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

REPLY BRIEF 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

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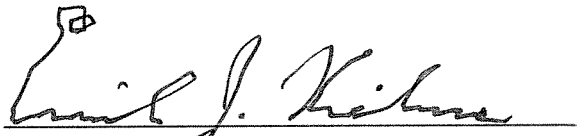
CERTIFICATE OF COMPLIANCE

As required by Rule 12-213(G), we certify that this Brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word, the body of the Reply Brief, as defined by Rule 12-213(F)(1), contains 4,389 words.

DATED this 19th day of November 2015.



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ARGUMENT

I. The District Court erred by excluding evidence of the causal role of Xanax and marijuana.

A. Facts not in dispute.

- A combination of Xanax, Fentanyl, and alcohol can cause a potent depressive effect on one's respiration system.
- Mercedes was not prescribed Xanax, alcohol, or marijuana at St. Vincent.
- A bottle of Xanax was in the bedroom where Mercedes slept on December 8-9.
- Mercedes' urine tested positive for Xanax.
- Mr. Bustos smoked marijuana on December 8-9 while Mercedes was present.
- Mercedes' urine tested positive for marijuana on December 9, which was not caused by passive inhalation.

B. Sufficient evidence supported Dr. Pike's opinions.

Plaintiff now concedes that an expert may base opinions on circumstantial evidence. AB 21. Nevertheless, Plaintiff points to Dr. Pike's testimony that knowledge of dosage is important, and says that there was no evidence of the amounts of Xanax and marijuana in Mercedes' system, nor evidence of when she took them. AB 22-24. This is another argument that knowledge of the exact dose

was necessary for Dr. Pike to express an opinion. But as *Parkhill* teaches, an expert may express an opinion even if exact dosage information is unavailable.

Plaintiff minimizes the circumstantial evidence that supported Dr. Pike's opinions. St. Vincent presented evidence that Mercedes was in stable condition when she left the hospital at 4:30 p.m. on December 8. BIC 11-12. The next morning, she was found vomiting and not breathing – exactly the symptoms that Dr. Pike testified a combination of Xanax, Fentanyl, alcohol, and marijuana can cause. *See* RP5:930, 937; RP13:2968, 2970; RP15:3394-95. While Plaintiff says the "best" Dr. Pike could do was opine that Mercedes consumed Xanax within the previous 48 hours, and marijuana within the previous 90 days, AB 23, this ignores the undisputed evidence that St. Vincent did not prescribe Xanax to Mercedes, and that it was present in the bedroom where she slept on December 8-9, from which a reasonable juror could infer that she consumed it at the Bustos home. As for marijuana, Dr. Pike testified it can be detected in *heavy users* for up to 90 days, but only for a week in infrequent users. RP6:1168. Plaintiff presented no evidence that Mercedes was a heavy user; her girlfriend Adrianna Bustos denied that Mercedes used marijuana from October 3-November 14 (RP13:2972 at 15); Mercedes was hospitalized from November 4-21 and from November 25-December 8; it is undisputed that St. Vincent did not prescribe marijuana to Mercedes; and

marijuana was smoked at the Bustos home on December 8-9. RP6:1344; RP13:2973-74.

Plaintiff asserts there is "no support whatsoever" for any claim that the Bustoses lied, AB 24-25, but here again, he ignores the evidence. Although the Bustoses denied that Mercedes consumed alcohol, Xanax, or marijuana, scientific tests proved otherwise. Moreover, they had a strong motive to deny any role in Mercedes' death lest they be held accountable for it. Further, Adrianna Bustos was present when Nurse Gallagher warned Mercedes not to drink alcohol, and Mr. Bustos (who was on criminal probation) was not allowed to have alcohol at home, facts which provide ample motive for denying its presence. Plaintiff's belief that the Bustoses' allegedly consistent testimony shows they were truthful is more appropriate for a jury than an appellate court, and a jury should be allowed to assess their credibility in light of *all* the relevant evidence.

C. <u>It was impossible to quantify the amounts of Xanax and marijuana.</u>

In *Parkhill*, this Court said that an expert may rely on circumstantial evidence where information regarding the exact degree of a plaintiff's exposure to a substance is unavailable, and held the testimony there inadmissible because the expert made no effort to quantify the dose that the plaintiffs received, "nor did he make any statement to the effect that it was not possible to quantify the dose...." 2010-NMCA-110, ¶¶38, 43. Here, by contrast, Plaintiff's counsel elicited

testimony from Dr. Pike that "absent somebody coming forward and saying they observed her taking X amount, at this time, there's no way that I know of" to quantify the drugs in her system, and "we have no data about how much she took of anything other than Fentanyl." RP5:936-37 at 174:22-175:6-22, 178:2-4.

In the District Court, Plaintiff did not dispute this testimony, and never argued it was possible to quantify the amounts of Xanax and marijuana. Now, however, Plaintiff suggests it was possible to quantify them but that St. Vincent and Dr. Pike failed to do so. AB 25. Plaintiff's argument lacks merit.

First, this argument is contrary to Dr. Pike's undisputed testimony that it was impossible to quantify the dose of any substance other than Fentanyl.

Second, Plaintiff misunderstands the "facts" on which his new argument is based. Plaintiff argues that "[b]lood and tissue samples were retained by OMI for two years after Mercedes' death," AB 25, but the record does not support this. The portions of the record that Plaintiff cites state only that OMI may have retained *blood* samples for two years. Tr.11/7/2011:62-63. But the tests for Xanax and marijuana were performed on *urine and bile* samples, not blood. RP5:930 at 58; 1076. Plaintiff also asserts that "St. Vincent waited – until after discovery had closed and after OMI had destroyed its samples – to subpoena those samples for further testing." AB 25. But that subpoena sought to obtain vials of *blood* from OMI to test them for alcohol. RP5:1098-1102. Plaintiff's attempt to create the

impression that St. Vincent purposefully ignored tissue samples which could have been tested to quantify the Xanax and marijuana in Mercedes' system has no basis in fact.

Third, it is improper for Plaintiff to offer this argument as an alternative ground for affirmance because St. Vincent had no opportunity to respond to it below. *See Meiboom v. Watson*, 2000-NMSC-004, ¶20, 128 N.M. 536 (appellate court will not affirm on new ground that is "unfair to appellant," and "will not assume the role of the trial court and delve into ... fact-dependent inquiries....").

D. Testimony that marijuana is a respiratory depressant was admissible.

Plaintiff also attacks Dr. Pike's testimony that marijuana has "some degree of respiratory depression" when combined with Fentanyl, alcohol, and Xanax. RP5:930. Plaintiff argues that the testimony was properly excluded because Drs. Shaffer and Reichard—neither of whom is a toxicologist—supposedly testified that marijuana is not a respiratory depressant. But Dr. Reichard simply testified that he did not know if "modest doses" of marijuana could cause respiratory depression. RP5:945. Dr. Shaffer agreed with Plaintiff's counsel that marijuana is "not really" a respiratory depressant, but he nevertheless listed marijuana, along with alcohol, opiates and benzodiazepines, on a "problem list" of "things that could have led to [Mercedes'] condition" on December 9. RP6:1339, 1344. To the extent there is a

dispute between experts, it was the jury's prerogative to determine which opinion to credit. *See State v. Duran*, 1994-NMSC-090, ¶9, 118 N.M. 303.

Moreover, Dr. Pike offered two alternative opinions that Plaintiff does not challenge. First, he testified that the combination of Fentanyl, alcohol, and Xanax could have caused respiratory depression, even without marijuana. RP15:3394-95; RP13:2970. Second, he testified that the combination of Fentanyl, alcohol, Xanax, and marijuana likely caused vomiting, which also contributed to Ms. Christopherson's death. RP13:2968. Thus, even if it were proper to preclude Dr. Pike from testifying that marijuana was a respiratory depressant, his testimony that marijuana contributed to Mercedes' vomiting and death would still be admissible.

E. St. Vincent was entitled to cross-examine Plaintiff's experts about Xanax and marijuana.

Plaintiff argues that St. Vincent was properly precluded from cross-examining his experts about how they could *exclude* Xanax and marijuana as having any causal role in Mercedes' death, because the standard for admissibility on direct and cross-examination is supposedly identical. AB 27-28.

This is incorrect – a defendant may ask a plaintiff's expert whether he or she can exclude other possible causes of death or injury. *See Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1069-72 (11th Cir. 2014) (reversing trial court's exclusion of evidence about potential cause of death because "courts treat evidence produced by plaintiffs to prove causation differently than they treat evidence

produced by defendants to rebut causation" and exclusion improperly shifted burden of proof to defendant); *Wilder v. Eberhart*, 977 F.2d 673, 676 (1st Cir. 1992) (in medical malpractice case, trial court improperly excluded testimony about other possible causes of injury; "a defendant may produce other 'possible' causes of the plaintiff's injury. These other possible causes need not be proved with certainty or more probably than not."); *Willis v. Westerfield*, 817 N.E.2d 672, 673-74 (Ind. Ct. App. 2004) (defendant may cross-examine plaintiff's expert about other possible causes of plaintiff's injury; defendant need not prove that the other possible causes actually caused injury).

Here, even if the District Court properly ruled that Dr. Pike could not affirmatively opine that the combination of Xanax, alcohol, Fentanyl, and marijuana *probably* caused Mercedes' death, he should have been allowed to opine that this combination is *capable* of causing death, and St. Vincent should then have been allowed to cross-examine Plaintiff's experts about their inability to *exclude* Xanax and marijuana as contributing factors. One of them, Dr. Cheng, admitted that Xanax is a respiratory depressant that St. Vincent did not prescribe to Mercedes. RP5:1080. Yet Dr. Cheng concluded that if Mercedes died from respiratory failure, then St. Vincent negligently caused her death by *oversedating* her with medications. Tr.8/1/2012:176. It was therefore unfair to prevent St. Vincent from eliciting testimony from them that: (a) Mercedes ingested Xanax, an

admitted respiratory depressant; (b) Xanax becomes especially potent when mixed with alcohol and Fentanyl; (c) St. Vincent did *not* give her any Xanax or alcohol; and (d) they could not exclude the possibility that Xanax played a causal role in her death.

By excluding evidence of other respiratory depressants, the District Court allowed Plaintiff to create the false impression that if Mercedes was oversedated, then only St. Vincent could be responsible. This was reversible error, and a new trial 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.

A. The facts here required a full retrial.

Plaintiff has no real answer to St. Vincent's claim that a full retrial of his negligence claim was required.

Plaintiff argues that in determining causation during Trial Three, "[i]t 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." AB 33. This is untrue. The First Jury was instructed it could find St. Vincent negligent if it accepted *even one* of Plaintiff's seven separate negligence theories. *See* RP10:2244-45. Therefore, one cannot assume that the First Jury found all seven theories against St. Vincent. But to determine whether St. Vincent's supposedly negligent acts or omissions caused Ms. Christopherson's death, the Third Jury needed to know *which* of the seven

negligent acts or omissions were found against St. Vincent. That information was simply not available, and nothing Plaintiff says can alter that fundamental fact.

Plaintiff also asserts, without explanation, that the closest case on the facts is *Scott v. McWood Corp.*, 1971-NMSC-068, 82 N.M. 776. AB 34. This is incorrect. *Scott* arose from an oilfield explosion in which Scott alleged that McWood was negligent for pumping flammable drilling fluid from a truck towards an oil well without grounding his truck, thus allowing static electricity to cause a fire. McWood alleged that Scott was contributorily negligent for allowing excessive vapors to concentrate at the site. In the first trial, the jury found McWood negligent but not liable due to a faulty jury instruction, and thus did not reach the contributory negligence defense. *See Scott v. Murphy Corp.*, 1968-NMSC-185, ¶¶2, 8, 11, 79 N.M. 697. The second trial was properly limited to the issue of Scott's contributory negligence, because McWood's negligence had already been determined. *Scott*, 1971-NMSC-068, ¶10.

Scott bears no resemblance to this case because the basis of the first jury's negligence verdict – McWood's failure to ground its truck – was known. Here, the basis of the First Jury's negligence determination is unknown, and therefore the Third Jury could not properly determine causation.

Significantly, Plaintiff does not discuss, much less distinguish, the cases St. Vincent cites, including the Supreme Court's decision in *Gasoline Products*, which

uniformly hold that a full retrial must be held in the situation presented by this case. BIC 27-28, 31. Plaintiff avoids them because he cannot answer them. A full retrial should be granted.

B. St. Vincent did not "waive" its request for a full retrial.

Plaintiff argues that St. Vincent waived its claim that a full retrial was required because it did not ask for a verdict form in Trial One that would have allowed a partial retrial. *See* AB 36. This argument fails.

The main purpose of the preservation rule is to alert the trial court to errors so that mistakes can be corrected at that time. *See Kilgore v. Fuji Heavy Indus.*, 2009-NMCA-078, ¶50, 146 N.M. 698. St. Vincent does not claim that the verdict form was defective, but rather that once the jury hung on causation, the District Court had no alternative but to order a full retrial of the negligence claim due to the way in which the jury had been instructed – *i.e.* that it could find St. Vincent negligent if it agreed with at least one of the seven negligence theories – and because the verdict form did not reveal the basis of the First Jury's decision. This claim only ripened after Trial One, when the District Court was deciding the retrial's scope. St. Vincent timely raised its argument then, and could not have done so earlier because no one could have anticipated the First Jury's decision.

In Plaintiff's view, St. Vincent should have: (1) divined that the First Jury would hang on causation; and (2) requested a verdict form asking the First Jury to

specify which of the seven theories of negligence it found against St. Vincent; so that (3) a partial retrial could be held on causation; although (4) St. Vincent did not *want* a partial retrial, and Plaintiff did. The result of Plaintiff's logic is that because St. Vincent did not predict the hung jury, and take steps to ensure that a *fair* partial retrial could be held, it was acceptable to subject St. Vincent to an *unfair* partial retrial.

Unsurprisingly, Plaintiff cites no authority for this remarkable argument. St. Vincent has not found a single decision, from any judge, in any jurisdiction within the United States, which even *suggests* that a party "waives" its right to contest the scope of a retrial by not asking for a different verdict form. Every court that has considered the issue simply takes the first jury's verdict as a given, and proceeds to consider whether a full or partial retrial can be held in light of it.

C. Plaintiff's argument that St. Vincent caused the First Jury to hang is meritless.

In an attempt to salvage the Third Jury's verdict, Plaintiff now claims that St. Vincent caused the First Jury to hang by committing "willful misconduct," and that it was appropriate for the District Court to "take into account" that misconduct in denying a full retrial. AB 37. This argument, never raised before, finds no support in the record, and is based solely on Plaintiff's speculation.

At the First Trial, the District Court allowed evidence regarding Xanax and marijuana to be admitted for limited purposes. RP9:2005-06. Plaintiff argued that

some evidence went beyond that limited scope, and the District Court gave a limiting instruction explaining that Xanax and marijuana played no causal role in Mercedes' death. RP10:2249.

The District Court *never* found, and was never asked to find, that the limited evidence of Xanax and marijuana at Trial One caused the hung jury, or that St. Vincent committed any "willful misconduct" in Trial One. In fact, at the end of Trial One, the District Court *congratulated* counsel for trying the case well. Tr.12/9/2011:145, 148. None of the District Court's rulings in favor of a partial retrial even suggest that St. Vincent did anything wrong in Trial One. *See* Tr.11/12/2013:26-27, 33-34; RP14:3150-51; RP15:3265-66; RP16:3550-51; RP17:3712-14. Indeed, in the multiple briefs and arguments discussing whether a full or partial retrial should be held, Plaintiff never once suggested this as a ground justifying a full retrial. *See* RP13:2778-2788; RP14:3019-20; Tr.11/12/2013:3-34; Tr.12/9/2013:9-11; RP16:3570-73; Tr.4/11/2014:10-11. Instead, despite all evidence and legal authority to the contrary, Plaintiff stubbornly insisted that a partial retrial was proper. *Id.*

Plaintiff led the District Court into reversible error. Now, he seeks to rely on a non-existent finding of misconduct in Trial One to avoid the consequences. This is contrary to New Mexico law. *See Garcia v. Jeantette*, 2004-NMCA-004, ¶¶22-

26, 134 N.M. 776 (refusing to affirm attorney fee award as a sanction, where district court had not imposed any sanction).

Finally, Plaintiff argues that judicial economy supported a partial retrial because Trials Two and Three were shorter. AB 38. Those trials were shorter because Dr. Palestine was no longer involved, but more importantly, judicial economy cannot justify the denial of a fair trial, as occurred here. A new, full retrial should be granted.

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

Plaintiff's arguments in support of the misconduct finding are based on an incorrect assumption that negligence and causation were distinct and separable issues in Trial Two. But the two issues were intertwined, and it was impossible for St. Vincent to defend itself on the issue of causation without introducing evidence of Mercedes' condition when she left St. Vincent, which was also relevant to the breach of duty element. Thus, defense counsel's struggle to navigate the imaginary line between standard of care and causation is unsurprising, and is not evidence of a scheme to mislead the jury. Plaintiff's misunderstanding of this issue is evident in his discussion of the alleged misconduct in opening statement, the examination of Dr. Kovnat, and closing arguments, which assumes that St. Vincent engaged in intentional misconduct when it attempted to present relevant evidence and argument about Mercedes' condition. AB 41, 43-44, 47-48.

Moreover, because Plaintiff refuses to acknowledge that negligence and causation were inextricably intertwined, he relies on distinguishable case law. For example, in *Chavez v. Valdez*, 1958-NMSC-034, 64 N.M. 143, the trial court issued a straightforward ruling that oral testimony to vary the terms of an unambiguous contract was not allowed. *Id.* ¶3. Plaintiffs' counsel nevertheless spoke at length about oral negotiations. *Id.* ¶¶4-6. Defendant moved for a mistrial, but the district court merely instructed the jury that arguments of counsel are not evidence. *Id.* ¶¶7-8. The Supreme Court ordered a new trial because the instruction was too mild to eradicate the objectionable opening statement. *Id.* ¶¶8, 15.

In *Hornay v. Paris*, 369 P.2d 636 (Okla. 1962), defense counsel asked the plaintiff in a personal injury case irrelevant questions about the fact that his catering business provided clients with exotic dancers. *Id.* at 636-37. A new trial was ordered because counsel's questions were irrelevant, prejudicial, and contrary to the court's rulings. *Id.* at 637-39.

Finally, in *Chicago, B&O R. Co. v. Kelley*, 74 F.2d 80 (8th Cir. 1934), counsel's questioning informed the jury of improvements made to the defendant's railroad after an accident. *Id.* at 85-86. The court found that the questions were not asked in good faith, because they were designed to convey improper information. *Id.* at 86.

In each of these cases, counsel violated a clear court order. That is not the case here, because St. Vincent's counsel were merely trying to navigate the non-existent boundary between permissible causation testimony and inadmissible standard-of-care testimony. That the court sustained some of Plaintiff's objections here does not mean that St. Vincent intended to elicit negligence testimony. Indeed, Plaintiff did not think anything at trial warranted a mistrial; he only asked for a new trial after he lost. *See Miller v. Marsh*, 1948-NMSC-064, ¶15, 53 N.M. 5 (when party discovers act that warrants mistrial, party cannot "remain silent and take his chances of a favorable verdict," and ask for new trial after losing).

A. Plaintiff's "cumulative misconduct" argument fails.

St. Vincent explained why the specific acts of purported misconduct were proper and did not affect the jury's verdict. For the most part, Plaintiff fails to respond to these arguments, simply asserting that these events demonstrated misconduct. *See, e.g.*, BIC 37-38 (court permitted allegedly improper comments in opening argument), 39-40 (St. Vincent did not ask Dr. Kovnat seven improper negligence questions in a row; objections were sustained on "asked and answered" grounds and could not have affected verdict); 44 (questions to Renee Bustos regarding EMTs were proper because she testified that she "believe[d] all of us" spoke with the fire department, and St. Vincent tried to clarify what she remembered); 48-49 (questions from Dr. Reichard's Trial One testimony were read

by mistake but could not have caused prejudice); 49 (comment following Dr. Allen's testimony was not intended for jury and could not have caused improper verdict); 50-51 (miscellaneous acts of supposed misconduct, such as filing a motion to reconsider Xanax and marijuana ruling, were proper and did not affect verdict).

Indeed, Plaintiff suggests that any attempt to address individual acts of so-called misconduct improperly minimizes the "cumulative impact" on the jury of "nearly 100 identified" acts of misconduct. AB 40. But the doctrine of cumulative error only applies if individual errors, when taken together, deprive a party of a fair trial. *See State v. Morales*, 2000-NMCA-046, ¶18, 129 N.M. 141 ("Because ... there was no error, there cannot be cumulative error."). Plaintiff cannot invoke cumulative error without explaining why the purported 100 identified acts of misconduct are actually improper. But Plaintiff declines to do so because most of the purported misconduct is innocuous (*e.g.*, using the word "exception"; defense counsel's statement that he was sorry for Mr. Christopherson's loss). Plaintiff cannot have it both ways. If he wants to rely on a "cumulative error" approach, he must explain why all of the so-called misconduct that formed the basis for the district court's opinion was improper and prejudicial. *Richardson v. Rutherford*, 1990-NMSC-015, ¶17, 109 N.M. 495 (refusing to find cumulative error on the

basis of allegedly improper comments due to lack of "explication of why the comments were improper, and a showing of prejudice").

Furthermore, to the extent Plaintiff does respond to some arguments, he fails to explain how the supposed misconduct satisfies *Apodaca*. With respect to the jury questionnaire, he suggests that St. Vincent intentionally misled the court about Plaintiff's approval of the document. AB 41-42. This could not have affected the jury's verdict. Moreover, the transcript shows that the district court did not believe that St. Vincent engaged in intentional misconduct: the court revised Plaintiff's proposed order on the questionnaires to omit a statement that "the Court was **misled**." 1RP12:2680 (replacing "misled" with "led"). Nothing suggests that St. Vincent engaged in the type of intentional misconduct that would satisfy *Apodaca*, or that St. Vincent's conduct influenced the jury.

With respect to defense counsel's comment during voir dire, Plaintiff has not identified any case in which an isolated comment of this type warranted a new trial. Further, Plaintiff cannot show that the comment influenced the jury, as counsel and members of the venire had already raised concerns about separating standard of care from causation. CD, 7/30/2012, 2:28:38-2:29:30, 2:48:13-2:49:29; 2:52:02-2:53:52. If Plaintiff believed this comment affected the fairness of the proceedings, he would have requested a new venire panel.

Regarding Dr. Cheng, Plaintiff incorrectly suggests that every objection raised by St. Vincent dealt with Dr. Cheng's new causation opinions, and that the objections were made "five times in a row" in quick succession. AB 46. In fact, St. Vincent's first five objections—spread over 20 pages of the transcript—addressed: (1) new causation testimony, Tr.8/1/2012:119-21; (2) Dr. Cheng's qualifications as a causation expert, Tr.8/1/2012:124-25; (3) Dr. Cheng's standard-of-care testimony, Tr.8/1/2012:133-34; (4) new causation testimony, Tr.8/1/2012:134; and (5) Dr. Cheng's standard-of-care testimony (request for continuing objection), Tr.8/1/2012:138. Plaintiff's contention that a single objection would have preserved St. Vincent's arguments, AB 50, is contrary to New Mexico law. *State v. Flanagan*, 1990-NMCA-113, ¶19, 111 N.M. 93.

Further, a good-faith basis existed for all these objections. Dr. Cheng testified about Mercedes' treatment and her physicians' thought process, which supported St. Vincent's standard-of-care objections. *E.g.,* Tr.8/1/2012:137-38. Likewise, St. Vincent's objection that Dr. Cheng was giving new opinions was made in good faith. *Compare* Trial Two, Tr.8/1/2012:143-45 (testifying that Mercedes was *expected* to have a low oxygen saturation on the morning of December 9) *with* Trial One, Tr. 11/30/2011:123 (testifying that "nobody knows" Mercedes' oxygen saturation on December 9, but not testifying that it was expected to be low).

Finally, Plaintiff's discussion of St. Vincent's opening statement, questioning of Dr. Kovnat, and closing argument fails because it does not acknowledge the specific arguments in St. Vincent's Brief-in-Chief or the intertwined nature of standard of care and causation.

B. Bench conferences did not satisfy *Apodaca*.

In an attempt to persuade this Court that St. Vincent engaged in misconduct, Plaintiff presents a descriptive account of conduct that allegedly occurred during bench conferences. This account highlights the supposed body language, tone, attitude, and demeanor of defense counsel. *E.g.*, AB 45, 48-49. Plaintiff cites no authority for the proposition that purported body language during bench conferences can constitute misconduct warranting a new trial. Moreover, none of counsel's supposed body language or demeanor appears in the record, and the available sound recording makes clear that counsel lowered his voice to the point of inaudibility. CD, 7/30/2012, 10:58:45-10:59:45. Appellate arguments cannot be based on alleged facts that are not in the record. *Durham v. Guest*, 2009-NMSC-007, ¶10, 145 N.M. 694.

Defense counsel's conduct was proper and could not have affected the jury. Plaintiff does not even attempt to explain how most of the purported misconduct upon which the District Court relied could have satisfied *Apodaca*. The Court

should reverse the finding of misconduct and direct entry of judgment consistent with the Second Jury's defense verdict.

CONCLUSION

St. Vincent Hospital respectfully requests that this Court reverse the judgment and reinstate the defense verdict in Trial Two. In the alternative, St. Vincent respectfully requests a new, full retrial of Plaintiff's negligence claim which includes expert testimony about the causal role of Xanax and marijuana.

Respectfully submitted,

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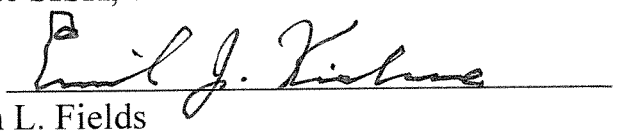
& SISK, P.A.

By: 
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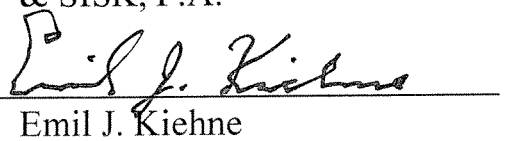
By: 
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