CASE NO. 70083

IN THE
SUPREME COURT OF NEVADA

VALLEY HEALTH SYSTEM, LLC, a Nevada limited liability company, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER; AND UNIVERSAL HEALTH SERVICES, INC., a Delaware corporation,

Appellants,

vs.

ESTATE OF JANE DOE, BY AND THROUGH ITS SPECIAL ADMINISTRATOR, MISTY PETERSON,

Respondent.

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA
HONORABLE JUDGE RICHARD SCOTTI, CASE NO. A-09-595780-C

APPELLANTS' OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC, a Nevada limited liability company, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER; AND UNIVERSAL HEALTH SERVICES, INC., a Delaware corporation, Appellants, vs. ESTATE OF JANE DOE, by and through its Special Administrator, MISTY PETERSON, Respondent.	Supreme Court No. 70083 District Court No. A595780

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APPELLANTS' NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant Valley Health System, LLC d/b/a Centennial Hills Hospital Medical Center ("Centennial Hills") is a Delaware Limited Liability Company. It is wholly owned and operated by UHS of Delaware, Inc., a Delaware

Corporation, the management company for Appellant Universal Health Services, Inc. ("UHS"), also a Delaware Corporation. UHS is a holding company that is a wholly owned subsidiary of Universal Health Services, a publicly held company that owns 10% or more of Appellants' stock.

DATED this 15th day of August, 2016.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy
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Rules

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A(b)(1) because this is an appeal from a final order. The Order Striking Answer of Defendant Valley Health System LLC as Sanction for Discovery Misconduct was entered on November 5, 2015 (the "Sanction Order"). (Appellants' Appendix ("AA"), Vol. VII, Tab 24, at 1348-49.) The Order Denying Motion for Reconsideration was entered on December 10, 2015. (AA, Vol. X, Tab 30, at 1842-43.) Because the Sanction Order was interlocutory, Centennial Hills and UHS could not initiate this appeal until the resolution of all claims and defenses, which occurred upon entry of the Stipulation and Order for Dismissal With Prejudice on February 29, 2016 (the "Dismissal With Prejudice"). (*Id.*, Tab 32, at 1854-55.) Pursuant to the terms of the Dismissal With Prejudice, Centennial Hills and UHS preserved their rights to appeal the Sanction Order. (*Id.*, Tab 31, at 1848-53.) Centennial Hills and UHS filed their Joint Notice of Appeal on March 30, 2016.[1] (*Id.*, Vol. XVII, Tab 84, at 3306-08.)

[1] Centennial Hills and UHS included the Estate of Jane Doe ("Doe") as the Respondent in an abundance of caution. However, due to the global settlement between and among the parties in the underlying litigation, it is unlikely that Doe will participate in this appeal. Nor is it necessary that she do so. *Cf. Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1169 (10th Cir. 2003) ("[T]he concern over the lack of an adversarial appeal in such cases is

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II. ROUTING STATEMENT

This case does not fall within any of the categories of cases presumptively assigned to the Supreme Court or the Court of Appeals under NRAP 17. Because it presents a substantial issue of first impression—*i.e.*, the applicability of the collective knowledge doctrine to a request for discovery sanctions against corporate entities accused of intentionally and willfully concealing material evidence—Centennial Hills and UHS request that the Supreme Court retain the appeal.

The District Court, despite the absence of evidence of intentional or willful concealment under N.R.C.P. 16.1, aggregated the knowledge of several former Centennial Hills employees in order to impute willful intent to Centennial Hills and UHS and, as a result, struck their Answer with respect to liability. (AA, Vol. XII, Tab 23, at 1311-1312; Vol. X, Tab 29, at 1839-40.) In so doing, the District Court improperly broadened the scope of the collective knowledge doctrine. It is particularly important for this Court to provide guidance as to the level of proof needed to establish intentional and willful

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assuaged by the fact that, on appeal, we review the district court's order-detailing the reasons for any finding of attorney misconduct-in addition to the appellant's brief.").

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culpability by corporate entities when used as the basis for extreme sanctions such as the striking of pleadings.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court abuse its discretion in issuing the Sanction Order by:

1) Applying the collective knowledge doctrine to make unsupported findings that Centennial Hills and UHS intentionally and willfully concealed relevant and material evidence with the intent to harm Doe; and

2) Sanctioning Centennial Hills and UHS for the inaction of its attorneys?

IV. STATEMENT OF THE CASE

A. Nature of the Case.

Doe filed a lawsuit against Centennial Hills and UHS, as well as other Defendants, alleging that Centennial Hills and UHS negligently failed to maintain hospital premises in a safe and secure manner and, as a result, Doe was assaulted by a Certified Nursing Assistant ("CNA") named Steven Farmer ("Farmer"). Doe alternatively alleged that Centennial Hills and/or UHS were

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vicariously liable for the actions of Farmer. (*See generally* AA, Vol. I, Tabs 1-2, at 1-12.)

B. Course of the Proceedings.

The Complaint was filed on July 23, 2009, and an Amended Complaint was filed on August 21, 2009. (*See generally id.*) Over the next several years, the parties conducted discovery regarding the subject matter of the litigation. (*See generally* Vols. X-XVII, Tabs 35-82, at 1867-3251; *see also* Vol. VII, Tab 23, at 1312.) During that time period, there were two District Court-ordered discovery stays at Doe's request—from January 21, 2011 through July 18, 2012, and from February 29, 2014 through July 4, 2014. (*Id.*, Vol. VII, Tab 23, at 1312.)

On April 29, 2015, Doe filed a Motion for Rule 37 Sanctions related to the nondisclosure of various witnesses by Centennial Hills and UHS, seeking to establish that Farmer's assault of Doe was reasonably foreseeable to Centennial Hills and UHS as a matter of law. (*Id.*, Vol. III, Tab 12, at 407-468.) After briefing and oral argument before the Discovery Commissioner (the Honorable Bonnie A. Bulla), Commissioner Bulla granted Doe's Motion

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in part, and referred it to the District Court to determine if additional sanctions were warranted. (*Id.*, Vol. IV, Tab 19, at 605-09.)

An evidentiary hearing was scheduled for August 28, 2015. (*Id.*, Tab 18, at 602-03.) Centennial Hills and UHS, as well as Doe, submitted briefs in anticipation of the evidentiary hearing. (*See generally id.*, Tab 20, at 612-735; Vol. V, Tab 21, at 736-948.) On August 28, 2015, the evidentiary hearing went forward. (*See generally id.*, Vols. VI-VII, Tab 22, 949-1308.)

On November 4, 2015, the District Court (the Honorable Richard F. Scotti) issued its Sanction Order, finding that "Centennial [Hills] intentionally and willfully violated its discovery obligations," and, as a result, sanctioning Centennial Hills and UHS "pursuant to NRCP 37 by striking [their] Answer in this action such that liability is established…." (*Id.*, Vol. VII, Tab 23, at 1311-12.) On November 19, 2015, Centennial Hills and UHS filed a Motion for Reconsideration of the Sanction Order. (*See generally id.*, Vol. VIII, Tab 25, at 1390-1589.) Following briefing and oral argument, the District Court denied the Motion for Reconsideration on December 4, 2015. (*Id.*, Vol. X, Tab 29, at 1839-40.)

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C. Disposition Below.

On February 29, 2016, following a global settlement between and among the parties, the District Court dismissed with prejudice all remaining claims. (*Id.*, Tab 31, at 1848-53.) Notwithstanding, the District Court ordered that "Centennial Hills[, UHS,] and Hall Prangle & Schoonveld hereby preserve their right to appeal the Sanction Order and the [District] Court will retain jurisdiction over this matter until thirty days following resolution of the appeal." (*Id.* at 1853.)

V. STATEMENT OF FACTS

A. Summary of the Dispute.

On May 14, 2008, Farmer sexually assaulted Doe while she was a patient at Centennial Hills. (*Id.*, Vol. VII, Tab 23, at 1316.) Because Doe did not report the assault, a criminal investigation resulted from Farmer's sexual assault of a different Centennial Hills patient named Roxanne Cagnina ("Cagnina")—a non-party to this action— on May 15-16, 2008. (*Id.*) This particular lawsuit concerns the sexual assault of Doe (Cagnina filed a separate lawsuit), and with respect to Centennial Hills and UHS, whether or not they were liable for Farmer's intentional tort.

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B. Underlying Facts.

In 2008, Farmer was assigned to work at Centennial Hills through a staffing agency called American Nursing Services ("ANS"), which had a contract with Centennial Hills to provide hospital staff such as CNAs. (*Id.*, Vol. VII, Tab 23, at 1315.) Following Cagnina's report of Farmer's assault, the Las Vegas Metropolitan Police Department ("Metro") interviewed and transcribed statements from Centennial Hills nurses Margaret Wolfe ("Wolfe") and Christine Murray ("Murray"). (*Id.* at 1317.)

Centennial Hills conducted an internal investigation regarding the Cagnina incident. (*Id.*) Centennial Hills retained Hall Prangle & Schoonveld ("Hall Prangle"), members of which met with Wolfe, Murray, and Centennial Hills nurse Renato Sumera ("Sumera") because each one was involved in Cagnina's treatment. (*Id.* at 1316-17; Vol. VI, Tab 22, at 996.) At that time, Centennial Hills and Hall Prangle were unaware of the incident regarding Doe. (*Id.*, Vol. VII, Tab 23, at 1316-17.)

Prior to the Cagnina report, no one from the nursing staff raised any concerns about Farmer with Carol Butler, Centennial Hill's Chief Nursing Officer ("Butler"); or Amy Bochenek, Centennial Hill's Director of

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Emergency Services ("Bochenek").[2] (*Id.*, Vol. VIII, Tab 25, at 1478-79, 1482-83.) *Following the Cagnina report*, although Bochenek and Butler became aware that Murray and Wolfe had given statements to Metro about Farmer, neither had access to the statements at the time of the internal Cagnina investigation. (*Id.*, Vol. XIII, Tab 59, at 2599; Vol. VIII, Tab 25, at 1477, 1480-81.) In fact, Butler and Bochenek never saw the Murray and Wolfe Metro statements until their 2015 depositions in this litigation. (*Id.*, Vol. XIII, Tab 59, at 2599; Vol. VIII, Tab 25, at 1474-76.) During the internal Cagnina investigation, Hall Prangle attempted to obtain these statements from Metro and the Clark County Public Defender, but, due to a pending criminal proceeding against Farmer, both refused to turn the statements over unless a court order was entered. (*Id.*, Vol. VI, Tab 22, at 993, 1170.)

According to Michael Saunders, a Metro detective who was assigned to the Farmer criminal investigation, Metro's general policy is to not provide transcripts of witness statements in an open criminal case without a court order. (*Id.*, Vol VIII, Tab 25, at 1486-87.) The Metro file related to the Farmer investigation contains no evidence that Murray, Wolfe, Bochenek, or Butler

[2] Bochenek's last name is now Blasing. (*Id.*, Vol. XIII, Tab 59, at 2590).

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ever received copies of the Metro statements. (*Id.*) Detective Saunders had no recollection of ever providing transcripts of the Metro statements to Murray, Wolfe, or anyone else at Centennial Hills, and could think of no other way any of them would have obtained the transcripts. (*Id.*) In fact, it would be "highly unusual" for Metro to have provided these statements to anyone other than the Clark County District Attorney without a court order. (*Id.*)

Murray testified in her deposition that she discussed her Metro statement with Butler in 2008, and that Butler had a copy. (*Id.*, Vol. XVII, Tab 82, at 3250-51.) Butler disagreed (as did Metro) and stated at her deposition that she had no recollection of ever seeing the statement. (*Id.*, Vol. VIII, Tab 25, at 1477, 1480-81.) Murray further testified at her deposition about an incident involving Farmer being yelled at by an elderly patient (an incident referenced in her Metro statement), yet acknowledged that she had not discussed that incident with anyone at Centennial Hills (including supervisory personnel).[3] (*Id.*, Vol. XVII, Tab 82, at 3250-51.)

Wolfe (who also gave a statement to Metro) recalled speaking with Sumera regarding her suspicions of Farmer. (*Id.*, Tab 80, at 3216-18.)

[3] The fact that Murray had not discussed this incident with Butler is further proof that Butler did not have a copy of Murray's statement.

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However, she did not speak with Centennial Hill's Risk Management department and, apart from a conversation with Bochenek about the Cagnina incident, Wolfe did not speak to any member of Centennial Hill's administration about Farmer. (*Id.* at 321-20.) Wolfe never saw a transcript of her Metro statement until she testified at Farmer's criminal trial. (*Id.*, Vol. VIII, Tab 25, at 1500-01.)

C. <u>Discovery.</u>

Although members of Hall Prangle had interviewed Wolfe, Murray, and Sumera in mid-2008 after the Cagnina incident and listed them in Centennial Hills/UHS' initial disclosures in the Cagnina lawsuit, (*id.*, Vol. VIII, Tab 25, at 1507-08), they did not re-interview these nurses after Doe filed her Complaint because those particular nurses were not involved in Doe's treatment. (*Id.*, Vol. VI, Tab 22, at 997.) Further, Wolfe and Murray were not Centennial Hills employees during the pendency of the Doe lawsuit—Murray left Centennial Hills on March 11, 2009, and Wolfe's employment ended on May 7, 2009.[4] (*Id.*, Vol. VIII, Tab 25, at 1504.)

[4] Butler and Bochenek left shortly after the filing of the Doe lawsuit. Specifically, Butler left on January 3, 2010, and Bochenek left on September 26, 2010. (*Id.*, Vol. VIII, Tab 25, at 1504.)

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In February of 2013, a member of Hall Prangle (*i.e.*, John Bemis, Esq.) received materials from the Clark County Public Defender's Office ("CCPD"), which included an audio recording of Murray's Metro statement. (*Id.*, Vol. VI, Tab 22, at 1041-42.) Mr. Bemis did not listen to the recording because he did not have speakers on his work computer. (*Id.* at 1093.) The CCPD production did not include the Wolfe Metro statement in audio or written form. (*Id.* at 1092-93.)

In May of 2013, Hall Prangle received the Metro file regarding the Farmer investigation in the Cagnina lawsuit. (*Id.* at 1024.) The Discovery Commissioner designated the Metro file as confidential, which prohibited its disclosure to anyone outside of the Cagnina lawsuit (which would include Doe and her counsel). (*Id.*, Vol. XIV, Tab 64, at 2798; Vol. VIII, Tab 25, at 1540-1557.) Due to this Protective Order, neither Hall Prangle nor Farmer's counsel supplemented their disclosures (at that time) in this litigation with the contents of the Metro file. (*Id.*, Vol. VI, Tab 22, at 84.)

Hall Prangle produced the Metro file in this litigation in October of 2014 pursuant to an Order by the Discovery Commissioner. (*Id.* at 1062-63.) The Metro file comprised 190 pages and included an affidavit of the Custodian of

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Records stating that the file was comprised of a total of 188 pages.[5] (*Id.*, Vol. XVI, Tab 77, at 2994-3185.) Each page was Bates-numbered with an "LVMPD" Bates number. (*Id.*) Although the Metro statement from Murray was included in the file, the Metro statement from Wolfe was not included. (*Id.*) Wolfe's Metro statement was disclosed in this litigation by Doe's counsel in March of 2015. (*Id.*, Vol. VIII, Tab 25, at 1565.)

D. Doe's Motion for Summary Judgment.

On September 29, 2014, Doe filed a Motion for Summary Judgment Regarding Liability (the "Summary Judgment Motion"). (*See generally id.*, Vol. 1, Tab 4, at 22-93.) Doe argued that Centennial Hills and UHS were strictly liable for Farmer's assault. (*Id.*) On October 14, 2014, Centennial Hills and UHS opposed the Summary Judgment Motion (the "Summary Judgment Opposition"). (*Id.*, Tab 6, at 99-112.) Relying on NRS 41.475, Centennial Hills and UHS argued that strict liability did not apply because "Farmer's actions weren't reasonably foreseeable under the facts and circumstances of the case." (*Id.* at 102-03.)

[5] The discrepancy in page count versus the actual number of pages produced is due to two single-page custodian of records affidavits. The actual number of pages that constitute the underlying file (without these affidavits) is 188.

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In conjunction with their foreseeability argument, Centennial Hills and UHS (through Hall Prangle) cited and summarized *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005) (a factually similar case), stating that "the Nevada Supreme Court concluded that [] because the assailant had no prior criminal record in the United States or Mexico, and because there w[ere] no prior complaints against the assailant for sexual harassment, that it was not reasonably foreseeable that the assailant would sexually assault a Safeway employee." (*Id.* at 107.) Based on *Wood,* Centennial Hills and UHS (through Hall Prangle) argued that "[i]n the instant situation, there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial Hills on notice that Mr. Farmer would assault a patient." (*Id.*) Centennial Hills and UHS (through Hall Prangle) further explained their argument, indicating that, *inter alia*, Farmer successfully went through a criminal background check, drug test, and employment background check prior to working at Centennial Hills. (*Id.* at 107-08.)

On February 27, 2015, the District Court denied the Summary Judgment Motion as to Centennial Hills and UHS, finding, "[T]here is a genuine issue of material fact with regard to liability, the principal one being whether the

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misconduct of Farmer was reasonably foreseeable." (*Id*., Vol. III, Tab 9, at 350.)

E. <u>The April 29, 2015 Writ Petition.</u>

On April 29, 2015, Centennial Hills and UHS filed a Petition for Writ of Mandamus and/or Prohibition with this Court regarding the February 27, 2015 Order. (*See generally id*., Tab 11, at 363-406.) In order to provide background information for this Court, Centennial Hills and UHS (through Hall Prangle) summarized the arguments presented in the Summary Judgment Motion and the Summary Judgment Opposition. In doing so, Hall Prangle made the following statement: "Specifically, Centennial Hills and UHS relied upon this Court's decision in *Wood v. Safeway, Inc.*, 121 Nev. 724, 737, 121 P.3d 1026, 1035 (2005), and urged that there were no known prior acts or any other circumstances that could have put Centennial Hills on notice that Farmer would sexually assault Ms. Doe." (*Id.* at 386-87.) This Court denied the April 29, 2015 Writ Petition, finding that Centennial Hills and UHS' right to an appeal following trial precluded extraordinary intervention. (*Id.*, Tab 14, at 488-89.)

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F. The Motion for Sanctions.

On April 29, 2015, Doe filed a Motion for Rule 37 Sanctions related to the nondisclosure of Wolfe, Murray, and Sumera as witnesses as well as the Metro statements, seeking to establish that Farmer's misconduct was reasonably foreseeable to Centennial Hills and UHS as a matter of law. (*See generally id.*, Tab 12, at 407-68.) After briefing and oral argument, Commissioner Bulla ruled as follows:

- That the Metro statements by Murray and Wolfe be admitted at trial without the necessity of establishing foundation, and without any hearsay objections;
- That Centennial Hills and UHS pay $18,000 in monetary sanctions ($9,000.00 to Doe and $9,000.00 to a non-party); and
- That the District Court conduct an evidentiary hearing to address[:] "(1) if case terminating sanctions are appropriate based on the conduct of failing to disclose witnesses[;] (2) whether or not there was intention to thwart discovery in this case, and hinder Plaintiff to discover the relevant facts[;] and (3) a failure to let the Court know what was going on in the case and whether the UHS Defendants misled the Court."

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(*Id.*, Vol. IV, Tab 19, at 607-08.) Commissioner Bulla also determined that these sanctions could be reduced if Centennial Hills and UHS were able to prove "with a degree of probability" that they had "no knowledge of Sumera or Wolfe until recently." (*Id.* at 609.)

G. <u>The Evidentiary Hearing.</u>

On August 28, 2015, the District Court held an evidentiary hearing regarding the potential imposition of additional sanctions against Centennial Hills and UHS. (*See generally id.*, Vol. VI-VII, Tab 22, at 949-1308.) During the hearing, members of Hall Prangle (Mr. Prangle and Mr. Bemis, in particular) mistakenly stated that the Metro file that they received in May of 2013 contained Wolfe's Metro statement. (*Id.*, Tab 22, at 1059-60.) After Doe's counsel pointed out that Centennial Hills and UHS' October 2014 disclosure of the Metro file did not include the Wolfe Metro statement, members of Hall Prangle reviewed the original file received from Metro and clarified that Wolfe's Metro statement was not received in May of 2013. (*Id.* at 1086). Apart from this mistake—which was corrected—there was no evidence presented during the evidentiary hearing indicating that anyone from Hall Prangle received Wolfe's Metro statement in 2013.

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During the evidentiary hearing, the District Court indicated that it was troubled by the statement in the Summary Judgment Opposition that "there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial on notice that Mr. Farmer would assault a patient." (*Id.* at 963-64.) Mr. Bemis, when questioned by Doe's counsel about that particular statement, stated that he had made that argument "as an advocate for [his] client" and disagreed with Doe's counsel's accusation that it was a false statement. (*Id.* at 1074-77.)

H. <u>The Sanction Order.</u>

On November 4, 2015, the District Court issued its Sanction Order. (*See generally id.*, Vol. VII, Tab 23, at 1309-47.) The District Court summarized its findings as follows:

> This Court further finds that, based on evidence that this Court considers to be clear and convincing, Centennial intentionally and willfully (a) violated its discovery obligations under NRCP 16.1 in failing to timely disclose that nurses Murray, Wolfe, and Sumera possessed relevant and material evidence relating to the central issue in this case – whether it was reasonably foreseeable to Centennial that Mr. Farmer would commit a criminal sexual assault on a patient; and (b) violated its duty under NRCP 16.1 to timely disclose the Police Statements which also contained relevant and material evidence relating to the same central issue.

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(*Id.* at 1311.) Based on these findings, the District Court sanctioned Centennial Hills and UHS "pursuant to NRCP 37 by striking [their] Answer in this action such that liability is hereby established on Plaintiff Jane Doe's claims against [Centennial Hills and UHS] for negligence and *respondeat superior*, but [Centennial Hills and UHS] shall still be entitled to defend on the question of the nature and quantum of damages for which it is liable." (*Id.* at 1312.)

The District Court confirmed that the basis of its Sanction Order was the finding that Centennial Hills and UHS intentionally and willfully concealed material evidence with the intent to harm Doe by reiterating that finding, in one form or another, no less than five additional times. (*Id.* at 1331, 1333, 1336, 1344, 1345.)[6] Yet, nowhere in the Sanction Order does the District Court identify the specific Centennial Hills employee(s) who possessed this culpable

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[6] ("Centennial concealed evidence about the nurses."); ("This Court finds that there is clear and convincing evidence that Centennial willfully and intentionally concealed the relevance of nurses Murray, Wolfe, and Sumera, and the existence of the Police Statements with an intent to harm and unfairly prejudice Plaintiff."); ("Centennial also intentionally concealed the similarly critical police statements of nurses Murray and Wolfe."); ("Centennial is the party that elected to hide evidence to prevent Jane Doe from adjudicating its claim on the merits."); ("The Court finds that Defendant Centennial intentionally, and willfully, and with the intent to unfairly prejudice and harm Plaintiff Jane Doe, concealed evidence regarding nurses Wolfe, Murray, and Sumera….") (*Id.*)

state of mind.

Further, the District Court based its Sanction Order on its finding that Hall Prangle received the Wolfe Metro statement "in or before May, 2013." (*Id.* at 1325.) Apart from the mistaken testimony—which, as noted above, was corrected—there was no competent evidence admitted during the evidentiary hearing that anyone from Hall Prangle received Wolfe's Metro statement in 2013. And the documentary evidence proves the contrary—*i.e.*, that the Wolfe Metro statement was not included in the Metro file. (*Id.*, Vol. XVI, Tab 77, at 2994-3185; Vols. X-XI, Tab 35, at 1867-2243.)

I. <u>The Motion for Reconsideration.</u>

On November 19, 2015, Centennial Hills and UHS filed a Motion for Reconsideration of the Sanction Order. (*See generally id.*, Vol. VIII, Tab 25, at 1390-1589). Following additional briefing and oral argument, the District Court issued an Order on December 10, 2015, denying the Motion for Reconsideration. (*Id.*, Vol. X, Tab 29, at 1839-40.) Despite finding that "clearly-identified employees acting in managerial capacities [] willfully withheld evidence," the District Court—for the second time—did not identify the specific Centennial Hills employee(s) who possessed this culpable state of

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mind. (*Id.*)

VI. SUMMARY OF ARGUMENT

The District Court committed two errors of law and then exacerbated those errors by using them as the foundation for making factual findings purportedly supporting its extreme discovery sanction against Centennial Hills and UHS. First, the District Court applied the collective knowledge doctrine to aggregate piecemeal knowledge of several Centennial Hills employees and impute it to Centennial Hills and UHS. However, the District Court took this doctrine ***one step too far*** by also applying the collective knowledge doctrine to impute ***willful intent*** to Centennial Hills and UHS. In order to find that a company acted willfully or intentionally, rather than negligently, one single employee within the company must possess the requisite culpable state of mind. The District Court did not (nor could it) identify a single Centennial Hills or UHS employee who possessed this culpable state of mind.

Second, the District Court used inapplicable agency principles to sanction Centennial Hills and UHS for Hall Prangle's nondisclosure of witnesses and documents under N.R.C.P. 16.1. Under the legal authority below, there must be evidence that Centennial Hills and UHS were

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independently culpable for the nondisclosure. As stated above, there is no evidence that any single employee from Centennial Hills or UHS willfully or intentionally concealed relevant evidence with the intent to harm Doe. Quite to the contrary, Centennial Hills made Murray, Wolfe, and Sumera available to members of Hall Prangle following the Cagnina incident.

Once the District Court's factual findings of willfulness and intentional concealment are stripped away, the remaining discovery sanction factors do not support striking Centennial Hills and UHS' Answer with respect to liability. At most, Hall Prangle (not Centennial Hills or UHS) negligently failed to conduct an adequate investigation once the Doe lawsuit was filed to ensure that the three relevant nurses with information pertaining to Farmer were disclosed—a finding that should never be used, on its own, to strike a party's pleading. Accordingly, the Sanction Order should be vacated, including the sanction that Centennial Hills and UHS pay a monetary sanction to a non-party.

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VII. ARGUMENT

A. Standard of Review.

A discovery sanction is subject to an abuse of discretion standard on appeal. *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). "When determining whether the district court has abused its discretion in such cases, we do not focus on whether the court committed manifest error, but rather we focus on whether the district court made any errors of law." *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 468-69, 255 P.3d 1281, 1286 (2011). Further, "[a]n abuse of discretion can occur when the district court based its decision on a clearly erroneous factual determination…." *LVMPD v. Blackjack Bonding*, 131 Nev. __, __, 343 P.3d 608, 614 (2015); *accord NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004) (noting that an abuse of discretion occurs if the district court's findings are "'not supported by substantial evidence'") (citation omitted).

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B. The District Court's Findings of Willful and Intentional Misconduct by Centennial Hills Is Based on an Error of Law.

1. The Collective Knowledge Doctrine Cannot Be Utilized to Find Willful or Intentional Misconduct by a Corporate Party.

Although the knowledge of a corporation's various employees may be aggregated and imputed to the corporation, it may not be done to prove willful intent by the corporation. Rather, in order to prove that a corporation acted willfully or intentionally, the culpable state of mind must be possessed by at least one single employee. *See, e.g., Ginena v. Alaska Airlines, Inc.*, No. 2:04-CV-01304-MMD-CWH, 2013 WL 3155306, at *7 (D. Nev. June 19, 2013) (predicting that the Nevada Supreme Court would refuse to find that a corporation acted with malice solely by piecing together information possessed by different corporate agents) (citing various cases, including *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1387 (9th Cir. 1986)).[7]

In *Ginena*, the United States District Court for the District of Nevada entertained a motion for a new trial following a defense verdict on a

[7] *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 440 n. 2, 245 P.3d 542, 546 n. 2 (2010) (recognizing that this Court may rely on unpublished federal district court opinions as persuasive, though nonbinding authority).

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defamation claim. *Id.*, 2013 WL 3155306, at *1. The district court had previously determined that the plaintiff was required to prove malice in order to recover for defamation and gave a jury instruction stating that the plaintiff must prove that one specific Alaska Airlines employee had the requisite state of mind. *Id.* at *6-7. In its motion for a new trial, the plaintiff argued that the jury instruction was incorrect because it "prevented the jury from considering Alaska's 'state of mind' as a corporation." *Id.* at *7. Plaintiff argued that under the collective knowledge doctrine, it could aggregate the knowledge of various Alaska Airlines employees and use their combined knowledge to prove that the company acted with malice. *Id.*

The district court (the Honorable Larry R. Hicks) disagreed with the plaintiff. Judge Hicks analyzed the relevant authority relating to the collective knowledge doctrine and determined that although it may be used to make a negligence finding, it has no application to a culpable state of mind. *Id.* at *7-8. Specifically, Judge Hicks found as follows:

> [T]he collective knowledge doctrine favors liability where various corporate agents have different pieces of information, but the corporation was negligent in compiling these pieces of information. But then

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> liability is premised on negligence, not on the "intentional" conduct that is at the heart of the higher levels of mens rea, knowing and willful conduct.

Id. at *8 (internal citations omitted). Judge Hicks determined that the Nevada Supreme Court would not apply the collective knowledge doctrine to aggregate the knowledge of multiple employees of a corporation for purposes of finding corporate malice. *Id.* Instead, Judge Hicks held that in order for a plaintiff to show that a corporation acted willfully, "the plaintiff would simply need to show that someone in the corporation had the required culpability." *Id.*

Other legal authority is in accord:

- *Lind v. Jones, Lang LaSalle Americas, Inc.*, 135 F. Supp. 2d 616, 622 n.6 (E.D. Pa. 2001) ("Although knowledge possessed by employees is aggregated so that a corporate defendant is considered to have acquired the collective knowledge of its employees, specific intent cannot be aggregated similarly.") (internal citations omitted);
- *First Equity Corp. of Fla. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 260 (S.D.N.Y. 1988) ("While it is not disputed that a corporation may be charged with the collective knowledge of its employees, it does not follow that the corporation may be deemed to have a culpable state

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of mind when that state of mind is possessed by no single employee. A corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual."); and

- *Reed v. Northwestern Publishing Co.*, 530 N.E.2d 474, 484 (Ill. 1988) ("We cannot, however, circumvent the actual-malice requirement in this case by pooling all of the information arguably within the knowledge of various employees and imputing all of that knowledge to the corporate defendant to establish that the corporate defendant acted with actual malice.").

Based on this authority, in order to determine that Centennial Hills and UHS ***willfully and intentionally concealed*** relevant information regarding Murray, Wolfe, and Sumera ***with the intent to harm Doe***, the District Court needed to find that at least one employee at Centennial Hills and UHS ***willfully and intentionally concealed*** that information ***with the intent to harm Doe***. The District Court did not make any such finding, and no such finding would have been supported by the record. The District Court committed an error of law by aggregating the knowledge of several corporate employees for the purpose of finding a culpable state of mind.

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2. There Is No Evidence Supporting the Imputation of Willful Misconduct to Centennial Hills and UHS Because the District Court Did Not Find That Any Specific Centennial Hills or UHS Employee Had a Culpable State of Mind.

No less than six times in its Sanction Order, the District Court stated, in one form or another, that Centennial Hills and UHS ***intentionally and willfully concealed*** relevant and material evidence, and also determined that Centennial Hills and UHS ***intended to harm Doe***. (AA, Vol. VII, Tab 23, at 1311, 1331, 1333, 1336, 1344, 1345; *see also supra* n.6 (quoting each of the District Court's findings).) The District Court also found that Centennial Hills and UHS' misconduct is "to an equal or greater extent than its lawyers." (AA, Vol. VII, Tab 23, at 1344.) The District Court endeavored to provide factual support for these "clear and convincing" findings of intentional and willful misconduct. (*Id.* at 1333-34.) Yet, it did not identify one single Centennial Hills or UHS employee who possessed this "clear and convincing" culpable state of mind.

The District Court identified two Centennial Hills employees who had some knowledge regarding Murray, Wolfe, and Sumera's suspicions of Farmer—*i.e.*, Butler and Bochenek. Butler (Centennial's Chief Nursing

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Officer) learned of these suspicions only following the discovery of the Cagnina incident (before learning of the Jane Doe incident), and further testified that while she was aware that Murray and Wolfe provided statements to Metro, ***she did not review or possess these statements***.[8] (*Id.*, Vol. VIII, Tab 25, at 1474-83.) Bochenek (Centennial's Director of Emergency Services) testified similarly. (*Id.*, Vol. XIII, Tab 59, at 2599.) Without knowledge of the specific contents of the Metro statements given by Murray and Wolfe, Butler and Bochenek—two laypersons—cannot be faulted for failing to realize that Murray, Wolfe, and Sumera had information that was potentially relevant to foreseeability in this litigation and for not relaying that information to Hall Prangle—***especially considering that they could not have learned about the Doe lawsuit until one year later***. Even assuming that they had knowledge

[8] As discussed above, Murray testified that Butler had a copy of her Metro statement in 2008. Butler contradicted Murray's testimony by stating that she had no access to either Murray or Wolfe's Metro statements in 2008 and never saw them until her deposition in 2015. Despite this factual dispute, the District Court made an "undisputed" factual finding that Butler "received a copy of the Statement, and discussed it with nurse Murray and others shortly after the Farmer incidents." (AA, Vol. VII, Tab 23, at 1319 (accepting Murray's deposition testimony as true).) Detective Saunders' Declaration, which was not necessary until Centennial Hills and UHS learned that the District Court had disregarded Butler's deposition testimony, further demonstrates that the District Court's "undisputed" factual finding is incorrect. (*Id.*, Vol VIII, Tab 25, at 1486-87.)

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regarding Murray, Wolfe, and Sumera's suspicions of Farmer, there was no evidence presented at the evidentiary hearing indicating that they were in a position to relay that information to Hall Prangle during the pendency of this litigation, or that they willfully withheld the information from Hall Prangle with the intent to harm Doe. Centennial Hills did everything that it was required to do when it made Murray, Wolfe, and Sumera available to members of Hall Prangle following the Cagnina report. (AA, Vol. VIII, Tab 25, at 1507-08.) It was reasonable for Centennial Hills to believe that Hall Prangle, its counsel, would then do whatever was appropriate with that information.

Although it did not explicitly reference the doctrine by name, the District Court utilized the collective knowledge doctrine to aggregate the knowledge of Butler and Bochenek, along with that of various lower level employees (*i.e.*, Murray, Wolfe, and Sumera), in order to conclude that Centennial Hills and UHS ***willfully and intentionally concealed*** relevant information ***with the intent to harm Doe***. As explained above, this constitutes an error of law, because (as recognized by Judge Hicks in *Ginena*) the collective knowledge doctrine cannot be used to impute willfulness or intentional misconduct to a corporation unless one or more of its employees

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possesses the requisite culpable state of mind. The Sanction Order, while lengthy, is devoid of any finding that any single Centennial Hills or UHS employee ***willfully and intentionally concealed*** relevant evidence ***with the intent to harm Doe***.

The District Court's decision to impute ***willful intent*** to Centennial Hills and UHS by aggregating the knowledge of Butler, Bochenek, Murray, and Wolfe is even more precarious in light of the fact that all of these employees left the employ of Centennial Hills before (or soon after) the Doe lawsuit was filed. (*Id.*, Vol. VIII, Tab 25, at 1504.) These Centennial Hills employees had no reason to willfully conceal evidence after they left Centennial Hills.[9] Further, Centennial Hills' ability to re-interview these employees to determine if and whether they had information relevant to foreseeability in this litigation was constrained.[10]

Based on the foregoing, the District Court's findings that Centennial Hills and UHS intentionally and willfully concealed relevant evidence with the

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[9] Bochenek went to Summerlin Hospital after leaving Centennial Hills.

[10] As stated above, discovery was stayed in this litigation from January 21, 2011 until July 18, 2012, and from February 29, 2014 through July 4, 2014, at the request of Doe, which would have further constrained Centennial Hills and UHS' ability to disclose relevant information. (*Id.*, Vol. VII, Tab 23, at 1312.)

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intent to harm Doe were an abuse of discretion, because they are based on an error of law (*i.e.*, misapplication of the collective knowledge doctrine) and are not supported by substantial evidence (*i.e.*, there is no evidence that one single Centennial Hills or UHS employee possessed a culpable state of mind).

C. Centennial Hills and UHS Should Not Have Been Sanctioned Based on Hall Prangle's Nondisclosure of Evidence.

One of the relevant factors for a discovery sanction is "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney…." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). Although this Court has not specifically addressed this factor in great detail, other courts have analyzed the appropriateness of sanctioning a party for its counsel's actions:

- *Ransmeier v. Mariani*, 718 F.3d 64, 71 (2d Cir. 2013) ("[A]lthough clients are responsible for dictating the ultimate goals of a lawsuit, *see* ABA Model R. of Professional Conduct, R. 1.2, we recognize that attorneys often have considerable latitude in the exercise of their professional judgment to design litigation strategies to achieve those

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goals. A client should not be punished when an attorney, without the client's approval, exercises that responsibility unwisely.");

- *Onstad v. Wright*, 54 S.W.3d 799, 809 (Tex. App. 2001) ("[A] party may *not* be punished with sanctions for his counsel's conduct unless the party is somehow independently culpable for counsel's actions.") (emphasis in original);
- *Shephard v. Am. Broadcasting Companies, Inc.*, 62 F.3d 1469, 1484 (D.D.C. 1995) ("Like other courts, we disfavor sanctioning a party for counsel's misconduct unless the party itself is somehow implicated."); and
- *Smith v. U.S.*, 834 F.2d 166, 171 (10th Cir. 1987) ("When imposing sanctions for a party's failure to comply with pretrial deadlines, the trial court is to consider, insofar as practical, where the fault lies for noncompliance. The impact of any sanction should then be directed at the lawyer or the party depending upon who is at fault.").

Although the District Court made a finding that Centennial Hills and UHS' misconduct is "to an equal or greater extent than its lawyers…," (AA, Vol. VII, Tab 23, at 1344), that finding is belied by logic and unsupported by

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evidence. It is an attorney's responsibility to ensure compliance with N.R.C.P. 16.1. The attorney—as opposed to the client—is intimately familiar with initial and supplemental disclosure obligations and is responsible for conferring with his or her client to ensure that the required witnesses and documents are timely disclosed. ***These are the types of important decisions which attorneys make—not clients***. Any client would be hard-pressed to properly analyze which witnesses and documents need to be disclosed without the direction of counsel.

There is no evidence that anyone from Centennial Hills or UHS was "independently culpable" for the nondisclosure. *Onstad*, 54 S.W.3d at 809. There is no evidence that anyone from Centennial Hills or UHS directed members of Hall Prangle to omit Murray, Wolfe, or Sumera as witnesses from Centennial Hills and UHS' initial disclosures. The record also confirms that no one at Centennial Hills or UHS had possession of the Metro statements. (*Id.*, Vol VIII, Tab 25, at 1486-87.) By contrast, there is evidence that members of Hall Prangle interviewed Murray, Wolfe, and Sumera in mid-2008 with respect to the Cagnina incident. (AA, Vol. VII, Tab 23, at 1316-17.) Thus, to the extent that anyone is to blame for nondisclosure in this litigation, it

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is Hall Prangle, not Centennial Hills or UHS.[11] Yet, the District Court's sanction is primarily directed at Centennial Hills and UHS. As a result, the District Court's sanction improperly penalized Centennial Hills and UHS for its counsel's non-compliance with N.R.C.P. 16.1.[12]

D. Without a Finding of Willful or Intentional Misconduct, the District Court Should Not Have Issued Such an Extreme Sanction, Especially When Considering the Other Relevant Sanction Factors.

Nevada courts are generally precluded from issuing extreme sanctions under N.R.C.P. 37 without a finding of willfulness. *See, e.g., Clark Cty.*

[11] That being said, Hall Prangle's omission of Murray, Wolfe, and Sumera could not have been intentional or willful because Hall Prangle disclosed them in the Cagnina lawsuit. (AA, Vol. VIII, Tab 25, at 1507-08.) At most, Hall Prangle's omission amounted to a negligent failure to conduct a reasonable investigation regarding the Doe incident.

[12] As explained in more detail in Hall Prangle's concurrently filed Petition for Extraordinary Writ Relief (the "Writ Petition"), the District Court issued a public reprimand to Hall Prangle in the Sanction Order by accusing its members of violating Nevada Rule of Professional Conduct 3.3(a). (AA, Vol. VII, Tab 23, at 1333-34.) Setting aside the legal impropriety of sanctioning Centennial Hills and UHS for the supposed ethical misconduct of their counsel, it is important to note (as thoroughly explained in the Writ Petition) that the District Court's findings in that regard were a manifest abuse of discretion. The alleged factual misrepresentation? "There were absolutely no known prior acts by Farmer that could potentially put Centennial Hills on notice that Farmer would assault a patient." (*Id.*) That statement was inherently argumentative and premised on a fair and reasoned view of the law and facts as presented in this litigation. As attorneys regularly do, members of Hall Prangle were weighing the evidence and arguing that it was not reasonably foreseeable that Farmer would sexually assault an elderly patient (a Category A felony in Nevada). This was an argument of counsel based upon the evidence—not a misrepresentation of fact.

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School Dist. v. Richardson Constr., Inc., 123 Nev. 382, 391, 168 P.3d 87, 93 (2007) ("In general, a district court may impose sanctions only when there has been willful noncompliance with the discovery order or willful failure to produce documents under NRCP 16.1."); *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 871, 900 P.2d 323, 326 (1995) (reversing, in part, the district court's sanction because there was "no evidence that the Golden Nugget intentionally or willfully destroyed" evidence); *Cf. Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 107 (2006) ("Thus, before a rebuttable presumption that willfully suppressed evidence was adverse to the destroying party applies, the party seeking the presumption's benefit has the burden of demonstrating that the evidence was destroyed with intent to harm.").[13]

For the reasons set forth above, the District Court could not make—on the evidence presented at the evidentiary hearing—a determination that Centennial Hills or UHS acted ***willfully and intentionally*** to conceal relevant

[13] Although spoliation of evidence sometimes requires a different analysis, the principles from *Bass-Davis* are relevant here because the District Court claimed that "Centennial [Hills] has caused the destruction of evidence that Jane Doe may have needed to satisfy its initial burden." (AA, Vol. VII, Tab 23, at 1344.)

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evidence ***with the intent to harm Doe***; any such findings were based on errors of law (*i.e.*, misapplication of the collective knowledge doctrine and holding Centennial Hills and UHS responsible for their counsel's nondisclosure). Without a finding of willfulness, the District Court's sanction (*i.e.*, a finding that Centennial Hills and UHS are liable for the claims alleged by Doe) is improper as a matter of law.

Other factors that the District Court considered in determining an appropriate discovery sanction weighed against the striking of the Answer for the purposes of liability.[14] Nevada has a strong policy in favor of deciding cases on their merits whenever possible. *See, e.g., Schulman v. Bongberg-*

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[14] As set forth in the Sanction Order,

> The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).

Whitney Elec., Inc., 98 Nev. 226, 227, 645 P.2d 434, 435 (1982). Although the sanction entered by the District Court was not necessarily case-concluding, *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev 243, 256, 235 P.3d 592, 596 (2010), for all intents and purposes, it precluded Centennial Hills and UHS from defending themselves at trial because the only issue left for the jury to decide was the amount that they would be forced to pay as damages. Considering the nature of the case (*i.e.*, sexual assault), the Sanction Order resulted in Centennial Hills and UHS being lumped together with Farmer for the purposes of awarding damages to Doe. As recognized by the District Court's February 27, 2015 Order denying the Summary Judgment Motion, even with the admissibility of the Murray and Wolfe Metro statements, issues of material fact remained for the jury in deciding liability. (*Id*., Vol. III, Tab 9, at 350.) The District Court's Sanction Order thus took away that important function from the jury, thereby undermining this state's policy of deciding cases on their merits.

Further, the District Court's sanction was not necessary to deter Centennial Hills and UHS from future misconduct. No evidence was submitted that Centennial Hills or UHS are recalcitrant or discovery abuse

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recidivists. In fact, Hall Prangle was extremely forthcoming and contrite during the evidentiary hearing.

Finally, the District Court's findings of prejudice were speculative and unsupported by logic. Testimony by Murray, Wolfe, and Sumera was sufficiently memorialized in the Murray and Wolfe Metro statements. (*See generally* AA, Vol. XIV, Tabs 65-66, at 2805-2834.) Further, Murray was already deposed in 2010 in the Cagnina lawsuit. (*See generally id.*, Vol. XIII, Tab 57, at 2490-2566.) Accordingly, any concerns with memory loss could have been resolved by simply admitting into evidence Murray and Wolfe's Metro statements and Murray's deposition from the Cagnina matter.

E. <u>The District Court Abused its Discretion by Treating Centennial Hills and UHS as One and the Same.</u>

There is "no authority for the proposition that a parent corporation, simply by virtue of ownership, may be held responsible for its subsidiary's alleged discovery violations." *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119, 141 n.24 (3d Cir. 2009).

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The District Court, in its Sanction Order, included UHS in its definition of "Centennial," and then proceeded to simultaneously issue each and every one of its findings against both entities. (AA, Vol. VII, Tab 23, at 1309.) There was no evidence admitted at the evidentiary hearing, or referenced in the Sanction Order, which justifies sanctioning UHS (a holding company) alongside Centennial Hills (which employed the nurses and employees at issue). Without any such evidence, the Sanction Order, at a minimum, must be vacated with respect to UHS.

VIII. CONCLUSION

The District Court's legal errors have tainted the entirety of the Sanction Order, resulting in an abuse of discretion. If the collective knowledge doctrine and the relevant principles applicable to party sanctions for the actions or inactions of counsel had been correctly applied, the Sanction Order could not

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have been issued. Accordingly, the Sanction Order should be vacated, including the sanction that Centennial Hills and UHS pay a monetary sanction to a non-party.[15]

DATED this 15th day of August, 2016.

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[15] The monetary sanction payable to Doe was resolved in the settlement and is not subject to this appeal.

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because:

[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[x] Proportionally spaced, has a typeface of 14 points or more, and contains 8,005 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the

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transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of August, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 15th day of August, 2016, service of the foregoing **APPELLANTS' OPENING BRIEF AND APPELLANTS' APPENDIX TO OPENING BRIEF, VOLUMES I through XVII,** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known addresses:

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