" conduct warranting a new trial. New Mexico cases granting a new trial do not involve conduct that is technically improper or inadvertent. Instead, counsel must intentionally violate a well-established rule or order to warrant a new trial. *See Sutherlin v. Fenenga*, 1991-NMCA-011, ¶¶37-47, 111 N.M. 767 (counsel improperly emphasized the "insurance crisis," insurance coverage, and counsel's prejudice against insurance companies); *State v. Gutierrez*, 2007-NMSC-33, ¶¶18-23, 142 N.M. 1 (prosecutor commented on defendant's refusal to take polygraph test). In fact, the District Court orally conceded that the questionnaire, by itself, did not warrant a new trial, Tr.6/18/2013:50, but its written order held that this mistake warranted a new trial all by itself. Supp.RP:4160-4161.

2. No misconduct occurred in the opening statement.

The District Court ruled that two comments during St. Vincent's opening statement "attempted to interject the standard of care and negligence issues into the case contrary to express rulings of the Court." Supp.RP:4160.

In the first, attorney David Lawrenz referred to anticipated expert testimony about C. diff. bacteria, which would tend to show that Ms. Christopherson did not have an intra-abdominal infection. Tr.7/31/2012:49-53. Overruling Plaintiff's

objection, the District Court *allowed* Mr. Lawrenz to continue. Tr.7/31/2012:53. It was blatantly unfair for the District Court to *allow* counsel to continue, but later to declare that counsel has committed "misconduct" for doing so.

Mr. Lawrenz also mentioned the discharge paperwork prepared by Dr. Kovnat, which referred to a future appointment with Dr. Palestine. Tr.7/31/2012:57-58. The paperwork was relevant to show that Dr. Kovnat believed that Ms. Christopherson had a line infection, not sepsis. Tr.7/31/2012:58-59. The District Court agreed that Mr. Lawrenz could "talk about what Dr. Kovnat was thinking in his thought process," but that the future appointment was not relevant. *Id.* This was not misconduct and could not have affected the verdict.

3. No misconduct occurred during voir dire.

The District Court ruled that attorney William Slattery committed misconduct during jury selection when he honestly answered a potential juror's question by saying that he did not agree with separating negligence from causation. Supp.RP:4160; CD, 7/30/2012 at 3:32:00-3:32:33. The impossibility of separating causation from negligence had already been raised by members of the panel, several of whom stated that they would need information on negligence in order to decide causation. CD, 7/30/2012 at 2:28:38-2:29:30; 2:48:15-2:49:29; 2:52:03-2:53:52. Mr. Slattery's comment did not inject the issue into the proceeding.

Plaintiff did not really believe that this affected the verdict, because he did not ask for a new venire panel. *Id.* at 3:33:13-3:33:25. No New Mexico case suggests that an isolated remark like this warrants a new trial.

4. Questions to Dr. Kovnat were not improper.

The District Court ruled that a new trial should be granted because Mr. Slattery asked Dr. Kovnat seven questions "going directly to negligence or standard of care issues." Supp.RP:4160. This ruling is based on (1) an exchange in which Mr. Slattery asked about supplemental oxygen orders, Tr.8/1/2012:60, and (2) questions regarding "red flags"—or warning signs—of sepsis that had been discussed during Plaintiff's examination of Dr. Kovnat, Tr.8/1/2012:60-61.

On the first issue, Dr. Kovnat testified that Medicare and insurance companies do not approve payment for supplemental oxygen. Tr.7/31/2012:190. Mr. Slattery requested leave to clarify that Dr. Kovnat does not allow insurance coverage to dictate his medical decisions. Tr.8/1/2012:57-59. The court granted permission to clarify Dr. Kovnat's testimony, but not to ask standard of care questions. *Id.* In any event, Dr. Kovnat never answered the questions because the court sustained Plaintiff's objections. Tr.8/1/2012:59-60. The jury was instructed not to speculate about questions to which objections were sustained, RP10:2298, so they could not have affected the verdict.

The remaining four questions referred to "red flags"—or signs—of sepsis about which Plaintiff's counsel had asked Dr. Kovnat. Tr.7/31/2012:238-239. Mr. Slattery asked whether certain red flags had concerned Dr. Kovnat. Tr.8/1/2012:60-61. Plaintiff's counsel objected that the questions were cumulative. Tr.8/1/2012:60. The court agreed with some of Plaintiff's objections on asked and answered grounds. Tr.8/1/2012:60-63. The court overruled some objections, and allowed further questioning about flags that had not been addressed. Tr.8/1/2012:63-64. The court did not suggest that the questions were substantively improper.

The District Court later found that Mr. Slattery's questions were improper because they went "directly to negligence or standard of care issues." Supp.RP:4160. This ruling is an abuse of discretion, because the record only contains "asked and answered" objections and the questions did not implicate standard of care.

Moreover, the questions did not affect the verdict. The nature of the "asked and answered" objection means that the jury had already heard the questions and answers. The verdict could not have been affected by hearing the questions twice.

5. St. Vincent's closing argument was proper.

The District Court held that "Defense counsel made two improper comments during closing" regarding negligence or standard of care. Supp.RP:4161.[1] This finding was error.

Attorneys have "considerable latitude in closing arguments," and remarks during closing "will generally not result in reversible error where counsel does not assert personal knowledge, vouch for his client's credibility or belittle or demean opposing parties or their witnesses." *Gallegos v. State Bd. of Educ.*, 1997-NMCA-40, ¶33, 123 N.M. 362.

The allegedly improper comments were proper. First, after Mr. Slattery reviewed medical evidence and witness testimony, Plaintiff objected that he had been "arguing standard of care" for some time. Tr.8/7/2012:46. The court did not sustain Plaintiff's objection, admonish Mr. Slattery, or grant Plaintiff's request for a curative instruction. *Id.*

Second, Mr. Slattery described Ms. Christopherson's condition on December 8 and noted that Nurse Gallagher said she was alert and responsive, so she "was not concerned about the breathing. She gave her the incentive spirometer to go

[1] Plaintiff's motion for new trial identified four allegedly improper comments. St. Vincent asked the District Court to clarify which two of the comments formed the basis of the court's ruling. Tr.6/18/2013:55-56. The court responded that it was "focusing on instances that dealt with interjecting matters of negligence and standard of care and comparative negligence." Tr.6/18/2013:56. Accordingly, St. Vincent will discuss the three comments that allegedly injected negligence.

home and told her the reducing of the – ." Tr.8/7/2012:63. Plaintiff objected, asserting that this was somehow an "effort to inject negligence." *Id.* The comment was not improper, because it addressed Ms. Christopherson's condition at discharge. If Nurse Gallagher was not concerned about Ms. Christopherson's breathing because she was alert and responsive, that tends to show that she was not oversedated and not hypoxic, which was relevant to causation. The court nevertheless gave a "curative" instruction that the jury was not to consider whether anyone other than St. Vincent was negligent. Tr.8/7/2012:64, 70-71.

Third, Plaintiff objected when Mr. Slattery suggested that the Bustos family would have called the doctor on December 8 if it had believed Ms. Christopherson was ill. Tr.8/7/2012:65-66. The court sustained the objection. *Id.* But the Bustos family's belief that there was no need to call a doctor was relevant to causation, because it tended to show that Ms. Christopherson was not severely ill with sepsis. Tr.7/31/2012:101. Mr. Slattery's remark was an appropriate comment on the evidence.

Finally, the Second Jury knew it should not revisit the question of negligence. Mr. Slattery told the jury that this is "a cause of death case." Tr.8/7/2012:33. In addition, the court told the jury that it was not to decide the issue of negligence, RP10:2303, and that St. Vincent had been found negligent. RP10:2279. The jury presumably followed these instructions.

C. St. Vincent's questioning of Renee Bustos did not warrant a new trial.

The District Court ruled that "[t]here were at least four improper impeachment questions directed to [Renee] Bustos." Supp.RP:4160. This ruling was based on Plaintiff's argument that St. Vincent improperly attempted to impeach Ms. Bustos with consistent testimony. Supp.RP:4011-4012; Tr.6/18/2013:52-53.

The first instance occurred when Mr. Slattery asked whether Ms. Christopherson was feverish when she arrived at the Bustos home. Tr.7/31/2012:96. Ms. Bustos testified that Ms. Christopherson "felt feverish." Tr.7/31/2012:97. Mr. Slattery then showed Ms. Bustos prior testimony in which she had stated that Ms. Christopherson did not say she was feverish. *Id.* Mr. Zamora objected that these statements were not actually inconsistent, and the District Court sustained his objection. *Id.* It is difficult to imagine how this allegedly consistent testimony could have caused an improper verdict, and the jury was instructed not to consider what the answers would be if the court sustains an objection. RP10:2298.

The second and third instances occurred when Mr. Slattery showed Ms. Bustos prior testimony that she did not recall her daughter saying that she could not wake Ms. Christopherson. Tr.7/31/2012:119-121. The previous testimony actually seemed consistent with her trial testimony. *Id.* Plaintiff never explained

how that could have affected the verdict. Plaintiff also objected when Mr. Slattery tried to clarify that she was only stating that she did not remember the conversation, not that it didn't happen. *Id.* Again, Plaintiff has never explained how this could have affected the verdict.

The fourth instance occurred when Mr. Slattery questioned Ms. Bustos about conversations between the Bustos family and the EMTs. Plaintiff argued that Ms. Bustos consistently testified that she had no knowledge regarding conversations with EMTs. Supp.RP:4012. But when asked "[w]ho talked to the fire department personnel when they got to the house?" Ms. Bustos responded that she "believe[d] all of us did." Tr.7/31/2012:106. Mr. Slattery properly explored what Ms. Bustos remembered, and whether her testimony was consistent with that of other family members. The court overruled some of Plaintiff's objections and sustained others, many on asked-and-answered grounds. *Id.* at 109:4-12, 116:1-7.

Nothing in this questioning implied that Ms. Bustos had lied. Instead, the questions established Ms. Bustos' lack of knowledge, and hence her inability to contradict the EMT report. Plaintiff never explained how these questions could have affected the verdict. *See Benavidez*, 2007-NMSC-026, ¶16.

D. St. Vincent's objections and questions during Dr. Cheng's testimony did not warrant a new trial.

The District Court ruled that a new trial should be granted because "Defense counsel made numerous improper objections and questions during Dr. Cheng's testimony." Supp.RP:4161. This was an abuse of discretion.

1. Defense counsel's objections were proper.

Mr. Slattery objected to Dr. Cheng's testimony in part because it raised previously undisclosed opinions. Plaintiff contended that the objections were merely an "attempt to disrupt, derail and confuse Dr. Cheng's testimony." Supp.RP:4013. The record, however, shows that Mr. Slattery's objections were proper.

If a lawyer believes that opposing counsel is asking improper questions, it is proper to object, and counsel must do so to preserve objections for appeal. *See* Rule 11-103(A)(1). Here, just after Dr. Cheng's testimony began, Mr. Slattery objected to Dr. Cheng's new cause of death opinions, which the Court overruled. Tr.8/1/2012:119-121. Mr. Slattery objected on similar grounds when Plaintiff offered Dr. Cheng as an expert. Tr.8/1/2012:124-125. The record reflects that Mr. Slattery's goal in raising these objections was to preserve issues for appeal. *Id.* at 121 ("Just making my record."); *id.* at 125 (same). Mr. Slattery also objected to standard of care testimony. Tr.8/1/2012:139-140. These objections were properly aimed at preserving error for appeal.

In fact, Mr. Slattery tried to avoid interrupting Dr. Cheng by asking for a continuing objection. Tr.8/1/2012:138; Tr.8/3/2012:11. The court responded, "I'll let you make that record. Objection overruled," which seemed to indicate that a continuing objection was not being allowed. Tr.8/1/2012:138. Seven questions later, Mr. Slattery asked the court to clarify whether it was allowing a continuing objection, and the court finally said that it was. Tr.8/1/2012:140-141. Later, Mr. Slattery asked for a continuing objection to the new causation opinions. Tr.8/1/2012:174. This conduct was proper, because this Court has held that when a continuing objection is not clearly granted, it will interpret the ruling as "requiring defendant to make specific objections to each question [it] did not want answered." *State v. Flanagan*, 1990-NMCA-113, ¶19, 111 N.M. 93.

Neither Plaintiff nor the District Court explained how St. Vincent's perfectly ordinary objections could improperly disrupt Dr. Cheng's testimony. Moreover, the District Court instructed the jury that "[i]t is the job of lawyers to object to questions, testimony or exhibits the lawyer believes may be improper," and that the court would either sustain or overrule any objections. RP10:2298. The jury presumably followed this instruction, disregarded the objections, and focused on the evidence.

2. Defense counsel did not ask improper impeachment questions.

The court also held St. Vincent asked Dr. Cheng improper impeachment questions. Supp.RP:4161.

The first instance involved Dr. Cheng's testimony that regardless of whether Ms. Christopherson died from either sepsis or a respiratory event, then St. Vincent caused the death. Tr.8/1/2012:175-176. On cross-examination, Mr. Slattery sought to impeach Dr. Cheng by highlighting deposition testimony in which he admitted that he could not determine the cause of death. Tr.8/1/2012:178-182. This was proper impeachment.

The other instance dealt with Dr. Cheng's opinion of what constitutes a fever. In his deposition, Dr. Cheng testified that a temperature of 100.9 "is definitely in the range where [he] would say that the patient is afebrile." Tr.8/1/2012:205. Mr. Slattery attempted to impeach Dr. Cheng with this testimony in Trial Two, after Dr. Cheng testified that he would *not* consider a temperature of 100.9 to be afebrile. Tr.8/1/2012:204. At Plaintiff's request, Mr. Slattery also showed Dr. Cheng his testimony from Trial One, in which he claimed that the deposition testimony was "a typo or a misstatement." Tr.8/1/2012:205-206. When Mr. Slattery asked whether Dr. Cheng had given the inconsistent prior answers, Plaintiff complained that Mr. Slattery was using improper impeachment

techniques, and the court sustained the objection. Tr.8/1/2012:206. There was nothing improper about that either.

E. St. Vincent's questions and comments regarding Dr. Reichard did not warrant a new trial.

The court also ruled that a new trial should be granted based upon "two improper questions or comments regarding Dr. Reichard," the OMI employee who oversaw the autopsy. Supp.RP:4161. This ruling is based upon (1) Mr. Slattery's inadvertent reading of questions from prior testimony to which objections had been sustained, and (2) a comment in closing on Dr. Reichard's availability to testify. Supp.RP:4014. Neither of these issues warranted a new trial.

First, Plaintiff and Defendant read long portions of Dr. Reichard's prior testimony into the record during Trial Two. Plaintiff identified two instances where Mr. Slattery read questions to which objections had been sustained in Trial One. Tr.8/2/2012:150-151. However, the record reveals that Mr. Slattery read the questions by mistake, Plaintiff's counsel objected, and he did not read the answers. *Id.* The court did not interpret his conduct as intentional. *Id.* at 151:10-11 (advising him to be "more careful").

Second, in closing argument, Mr. Slattery said it would have been easier to question Dr. Reichard, and show that OMI's autopsy was flawed, if he had been willing come to trial, and began to remark on something he thought was apparent to the First Jury. Tr.8/7/2012:51. He did not finish the remark because Plaintiff

objected, and the court told the jury to disregard that remark. Tr.8/7/2012:51-52. This isolated comment did not warrant a new trial, because the jury presumably followed the court's instruction.

F. Mr. Slattery's comment during Dr. Allen's testimony did not warrant a new trial.

The court found that Mr. Slattery "made improper, gratuitous comments with regard to Dr. Allen's testimony which were audible throughout the courtroom." Supp.RP:4161. At the end of Plaintiff's cross-examination of defense expert Dr. Allen, Mr. Slattery said, "Right on, sister." Tr.8/3/2012:100-101. Plaintiff did not object. Later, the District Court admonished Mr. Slattery, who apologized and explained that he had not meant for others to hear his comment. Tr.8/3/12:102-103. This comment could not have caused an improper verdict.

G. St. Vincent did not improperly fail to clarify Dr. Pike's opinions.

Plaintiff also argued that St. Vincent "intended to mislead both the Court and the jury" because it failed to clarify whether Dr. Pike was offering a new causation opinion. Supp.RP:3832-3833. But Dr. Pike's opinions in Trials One and Two were nearly identical. *Compare* Tr.8/3/2012:117 ("excessive vomiting ... caused airway obstruction that led to acute respiratory failure."), *with* Tr.12/8/2011:138 ("she vomited, had respiratory depression as a result of the vomit, continued to vomit, occluded her airway, had respiratory failure, and had cardiac arrest").

H. St. Vincent did not elicit improper testimony from Dr. Kovnat.

Plaintiff argued that St. Vincent "encouraged Dr. Kovnat to justify his discharge decision by testifying that he made it 'in consultation' with others," such as Dr. Palestine. Supp.RP:3831. But *Plaintiff* first elicited testimony about Dr. Kovnat's consultation with Dr. Palestine. Tr.7/31/2012:179.

I. The District Court abused its discretion by finding that other assorted acts warranted a new trial.

The District Court found that "the entirety of Plaintiff's arguments in his Motion ... were well-taken." Supp.RP:4161. The District Court abused its discretion by adopting Plaintiff's argument that each of the following points warranted a new trial:

- Plaintiff contended that a pretrial motion to reconsider the orders excluding Xanax and marijuana was "disrespectful and inappropriate." Supp.RP:4003-4004, 4009. But there's nothing wrong with asking a court to revisit an erroneous ruling, and the jury never heard about it.
- Defense counsel used the word "exception" (a synonym for "objection") on two occasions. Supp.RP:4014.
- Defense counsel said he would address certain issues with other witnesses. Supp.RP:4014. For example, when Mr. Slattery asked Dr. Kovnat a question and received unsolicited information that was supposed to be

addressed by a defense expert, Mr. Slattery said he would address the issue with the expert. Tr.8/1/2012:49-50.

- During Plaintiff's own testimony, Mr. Slattery said he was sorry that Ms. Christopherson had died. Plaintiff argued that this basic civility was misconduct warranting a new trial because it had "no evidentiary value and designed solely to curry favor with the jury." Supp.RP:4014; Tr.8/2/2012:83.
- Plaintiff complained that Mr. Slattery asked "Dr. Kovnat, first of all, sir, out of courtesy to you, where were you born and raised, sir?" Supp.RP:4014; Tr.7/31/2012:227.
- Plaintiff complained that Mr. Slattery "included unnecessary and prejudicial predicates to his questions," Supp.RP:4014, such as asking Ms. Christopherson's girlfriend, "And no criticism, ma'am, but you didn't ... get out of the car and try to just walk in to the apartment ... right?" Tr.7/31/12:147.
- Plaintiff complained that Mr. Slattery committed misconduct because he was asked to lower his voice during some bench conferences. Supp.RP:4014-4015.

J. The court abused its discretion in holding that all of the above instances of supposed misconduct "collectively" warranted a new trial.

The trial court ruled that "[a]ll of Defense counsel's improper actions ... collectively[] meet the *Apodaca* standard." Supp.RP:4161. But none of counsel's conduct was improper, and adding it all together does not make it so. *State v. McGuinty*, 1982-NMCA-011, ¶22, 97 N.M. 360 (cumulative error "has no application if no errors are committed").

CONCLUSION

St. Vincent Hospital respectfully requests that this Court reverse the judgment by reinstating the defense verdict in Trial Two. In the alternative, St. Vincent respectfully requests a new, full retrial of Plaintiff's negligence claim at which St. Vincent may present expert testimony about the causal role of Xanax and marijuana in Ms. Christopherson's death.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be granted because this case presents issues which have not been authoritatively resolved in New Mexico, including (1) whether this Court's opinion in *Parkhill v. Alderman-Cave Milling and Grain Company* precludes an expert in toxicology from relying on circumstantial evidence, no matter how compelling, when evidence of the exact dosage and timing is unavailable; (2) whether a jury can properly be asked to determine whether a defendant's negligence caused a person's death without knowing what the

negligence consisted of; and (3) whether a trial court may find that counsel has committed misconduct in the circumstances described above.

Respectfully submitted,

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WE HEREBY CERTIFY that a true and correct copy of the foregoing document was served via first-class mail upon the following persons this 20th day of April, 2015:

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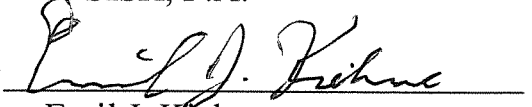
By: 
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