IN THE SUPREME COURT OF THE STATE OF NEVADA

TAWNI MCCROSKY, INDIVIDUALLY AND AS THE NATURAL PARENT OF LYAM MCCROSKY, A MINOR CHILD, Appellants, vs. CARSON TAHOE REGIONAL MEDICAL CENTER, A NEVADA BUSINESS ENTITY, Respondent.	Case No. 70325

APPEAL

From the First Judicial District Court, Carson City County
The Honorable JAMES T. RUSSELL, District Judge
District Court Case No. 13TRT00028IB

RESPONDENT'S ANSWERING BRIEF

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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:

1. Respondent Carson Tahoe Regional Medical Center is a not-for-profit 501(c)(3) corporation.

2. John C. Kelly, Robert C. McBride, Ashley A. Balducci, and Chelsea R. Hueth of the law firm Carroll, Kelly, Trotter, Franzen, McKenna & Peabody represented respondent in the district court.

3. No publicly traded company owns 10% or more of respondent's stock.

These representations are made in order that the judges of this court may evaluate possible disqualification of recusal.

DATED this 13th day of February, 2017.

CARROLL, KELLY, TROTTER,
FRANZEN, MCKENNA & PEABODY

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STATEMENT OF THE CASE

Plaintiffs' entire theory of liability against Carson Tahoe Regional Medical Center ("CTRMC") and Dr. Hayes was based on the conduct of one actor—Dr. Hayes. Plaintiffs' retained an ob-gyn expert to opine that Dr. Hayes was "in charge" and negligently managed Ms. McCrosky's labor resulting in injuries due to delayed delivery of Lyam McCrosky. (1AA106; 1AA94.) Plaintiffs' theory against CTRMC's nursing staff was that Dr. Hayes' negligence was so obvious, the nurses should have taken action to usurp Dr. Hayes' medical judgment. (1AA110-1AA111). With their theory of liability still entirely predicated on Dr. Hayes' conduct, Plaintiffs' chose to settle their claim against Dr. Hayes prior to trial. The instant appeal arises out of Plaintiffs' unsuccessful attempt to hold CTRMC vicariously liable for Dr. Hayes' actions and directly liable for the nursing staff's alleged failure to act in the face of such blatant negligence.

ARGUMENT

I. THE JURY'S VERDICT WAS SUPPORTED BY COMPETENT EVIDENCE THAT CTRMC DID NOT BREACH THE STANDARD OF CARE

Throughout the eleven-day trial of the instant matter, the jury heard from numerous expert witnesses that the nurses at CTRMC met the applicable standard of care. The jury ultimately concluded that CTRMC was not negligent in its care and treatment of Lyam McCrosky. (15AA3121.) The jury made no finding as to

whether Dr. Hayes was negligent or that Dr. Hayes' negligence proximately caused Plaintiffs' injuries. (15AA3122.) CTRMC presented testimony from nursing expert, Kathryn Cavanaugh, R.N. to establish that the nurses were appropriately performing various interventions alongside Dr. Hayes once the fetal heart rate monitor warranted concern. (14AA002868-AA002869.) The jury heard from over five CTRMC nurses in support of their respective care. Nurse Cavanaugh explained that the nursing staff appropriately followed Dr. Hayes' orders after ensuring Dr. Hayes was aware what was shown by the fetal heart rate monitor strip. (14AA2873-AA2876.) The evidence presented at trial supports the jury's verdict and a new trial is not warranted.

A. Pertinent Care and Treatment

The chain of a command is a procedure by which the nurses may request intervention from another physician if they have reason to question the soundness of a physician's order. (13AA2499.) A nurse initiates the chain of command by essentially requesting assistance from people higher on the chain—starting with the charge nurse or team leader, and potentially going all the way up to the division chair or chief medical officer. (13AA2506.) The chain of command is utilized in situations such where a physician is not responsive to nursing requests to evaluate a patient. (11AA2506.)

During opening statements, Plaintiffs' argued that the evidence would show that "for approximately 60 minutes nobody, even though it's a well – it's a policy that was in effect for many years at this hospital, nobody invoked the chain of command." (6AA1188.) Plaintiffs' contend that Ms. McCrosky's labor progressed uneventfully until approximately 6:30a.m. on April 25, 2012. (AOB at 8.) Plaintiffs' nursing expert, Laura Mahlmeister, R.N. testified that at 6:42a.m. the nurses should have initiated the chain of command and acted independently to take Ms. McCrosky to the operating room. (8AA1641.) Plaintiffs' nursing expert further testified that Nurse Parkhurst, Nurse Lusich, and Nurse Klein violated the standard of care by failing to invoke the chain of command. (8AA1619-1620).

Plaintiffs detail the number of nursing interventions performed and efforts made to prepare an operating room on the main floor should Dr. Hayes have deemed it necessary. (AOB at 14-17.) For the first time, Plaintiffs' now argue that the "chain of command was initially initiated", but was abandoned at 7:00a.m. during the shift change between the night and day nursing staff. (AOB at 13-18.)

At trial, CTRMC presented substantial evidence that the nurses acted reasonably to ensure Dr. Hayes was aware of the fetal heart rate monitor strip, made arrangements to have two operating rooms available (one on the main floor and the operating room on the labor and delivery unit) if needed, these nurses had no reason to invoke the chain of command. From 6:30a.m. until approximately

6:50a.m., Dr. Hayes testified she was continuously with Ms. McCrosky. (11AA2408.) Upon arriving on the floor shortly before 7:00a.m., Nurse Lusich approached Dr. Hayes, who was sitting at the nurses' station next to her partner, Dr. Tomita. (7AA1476). The central fetal heart rate monitor, which shows the tracings for all patients in labor, was visible to both physicians. (7AA1477.) Dr. Hayes told Nurse Lusich that she was aware of the strip and would be in to see Ms. McCrosky. (7AA1477.) Given Dr. Hayes' obstetrical medical training, background, and experience, Nurse Lusich did not have any reason to question Dr. Hayes' judgment. (7AA1478.) Around that same time, charge nurse Carla Sells, R.N. approached Dr. Hayes to ask whether Ms. McCrosky would be delivering in the main operating room. (12AA2599.) Dr. Hayes' responded "no", that they would use the operating room on the labor and delivery unit. (12AA2599.) Based on Nurse Sells' experience, she testified that it was entirely possible that Ms. McCrosky could still deliver vaginally and she anticipated that may have been Dr. Hayes' plan. (12AA2599.) Nurse Sells' assumption was correct. Dr. Hayes testified that from approximately 7:04a.m. to 7:20a.m. there was recovery in the fetal heart rate such that Dr. Hayes anticipated a vaginal delivery. (11AA2422-2423.) Additionally, Dr. Hayes' called one of her partners to come to CTRMC and manage the non-emergent delivery of Dr. Hayes' other patient on the labor and delivery floor. (11AA2415-002416.)

From the nurses' perspective, Dr. Hayes was aware of the fetal heart rate monitor and was appropriately utilizing various interventions to facilitate a vaginal delivery. Further, Dr. Hayes called one of her partners to manage her other laboring patient such that her focus was only on Ms. McCrosky. Accordingly, the standard of care did not require the nurses to initiate the chain of command or defy Dr. Hayes' decision and take Ms. McCrosky to an operating room. (14AA2869-2870.)

B. Standard of Review

Plaintiffs failed to make a motion for judgment as a matter of law and did not request the district court grant a new trial. Thus, this Court should not review the sufficiency of the evidence for the first time on appeal. *Bill Stremmel Motors v. Kerns*, 91 Nev. 110, 111, 531 P.2d 1357 (1975) (rejecting consideration of appellant's argument that the evidence did not support the judgment where appellant failed to move for a directed verdict, judgment notwithstanding the verdict, or a new trial). This Court has recognized that it "is solidly established that when there is no request for a directed verdict, the question of the sufficiency of the evidence to sustain the verdict is not reviewable." *Price v. Sinnott*, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969). Plaintiffs' request for a new trial, for the first time on appeal, is the conduct this rule was established to prevent, "[a] party may

not gamble on the jury's verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it." *Id.*

Plaintiffs urge this Court to review the sufficiency of the evidence to find that the verdict amounts to manifest injustice. This level of review has been utilized pursuant to an exception reserved for cases where a party fails to move for judgment as a matter of law, but (unlike the present case) requested the district court grant a new trial. *Avery v. Gilliam*, 97 Nev. 181, 182, 625, P.2d 1166, 1167 (1981)(reviewing the sufficiency of the evidence after appellants' motion for judgment notwithstanding the verdict or for a new trial was denied); *see also Price*, 85, Nev. at 603, 460 P.2d at 839 (plaintiff filed her appeal after the district court denied her motion for a new trial); *Fox v. Cusick*, 91 Nev. 218, 219, 533 P.2d 466, 467 (1975) (appeal from district court's granting plaintiffs' motion for a new trial).

Even if this Court is inclined to review the sufficiency of the evidence, the verdict in this case does not "strike [the] minds at first blush, as manifestly and palpably contrary to the evidence." *Price*, 85 Nev. at 608, 460 P.2d at 842.

C. CTRMC Presented Compelling Evidence that the Nursing Staff Met the Standard of Care

The jury was properly instructed that Plaintiffs bore the burden of proving, by a preponderance of the evidence, that the CTRMC nurses' conduct breached the standard of care. (RA 0000020.) *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). CTRMC presented sufficient evidence to support the jury's

finding that its nurses did not breach the standard of care. For example, CTRMC's nursing expert, Kathryn Cavanaugh, R.N. explained that by 6:42a.m., the nursing staff was appropriately performing interventions to improve the fetal heart rate. (13AA2868-AA2869.) Plaintiffs argue that by 6:50a.m. "the nurses were obligated to take measures to ensure an expeditious delivery." (AOB at 67:13-15.) Nurse Cavanaugh testified that the nurses acted within their scope of practice, by discussing the plan for delivery with Dr. Hayes. (13AA2869.) Dr. Hayes testified that by 6:50a.m. there was some recovery in the fetal heart rate and she believed a vaginal delivery was likely. (11AA2411-AA2412.) At that time, charge nurse Carla Sells, R.N. arrived and noticed Lyam McCrosky's fetal monitor tracing warranted attention. (12AA2597.) Nurse Sells immediately received a call from another physician in Dr. Hayes' group inquiring as to whether Ms. McCrosky would be brought downstairs to the main operating room. (12AA2598.) Nurse Sells testified that she went to Ms. McCrosky's room where she observed Dr. Hayes and two nurses performing interventions. (12AA2599.) Nurse Sells asked whether Ms. McCrosky would deliver in the main operating room and Dr. Hayes asserted that she would not be going to the main operating room. (12AA2599.) Accordingly, Nurse Sells ensured the operating room on the labor and delivery unit would be ready if necessary. (12AA2600.) The evidence demonstrated that the nursing staff ensured an operating room was available if Dr. Hayes deemed it

necessary. Only a physician can decide when a cesarean section is performed. Dr. Hayes did not expect the CTRMC nursing staff to make such decisions, which would be outside the scope of their nursing practice. (11AA2412-AA002413; 14AA2873.) The evidence demonstrated that the nurses appropriately relied on Dr. Hayes' medical decision making. (2AA246; 11AA2478; 14AA2873-AA2874; 11AA2507.)

The defense refuted Plaintiffs' assertion that the nurses breached the standard of care by presenting compelling evidence that CTRMC's nurses acted appropriately within their scope of practice. *Barnes v. Sabron*, 10 Nev. 217, 235-236 (1875) (appellate courts will not disturb the jury's verdict where there is "a substantial conflict in the evidence"). The jury's verdict was supported by the evidence and a new trial is not warranted.

II. CTRMC WAS ENTITLED TO SUMMARY JUDGMENT BY NEGATING AN ESSENTIAL ELEMENT OF OSTENSIBLE AGENCY

After settling their claims against Dr. Hayes, Plaintiffs sought to recover again for Dr. Hayes' conduct under an ostensible agency theory. CTRMC presented evidence that demonstrated there were no genuine issues of material fact as to whether Ms. McCrosky could have reasonably assumed that Dr. Hayes was an agent of the hospital. By negating an essential element of the agency relationship, CTRMC was entitled to summary judgment.

A. Summary Judgment Standard

This Court's review of a summary judgment order is de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). This Court is "required to determine whether the trial court erred in concluding that an absence of genuine issues of material fact justified its granting of summary judgment." *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) (citation omitted). Summary judgment cannot be defeated by reliance on irrelevant factual disputes as "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Wood*, 121 Nev. at 730, 121 P.3d at 1030.

This Court has recognized that summary judgment may appropriately be entered on the issue of ostensible agency. *Oehler v. Humana, Inc.*, 105 Nev. 348, 352, 775 P.2d 1271, 1273 (1989). A judge may determine that agency does not exist as a matter of law, since concluding that agency does not exist requires only the negation of one element of the agency relationship. *Schlotfeldt v. Charter Hospital of Las Vegas*, 112 Nev. 42, 47, 910 P.2d 271, 274 (1996). Conversely, "concluding agency exists requires an affirmative finding on all the elements of agency." *Id.* at fn. 3. Ostensible agency only applies to bind the hospital for a physician's conduct where:

> [A] patient goes to the hospital and the hospital selects the doctor to treat the patient such that it is reasonable for the patient to assume the doctor is an agent of the hospital

Renown Health, Inc. v. Vanderford, 126 Nev. Adv. Rep. 24, 235 P.3d 614, 618 (2010).

Although not required, CTRMC established that there were no genuine issues of material fact as to multiple elements of ostensible agency.

B. Ms. McCrosky Could Not Have Reasonably Believed Dr. Hayes was an Agent of CTRMC

Before arriving to CTRMC on April 24, 2012, Ms. McCrosky could not, and did not reasonably believe that Dr. Hayes was an agent of the hospital. CTRMC presented the district court with Ms. McCrosky's sworn deposition testimony wherein she admitted she did not know whether the physicians were employees of CTRMC[1]. (2AA000406.) This Court has looked to whether there was affirmative conduct by the hospital creating a reasonable belief that the physician as an employee or agent. *Oehler*, 105 Nev. at 351 (hospital subsidizing rent of physicians held insufficient to defeat summary judgment); *see also Baptist Mem. Hosp. Sys*, 969 S.W.2d 945, 949 (1998) (a prerequisite to finding an ostensible agency relationship requires conduct by the hospital that would lead a "reasonably

[1] Ms. McCrosky's subsequent Declaration, which conflicted with her earlier deposition testimony, did not create a genuine issue of material fact. AA000297-AA00297; *Dennison v. Allen Group Leasing Corp.*, 110 Nev. 181, 185, 871 P.2d 288, 290 (1994); *Bank of Las Vegas v. Hoopes*, 84 Nev. 585, 586, 445 P.2d 937 (1968).

prudent person" to believe the physician was an employee or agent). Plaintiffs' own cited authority supports this threshold inquiry. Plaintiffs' invite this court to rely on *Loaiza v. Lam*, which they claim presents "analogous facts" to the instant case. (AOB at 35; *Loaiza v. Lam*, 107 A.D. 3d 951, 952 (N.Y. 2013) In *Loaiza*, the court looked to whether plaintiff relied on the appearance of authority "based on some misleading words or conduct by the principal, not the agent." *Id.* The court found a triable issue of material fact where the physician was specifically assigned by Flushing Hospital Medical Center to be the patient's attending physician. *Id.* at 953. Unlike *Loaiza*, there is no evidence that CTRMC assigned Dr. Hayes to care for Ms. McCrosky. (3AA342 (when asked how she came to be under Dr. Hayes' care, Ms. McCrosky testified that "she was just the doctor that was on shift that evening."))

Plaintiffs presented no evidence of affirmative conduct by CTRMC that would cause a reasonably prudent person to believe the obstetrician-gynecologists were employees or agents of the hospital. Ms. McCrosky admitted that she chose to deliver at CTRMC because it was the hospital located closest to her home and that she did not investigate any other hospitals to potentially deliver her baby. (3AA407; 3AA409.) Ms. McCrosky's belief that she would be "in good hands" at CTRMC was based solely on the fact that she "had never heard anything bad about them." (3AA407.) It is undisputed that Ms. McCrosky was never told that the

physicians were employees of the hospital and Dr. Hayes never represented she was an employee of CTRMC. (3AA406; 1AA201) Plaintiffs failed to set forth any significantly probative evidence that CTRMC affirmatively held the physicians out as agents or employees of the hospital.

1. Ms. McCrosky was Repeatedly Put on Notice that the Physicians Were Not Employees of CTRMC

CTRMC did not hold the physicians out as agents or employees, but actually took affirmative steps to ensure patients were informed that the physicians were independent contractors. In *Schlotfeldt*, this Court examined various factors that can negate an ostensible agency relationship and looked to *Stewart v. Midani*, 525 F. Supp. 843 (N.D. Ga. 1981) for additional guidance. *Schlotfeldt*, 112 Nev. at 48-49, 910 P.2d 271, 275. In *Stewart*, the court recognized that a hospital would not be liable for a physician's negligence if the patient was aware of the relationship between the hospital and the doctor by "a simple notice." *Stewart*, 525 F.Supp. at 853. Where the patient signs a consent expressly stating that the physician is not an employee of the hospital, proving this essential element of ostensible agency is "extremely difficult." *James by James v. Ingalls Mem'l Hosp.*, 299 Ill.App.3d 627, 633 (1998).

The Texas Supreme Court similarly examined the effect of a consent form advising the patient that physicians are independent contractors on an ostensible agency claim. *Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 950 (1998).

In *Baptist*, the patient offered two affidavits in opposition to summary judgment indicating she did not remember signing the consent form, the form was not explained to her, and she believed the physician treating her was a hospital employee. *Id.* Despite the patient's affidavits, the court held summary judgment in favor of the hospital was appropriate where "no conduct by the Hospital would lead a reasonable person to believe that the treating emergency room physicians were hospital employees." *Id.*

On six separate occasions before her labor and delivery, Ms. McCrosky signed CTRMC's "Conditions of Admission". (1AA200; 1AA207.) The Conditions of Admission contain a separate heading, delineated in bold and all capital letters, entitled "**LEGAL RELATIONSHIPS BETWEEN HOSPITAL AND PHYSICIANS**". (1AA207 (emphasis in original)) The patient is instructed to specifically initial the paragraph advising that:

> All physicians and surgeons furnishing healthcare services to me/the patient, including the radiologist, pathologist, anesthesiologist, emergency room physicians, hospitalists, etc., are independent contractors and are NOT employees or agents of the hospital. **I am advised that I will receive separate bills for these services.**

Id.

CTRMC also presented evidence that prior signing the Conditions of Admission patients are specifically informed that the physicians are not employed by the hospital and the patient will receive a separate bill from the physician. (2AA303.) In additional to initialing that specific paragraph, on each occasion Ms.

McCrosky also signed directly under the line that reiterated that physicians are independent contractors. (1AA208.) Plaintiffs' rely on *Cuker v. Hillsborough County Hosp. Auth.*, 605 So.2d 998, 999 (Fla. Ct. App. 1992). (AOB at 36.) Yet, unlike the six separately signed Conditions of Admission in this case, the court in *Cuker* noted that "there was nothing" that put the patient on notice that physicians were independent contractors. *Id.*

Ms. McCrosky's claim that she does not recall signing the Conditions of Admission does not create a genuine issue of material fact. *See Fletcher v. S. Peninsula Hosp.*, 71 P.3d 833, 841 (2003). In *Fletcher*, the patient claimed he did not carefully read the hospital's Permission for Treatment form, which indicated all physicians were independent practitioners. *Id.* The Supreme Court of Alaska upheld summary judgment in favor of the hospital, reasoning that "[w]hether the patient understood the hospital's notice is not in itself a determining factor." *Id.* Rather, the Permission form was action taken by the hospital to dispel any appearance of agency. *Fletcher*, 71 P.3d at 841.

Ms. McCrosky admittedly did not believe the physicians were agents or employees of CTRMC. CTRMC did not engage in conduct that would lead Ms. McCrosky to believe Dr. Hayes was an employee. Rather, CTRMC took steps to dispel any notion that the physicians were agents of the hospital. Summary

judgment was appropriate as CTRMC negated this essential element of Plaintiffs' ostensible agency claim.

C. CTRMC Did Not Select Dr. Hayes to Care for Ms. McCrosky

When Ms. McCrosky presented to CTRMC on April 24, 2012, Dr. Hayes was one of six members of Carson Medical Group. (1AA159.) Carson Medical Group was not "contracted" by CTRMC to "staff its labor and delivery department" as Plaintiffs claim. (AOB at 36.) Carson Medical Group agreed to provide on-call coverage, as independent contractors, to ob/gyn patients at CTRMC. (1AA180.) CTRMC did not determine which physician would be on call at any specific time. Plaintiffs' "lack of choice" does not preclude summary judgment where CTRMC did not deprive Ms. McCrosky of the ability to choose an obstetrician if she wanted.

As a member of Carson Medical Group, Dr. Hayes was one of the physicians who Ms. McCrosky knew "rotated" through the MOM's Clinic. Ms. McCrosky was referred to the MOM's clinic for prenatal care by her family practice provider. (3AA406.) While receiving prenatal care, Ms. McCrosky knew that she would not be seen by a specific physician because the physicians rotated through the clinic. *Id.* So, when Ms. McCrosky arrived to CTRMC on April 24, 2012 and was cared for by Dr. Hayes, she knew it was because Dr. Hayes "was just the doctor that was on shift." (3AA342.) Ms. McCrosky knew that she would not

be seen by a specific physician and made the choice not to seek a specific physician to deliver her baby. CTRMC did not deprive Ms. McCrosky of the opportunity to select her own physician. Almost seven months prior to her delivery, CTRMC advised Ms. McCrosky that the patient directed the relationship with her physician and she could choose to obtain services from another physician. (1AA177.) Ms. McCrosky was reminded of this an additional five times before April 24, 2012.

A lack of choice is not the same as declining to exercise the right to choose. Unlike *Loaiza* where the hospital assigned the physician to the patient, Dr. Hayes was scheduled to be on call as determined by her medical group. *Loaiza*, 107 A.D. at 953. This case is also unlike *Roessler v. Novak*, where the radiologists provided all radiological services to all the hospital's inpatient and outpatients, twenty-four hours per day from a department located within the hospital as the exclusive provider of such services. *Roessler v. Novak*, 858 So.2d 1158, 1162 (Fla. Dist. Ct. App. 2003). Ms. McCrosky could have selected a specific physician to deliver her baby, but chose not to. As such, Ms. McCrosky was assigned the physician selected by Carson Medical Group to be on call that evening.

CTRMC did not select Dr. Hayes to care for Ms. McCrosky and Ms. McCrosky could not have reasonably believed that Dr. Hayes was an agent of the hospital. Summary judgment was appropriately entered where CTRMC

demonstrated there were no genuine issues of material fact as to the essential elements of ostensible agency.

III. SUMMARY JUDGMENT APPROPRIATELY PRECLUDED PLAINTIFFS FROM RECOVERING TWICE FOR DR. HAYES ALLEGED NEGLIGENCE

Despite settling with Dr. Hayes, Plaintiffs sought to hold CTRMC vicariously liable for Dr. Hayes' conduct. Plaintiffs attempt to recover twice for Dr. Hayes' alleged negligence contravenes NRS 41A.045 and was appropriately prohibited. NRS 41A.045 applies to professional negligence actions against providers of health care and limits liability to the "percentage of negligence attributable to the defendant." Plaintiffs' concede that vicarious liability ignores the respective fault of each defendant as it is "based on a relationship between the parties, irrespective of participation" and "irrespective of fault". (AOB at 24.) This Court has affirmed that NRS 41A.045 limits a defendant's liability to its share of plaintiff's damages. *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 100, 363 P.3d 1168, 1171 (2015). Permitting Plaintiffs to seek damages against CTRMC "irrespective of fault" by holding CTRMC vicariously liable for Dr. Hayes' conduct would render NRS 41A.045 meaningless. To fully capitalize on their subversion of NRS 41A.045, Plaintiffs' also seek to overturn *Piroozi* to obtain an unapportioned recovery against CTRMC for its own alleged negligence and the unapportioned negligence of Dr. Hayes.

Plaintiffs rely on the inapplicable decision rendered in *Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 706 P.2d 845 (1985) for their argument. *Gamboni* was decided in 1985, almost twenty years before NRS 41A.045 was enacted, based on the court's application of the Uniform Act codified in NRS Chapter 17[2]. *Van Cleave*, 101 Nev. at 527, 706 P.2d at 847. *Gamboni* is inapplicable as it specifically recognized that the employer (whose liability was vicarious only) was permitted to seek indemnity against the settling employee. *Gamboni*, 101 Nev. at 529. When *Gamboni* was decided in 1985, NRS Chapter 17 provided that when a good faith covenant not to sue was given, it discharged the settling tortfeasor from all liability for contribution to any other tortfeasors. In 1997, twelve years after *Gamboni*, NRS 17.245 was amended to discharge the settling tortfeasor from "all liability for contribution and for equitable indemnity." Nev. Rev. Stat. 17.245(b) This Court recognized in *Piroozi*, that because defendant would only be liable for his or her share of apportioned negligence, there would be no right to an offset or basis to pursue a claim for contribution. *Piroozi*, 363 P.3d at fn. 4.

States with similar statutory schemes have recognized that settlement with the employee precludes further recovery against the employer based on vicarious liability alone. For example, in *Biddle v. Sartori Memorial Hosp.*, plaintiff settled

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[2] This Court recognized in Piroozi that when statutes conflict, the more recent one controls. *Piroozi*, 363 P.3d at fn. 3.

with the physician and sought to recover against the hospital under a vicarious liability theory. *Biddle v. Sartori Memorial Hosp.*, 518 N.W.2d 795 (Iowa 1994). The Supreme Court of Iowa held that the percentage of negligence attributable to "the servant constitutes the entire share of liability attributable jointly to the master and servant." *Id.* at 798. While plaintiff could pursue her claim for direct negligence against the hospital, settlement with the physician resolved any vicarious fault attributable to the hospital. *Id.* at 799. The Supreme Court of Iowa noted that its holding would promote settlement by relying on Iowa Code Section 668.7 which releases the settling party from all liability for contribution[3]. *Id.* at 798. The court reasoned that if the hospital is only held liable for its direct negligence, there is no right to contribution against the physician. *Id.* However, if the hospital were held liable for the physician's negligence under a vicarious liability theory, the hospital would retain a right to indemnity. *Id.* at 799.

Plaintiffs misapply *Gamboni* to claim that unless the Uniform Act is applied, settlements will be discouraged as Plaintiffs did not believe they were settling for their "entire loss" when they settled with Dr. Hayes. (AOB at 28.) The "entire loss" contemplated in *Gamboni* was a single negligence claim asserted against an

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[3] Plaintiffs' attempt to distinguish *Biddle* by pointing to the Iowa Code provision that allows the court to determine "that two or more persons are to be treated as a single party" and claiming "Nevada has no similar, or even comparable statute." (AOB at 23.) NRS 17.295(1) provides that in determining the equitable shares of tortfeasors, "the collective liability of some as a group constitutes a single share."

employee and, vicariously, his employer. *Gamboni*, 101 Nev. at 526. In this case, Plaintiffs asserted a direct negligence claim against CTRMC. Accordingly, when Plaintiffs settled with Dr. Hayes, they settled for their "entire loss" based on Dr. Hayes' conduct. Plaintiffs were free to pursue their direct negligence claim against CTRMC.

IV. DR. HAYES WAS APPROPRIATELY INCLUDED ON THE JURY VERDICT FORM

CTRMC filed a motion to include Dr. Hayes on the verdict form due, in part, to Plaintiffs attempt to hold CTRMC vicariously liable for Dr. Hayes alleged negligence. The inequity of Plaintiffs' request is made clear where even after the district court summary judgment as to ostensible agency and ruled Dr. Hayes could be listed on the verdict form, Plaintiffs still presented evidence to the jury that Dr. Hayes' negligence was so obvious the nurses should have acted independently to override her actions. (8AA1622.) The district court correctly anticipated that this Court would not permit such a strained interpretation of NRS 41A.045 that limits apportionment of negligence to the defendants present at the time of trial.

A. Standard of Review

Plaintiffs' contend that this Court's decision in *Piroozi* should be reversed because it incorrectly interpreted NRS 41A.045 to permit evidence of a settled defendant's fault and list the settled defendant on the verdict form. (AOB at 47.) This Court reviews issues of statutory interpretation de novo. *Slade v. Caesars*

Entm't Corp., 132 Nev. Adv. Rep. 36, 373 P.3d 74, 75 (2016). However, this Court's decision, just over a year ago, "should be respected until [it is] shown to be unsound in principle." *Asap Storage, Inc. v. City of Sparks*, 123 Nev. 639, 653, 173 P.3d 734, 743 (2007). This Court's well-reasoned decision in *Piroozi* effectuates the purpose of NRS 41A.045.

B. NRS 41A.045 is Not Limited to Defendants Present at Trial

This Court expressly held that "defendants must be allowed to argue the comparative fault of the settled defendants and the jury verdict forms must account for the settled defendants' percentage of fault" to ensure each is held responsible only for their share of liability. *Piroozi*, 363 P.3d at 1171. Plaintiffs claim that once Dr. Hayes settled, she was no longer a "defendant" under NRS 41A.045. Despite arguing that the meaning of "defendant" is unambigious such that this Court should not look beyond NRS 41A.045 for clarification, Plaintiffs' sole support appears to be based on NRS 41.141(2)(b)(2). (AOB at 47.) NRS 41.141(2)(b)(2) specifically permits a jury to allocate negligence among "each party remaining in the action." NRS 41A.045 has no such limitation. This Court found that the plain language of NRS 41A.045 permits a party to include settled defendants on a jury verdict form. The plain language of NRS 41A.045 refers to "defendant" without distinction as to whether they are settled, dismissed, or present at the time of trial.

This Court also found that permitting settled defendants to be included on the jury verdict form fulfills the purpose of NRS 41A.045—to hold defendant severally liable only for the portion of negligence specifically assigned by the jury. *Piroozi*, 363 P.3d at 1171. In *Piroozi*, this Court looked to other jurisdictions that similarly impose several liability only. For example, in *Le'Gall v. Lewis County*, plaintiff Le'Gall sued the county for negligently placing a bed and curtain too close to a heater, and the building owner for failing to have smoke alarms, after sustaining an injury escaping an apartment fire. *Le'Gall v. Lewis Cnty.*, 923 P.2d 427 (Idaho 1996). Le'Gall did not name his roommate whose negligence arguably started the fire. *Id.* at 430. Nonetheless, the Supreme Court of Idaho held that negligence should be apportioned among all actors who the evidence demonstrates negligently contributed to the plaintiff's injury, "even if the actors are not parties…or they cannot be liable to the plaintiff by operation of law or settlement." *Id.*; *see also DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 903 A.2d 969, 981 (N.H. 2006) (holding that apportionment is appropriate among all parties contributing to the alleged injury, including settled defendants). Limiting NRS 41A.045 to defendants present at trial would be especially unfair in cases, such as this, where Plaintiffs argued that Dr. Hayes' negligence was so obvious, CTRMC nurses were negligent for failing to override Dr. Hayes' medical decisions. (AA001622-AA001623.)

Plaintiffs' insist that NRS 41A.045 must be read in conjunction with NRS 41.141. Such a reading ignores this Court's recognition of NRS 41A.045 as a special statute that displaces NRS 41.141, which is a general statute. *Piroozi*, 363 P.3d at 1172 (also holding that as the more recently enacted statute, NRS 41A.045 controls over NRS 41.141). Plaintiffs' reliance on *Banks v. Sunrise Hosp.* is also unpersuasive. (AOB at 52.) Plaintiffs' seemingly argue that NRS 41.141 precludes apportionment between CTRMC and Dr. Hayes because *Banks* was decided in 2004 when NRS 41A.041 was in effect. *Banks v. Sunrise Hospital*, 120 Nev. 822, 102 P.3d 52 (2004). In *Banks*, this Court did not address NRS 41A.041; likely because the trial at issue took place in 2001 and NRS 41A.041 was not enacted until 2002.

C. This Court's Decision in *Piroozi* will Encourage Settlements Based on the Respective Fault of the Parties, Not the Ability to Pay

Plaintiffs claim that the intent of NRS 17.245 to encourage settlement will be eroded by the inclusion of a settled defendant on a jury verdict form because it "could have the effect of reducing the judgment the plaintiff can recover overall." (AOB at 54.) Plaintiffs' overlook that NRS 17.245(1) already reduces a judgment by the amount provided in a release or covenant not to sue. In *Piroozi*, this Court noted that because a defendant's liability is several only, NRS 17.245 would not provide an offset. *Piroozi*, 363 P.3d at fn. 4. Accordingly there is no windfall to defendant. The "absurd result" contemplated by Plaintiffs' hypothetical appears to

be due to the attorney's decision to settle with the defendant bearing 90% of the fault for 1% of the case value. (AOB at 54-55.)

Piroozi fulfills the long sought-after intent of NRS 17.245, NRS 41.141, and NRS 41A.045 by holding a defendant liable based on fault, not the ability to pay. *See*, *Warmbroft v. Blanchard*, 100 Nev. 703, 708, 692 P.2d 1282, 1286 (1984)(describing the identical 1973 version of NRS 41.141 as abolishing joint and several liability "substituting several, proportionate liability based on fault"); *see also*, Sen. Jud. Com. Min. at 13 (June 6, 1997) (discussing Assembly Bill 421 which would amend NRS 17.245 to discharge settling defendants from equitable indemnity claims to "release defendants less involved from the case.")

This case demonstrates that *Piroozi* achieved the right result. Plaintiffs resolved their claims by settling with Dr. Hayes. Plaintiffs then sought to hold CTRMC liable for Dr. Hayes' conduct and preclude CTRMC from including Dr. Hayes on the verdict form. This would amount to joint liability whereby Plaintiffs could seek double recovery for Dr. Hayes' conduct based on CTRMC's ability to pay.

D. Plaintiffs Created Any Claimed Error Regarding Dr. Hayes' Settlement

The district court appropriately ruled that for the jury to apportion negligence, Dr. Hayes could be listed on the verdict form. In Plaintiffs' opening statements, Plaintiffs' counsel told the jury:

> Dr. Hayes was once a defendant in this case. Dr. Hayes has settled her responsibility. And the Court will tell you that you are not to speculate on the reasons behind her decision to settle or the amount of money that was paid as a result of that settlement...As I said, Dr. Hayes is no longer a part of this case. She has resolved her role. She's accepted her responsibility.

(6AA1173.)

This Court has long recognized the invited error doctrine precludes a party from seeking review of "errors which he himself induced." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P. 2d 343, 345 (1994). Plaintiffs' bald assertion that "evidence of Hayes' settlement" led to improper speculation by the jury should not be considered by this Court as Plaintiffs invited the alleged speculation they now contend warrants a new trial. Plaintiffs present no evidence that the jury's verdict was based on improper speculation regarding Dr. Hayes' settlement as the jury concluded that the CTRMC nurses did not breach the standard of care. (15AA3121.) The jury did not reach the issues which may have been influenced by Plaintiffs' statements that Dr. Hayes' "accepted responsibility"; namely, Dr. Hayes' negligence, causation, or damages.

V. THE DISTRICT COURT APPROPRIATELY SEVERED NRS 42.021(2) AND UPHELD NRS 42.021(1)

The district court found that NRS 42.021(2)'s prohibition against recovery by a collateral source against plaintiff likely violates the Supremacy Clause as preempted by 42 U.S.C. §2651. (5AA961; 42 U.S.C. §2651(a) (providing the

United States the right to recover against third parties who may be liable in tort for the reasonable value of medical care.)) To that extent, the district court agreed with Plaintiffs. The district court then determined that NRS 42.021(2) can be severed from NRS 42.021(1) and remain in effect. (5AA961.) Without citation to any authority, Plaintiffs' argue that severing NRS 42.021(2) from the remainder of the statute "cannot be what the Legislature intended." (AOB at 60.) Yet the ballot initiative leading to the enactment of NRS 42.021 mandates the severance performed by the district court.

A. Standard of Review

The district court's decision to admit collateral source evidence is reviewed for abuse of discretion. *Frei v. Goodsell*, 129 Nev. Adv. Rep. 43, 305 P.3d 70, 73 (2013) (noting that the appellate court will not interfere "absent a showing of palpable abuse). However, whether NRS 42.021 is preempted by federal statute is reviewed de novo. *Cervantes v. Health Plan of Nev., Inc.*, 127 Nev. 789, 792-793, 263 P.3d 261, 264 (2011). The district court held that NRS 42.021(2) is likely preempted by federal statute 42 U.S.C. §2651. However, the district court then appropriately determined that NRS 42.021(1) could remain in effect after striking NRS 42.021(2).

B. The Severance Doctrine was Appropriately Applied

The severance doctrine requires courts to "uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 515, 217 P.3d 546, 555 (2009). A statute is severable if: (1) "the remaining portion of the statute, standing alone, can be given legal effect"; and (2) "the Legislature intended for the remainder of the statute to stay in effect when part of the statute is severed." *Id.*; *see also Nevadans for the Protection of Property Rights, Inc. v. Heller*, 122 Nev. 894, 912, 141 P.3d 1235, 1247 (2006) (stating that the second element is met if "it appears the [voters] intended the provisions to stand alone even if another section in the same [initiative] is held invalid") Plaintiffs do not address the first prong of the test, but argue that the effect of severance contravenes Legislative intent. NRS 42.021 meets both prongs of the test for severability.

1. The Remaining Portion of NRS 42.021 Can be Effectuated

Collateral source evidence can be admitted without the provision extinguishing a third-party's subrogation rights. For example, NRS 616C.215 contains an exception to the collateral source rule in worker's compensation cases and says nothing about eliminating subrogation rights. Although the court found in *Tri-County Equipment & Leasing, LLC v. Klinke*, 128 Nev. Adv. Op. 33, 286 P.3d 593 (2012) that evidence of workers' compensation payments "necessarily incorporates the written down medical expenses" the statute was upheld. *Id.* at 596.

In *Lamb v. Village of Quincy*, the Ohio Court of Appeals found that the exception to the general collateral source rule was not preempted by the Medicare Secondary Payer Act. *Lamb v. Village of Quincy*, 636 N.E.2d 412, 416 (Ohio Ct. App. 1993). Although the court found that the anti-subrogation portion of the collateral source exception preempted, the court upheld the trial court's reduction of the jury verdict by the amount paid by Medicare. The court reasoned that:

> Failure to deduct the amount paid by Medicare makes both Medicare and Quincy primary payers should the federal government decide not to enforce its subrogation rights. This is the result which R.C. 2744.05(B) and Section 1395y(b)(2), Title 42, U.S.Code were specifically intended to avoid. **Moreover, failure to make the deduction would violate that part of R.C. 2744.05(B) which has not been pre-empted by federal law.**

Id. at 416-417. (emphasis added)

Likewise, the statutory exception to the common law collateral source rule contained in NRS 42.021(1) can stand on its own, independent of any provision extinguishing an insurer's or third-party payor's subrogation rights contained in a different section of the statute.

2. The Legislature Intended the Remainder of NRS 42.021 to Stay in Effect

The ballot initiative which led to the enactment of NRS 42.021 contained the following severability clause:

> If any provision of this act, or the application thereof to any person, thing or circumstance is held invalid, such invalidity **shall not affect** the provisions or application of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

(RA0000070.)

With this language, the citizens of Nevada approved the Initiative. The only provision of NRS 42.021 at issue is NRS 42.021(2), which states that "[a] source of collateral benefits introduced pursuant to subsection 1 **may** not [r]ecover any amount against the plaintiff or [b]e subrogated to the rights of the plaintiff against a defendant." (emphasis added). The permissive "may not" provided by NRS 42.021(2) contrasted to the mandated severability imposed by NRS 0.020 and Section 11 of 2004 Initiative Petition demonstrates that the Legislature clearly intended the remainder of NRS 42.021 to remain in effect if any part was severed.

C. Even if NRS 42.021 is Entirely Preempted, Its Admission was Harmless Error

Even assuming the district court erred in allowing collateral source evidence, Plaintiffs cannot establish that it affected their substantial rights. Where an error is harmless, reversal is not warranted. Plaintiffs must demonstrate that "but for the alleged error, a different result might reasonably have been reached." *Wyeth v. Rowatt*, 120 Nev. 446, 465, 244 P.3d 765, 778 (2010); *see also Khoury v. Seastrand*, 132 Nev. Adv. Rep. 52, 377 P.2d 81, 94 (2016) (finding the exclusion of evidence of Medicaid liens was an abuse of discretion, but the error was harmless because appellant failed to show that admission of the subject evidence would have resulted in a different verdict). The jury determined that CTRMC did not breach the standard of care. (15AA3121.) Evidence of collateral source benefits are irrelevant to this determination. Causation and damages were not even considered by the jury making it unlikely that had collateral source evidence been excluded, the verdict would have resulted in a finding that CTRMC breached the standard of care, caused Plaintiffs' injuries, and an award of damages. In *Proctor v. Castelletti*, defendant was permitted to introduce evidence of collateral source benefits to show plaintiff's malingering. *Proctor v. Castelletti*, 112 Nev. 88, 89, 911 P.2d 853 (1996). The jury awarded plaintiff $7,000.00. *Id.* This Court held that

admission of collateral source benefits was prejudicial when the jury's verdict was compared to defendant's $150,000.00 offer of judgment and plaintiff's requested damages. *Id.* at 91. *See also Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1009, 194 P.3d 1214, 1222 (2008) (finding a jury instruction that misstated the law on liability was prejudicial where the jury returned a verdict of no liability).

Unlike *Proctor* and *Cook*, the jury in this case did not reach the issue (damages) that may have arguably been effected by collateral source evidence. CTRMC's liability defense was unaffected by the admission or preclusion of collateral source evidence. Plaintiffs do not cite to the record to support a finding that the collateral source evidence influenced the jury's determination of liability. Accordingly, a new trial is not warranted.

CONCLUSION

The jury's verdict should not be disturbed as it was the result of sufficient evidence that CTRMC did not breach the standard of care. A new trial is not warranted as the plain language and intent of Nevada Revised Statute 41A.045 was correctly applied in this case and should be affirmed.

DATED this 13th day of February, 2017

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By: _____

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CERTIFICATE OF COMPLIANCE

1. I certify that his brief complies with the formatting, type-face, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsift Word 2010 with a proportionally spaced typeface in 14-point, double-s[aced Times New Roman.

2. I certify that this brief complies with the type-volume limitations of NRAP32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 7,188 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 13th day of February, 2017

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CERTIFICATE OF SERVICE

I certify that I am an employee of Carroll, Kelly, Trotter, Franzen, McKenna & Peabody, and that on the date shown below, pursuant to NRAP 25(d), I caused service of the foregoing document by electronically filing the same with the Clerk of the Court which serves the following party automatically:

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Additionally, I deposited in the United States mail at Las Vegas, Nevada, a true copy of the foregoing document, addressed to:

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DATED this 13th day of February, 2017.

Sharlene Reed