IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

PHILLIP GRASSIE, as Personal Representative and Executor of the Estate of WALTER GRASSIE,

Plaintiff-Appellee

vs.

ROSWELL HOSPITAL CORPORATION, d/b/a EASTERN NEW MEXICO MEDICAL CENTER,

Defendant-Appellant.

Cause No. 28,050

Appeal from the Fifth Judicial District Court
The Honorable Ralph D. Shamas
D-0504-CIV-2006-00286

DEFENDANT-APPELLANT'S BRIEF IN CHIEF

MONTGOMERY & ANDREWS, P.A.
Sarah M. Singleton
Jaime R. Kennedy
Post Office Box 2307
Santa Fe, New Mexico 87504
(505) 982-3873

SHEEHY, SERPE & WARE, P.C.
Richard A. Sheehy
2500 Two Houston Center
Houston, Texas 77010
(713) 951-1111

Attorneys for Defendant-Appellant Roswell Hospital Corporation

Dated June 16, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Other Jurisdictions

Statutes, Rules, UJIs and Codes

STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, I certify that this brief was prepared using a proportionally-spaced typeface and that the body of the brief contains 10,815 words.

SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

Defendant Roswell Hospital Corporation d/b/a Eastern New Mexico Medical Center ("Eastern Hospital") appeals from a jury verdict in this wrongful death case. This action arose out of the death of Walter Grassie ("Decedent") at Eastern Hospital. Decedent was brought to the emergency room by ambulance on August 19, 2005, and died approximately one hour later. (Tr. (Vol. 5), pp. 1005, 1112-13.) Decedent's personal representative ("Plaintiff") filed a one-page complaint against Eastern Hospital alleging medical negligence. (RP 1.) An amended complaint also raised allegations of a violation of the New Mexico Unfair Practices Act, negligent hiring and management of the emergency room, and joint and several liability for negligent acts caused by the Chaves Emergency Group, LLC, who provided emergency medical physicians to staff Eastern Hospital's emergency room. (RP 247-52.)

At trial, the jury found in favor of Plaintiff on the claims of medical negligence, negligent hiring and management of the emergency room, and unfair trade practices. (RP 1472-73.) The jury awarded $1,986,931.00 in compensatory damages for the medical negligence and negligent hiring and management claims, and $9,501.65 in damages under the UPA, which the district court trebled. (RP 1453, 1472.) The jury also awarded $10,000,000 in punitive damages against Rich

Robinson, a non-party, and $10,000,000 in punitive damages against Eastern Hospital, of which Plaintiff voluntarily remitted $16,000. (RP 1472-73.)

II. SUMMARY OF BACKGROUND FACTS

a. Facts Relevant to Appellee's Medical Negligence Claim

On August 19, 2005, at approximately 3:40 p.m., Decedent was driving to Roswell from Ruidoso when he began feeling pain in his chest. (Tr. (Vol. 4), p. 935.) He dialed 911 from the side of the road. (*Id.*) Southwest Ambulance arrived on the scene and transported Decedent to Eastern Hospital. (*Id.*, p. 898, 906-07.)

At 5:00 p.m., Dr. Theodore Collins examined Decedent. (*Id.*, pp. 1013; Tr. (Vol. 6), p. 1270.) Dr. Collins noted that Decedent had a past history of high blood pressure and heart disease, including a past heart attack. (Tr. (Vol. 6), p. 1314.) Although the chest x-ray may have been available at this time, Dr. Collins did not review it. (Tr. (Vol. 5), pp. 1098, 1156-57.) After leaving Decedent's room, Dr. Collins ordered tests and medicine, including a nitroglycerin drip. (Tr. (Vol. 6), pp. 1356-58; Tr. (Vol. 7), pp. 1609-10.)

At 5:43 p.m., the nitroglycerin drip started. (Tr. (Vol. 5), pp. 1112-13.) Almost immediately after the drip started, Decedent became unresponsive. (*Id.*, p. 1109.) Despite the attempts by Hospital personnel to resuscitate Decedent, he died soon thereafter. (*Id.*, p. 1128; Tr. (Vol. 5), p. 1054.) It was disputed at trial whether Decedent died of an aortic dissertion or from a heart attack. (Tr. (Vol. 5),

p. 1155; Tr. (Vol. 8), p. 1852; Tr. (Vol. 9), pp. 1999-2000.) Both sides agreed, however, that the only way to conclusively establish cause of death was to do an autopsy. (Tr. (Vol. 5), pp. 1190-91, 1244; Tr. (Vol. 6), p. 1426.) Decedent's family did not ask for an autopsy. (Tr. (Vol. 4), p. 961.)

At trial, Plaintiff's expert witnesses testified that Dr. Collins breached the standard of care by failing to read the chest x-ray, failing to consider and diagnose an aortic dissection, and failing to lower Decedent's blood pressure. (Tr. (Vol. 5), pp. 1155, 1174-75, 1231-36; Tr. (Vol. 6), pp. 1412-14.) By contrast, Eastern Hospital presented evidence that that the care provided to Decedent was reasonable when an emergency room is busy, as it was that night. (Tr. (Vol. 5), p. 1082; Tr. (Vol. 9), pp. 1981-86.) Additionally, Eastern Hospital's expert witnesses testified that Dr. Collins' failure to read the chest x-ray would not have altered the outcome and that in light of the x-ray, Dr. Collins' treatment of Decedent was appropriate. (Tr. (Vol. 9), pp. 1989, 1997.) Further, evidence was presented that it could not be said with a reasonable degree of medical probability that Dr. Collins could have stabilized Decedent's blood pressure or that Decedent would have survived even if the blood pressure medication was administered earlier. (*Id.*, pp. 1998-99, 2039.) Eastern Hospital's expert witnesses opined that Decedent most likely died of a heart attack rather than an aortic dissection. (Tr. (Vol. 8), p. 1852; (Tr. (Vol. 9), pp. 1999-2000.))

b. Facts Relevant to Plaintiff's Negligent Hiring and Management Claim

Plaintiff based his negligent hiring claim on two different theories. First, Plaintiff argued that Eastern Hospital was negligent in contracting with Chaves Emergency Group to provide the emergency medical physicians for its emergency room. (Tr. (Vol. 4), p. 869.) Plaintiff presented no evidence, however, to support this theory. Rather, the evidence presented at trial indicated that the arrangement between Eastern Hospital and Chaves Emergency Group was proper and was standard in the profession. (Tr. (Vol. 6), pp. 1532-34; Tr. (Vol. 7), pp. 1730-36; Tr. (Vol. 9), p. 1975.) Notably, Dr. Gregory Henry testified that when a hospital contracts with a group that provides emergency medicine physicians, the hospital has the same oversight over the doctors as it would if the doctors were employed by the hospital. (Tr. (Vol. 9), pp. 1975-76.)

Plaintiff's second negligent hiring theory was that Eastern Hospital was negligent because it allegedly failed to meet the "requirements" of its contract with Chaves Emergency Group in granting privileges to Dr. Collins. (Tr. (Vol. 4), p. 873.) In support of this theory of liability, Plaintiff argued that the contract had two requirements: (1) emergency medicine physicians were required to be board certified in emergency medicine by the American Medical Association ("AMA") and/or the American Osteopathic Association ("AOA"); and (2) Eastern Hospital's CEO, Rich Robinson, must personally exercise final approval of the doctors who

work in the emergency room. (*Id.*, p. 869.) Plaintiff argued that Eastern Hospital failed to fulfill these two requirements and therefore negligently credentialed Dr. Collins. (*Id.*, pp. 869-73.) Plaintiff presented no expert testimony on this issue.

Eastern Hospital took the position that the contract itself did not set the standard of care and that expert testimony was necessary on that issue. (Tr. (Vol. 7), pp. 1566-71; Tr. (Vol. 9), p. 2075.) Mr. McGinty, Eastern Hospital's hospital administrator expert, testified that the contract simply required board certification or board eligibility—not necessarily in emergency medicine—and that a certification in family practice, internal medical, or general surgery would also meet the contract's requirements. (Tr. (Vol. 7), pp. 1740-41.) Eastern Hospital's CEO, Mr. Robinson, testified that he is not a physician and, for that reason, was not able to judge the competency of the emergency medicine physicians. (Tr. (Vol. 6), p. 1496.) Accordingly, Eastern Hospital's medical staff, which consists of physicians with hospital privileges, reviews the qualifications of physicians to ascertain whether a physician is qualified to work in the emergency room. (*Id.*, pp. 1496-1500.) If a particular physician is found to be competent, Mr. Robinson has the option to waive the requirement of board certification. (*Id.*, p. 1502.) If Eastern Hospital's medical staff does not believe that a physician is qualified, the medical staff passes that information on to Mr. Robinson, who then has the authority to refuse the hospital privileges of that particular physician. (*Id.*, pp.

1499-1500.) Mr. McGinty testified that the procedure set forth in Eastern Hospital's bylaws for the credentialing of emergency medicine physicians is standard in the profession. (Tr. (Vol. 7), pp. 1728-29, 1738-39.)

At trial, Eastern Hospital presented evidence that its medical staff reviewed Dr. Collins' qualifications and advised Mr. Robinson to grant privileges to Dr. Collins, even though Dr. Collins was not board certified in emergency medicine by the AMA or AOA. (Tr. (Vol. 6), p. 1531; Tr. (Vol. 7), pp. 1787-88.) Dr. Collins was board certified in family practice by the AOA and was board certified in emergency medicine through the American Association of Physician Specialists. (Tr. (Vol. 6), pp. 1331, 1348-49.) Additionally, Plaintiff himself presented evidence that it is not uncommon for emergency medicine physicians not to have board certification. (Tr. (Vol. 7), pp. 1741-44; Tr. (Vol. 9), pp. 1972-74; Tr. (Vol. 5), pp. 1216-17, 1237.)

Plaintiff was allowed to ask Dr. Collins about the two hospitals that he had previously been asked to leave and about the circumstances of his leaving the military. (*Id.*, pp. 1333-40.) Over Eastern Hospital's objections, Plaintiff asked Dr. Collins about being removed as director of the emergency room in Carlsbad *after* Decedent had died. (*Id.*, pp. 1337-38.) Plaintiff offered no evidence to suggest that Eastern Hospital's decision to grant privileges in light of these circumstances was negligent or otherwise below the standard of care.

c. Facts Relevant to Plaintiff's Claim Under the Unfair Practices Act

Plaintiff's claim under the Unfair Trade Practices Act, NMSA 1978, §§ 56-12-1 to -26 (1953, as amended through 2007) was based, in part, on a billboard that states, "You believe your emergency shouldn't have to wait. So do we." (Tr. (Vol. 9), pp. 2125-26.) The billboard also contained the phrase "ER+." (*Id.*, p. 2126.) At trial, Phillip Grassie testified that he had seen this billboard and thought, there is "something special" there. (Tr. (Vol. 6), pp. 1452-53.) Plaintiff also based his claim on Eastern Hospital's web page, which contained statements about Eastern Hospital's emergency medicine team. (Tr. (Vol. 4), p. 866; Tr. (Vol. 9), p. 2127.) None of the Grassies testified to having seen the web page. Nonetheless, Plaintiff argued that the reference to Eastern Hospital's emergency room "team" was a misrepresentation because the emergency medicine physicians actually worked for Chaves Emergency Group and because the medical providers did not work well as a team. (Tr. (Vol. 9), p. 2127.) Plaintiff also argued that Eastern Hospital should have, but failed to, let the public know that its physicians are staffed by Chaves Emergency Group. (Tr. (Vol. 4), p. 866; Tr. (Vol. 9), p. 2128.)

d. Arguments of Plaintiff's Counsel

i. Arguments Regarding Chaves Emergency Group and Community Health Systems, Inc.

Plaintiff wove the theme of "shell corporations" and Community Health Systems, Inc. ("CHS") being a foreign corporation into the entire trial, although it

made no effort to support these arguments. During Plaintiff's opening, Plaintiff's counsel told the jury that Eastern Hospital was owned by Roswell Hospital Corporation, which in turn was owned by CHS of Brentwood, Tennessee. (Tr. (Vol. 4), p. 868.) Plaintiff's counsel also argued that Eastern Hospital "had farmed out its emergency room to a corporation that has a PO Box." (Tr. (Vol. 4), p. 867.) Plaintiff's counsel argued, inaccurately, that Chaves Emergency Group—which was not a party because the district court denied Eastern Hospital's motion to add it as a party—was a "PO Box" in Lafayette, Louisiana, and that it "was a shell corporation that was set up by another outfit . . . called the Schumacher Corporation." (*Id.*, p. 868.)

Additionally, in questioning Eastern Hospital's CEO, Mr. Robinson, on cross examination, Plaintiff's counsel represented that Chaves Emergency Group was not owned by Schumacher Corporation—despite Mr. Robinson's testimony to the contrary—and stated, "I'll bet you a buck they don't have a phone there." (Tr. (Vol. 6), p. 1508.) Although Mr. Robinson never suggested that anyone sue Chaves Emergency Group, Plaintiff's counsel asked Mr. Robinson, "So if you are saying sue [Chaves Emergency Group], who's there to sue?" (*Id.*, p. 1509.) Mr. Robinson testified that Chaves Emergency Group is a real corporation doing business in New Mexico. (*Id.*) Nonetheless, Plaintiff's counsel argued with Mr.

Robinson, "If we sue these people, if we sue any of these people, it's just a shell." (*Id.*, p. 1510.)

In closing argument, Plaintiff argued that Eastern Hospital is not really a small town hospital, but that its parent corporation, CHS, actually owns seventy hospitals. (Tr. (Vol. 9), p. 2105.) Plaintiff argued that Eastern Hospital banks on the hospital being in a small town where the people "speak in small dollars." (*Id.*, p. 2141-42.) No evidence had been offered at trial to support these arguments. Additionally, Plaintiff asked the jury to award punitive damages "against the hospital on behalf of the community." (*Id.*, p. 2106.)

e. Jury Instructions

In connection with the negligence claims, the court instructed the jury that Nurses Hayes-Rodrigues and Miller were employees of Eastern Hospital at the time that Decedent was admitted, and Eastern Hospital was therefore liable for the nurses' negligence. (RP 1430.) The same instruction did not include Mr. Robinson, Eastern Hospital's CEO, although Eastern Hospital specifically asked that he be included. (Tr. (Vol. 9), p. 2074.) As such, the jury was not informed that Eastern Hospital could be vicariously liable for the negligence of Mr. Robinson by virtue of his employment status.

The jury was also instructed regarding punitive damages, although UJI 13-1827 NMRA—addressing punitive damages—was modified from its approved

form. (RP 1441.) The modified instruction failed to instruct the jury that Eastern Hospital could only be liable for the negligence of its employees or agents under limited circumstances. *See id.* Additionally, the instruction failed to instruct the jury that they must specifically find that Dr. Collins was Eastern Hospital's apparent agent before punitive damages may be awarded against the Hospital for his conduct. (*Id.*; Tr. (Vol. 9), p. 2077.) *See id.* Moreover, with respect to Mr. Robinson, the instruction failed to inform the jury that Mr. Robinson was an employee of Eastern Hospital and that Eastern Hospital was therefore vicariously liable for Mr. Robinson's actions. (RP 1441; Tr. (Vol. 9), pp. 2074, 2077.)

The confusion created by these instructions was further compounded by the special verdict form, which allowed the jury to apportion compensatory damages between Dr. Collins, Eastern Hospital's nurses, and Mr. Robinson—Eastern Hospital was not included in the apportionment of damages. (*Id.*) The jury was also asked to award punitive damages against Eastern Hospital and against Mr. Robinson, who was not a party to the action. (RP 1454.)

f. Pre-Trial Proceedings

On October 30, 2006, Plaintiff moved to amend its Complaint, without specifically naming Chaves Emergency Group as a party, to add allegations that Eastern Hospital was jointly and severally liable for the actions of what it referred to as the "other corporate entity." (RP 246, 475-80.) Plaintiff also added claims

for violation of the UPA and negligent hiring and management of the emergency room. (RP 478-80.) Despite Eastern Hospital's objections, the district court granted Plaintiff's motion. (RP 332-46, 454.)

Two weeks after Plaintiff filed its Amended Complaint, Eastern Hospital moved for leave to file a third-party complaint against Chaves Emergency Group for indemnity based on the new allegations raised in the Amended Complaint. (RP 518-20.) Despite having just amended its Complaint to include allegations that Eastern Hospital was vicariously liable for the actions of Chaves Emergency Group, Plaintiff opposed the motion. (RP 546-48.) The district court denied Eastern Hospital's motion. (RP 686.)

ARGUMENT

I. THE PUNITIVE DAMAGES AWARD SHOULD BE REVERSED BECAUSE IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, BECAUSE THE PLAINTIFF'S THEORY OF RECOVERY FAILS AS A MATTER OF LAW, AND BECAUSE THE AWARD IS UNCONSTITUTIONAL

a. Standard of Review

"Whether conduct arises to the level such that punitive damages are appropriate is a mixed issue of fact and law." *N.M. Banquest Investors Corp. v. Peters Corp.*, 2007-NMCA-065, ¶ 29, 141 N.M. 632, *cert. granted, Peters Corp. v. N.M. Banquest Investors Corp.*, 2007-NMCERT-005, 141 N.M. 763. Under such a standard, this Court will "review any factual questions under a substantial evidence

standard and [will] review the application of law to the facts de novo." *State v. Baca*, 2004-NMCA-049, ¶ 11, 135 N.M. 490.

In determining whether a jury verdict is excessive, an appellate court does "not reweigh the evidence but determine[s] whether the verdict is excessive as a matter of law." *Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 27, 131 N.M. 32. Under such circumstances, the court does not defer to the jury's verdict, *see Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), but is constitutionally required to review the award *de novo*. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

b. Preservation

Eastern Hospital preserved this issue in its motion for partial summary judgment on Plaintiff's claim for punitive damages, in discussions of and objections to jury instructions, in its motion for directed verdict, in its motion for judgment as a matter of law, and in its motion for a new trial or remittitur. (RP 719-24, 1477-98, 1502-17; Tr. (Vol. 7), pp. 1577-85; Tr. (Vol. 9), pp. 2074, 2077.) *See* Rule 12-216(A) NMRA; *see also Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶ 18, 129 N.M. 586.

c. Points & Authorities

The punitive damages award against Eastern Hospital and its CEO, Mr. Robinson, should be reversed because the award is not supported by substantial

evidence, because the theory of recovery propounded by Plaintiff fails as a matter of law, and because the award is unconstitutional. Each issue will be discussed in turn.

i. Plaintiff Cannot Recover Punitive Damages Against Eastern Hospital for the Acts of Dr. Collins and the Nurses

"The long-standing rule in New Mexico is that an employer is liable in punitive damages for the acts of its employee *only* in cases in which the employer has authorized, participated in or ratified the acts of the [employee]." *Brashear v. Packers*, 118 N.M. 581, 583, 883 P.2d 1278, 1286 (1994) (internal quotation marks and citation omitted). It has also been recognized that an employer may be liable for the conduct of its employees where such employees "had sufficient discretionary or policy-making authority to speak and act for [the employer] with regard to the conduct at issue, independently of higher authority." UJI 13-827 NMRA; *see also Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 21, 140 N.M. 478.

At trial, Plaintiff did not present any evidence that Eastern Hospital authorized, participated in, or ratified the acts" of Dr. Collins or the nurses, and indeed conceded that Dr. Collins lacked sufficient authority to speak and act for Eastern Hospital. (Tr. (Vol. 7), p. 1582.) Instead, Plaintiff argued that New Mexico law allowed for vicarious liability based on the "cumulative acts" of employees or agents of Eastern Hospital. (Tr. (Vol. 7), pp. 1583-85.) Such a

theory of liability stems from *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994), but has not been recognized in the uniform jury instructions even though UJI 13-1827 NMRA was amended in 1998, four years after *Clay*. Significantly, recently proposed revisions to UJI 13-1827 NMRA also do not embrace such a theory of liability for punitive damages. *See Proposed Revisions to the Uniform Jury Instructions—Civil*, Vol. 47, No. 20, SBB 18 (May 12, 2008). Indeed, the district court expressly recognized at trial that if the "cumulative acts" theory failed, the punitive damages award also failed as a matter of law. (Tr. (Vol. 9), p. 2069.)

Even assuming that a "cumulative acts" theory of recovery is supported by New Mexico law, such a theory fails in the instant case. At trial, the jury concluded that the acts of the nurses were not the proximate cause of Decedent's death. (RP 1453) Thus, punitive damages could not be awarded for their conduct. *See Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 134 N.M. 43 ("[A] negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff's damages."); *Gonzales v. Sansoy*, 103 N.M. 127, 129, 703 P.2d 904, 906 (Ct. App. 1984) ("An award of punitive damages must be supported by an award of compensatory damages."). Plaintiff's "cumulative acts" theory was reduced to the

acts of only one individual—Dr. Collins—thereby allowing the jury to award punitive damages against Eastern Hospital based solely on the acts of Dr. Collins, and without finding that Dr. Collins had the requisite managerial capacity to speak or act for Eastern Hospital or that Eastern Hospital otherwise ratified Dr. Collins' actions. Such a result is not supported by New Mexico law, and accordingly, reversal of the punitive damages award is appropriate.

ii. Plaintiff Cannot Recover Punitive Damages Against Eastern Hospital for the Conduct of Mr. Robinson

1. There is No Evidence that Mr. Robinson Had the Requisite Mental State for an Award of Punitive Damages

In order to demonstrate a basis for punitive damages, Plaintiff was required to present evidence suggesting "a culpable mental state" and conduct "rising to a willful, wanton, malicious, reckless, oppressive, or fraudulent level." *Clay*, 118 N.M. at 269, 881 P.2d at 14. At trial, Plaintiff asserted that Mr. Robinson did not satisfy the "requirements" of its contract with Chaves Emergency Group in granting privileges to Dr. Collins. (Tr. (Vol. 4), p. 873.) However, Plaintiff failed to present any evidence to suggest, even assuming that Plaintiff's interpretation of the contract was correct, that Mr. Robinson's conduct was below the standard of care for a hospital CEO. Likewise, there was no evidence presented to indicate that Mr. Robinson's actions indicated a culpable mental state and/or conduct that was "willful, wanton, malicious, reckless, oppressive, or fraudulent." In the

absence of any such evidence, the award of punitive damages for Mr. Robinson's conduct should be reversed as a matter of law.

2. Plaintiff's Negligent Hiring and Management Claim Fails as a Matter of Law

As previously indicated, "[a]n award of punitive damages must be supported by an award of compensatory damages." *Gonzales*, 103 N.M. at 129, 703 P.2d at 906. If conduct does not support the imposition of compensatory damages, any award of punitive damages must also be reversed. In this case, for the reasons discussed more thoroughly in Section III.c, *infra*, Plaintiff's negligent hiring and management claim fails as a matter of law. Accordingly, any punitive damages awarded based on alleged conduct giving rise to Plaintiff's negligent hiring and management claim must also be reversed.

iii. The Punitive Damages Award Violates Due Process

In this case, the award of approximately $20 million in punitive damages exceeds the constitutional guidelines of the United States Constitution. *See Bogle v. Summit Investment Co.*, 2005-NMCA-024, ¶¶ 34-35, 137 N.M. 80; *Weidler v. Big J Enterprises, Inc.*, 1998-NMCA-021, ¶¶ 48, 124 N.M. 591. The district court erred by failing to grant Eastern Hospital's motion for a new trial or remittitur on these grounds.

Campbell recognized there are important "procedural and substantive constitutional limitations" on punitive damages awards because defendants in civil

cases are not "accorded the protections applicable in a criminal proceeding." 538 U.S. at 417. The lack of such protections, compounded with the wide discretion given to juries in assessing the amount of damages, creates the potential that juries will use their verdicts in an arbitrary and discriminatory manner to reflect their own biases and not the actual conduct of a civil defendant—indeed, this is exactly what happened in this case. *See id.*; *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting) ("Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm.").

Three criteria or "guideposts" should be considered in determining the reasonableness of a punitive damages award:

> (1) the reprehensibility of the defendant's conduct, or the enormity and nature of the wrong; (2) the relationship between the harm suffered and the punitive damages award; and (3) the difference between the punitive damages award and the civil and criminal penalties authorized or imposed in comparable cases.

Chavarria, 2006-NMSC-046, ¶ 36; *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996). In this case, each of these guideposts weighs in Eastern Hospital's favor and against the punitive damages award.

1. Defendants' Conduct Was Not "Reprehensible" as Required Under *Gore* and *Campbell*

The conduct at issue in this case simply does not rise to the level necessary to justify the award of punitive damages in this case. In determining the reprehensibility of a defendant's conduct, *Campbell* stated:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.*

538 U.S. at 419 (citation omitted and emphasis added). Importantly, "dissimilar acts, independent from the acts upon which liability was premised, may not serve as a basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 422-23.

At trial, Plaintiff also wrongly suggested that the jury should award damages on behalf of the community—thereby improperly suggesting that the jury should punish Defendants for harm purportedly done to those other than Plaintiff. Additionally, the district court improperly allowed Plaintiff to mount an indiscriminate attack on Chaves Emergency Group in which Plaintiff made

numerous unsupported assertions in front of the jury that Chaves Emergency Group was a "sham" corporation and that the Group could not be sued because it was just a "shell." Likewise, rather than focusing its attack on the only named corporate defendant, Eastern Hospital, Plaintiff made numerous unsupported assertions regarding Eastern Hospital's corporate parent, CHS. Among other things, Plaintiff suggested that CHS preyed on small towns and asked the jury to punish the corporation with "many millions of dollars." (Tr. (Vol. 9), pp. 2141-42.) This is wholly violative of Eastern Hospital's due process rights. *See id.* at 423 ("A defendant should be punished for the conduct that harmed the plaintiff."); *see also Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (2007) ("In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties[.]").

Further, there is no evidence that the conduct of Eastern Hospital and its employees or agents rose to the level of reprehensibility required to justify the punitive damages award in this case. Indeed, while the case involved physical harm as opposed to economic harm, Plaintiff failed to demonstrate that the harm "was the result of intentional malice, trickery, or deceit, [rather than] mere accident," that "the target of the conduct had financial vulnerability," or that "the conduct involved repeated actions [rather than] an isolated incident." *Campbell*, 538 U.S. at 419. Accordingly, the level of reprehensibility in this case is not so

high as to negate the serious due process concerns identified above. *See Clark v. Chrysler Corp.*, 436 F.3d 594, 601-02 (6th Cir. 2006).

2. The Ratio of Compensatory Damages to Punitive Damages is so Disproportionate as to Violate Due Process

The second guidepost similarly weighs in favor of Eastern Hospital and against the punitive damages awarded to Plaintiff. "The second guidepost in BMW is the ratio [of punitive damages] to the actual harm inflicted on the plaintiff." *Aken v. Plains Elec. Generation & Transmission Co-op., Inc.*, 2002-NMSC-021, ¶ 23, 132 N.M. 401 (internal quotation marks and citation omitted). In New Mexico, the test under this guidepost is that "the amount of an award of punitive damages must not be so unrelated to the injury and the actual damages proven as to plainly manifest passion and prejudice rather than reason or justice." *Chavez-Rey v. Miller*, 99 N.M. 377, 379, 658 P.2d 452, 454 (Ct. App. 1982).

Few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *See Campbell*, 538 U.S. at 425. Indeed, ratios above the 4:1 level are likely to "be close to the line . . . of constitutional impropriety." *Haslip*, 499 U.S. at 23-24. Moreover, while courts typically eschew reducing punitive damages to a "simple mathematical formula," the Supreme Court has identified only a few scenarios in which a larger ratio between punitive and compensatory damages may be permissible:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Gore, 517 U.S. at 582; *see also Campbell*, 538 U.S. at 425; *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005). Neither scenario is present in this case.

In this case, the ratio of punitive damages to compensatory damages is approximately 10:1. Contrary to what Plaintiff may argue, such an award is not justified by the mere fact that the harm caused was physical rather than economic. *See, e.g.*, *Clark*, 436 F.3d at 606-07 (reducing punitive damages award to 2:1 ratio in case involving fatality); *Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 291 (Cal Ct. App. 2008) (reducing punitive damages award to 2:1 ratio in case where plaintiff was rendered paraplegic as a result of an automobile accident). Even more importantly, such a ratio clearly exceeds the permissible bounds enumerated in *Campbell* and *Haslip*. Accordingly, the district court erred by denying Eastern Hospital's motion for a new trial or remittitur.

3. The Comparable Civil and Criminal Penalties Demonstrate the Excessiveness of the Punitive Damages Award

"[A] reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments

concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583 (internal quotation marks and citation omitted). In this case, the legislative sanctions for violations of the Emergency Medicine Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, which mandates that hospitals give appropriate medical screenings and that hospitals stabilize patients before discharge or transfer, provides the best guidance for the appropriate measure of punitive damages. A hospital that violates EMTALA's provisions may be subject to civil penalties up to $50,000. *Id.* § 1395dd(d)(1)(A). Physicians who violate the Act may also be liable for civil penalties up to the same amount. *Id.* § 1395dd(d)(1)(B).

A comparison of the damages award in this case with the potential civil penalties that could have been imposed against Eastern Hospital and/or Dr. Collins further indicates that the punitive damages awarded in this case are far outside the bounds of the constitutional limitations described by the federal and state courts. This final guidepost likewise weighs in favor of Eastern Hospital and therefore strongly indicates that the district court improperly denied Eastern Hospital's motion for a new trial or remittitur.

II. ALTERNATIVELY, IF PLAINTIFF IS NOT BARRED FROM RECOVERY OF PUNITIVE DAMAGES AS A MATTER OF LAW, THE CASE SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL BECAUSE OF ERRORS IN THE JURY INSTRUCTIONS

a. Standard of Review

This Courts reviews "jury instructions de novo to determine whether they correctly state the law and are supported by the evidence introduced at trial." *Chamberland v. Roswell Osteopathic Clinic, Inc.*, 2001-NMCA-045, ¶ 11, 130 N.M. 532 (internal quotation marks and citation omitted).

b. Preservation

Eastern Hospital preserved this issue in its motion for partial summary judgment on Plaintiff's claim for punitive damages, in discussions of and objections to jury instructions, in its motion for directed verdict, in its motion for judgment as a matter of law, and in its motion for a new trial or remittitur. (RP 719-24, 1477-98, 1502-17; Tr. (Vol. 7), pp. 1577-85; Tr. (Vol. 9), pp. 2074, 2077.) *See* Rule 12-216(A) NMRA; *see also Gonzales*, 2000-NMSC-029, ¶ 18.

c. Points & Authorities

The punitive damages award in this case should be reversed, and a new trial should be granted, because the district court improperly instructed the jury on punitive damages by modifying UJI 13-1827 NMRA to omit instruction on vicarious liability. Additionally, the punitive damages award should also be reversed on the grounds that the jury instructions and special verdict form

ostensibly allowed the jury to award punitive damages against Eastern Hospital twice for the same acts by failing to inform the jury that Eastern Hospital would be vicariously liable for any punitive damages assessed against Mr. Robinson.

i. The District Court Improperly Modified UJI 13-1827 NMRA

Uniform jury instructions must be used, in their original form and without modification, "unless under the facts or circumstances of the particular case they are erroneous or otherwise improper, and the trial court states its reasons for refusing to use them." *First Nat'l. Bank in Alb. v. Sanchez*, 112 N.M. 317, 322, 815 P.2d 613, 618 (1991). Absent findings justifying a departure from a uniform jury instruction, a district court should give an applicable uniform jury instruction without modification, and the failure to instruct the jury using the applicable uniform jury instruction constitutes reversible error. *Brooks v. K-Mart*, 1998-NMSC-028, ¶ 7, 125 N.M. 537.

The district court instructed the jury as to liability for punitive damages as follows:

> If you find that the conduct of Rich Robinson, the CEO of Eastern New Mexico Medical Center, was willful, reckless, or wanton, then you may award punitive damages against it.
>
> If you find that the combined acts or omissions of Pamela Hayes Rodriguez, and/or Brian Miller, as employees, and Theodore Collins, as the apparent agent, of Eastern New Mexico Medical Center amounted to willful, reckless, or wanton conduct, you may award punitive damages against Eastern New Mexico Medical Center.

(RP 1441.) By way of contrast, the uniform jury instruction on punitive damages, UJI 13-1827 NMRA, in part, provides:

> (Direct Liability)
>
> If you find that the conduct of _____ (name of party against whom direct liability for punitive damages is asserted) was [malicious], [willful], [reckless], [wanton], [fraudulent] [or] [in bad faith], then you may award punitive damages against [him] [her] [it].
>
> (Vicarious Liability)
>
> Additionally, if you find that the conduct of _____ (name of agent or employee of party on whose conduct vicarious claim for punitive damages is based) was [malicious], [willful], [reckless], [wanton], [fraudulent] [or] [in bad faith], you may award punitive damages against _____ (name of party against whom vicarious liability for punitive damages is asserted) if:
>
> (A) _____ (name of agent or employee) was acting in the scope of [his] [her] employment by _____ (name of party) and had sufficient discretionary or policy-making authority to speak and act for [him] [her] [it] with regard to the conduct at issue, independently of higher authority; [or if]
>
> (B) _____ (name of party) in some [other] way [authorized,] [participated in] [or] [ratified] the conduct of _____ (name of agent/employee).

A comparison of the punitive damages jury instruction given at trial with UJI 13-1827 indicates that there are a number of issues with the instruction as given. First, the punitive damages instruction as to Eastern Hospital's liability for the conduct of the nurses and Dr. Collins is incorrect as a matter of law as it

permits the jury to award punitive damages against Eastern Hospital for the conduct of others without a finding that Eastern Hospital was vicariously liable for such conduct.

In order to award punitive damages against Eastern Hospital for the conduct of Dr. Collins or the nurses, the jury must have specifically determined that Eastern Hospital was vicariously liable for Dr. Collins' and/or the nurses' conduct. As previously discussed, an employer is liable for the acts of its employees only where "the employer has authorized, participated in or ratified the acts of the [employee]." *Brashear*, 118 N.M. at 583, 883 P.2d at 1286. Additionally, an employer may be liable for the conduct of its employees where such employees "had sufficient discretionary or policy-making authority to speak and act for [the employer] with regard to the conduct at issue, independently of higher authority." UJI 13-1827 NMRA; *see also Chavarria*, 2006-NMSC-046, ¶ 21. Both these bases are embodied in the section labeled "Vicarious Liability" in UJI 13-1827 NMRA.

According to the Directions for Use for UJI 13-1827 NMRA, "[w]here the case includes a claim for punitive damages on a theory of vicarious liability, the section labeled 'Vicarious liability' should be given." Accordingly, the jury should have been instructed on vicarious liability. Over Eastern Hospital's objection, however, the district court declined to so instruct.

Instead, the district court instructed the jury that if they found "that the combined acts or omissions of Pamela Hayes-Rodrigues, and/or Brian Miller, as employees, and Theodore Collins, as the apparent agent, of Eastern New Mexico Medical Center amounted to willful, reckless, or wanton conduct, [they] may award punitive damages against Eastern New Mexico Medical Center." (RP 1441.) According to Plaintiff, the Supreme Court's decision in *Clay* lends support to such a theory. (Tr. (Vol. 9), p. 1955.) As observed in Section I.c.i, *supra*, however, this theory has not been recognized in the uniform jury instructions. *See, e.g.*, UJI 13-1827 NMRA; *Proposed Revisions to the Uniform Jury Instructions—Civil*, Vol. 47, No. 20, SBB 18 (May 12, 2008).

Moreover, even assuming that this was a proper theory of punitive damages to instruct the jury on, the jury instruction given does not properly reflect the theory. According to *Clay*, under certain circumstances, the actions of agents or employees in the aggregate may demonstrate that a principal or employer has the requisite culpable mental state such that an award of punitive damages is appropriate. 118 N.M. at 270, 881 P.2d at 15. Thus, contrary to the instruction quoted above, the question is not whether the nurses or Dr. Collins engaged in "willful, reckless, or wanton conduct," but rather, whether their cumulative actions or inactions indicated that Eastern Hospital had a culpable mental state. *See id.*; *Chavarria*, 2006-NMSC-046, ¶ 21. The effect of this misstatement of the holding

in *Clay* resulted in the jury being able to award punitive damages against Eastern Hospital solely because it found that one or more of its employees or agents had the requisite culpable mental state. This is contrary to *Clay* and not supported by New Mexico law on punitive damages. *See, e.g., Couch v. Astec Indus., Inc.*, 2002-NMCA-084, ¶ 58, 132 N.M. 631 ("Because the purpose of punitive damages is to punish a wrongdoer, a wrongdoer must have a culpable mental state to be liable for punitive damages."); *Gillingham v. Reliable Chevrolet*, 1998-NMCA-143, ¶ 19, 126 N.M. 30 ("While it is clear that the law will not permit Plaintiff to recover punitive damages against [Employer] based solely upon [Employee's] misconduct, nevertheless, the instruction given by the trial court incorrectly stated that the jury could award punitive damages against [Employer] based solely upon evidence of [Employee's] culpable state of mind."), *overruled on other grounds by Fernandez v. Espanola Pub. Sch. Dist.*, 2005-NMSC-026, ¶ 9, 138 N.M. 283.

The prejudicial effect of this erroneous instruction is even more apparent when one considers the jury's actual verdict. The jury concluded that the conduct of the nurses was not the proximate cause of Decedent's death. (RP 1453.) The jury did conclude, however, that Dr. Collins' conduct was the proximate cause of Decedent's death. (RP 1452.) Thus, under the jury instruction on punitive damages, the jury awarded punitive damages against Eastern Hospital for the "cumulative conduct" of a single individual who was not even an employee of the

Hospital. Indeed, the instruction improperly states that Dr. Collins is an apparent agent of the Hospital and allows the jury to award punitive damages without actually first determining whether Dr. Collins was an apparent agent of the Hospital. The district court's improper modification of UJI 13-1827 NMRA, and refusal to instruct the jury on vicarious liability, constitutes reversible error. *See Brooks*, 1998-NMSC-028, ¶ 7.

ii. The Special Verdict Form Improperly Allowed the Jury to Award Punitive Damages Against Eastern Hospital Twice for the Same Acts

It is generally understood that "where there are two defendants, there can be two separate punitive damages award, one against each defendant for the purpose of punishing the individual defendant's wrongful conduct." *Zimmer v. Travelers Ins. Co.*, 521 F. Supp. 2d 910, 937 (S.D. Iowa 2007). However, if a defendant is "a party to the action simply on the basis that it is vicariously liable for the actions of its employees, taken in the scope of their employment," only one punitive damages award is appropriate. *Id. Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶ 41, 135 N.M. 641 echoed this approach, holding that

> when a principal is held liable under the theory of respondeat superior, and punitive damages are appropriate due to the principal's ratification of or participation in an intentional tort, there is no need to allocate separate awards of punitive damages against the principal and agent, as their liability is equal.

As in *Robertson*, "we are presented with a judgment for punitive damages against a principal and [its] agent, not simply two co-defendants." *Id.* ¶ 40. As indicated by the special verdict form, the jury awarded punitive damages against Eastern Hospital and against its CEO, Mr. Robinson, who was not a party to the lawsuit. Eastern Hospital requested and was denied an instruction stating that it would be vicariously liable for any punitive damages awarded against Mr. Robinson.

Significantly, because "[t]he liability of a principal for his agent is vicarious in nature . . . a principal who ratifies or participates in [tortious] acts of an agent is held responsible for the [tort], by operation of law, to the same extent as the agent." *Id.* In this case, because the principal, Eastern Hospital, was responsible for any punitive damages award against Mr. Robinson, it was improper to allow the jury on the special verdict to award punitive damages twice—against both Eastern Hospital and Mr. Robinson—for the same conduct. *See Conant v. Rodriguez*, 113 N.M. 513, 517, 828 P.2d 425, 429 (Ct. App. 1992) (reversing judgment that required Principal to pay punitive damage award against him plus a punitive damage award against his agent). Although Eastern Hospital was also responsible for any punitive damages assessed against Dr. Collins and/or the nurses, it is not possible from the special verdict form to determine whose conduct

the punitive damages award against Eastern Hospital was intended to punish. The district court's failure to remedy this error warrants reversal.

III. THE DISTRICT COURT IMPROPERLY SUBMITTED THE NEGLIGENT HIRING AND MANAGEMENT CLAIM TO THE JURY WHERE THE PLAINTIFF FAILED TO PRESENT EXPERT TESTIMONY AND WHERE THE NEGLIGENT HIRING AND MANAGEMENT CLAIM WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

a. Standard of Review

The question of whether expert testimony was required to prove Plaintiff's negligent hiring and management claim is a question of law that is reviewed *de novo*. *Consol. Elec. Distrib. V. S.F. Hotel Group, LLC*, 2006-NMCA-005, ¶ 7, 138 N.M. 781; *see also Neff v. Johnson Mem. Hosp.*, 889 A.2d 921, 926 (Conn. Ct. App. 2006).

An appellate court reviews the sufficiency of the evidence to support the verdict by examining whether the verdict is supported by which "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Weststar Mortgage Corp.*, 2003-NMSC-002, ¶ 8 (internal quotation marks and citation omitted). In so doing, the court will "review all evidence in the light most favorable to the verdict and resolve all conflicts in the light most favorable to the prevailing party." *Id.* (citation omitted).

b. Preservation

This issue was preserved by Eastern Hospital's motion for summary judgment on Plaintiff's negligent hiring claims, by its motion for directed verdict,

and by its motion for judgment as a matter of law. (RP 741-751, 1502-17; Tr. (Vol. 7), pp. 1566-72.) *See* Rule 12-216(A) NMRA; *see also Gonzales*, 2000-NMSC-029, ¶ 18.

c. Points & Authorities

Plaintiff's theory of liability under his negligent hiring and management claim was that Eastern Hospital "was negligent in allowing [Dr.] Collins to work in its emergency room." (RP 1421.) This is a quintessential negligent credentialing claim. *See, e.g., Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, ¶¶ 41-44, 124 N.M. 549; *Diaz v. Feil*, 118 N.M. 385, 389-90, 881 P.2d 745, 749-50 (Ct. App. 1994). Despite Plaintiff's assertions below that he was not making a negligent credentialing claim, New Mexico case law on negligent credentialing is nonetheless applicable to his claim. *Cf. United States v. E-Gold, Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008) ("Indeed, as Gertrude Stein pointed out, a '[r]ose is a rose is a rose.' In this case we would advise the government that an injunction is an injunction is an injunction." (citation omitted)). Plaintiff's claim should not have been submitted to the jury because Plaintiff failed to present expert testimony to prove his claim and because the claim was not supported by substantial evidence.

i. Plaintiff Failed to Present Expert Testimony to Prove His Claim of Negligent Hiring and Management

In New Mexico, "the doctrine of corporate negligence may impose liability on a hospital for the negligent granting of staff privileges or the negligent supervision of treatment." *Eckhardt*, 1998-NMCA-017, ¶ 41; *Diaz*, 118 N.M. at 389, 881 P.2d at 749. A plaintiff makes a prima facie showing of negligent credentialing by showing that the hospital "negligently failed to screen [the doctor's] competency, or that it negligently retained [the doctor] after it knew or should have known of matters involving [his or her] general competency." *Eckhardt*, 1998-NMCA-017, ¶ 41.

Significantly, "New Mexico law has not specifically addressed whether expert testimony is necessary" to prove a negligent credentialing claim. UJI 13-1119B NMRA (Committee comment). Whether or not an expert is needed to establish a plaintiff's claim of negligent credentialing depends "on the kind of conduct that is alleged to constitute a breach of the duty." *Id.* In the instant case, Eastern Hospital's act of contracting with a third party to provide emergency room services, along with its alleged failure to follow the emergency services contract provisions regarding privileges, constitutes Plaintiff's basis for his negligent credentialing claim.

Given the nature of Plaintiff's negligent credentialing claim, Plaintiff's failure to present expert testimony regarding the applicable standard of care should

have been fatal to his case. At trial, evidence was presented that Eastern Hospital and Chaves Emergency Group had an emergency services contract which, among other things, required that each emergency room physician furnished by Chaves Emergency Group was required to (1) be board certified or eligible by the AMA or AOA, and (2) be accepted by Eastern Hospital's CEO, Mr. Robinson. Through questioning and during opening and closing arguments, Plaintiff intimated that Dr. Collins' lack of board certification in emergency medicine was contrary to the language of the agreement. Plaintiff also asserted that by delegating the credentialing process to medical staff, Mr. Robinson failed to adhere to the language of the agreement, which required that Mr. Robinson "accept" Dr. Collins. Lastly, Plaintiff argued that Dr. Collins honorable discharge from the Air Force after only one year of service and his being asked to leave two other hospitals also constituted evidence that Dr. Collins was negligently credentialed. Even accepting that Plaintiff substantiated these assertions at trial—he did not—Plaintiff wholly failed to demonstrate that failing to adhere to the terms of the emergency services agreement or granting privileges to Dr. Collins in light of his past employment history violated any applicable standard of care.

In *Neff*, a Connecticut court rejected the argument that a hospital's bylaws or policies "furnish sufficient evidence of the applicable standard of care owed to the plaintiff." 889 A.2d at 929. The court observed that a hospital's bylaws or

policies "do not themselves establish a standard of care," and that expert testimony is needed to establish whether the hospital's actions violated the duty owed to its patients. *See id.* The court further noted that expert testimony is typically required in negligent credentialing claims, where the nature of the hospital credentialing process is typically "beyond the experience and ken of the ordinary fact finder." *Id.* This position has been echoed in a number of other cases. *See, e.g.*, *Frigo v. Silver Cross Hosp. & Med. Center*, 876 N.E.2d 697, 723 (Ill. Ct. App. 2007) (holding that "[e]xpert testimony is required to prove the applicable standard of care and whether that standard was violated"); *Welsh v. Bulger*, 698 A.2d 581, 585 (Pa. 1997) ("[U]nless a hospital's negligence is obvious, a plaintiff must produce expert testimony to establish that the hospital deviated from an accepted standard of care and that the deviation was a substantial factor in causing the harm to the plaintiff."); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 172 (Wis. 1981) ("[S]ince the procedures ordinarily employed by hospitals in evaluating applications for staff privileges are not within the realm of the ordinary experience of mankind . . . expert testimony was required to prove the same."). New Mexico case law mandates a similar result. *Cf. Jaramillo v. Kellogg*, 1998-NMCA-142, ¶ 7, 126 N.M. 84 ("Medical malpractice cases usually require expert medical testimony to establish departure from recognized standards in the community.").

Expert testimony is typically required to prove a negligent credentialing claim. As indicated by the Committee Comment to UJI 13-1119B,

> a case in which the hospital relied on the medical judgments of physicians on its credentials committee, who recommended granting an application for clinical privileges after reviewing materials in the applicant's file, might require expert testimony on the question whether the committee reasonably should have known of deficiencies in the application's competency based on the materials reviewed.

Id. Indeed, unless a physician's actions are particularly flagrant, the "parameters of a hospital's judgment in credentialing its medical staff is not within the grasp of ordinary jurors." *Neff*, 889 A.2d at 928.

The question of whether Eastern Hospital's decision to grant privileges to Dr. Collins' in light of his lack of board certification in emergency medicine and his employment history was negligent is not within the "experience and ken of the ordinary fact finder." Rather, expert testimony was needed to explain to the jurors the significance, if any, of these allegations. In the absence of any such testimony, Plaintiff's claim should have been dismissed as a matter of law.

ii. Plaintiff's Negligent Hiring and Management Claim is Not Supported by Substantial Evidence

Assuming *arguendo* that expert testimony was not needed to establish the proper standard of care in this case, the district court should have still granted Eastern Hospital's motion for judgment as a matter of law because Plaintiff's negligent hiring claim is not supported by substantial evidence.

In order to prove his negligent hiring claim, Plaintiff was required to demonstrate that the hospital "negligently failed to screen [the doctor's] competency, or that it negligently retained [the doctor] after it knew or should have known of matters involving [his or her] general competency." *Eckhardt*, 1998-NMCA-017, ¶ 41. At trial, Plaintiff attempted to prove that Eastern Hospital violated the emergency services agreement by granting Dr. Collins privileges when he was not board certified in emergency medicine and by delegating the credentialing process to the medical staff at the Hospital. Notably, however, Plaintiff failed to substantiate either allegation. Similarly, Plaintiff failed to establish that Dr. Collins' employment history should have signaled to Eastern Hospital that Dr. Collins was incompetent or otherwise unqualified.

Mr. Robinson testified that Eastern Hospital's medical staff, which consists of physicians with hospital privileges, reviews the qualifications of physicians to ascertain whether a physician is qualified to work in the emergency room. If a particular physician is found to be competent, Mr. Robinson has the option to waive the requirement of board certification. Once the medical staff has determined whether or not a particular physician should be granted privileges, it passes this recommendation on to Mr. Robinson, who then has the option of granting or denying privileges. Mr. Robinson stated that this procedure comported with the emergency services agreement requirement that he "accept" the physician.

Mr. McGinty, Eastern Hospital's hospital administrator expert, testified regarding the plain language of the contract, e.g., physicians "shall be certified by the AMA/AOA recognized board in the specialty indicated or eligible for certification by such board by virtue of having successfully completed all educational and residency requirements required to it for the board examinations." (Tr. (Vol. 7) p. 1740.) According to Mr. McGinty, the plain language of the contract simply required board certification or eligibility—not necessarily in emergency medicine—and that a certification in family practice, internal medicine, or general surgery would also meet the contract's requirements. Plaintiff did not present any evidence to dispute this fact, aside from baldly asserting that the plain language of the contract required board certification in emergency medicine.

Mr. McGinty also testified that the procedure set forth in Eastern Hospital's bylaws for the credentialing of emergency medicine physicians is standard in the profession. He further explained that the bylaws required that Dr. Collins provide all of his past training and experience, information regarding licensure, loss of privileges, etc., and the fact that Dr. Collins was granted privileges in this case indicated that the medical staff reviewed all the information required by the bylaws. (Tr. (Vol. 7), pp. 1787-88.) Mr. McGinty added that Dr. Collins was credentialed at other hospitals in the area, was eligible for privileges at Eastern Hospital, and that Eastern Hospital properly granted him privileges. (*Id.*, p. 1788.)

Other evidence showed that it is not uncommon for emergency medicine physicians not to have board certification. Dr. Robert Henry, Plaintiff's expert, testified that he is not board certified and that the hospital where he works has three emergency room doctors who are not board certified. (Tr. (Vol. 5), pp. 1216-17, 1237.) Further, the American College of Emergency Physicians deems it acceptable for physicians to work in the emergency room even if the physician is not board certified in emergency medicine, as long as the physician began practicing emergency medicine before the year 2000. (*Id.*, p. 1238.) Dr. Collins has been practicing emergency medicine since 1983. (Tr. (Vol. 6), p. 1345.)

Dr. Collins testified that, in order to be hired at Eastern Hospital, he went through the same process that he went through to obtain privileges in Carlsbad, Artesia, Clovis, and Ruidoso, including submitting all of his credentials and qualifications to Eastern Hospital's medical staff. (*Id.*, p. 1349.)

Plaintiff did not offer any testimony or evidence that Dr. Collins was an incompetent physician or that Eastern Hospital should have known that Dr. Collins was purportedly incompetent. Rather, the evidence presented at trial was that Eastern Hospital used precisely the same method of credentialing emergency room physicians as most other hospitals. Moreover, despite Plaintiff's various assertions at trial, he failed to support his allegations that Eastern Hospital violated the emergency services agreement or its own bylaws in credentialing Dr. Collins.

Because Plaintiff failed to present substantial evidence to support its claim, the district court erred by failing to grant Eastern Hospital's motion for judgment as a matter of law.

IV. THE DISTRICT COURT IMPROPERLY SUBMITTED THE UPA CLAIM TO THE JURY BECAUSE THE PRACTICE OF MEDICINE AND OPERATION OF A HOSPITAL ARE EXEMPT FROM THE UPA AND BECAUSE PLAINTIFF'S ALLEGATIONS DO NOT CONSTITUTE "FALSE OR MISLEADING STATEMENTS" UNDER THE UPA

a. Standard of Review

The question of whether Eastern Hospital's actions fall under the purview of the UPA is a question of law that is reviewed *de novo*. *See Summit Properties, Inc. v. Pub. Serv. Co. of N.M.*, 2005-NMCA-090, ¶ 7, 138 N.M. 208.

b. Preservation

Eastern Hospital preserved this issue in its motion for partial summary judgment on Plaintiff's UPA claim, in discussions of and objections to jury instructions, in its motion for a directed verdict, and in its motion for judgment as a matter of law. (RP 1508-12; Tr. (Vol. 7), pp. 1558-66; Tr. (Vol. 9), pp. 2075-76, 2078-79.) *See* Rule 12-216(A) NMRA; *see also Gonzales*, 2000-NMSC-029, ¶ 18.

c. Points & Authorities

The bases for Plaintiff's UPA claims are thoroughly outlined in Jury Instruction No. 7. (RP 1421-22.) Significantly, none of Plaintiff's allegations

constitute a violation of the UPA, as the actions at issue are not covered by the UPA and/or are otherwise not misrepresentations as defined in the UPA.

i. The Practice of Medicine and the Operation of a Hospital are Exempted from the UPA

While New Mexico case law has not addressed the issue, it is generally recognized that physicians and health care providers are subject to statutes prohibiting unfair trade practices. *See, e.g.*, *Haynes v. Yale-New Haven Hosp.*, 699 A.2d 964, 973 (Conn. 1997); *Nelson v. Ho*, 564 N.W.2d 482, 486-87 (Mich. Ct. App. 1997); *Quimby v. Fine*, 724 P.2d 403, 405-06 (Wash. Ct. App. 1986). This inclusion of physicians and health care providers in unfair trade practices statutes comes with one important caveat: the only acts that the statutes cover are the "entrepreneurial or commercial" aspect of the medical profession. *See Haynes*, 699 A.2d at 973-74; *Simmons v. Stephenson*, 84 S.W.3d 926, 928 (Ky. Ct. App. 2002); *Darviris v. Petros*, 812 N.E.2d 1188, 1193 (Mass. 2004); *Nelson*, 564 N.W.2d at 486-87; *Quimby*, 724 P.2d at 405-06. Violations of unfair trade practices statutes that are predicated on malpractice or negligence are universally held not to be actionable. *See Haynes*, 699 A.2d at 973-74; *Simmons*, 84 S.W.3d at 928; *Darviris*, 812 N.E.2d at 1193; *Nelson*, 564 N.W.2d at 486-87; *Quimby*, 724 P.2d at 405-06.

Even allegations that ostensibly involve "entrepreneurial or commercial" aspect of a medical practice, such as advertising, are nonetheless not actionable

under unfair trade practices statutes if issues of medical competence or malpractice are involved. For example, in *Haynes*, the plaintiff alleged that a hospital violated the Connecticut Unfair Trade Practices Act ("CUPTA") by "holding itself out as a major trauma center," thereby "representing to the public that it would meet the applicable standards of competency for a major trauma center." 699 A.2d at 974. The court held that the plaintiff's unfair trade practices claim failed as a matter of law:

> We conclude that this representation is simply what all physicians and health care providers represent to the public—that they are licensed and impliedly that they will meet the applicable standards of care. If they fail to meet the standard of care and harm results, *the remedy is not one based upon CUPTA, but upon malpractice.*

Id. at 974-75 (emphasis added).

Likewise, *Burnet v. Spokane Ambulance*, 772 P.2d 1027, 1029 (Wash. Ct. App. 1989) rejected a Washington Consumer Protection Act claim that a physician had engaged in a "deceptive practice of holding himself out as a pediatric neurologist when he was not board certified." The allegedly deceptive statements appeared in the telephone book. *See id.* The claim was rejected because there was nothing that related to any "entrepreneurial or commercial" practices. *Id.* at 1030.

Below, Plaintiff's evidence about Eastern Hospital's billboard and its website proved no more than what was rejected in *Haynes*. Such representations simply indicate that Eastern Hospital's physicians and medical staff will adhere to

an applicable standard of care. 699 A.2d at 974-75. The failure to adhere to this standard constitutes malpractice or negligence, not a violation of the UPA. *See id.*; *Burnet*, 772 P.2d at 1029.

ii. Eastern Hospital's Statements on its Billboard and Web Site Were Not False or Misleading Under the UPA

The district court also erred as a matter of law in finding that Eastern Hospital's statements that formed the basis for Plaintiff's UPA claim were "false or misleading" statements, as required under the UPA. In order to state a claim under the UPA, Plaintiff was required to demonstrate, *inter alia,* that "the representation was of the type that may, tends to, or does deceive or mislead any person." *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437 (citations omitted). At trial, Plaintiff failed to meet this requirement.

While not yet addressed by New Mexico courts, it is widely recognized that puffery is not actionable under unfair trade practices statutes. *See, e.g., Verizon Directories Corp. v. Yellow Book USA, Inc.*, 309 F. Supp. 2d 401, 404-06 (E.D.N.Y. 2004); *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 502 (Tex. 2001); *Lens Crafters, Inc. v. Vision World, Inc.*, 943 F. Supp. 1481, 1489 (D. Minn. 1996); *N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 177 (N.J. Super. Ct. App. Div. 2003); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 245-46 (Wis. 2004).

As recognized by the above cases, "[a]dvertising that amounts to 'mere' puffery is not actionable because no reasonable consumer relies on puffery." *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994); *see also Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997). For example, statements that one product or service is "superior" are not actionable. *Id.* Likewise, statements "that are expressed in broad, vague, and commendatory language" constitute mere puffery and are therefore not actionable. *Lens Crafters, Inc.*, 943 F. Supp. at 1489. By way of contrast, specific statements that a product is flame resistant or tested to a certain strength "that can be objectively confirmed may be actionable." *X-IT v. Walter Kidde Portable Equip., Inc.*, 155 F. Supp. 2d 577, 628 (E.D. Va. 2001).

Eastern Hospital's advertisements in which Eastern Hospital states it does not think consumers should wait for emergency care, uses the phrase "ER+," and suggests that a "team" atmosphere exists are simply advertisements touting the superiority of Eastern Hospital's services. *See, e.g.*, *Mason v. Chrysler Corp.*, 653 So.2d 951, 953-54 (Ala. 1995) (holding that Chrysler's national advertising campaign highlighting the quality of vehicle was puffing); *Rodio v. Smith*, 587 A.2d 621, 624 (N.J. 1991) (holding that slogan "You're in good hands with Allstate," is nothing more than mere puffery). There is no actionable claim under

the UPA; therefore, the district court erred by failing to grant Eastern Hospital's motion for judgment as a matter or law or new trial.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING EASTERN HOSPITAL'S MOTION FOR LEAVE TO FILE A THIRD-PARTY COMPLAINT AGAINST CHAVES EMERGENCY GROUP

a. Standard of Review

The question of whether the district court improperly denied Eastern Hospital's motion for leave to file a third-party complaint is reviewed under an abuse of discretion standard. *See Yates Exploration, Inc. v. Valley Improvement Assoc.*, 108 N.M. 405, 408, 773 P.2d 350, 353 (1989).

b. Preservation

Eastern Hospital preserved this issue by filing a motion for leave to file a third-party complaint and by filing a renewed motion for leave to file a third-party complaint. (RP 518-20, 636-39.) *See* Rule 12-216(A) NMRA.

c. Points & Authorities

The district court abused its discretion by denying Defendant's motion for leave to file a third-party complaint, because the denial of Defendant's motion resulted in a verdict tainted by passion and prejudice, as Plaintiff essentially tried its case against the absent third party. Under Rule 1-014(A) NMRA, a defendant may implead a third party "who is or may be liable to him for all or part of the plaintiff's claim against him." In order "[t]o come within the scope of Rule 1-

014(A), the third-party's potential liability must in some way be dependent upon the outcome of the main claim against the defendant." *Yates Exploration, Inc.*, 108 N.M. at 408, 773 P.2d at 353.

In this case, Eastern Hospital asserted that Chaves Emergency Group should be brought into the case because Plaintiff's amended complaint asserted Eastern Hospital was liable for the allegedly tortious actions taken by certain employees of Chaves Emergency Group. The district court denied Eastern Hospital's motion on the grounds that allowing impleader would cause undue delay. Notably, however, just four months later, Plaintiff sought and obtained an extension of the discovery deadline—causing Eastern Hospital to renew its motion on the ground that any undue delay was rendered moot by Plaintiff's own failure to abide by court deadlines. The court again denied Eastern Hospital's motion.

The prejudicial effect of the district court's denial of Eastern Hospital's motion became particularly clear during trial. At trial, the focus of Plaintiff's case was the conduct of Chaves Emergency Group's employee, Dr. Collins. Plaintiff asserted that Dr. Collins not only acted negligently, but that, due to his employment history and qualifications, it was negligent to allow him to work at the Hospital. Plaintiff also focused on the conduct of Chaves Emergency Group, asserting on more than one occasion that the Group was a "sham" corporation and that the Group could not be sued because it was just a "shell." Plaintiff tried his

case against the Chaves Emergency Group and the jury essentially awarded damages against Eastern Hospital for the conduct of the third party. This should not have been allowed, as the district court dismissed Plaintiff's claims for joint and several liability. Accordingly, the district court abused its discretion in denying Eastern Hospital's motion for leave to file a third-party complaint.

CONCLUSION

For the foregoing reasons, Eastern Hospital respectfully request that the Court reverse the jury's verdict and the district court's order denying Defendant's motion for judgment as a matter of law, new trial, or remittitur.

Respectfully submitted

SHEEHY, SERPE & WARE, P.C.
Richard A. Sheehy
2500 Two Houston Center
Houston, Texas 77010
(713) 951-1111

and

MONTGOMERY & ANDREWS, P.A.

By Sarah M. Singleton
Sarah M. Singleton
Jaime R. Kennedy
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
(505) 982-4289 – facsimile

Attorneys for Defendant-Appellant
Roswell Hospital Corporation d/b/a
Eastern New Mexico Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2008, I caused a true and correct copy of Defendant-Appellant's Brief-in-Chief to be served via U.S. mail, postage prepaid, to the following:

Stephen Durkovich
Law Office of Stephen Durkovich
534 Old Santa Fe Trail
Santa Fe, New Mexico 87501

Ray M. Vargas, II
Garcia & Vargas, LLC
303 Paseo de Peralta
Santa Fe, New Mexico 87501

Sarah M. Singleton