IN THE SUPREME COURT OF THE STATE OF NEVADA

TAWNI McCROSKY, individually and as the natural parent of LYAM McCROSKY, a minor child, Appellants, v. CARSON TAHOE REGIONAL MEDICAL CENTER, a Nevada business entity, Respondent.	Supreme Court Case No. 70325 District Court Case No. 13TRT000281B

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondent Carson Tahoe Regional Medical Center ("CTRMC") argued that Appellants Tawni McCrosky's, individually and as the natural parent of Lyam McCrosky (individually as "Ms. McCrosky" and "Lyam" and collectively as "Appellants"), settlement with ostensible agent Amy Sue Hayes, M.D. ("Hayes") precluded Appellants from holding CTRMC vicariously liable for the fault of Hayes. CTRMC next argued that the district court was justified in ruling that Hayes could not be viewed as the ostensible agent of CTRMC, and in support of this position proffered arguments that are not supported by the record on appeal.

Regarding NRS 42.021, CTRMC (1) unconvincingly urged this Court to hold that NRS 42.021(1) is severable from NRS 42.021(2); and (2) while acknowledging that NRS 42.021 is preempted by federal law, incorrectly suggested that the admission of collateral source evidence was harmless. As to the claim that this Court should reconsider its decision in *Piroozi v. Eighth Jud. Dist. Ct.*, __ Nev. __, 363 P.3d 1168 (2016), CTRMC offered no valid reason why reconsideration is not appropriate and in the best interests of all. Nor did CTRMC show that manifest injustice is lacking for this Court to address the insufficiency of the evidence argument.

II. ARGUMENT

A. Appellants' Settlement with Hayes Did Not Remove the Basis for Additional Recovery from CTRMC.

According to CTRMC, NRS 41A.045 effectively eliminated vicarious liability with respect to a hospital's negligence for a physician's negligence whenever the plaintiff settles with the physician. According to CTRMC, NRS 41A.045 effectively eliminated a plaintiff's ability to hold a hospital vicariously liable for the negligence of its alleged independent contractors based upon the doctrine of ostensible agency, thereby abrogating this Court's holdings in *Renown Health v. Vanderford*, 126 Nev. 221, 235 P.3d 614 (2010), *Schlotfeldt v. Charter Hosp. of Las Vegas*,112 Nev. 42, 910 P.2d 271 (1996), *Oehler v. Humama, Inc.,* 105 Nev. 348, 775 P.2d 1271 (1989), and Nevada's adoption of the Uniform Contribution Among Tortfeasors Act.

CTRMC's erroneous and unsupported position is that a hospital cannot be vicariously liable for a physician's several share. Nothing in NRS 41A.045 or *Piroozi.,* __ Nev. at __, 363 P.3d at 1168, supports this strained interpretation of NRS 41A.045.

By allowing a plaintiff to recover severally from a hospital after a plaintiff settles with the physician does not render NRS 41A.045

meaningless. NRS 41A.045 abrogated joint and several liability among providers of healthcare in professional negligence actions. NRS 41A.045. Nothing in NRS 41A.045 provides that once a plaintiff settles with a physician, that plaintiff is precluded from seeking several liability (not joint and several in contravention of the statute) from the hospital for the physician's negligence based on the doctrine of ostensible agency. *Id.* Appellants are not seeking to recover jointly and severally from CTRMC. Appellants seek to recover severally from CTRMC for Hayes' negligence based upon the doctrine of ostensible agency.

CTRMC incorrectly contended that *Van Cleave v. Gamboni Constr. Co.* is inapplicable because it was decided almost 20 years before the enactment of NRS 41A.045. 101 Nev. 524, 706 P.2d 845 (1985). *Gamboni* is directly on point and remains good law. Nothing in NRS 41A.045 or *Piroozi* abrogated this Court's holding and reasoning in *Gamboni. See* NRS 41A.045 *and Pirzoozi,* __ Nev. at__, 363 P.3d at 1168.

It is noteworthy that CTRMC ignored the fact that this Court in *Gamboni* held that an employer can be ***severally liable*** for the same injury to a plaintiff even where the plaintiff settles with the employee. 101 Nev. at 528, 700 P.2d at 847-848. CTRMC ignored the fact that *Gamboni* makes

clear that an employee's settlement with a plaintiff does not extinguish any further claim against the employer on a theory of vicarious liability whether liability is joint or several. *Id.* at 527-528, 700 P.2d at 847-848.

Nor did CTRMC dispute the fact that Appellants' settlement with Hayes was not intended to release CTRMC. That is because Appellants preserved all claims against CTRMC. 44AA587; *see also Verified Petition for Compromise of Minor's Claim and Establishment of Special Needs Trust (Under Seal).*[1]

CTRMC's attempt to contend that *Biddle v. Sartori Mem. Hosp.,* is applicable is unpersuasive. 518 N.W.2d 795, 798 (Iowa 1994).[2] CTRMC

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[1] Filed concurrently with this brief is a motion to transmit this pleading that was filed under seal.

[2] *Biddle* is also distinguishable for the additional reason that in Iowa, a settling tortfeasor would be subject to an indemnity claim by the hospital if a *derivative claim* were allowed against the hospital. 518 N.W.2d at 798. Not so in Nevada where a good faith settlement "discharges the tortfeasor . . . from all liability for contribution and for equitable indemnity to any other tortfeasor." NRS 17.045(1)(b). Because Iowa's law contains no similar protection, the court in *Biddle* recognized that allowing the derivative action to proceed would discourage settlements, for a settling defendant could not buy her peace with the knowledge that a remaining defendant's right to implied indemnity remains. 518 N.W.2d at 798. In contrast, a defendant in Nevada is encouraged to settle because all claims for indemnity and contribution are discharged so long as the settlement is deemed in good faith. NRS 17.045(1)(b).

incorrectly contended that NRS 17.295(1) sets forth similar language to Iowa's statute.

A comparison of NRS 17.295(1) and Iowa's statute dispels this. *Compare* NRS 17.295(1) *with* Iowa Code § 668.3(2)(b)(2). There is nothing in NRS 17.295(1) to support the proposition that the tortfeasors are to be treated as a single party for purposes of a release of one party from liability. NRS 17.295(1).

CTRMC further disregarded the fact that this Court decided *Gamboni* when NRS 17.295 was in effect. NRS 17.295 was first enacted in 1973 and amended in 1979. NRS 17.295. This Court decided *Gamboni* in 1985. 101 Nev. at 524, 702 P.2d at 845. CTRMC's reliance upon NRS 17.295(1) is misplaced.

In an attempt to argue that settlements will not be discouraged, CTRMC incorrectly contended that Appellants *only* asserted a direct negligence claim against CTRMC. Appellants not only asserted a direct negligence claim against CTRMC, they also asserted a vicarious liability claim against CTRMC based upon the doctrine of ostensible agency. 1AA001-010

The crux of this entire case is that CTRMC is not only directly negligent for the conduct of its nurses, but it is also negligent for Hayes' conduct. If a plaintiff's vicarious liability claim against a hospital can only survive if she does not settle with a physician, then there is no incentive for a plaintiff to settle with the physician. The district court's decision to preclude additional recovery from CTRMC for the conduct of its agent is contrary to *Gamboni* and this state's long standing public policy favoring settlement of disputes.

B. Questions of Fact Exist as to the Ostensible Agency Doctrine.

CTRMC contended that *Schlotfeldt* stands for the proposition that to forestall the entry of summary judgment in CTRMC's favor, Appellants are required to show that genuine issues of material fact exist with respect to each element of the ostensible agency doctrine. Appellants dispute that they are required to make such a showing. Even assuming that they are required to do so, Appellants can make such a showing.

Where this Court specifically used the words "***typical questions of fact for the jury***" to determine the existence of ostensible agency, Appellants urge this Court to conclude that no one factor is dispositive and the ultimate determination is made by the jury considering the totality of the

circumstances. *Schlotfeldt,* 112 Nev. at 48, 910 P.2d at 275 (emphasis added); *see also Vanderford,* 126 Nev. at 227, 235 P.3d at 618. Even if this Court agrees with the district court and CTRMC, the record nevertheless shows that questions of fact exist as to all four factors articulated in *Schlofeldt.* 112 Nev. at 48, 910 P.2d at 275.

1. Ms. McCrosky entrusted herself to CTRMC.

CTRMC conceded that Ms. McCrosky entrusted herself to CTRMC. 4AA569 This factor weighs in favor of Appellants. 4AA568-569

2. CTRMC selected Hayes to serve Ms. McCrosky.

CTRMC incorrectly contended that it did not select Hayes to serve Ms. McCrosky and her "'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." *Answering Brief* at 15. While the facts clearly demonstrate that Ms. McCrosky played no part in selecting Hayes, the law clearly demonstrates that it makes no difference that CTRMC contracted with Hayes' group to provide on call obstetrical service.

CTRMC did not and cannot dispute the following salient facts showing that at a minimum questions of fact exist as to whether CTRMC selected Hayes to serve Ms. McCrosky:

1. Ms. McCroksy received her prenatal care from the Mom's Clinic, operated by CTRMC, and the Mom's Clinic did not assign her a doctor. 2AA292, 297, 300, 6AA1258-1259.

2. Ms. McCrosky never received treatment from Hayes while at the MOM's Clinic. 2AA284, 290.

3. Expecting mothers from the MOM's Clinic have no opportunity to select a specific physician to deliver their babies. 2AA304-305.

4. As a MOM's Clinic patient, Ms. McCrosky was required to pre-register at CTRMC. 2AA297, 300, 304-305; 9AA1806; 11AA2350, 2436.

5. Ms. McCrosky arrived at CTRMC at 10:40 p.m. April 24, 2012 and was admitted at 11:00 p.m. by Hayes pursuant to a telephone order. 6AA1257, 1259

6. Hayes met Ms. McCrosky for the first time at 6:00 a.m. April 25th, seven hours after her admission. 2AA284, 289; 11AA2395

7. When Ms. McCrosky was admitted to CTRMC, Hayes was the only obstetrician at CTRMC providing on-call coverage, and the only obstetrician who could serve Ms. McCrosky. 2AA285, 290; 11AA2395, 2435-2436

Despite these undisputed facts, CTRMC argued that it was Carson Medical Group ("CMG") who selected Hayes to care for Ms. McCrosky and therefore there can be no vicarious liability.[3] *Answering Brief* at 15. The district court rejected this argument and this Court should likewise do the same. 4AA570

CTRMC offered no authority to support this specious contention. That is because courts have overwhelmingly held that questions of fact exist as to whether a hospital should be vicariously liable for the acts of the physician where the hospital contracted with the physician's medical group to provide medical services. *Cordero v. Christ. Hosp.,* 958 A.2d 101 (N.J. Ct. App. 2008) (holding questions of fact present as to whether hospital vicariously liable for physician's negligence where hospital contracted with private medical group for its services to staff anesthesiology department and hospital put in place system under which anesthesiologist arrived to provide medical services in hospital's operating room and patient had no prior contact with physician); *Stone v. Williamson,* 2007 WL 1135686 (Mich. Ct.

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[3] The fact that CTRMC contracts with CMG to hire and schedule physicians is only relevant if Ms. McCrosky had some reason to know about the specific arrangements between CTRMC and CMG. There is nothing in the record to suggest this. 2AA297

App. 2007), *aff'd on other grounds,* 753 N.W.2d 106 (2008) (holding trial court properly found existence of ostensible agency between physician and hospital where there was no pre-existing physician-patient relationship with physician or physician's medical group); *Franklin v. Murray,* 2004 WL 616188 (Conn. Super. Ct. 2004) (holding question of fact as to whether, since hospital extended privileges to anesthesiologist group, patient could assume that whatever medical services required would be provided by employee or agent of hospital); *Pamperin v. Trinity Mem. Hosp.,* 423 N.W.2d 848 (Wis. 1988) (holding patient had cause of action against hospital for negligence of radiologist employed by radiological group that provided hospital's medical services as independent contractor); *Stratso v. Song,* 477 N.E.2d 1176 (Ohio Ct. App. 1984) (holding hospital could be vicariously liable for anesthesiologist's negligence where hospital contracted with physician's medical group to provide anesthesia to patients and patient did not select anesthesiologist).

CTRMC's attempt to distinguish *Loazia v. Lam,* 107 A.D.3d 951 (N.Y. 2013), is unavailing and its reliance upon *Roessler v. Novak,* 858 So.2d 1158, 1162 (Fla. Ct. App. 2003), is misplaced. Similar to Hayes, the obstetrician on duty and assigned to the plaintiff in *Loazia* was part of a

medical group who contracted with the hospital to provide obstetric services at the hospital. 107 A.D.3d at 951. In *Roessler*, the court reversed the trial court's grant of summary judgment finding genuine issues of material fact as to the hospital's vicarious liability for the radiologist's negligence who was part of medical group with whom the radiologist belonged. 858 So.2d at 1162.

CTRMC's arguments that "[a] lack of choice is not the same as declining to exercise the right to choose" and because "CTRMC did not deprive Ms. McCrosky of the ability to choose an obstetrician if she wanted" summary judgment in its favor was warranted are even more specious and offensive.[4] *Answering Brief* at 15-16. CTRMC offered no authority for these fallacious contentions. That is because the overwhelming legal authority, including this Court's decision in *Schlofeldt,* 112 Nev. at 42, 910 P.2d at 271, supports the proposition that lack of choice on the part of a patient is sufficient to create a jury question on the hospital's vicarious liability for the negligence of an independent contractor physician. *Jones v.*

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[4] The unrefuted evidence shows that Ms. McCrosky did not have the financial means to choose her own obstetrician. 2AA292 CTRMC's contention that because she did not choose her own obstetrician some how translates into her having a choice is offensive and makes no sense.

Tallahassee Mem. Reg. Healthcare, Inc., 923 So.2d 1245 (Fla. Ct. App. 2006) (weight of authority holds that lack of choice on patient's part sufficient to create question of fact on hospital's vicarious liability for physician's negligence); *Burless v. W. Va. Univ. Hosp., Inc.,* 601 S.E.2d 85 (W. Va. 2004) (questions of fact exist as to whether hospital vicariously liable for obstetrician where hospital assigned obstetrician who treated patient and consulted with her throughout her prenatal care and delivery of her son); *Setterington v. Pontiac General Hosp.,* 568 N.W.2d 93 (Mich. Ct. App. 1997) (patient did not have patient-physician relationship with radiologist independent of hospital setting and radiologist on duty when patient arrived at hospital); *Fulton v. Schwartz,* 1994 WL 811479 (Pa. C.P. 1994) (where patient did not request any doctor and hospital supplied doctor patient could reasonably believe doctor employee of hospital); *White v. Methodist Hosp. So.,* 844 S.W.2d 642 (Tenn. Ct. App. 1992) (where hospital and not patient chose anesthesiologist and hospital offered anesthesiology as service to public constitute evidence of patient's reliance); *Tompkins v. McGinnis,* 1989 WL 75861 (Ohio Ct. App. 1989) (question of fact as to whether hospital could be vicariously liable for independent contractor pathologist's negligence where patient had no choice in selection of

pathologist and relied upon hospital to furnish pathology services). As for the argument that summary judgment was proper because Ms. McCrosky had the right to choose her own obstetrician and should have exercised it, the case relied upon by CTRMC undermines this specious argument. *Roessler,* 858 So.2d at 1158 (genuine issues of fact exist where patient did not attempt to secure specialist on his own but instead accepted physician provided to him by hospital).

It is undisputed that Ms. McCrosky was subject to the choice made by CTRMC. 2AA304-305 (according to CTRMC, expecting mothers from the MOM's Clinic have no opportunity to select a specific physician to deliver their babies). She sought care from CTRMC rather than from any particular physician. This is a classic case for the application of the ostensible agency doctrine as this Court acknowledged in *Schlotfedlt.* 112 Nev. at 42, 910 P.2d at 271.

Lastly, CTRMC's contention that "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[,]'" somehow lends CTRMC support is misplaced. *Answering Brief* at 11 (citing 3AA407). This factual detail weighs in favor of a denial of summary judgment. *Franklin,* 2004

WL616188 (questions of fact as to hospital's vicarious liability where patient had right to rely upon hospital's reputation and to assume that whatever medical services required would be provided by employee or agent of hospital); *Kafri v. Greenwich Hosp. Ass'n,* 2000 WL 306620 (D. Conn. 2000) (same); *Pamperin*, 423 N.W.2d at 848 (if patient proves that he/she relied upon hospital to provide medical services rather than upon specific physician, patient meets burden of proving reliance to hold hospital vicariously liable for acts of independent contractor).

CTRMC's contention that Appellants purportedly "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[,]"*Answering Brief* at 11, is repelled by the record where it is undisputed that CTRMC selected Hayes to serve Ms. McCrosky and where as a MOM's Clinic patient, she was expected to pre-register at CTRMC. At a minimum, questions of fact exist as to this factor to preclude summary judgment. In any event, the focus is on Ms. McCrosky's beliefs and not the beliefs of a reasonably prudent person. *Schlofeldt,* 112 Nev. at 48, 910 P.2d at 275; 4AA573.

3. Ms. McCrosky reasonably believed that Hayes was an employee or agent of CTRMC.

Questions of fact exist as to whether Ms. McCrosky could have reasonably believed that Hayes was an agent of CTRMC. In an unavailing effort to contend otherwise, CTRMC argued that Ms. McCrosky's declaration somehow conflicts with her deposition testimony. *Answering Brief* at 10 n.1. When this Court views both Ms. McCrosky's declaration and deposition, there is nothing inconsistent about them. *Compare* 3AA0406 *with* 2AA297. Even assuming that her declaration is somehow inconsistent with her deposition and this Court disregards the declaration, the record still supports a finding that Ms. McCrosky reasonably believed that Hayes was CTRMC's employee or agent.

In further effort to convince this Court that Ms. McCrosky believed Hayes to be independent of the hospital, CTRMC made factual assertions without the required citation to the record:

> Page 10: "Before arriving at CTRMC on April 24, 2012, Ms. McCrosky could not, and did not reasonably believe that Dr. Hayes was an agent of the hospital."
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> Page 14: "Ms. McCrosky admittedly did not believe the physicians were agents or employees of CTRMC."

Page 14: "CTRMC did not engage in conduct that would lead Ms. McCrosky to believe Dr. Hayes was an employee."

Page 15: "CTRMC did not determine which physician would be on call at any specific time."

Page 15: "As a member of Carson Medical Group, Dr. Hayes was one of the physicians who Ms. McCrosky knew "rotated" through the MOM's Clinic."

Page 15 - 16: "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."

Page 16: "CTRMC did not deprive Ms. McCrosky of the opportunity to select her own physician."

CTRMC operates an obstetrics department with Dr. Tomita (a physician with CMG) as its Chief of Staff and Chief of Obstetrics. 11AA2514; 12AA2594 Ms. McCrosky relied upon CTRMC to provide obstetric services when she was admitted and understood that Hayes was assigned to her by CTRMC and employed by CTRMC, but she did not know for certain one way or the other. 2AA297; *see also Cordero,* 958 A.2d at 101 (totality of circumstances would lead reasonable patient to assume that hospital furnished services of anesthesiologist along with those other members of hospital staff); *Diggs v. Novant Health, Inc.,* 628 S.E.2d 851 (N.C. Ct. App. 2006) (questions of fact present as to whether hospital

indicated to public that it was providing anesthesia services to its patients, whether patient looked to hospital rather than individual medical providers to perform such services, and whether patient accepted anesthesia services from hospital in reasonable belief that services rendered by hospital or its employees where hospital had department of anesthesiology with chief of anesthesiology and medical director); *Lam*, 107 A.D.3d at 953 (triable issues of fact exist as to whether hospital can be held vicariously liable under theory of ostensible agency for malpractice committed by physicians where plaintiff understood that doctors who examined her and delivered baby assigned to her and employed by hospital); *Hunt v. Mercy Med. Ctr.,* 710 A.2d 362 (Md. Ct. App. 1998) (questions of fact exist as to medical center's vicarious liability for physician's negligence where patient relied on medical center to conduct biopsy and patient could properly assume that physicians acting on behalf of medical center).

Ms. McCrosky received the entirety of her prenatal care from the MOM's Clinic, run and operated by CTRMC. 2AA292, 297, 300; 6AA1258 Ms. McCrosky was instructed by the MOM's Clinic that she had to pre-register with CTRMC. 2AA297, 300; 9AA1806; 11AA2350, 2436 The

evidence presented raises a fact issue for the jury to determine whether Ms. McCrosky reasonably believed that Hayes was an employee of CTRMC.

4. Questions of fact exist as to whether Ms. McCrosky was put on notice that Hayes was an independent contractor.

CTRMC incorrectly contended that Ms. McCrosky was repeatedly[5] put on notice that the physicians were not employees or agents of the hospital. This is incorrect and misleading where the record shows that Ms. McCrosky executed only one Conditions of Admissions ("COA") at CTRMC. 1AA165-178, 207-208 There is no evidence in the record, and CTRMC was not able to show that Ms. McCrosky executed all of the COAs at CTRMC. Nor did CTRMC dispute that Ms. McCrosky has no independent recollection of signing any of them or even reading the paperwork she signed. 2AA297; *see also Dewald v. HCA Health Services Tenn.,* 251 S.W.3d 423 (Tenn. 2008) (holding genuine issue of material fact existed as to whether hospital could be held liable for the acts of independent

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[5] Unmindful of the requirement of NRAP 28(e)(1) to provide citations to the record, CTRMC made the following assertion without any citation to the record: "Ms. McCrosky was reminded of this an additional five times before April 24, 2012." *Answering Brief* at 16 (emphasis in original).

contractor radiologist even where patient signed form stating that physicians not agents or employee where patient admitted she had not read form).

While Ms. McCrosky does not recall any one explaining the paperwork to her, 2AA297, CTRMC argued that the nurse, who had Ms. McCrosky execute the COA, testified that it was the nurse's custom and practice to do so.[6] 2AA303 This conflicting evidence obviously creates a question of fact for the jury to decide whether Ms. McCrosky was adequately and meaningfully apprised of Hayes' status.

This Court has never held that a patient's execution of a COA informing her that a physician may not be an employee of the hospital precludes liability under a theory of ostensible agency.[7] *Tadlock v. Mercy Healthcare Sacramento,* 2004 WL 1203138 (Cal. Ct. App. 2004) (holding mere fact that signed consent form contained in patient's file stating treating

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[6] Jenny Glover was the nurse who presented Ms. McCrosky with the COA. 2AA301, 302 Her testimony is problematic where it would appear that she is clearly confused as to the differences between an "agent" and an "independent contractor". 2AA306

[7] If this Court did so, then it would effectively eliminate the ostensible agency doctrine for a hospital's negligence for the conduct of its independent contractors and thereby undermine this Court's holding in *Vanderford* whereby it rejected the district court's decision to impose an absolute nondelegable duty on hospitals where plaintiffs have available to them the ostensible agency doctrine as a basis for a hospital's liability for the acts of its independent contractors. 126 Nev. at 221, 235 P.3d at 614.

physicians at hospital not employees of hospital did not entitle hospital to summary judgment). The COA constitutes but one factor in the totality of the circumstances and the jury should be permitted to consider all the evidence in its totality presented by both CTRMC and Appellants. Whether CTRMC adequately notified Ms. McCrosky that Hayes was an independent contractor is a question of fact properly left for the jury.

In their *Opening Brief,* Appellants argued that even assuming that Ms. McCrosky recalls reading the specific terms of the COAs, the operative paragraph in that document is nevertheless vague and ambiguous. *Opening Brief* at 40-42. Appellants argued that the operative paragraph did not inform Ms. McCrosky that CTRMC is not responsible for the judgment or conduct of Hayes. 1AA207 Instead, it only informed Ms. McCrosky that she will be receiving separate bills for the services rendered. *Id.* CTRMC did not address any of these contentions and its failure to do so means that it conceded that the paragraph at issue is vague and ambiguous.

Ms. McCrosky further argued that while the radiologist, pathologist, anesthesiologist, emergency room physicians, and hospitalists are specifically enumerated, "obstetrician" is not. *Id.; see also Bruce v. Marhsall County Public Hosp. Dist. Corp.,* 2003 WL 1240503 at *2 (Ky. Ct.

App. 2003). CTRMC offered no explanation for this exclusion even though CTRMC operates the MOM's Clinic and expecting mothers who receive treatment at the MOM's Clinic are required to pre-register at CTRMC. 2AA297, 300, 304-305; 11AA235. Where "obstetrician" is not specifically enumerated, the jury could conclude that Ms. McCrosky reasonably believed that the language of the COA did not apply to Hayes, particularly where she was selected by CTRMC to serve Appellants. CTRMC's failure to address this argument means that it conceded that questions of fact exist as to whether Ms. McCrosky reasonably believed that Hayes was not an employee of CTRMC.

In their *Opening Brief,* Appellants further argued that even assuming paragraph 6 of the COA is not vague and ambiguous, the document constitutes a contract of adhesion. *Opening Brief* at 42-44. CTRMC made no effort to address this argument. That is because CTRMC conceded during oral arguments before the district court that the COA could be a contract of adhesion if Ms. McCrosky had to deliver at CTRMC. 4AA557-558

According to CTRMC's own witnesses, expecting mothers from the MOM's Clinic are "sent over to the main hospital to pre-register for their

delivery . . . " 2AA300, 304-305; *see also* 11AA2436 (Hayes testified that expecting mothers who receive care from MOM's Clinic instructed to go to CTRMC when they are in labor). This is consistent with Ms. McCrosky's and her father's testimony that she was told that she had to register at CTRMC. 2AA297; 9AA1806; 11AA2350 CTRMC's failure to address this argument means that it conceded that the COA is a contract of adhesion. By virtue of CTRMC's concessions, this Court should "not enforce against an adhering party a provision limiting the duties or liabilities of the stronger party absent plain and clear notification of the terms and an understanding consent." *Obstetrics and Gynecologists v. Pepper,* 101 Nev. 105, 108, 693 P.2d 1259, 1261 (1985) (citation omitted).

When this Court views the evidence in the light most favorable to Appellants, questions of fact remain as to whether Ms. McCrosky understood and believed that Hayes was employed by CTRMC. A reversal of the district court's order in favor of CTRMC as to the issue of ostensible agency is warranted. The jury should not have been deprived of the opportunity to determine whether Hayes was an ostensible agent of CTRMC.

C. This Court Should Overrule *Piroozi*.

1. *Piroozi* discourages the settlement of medical malpractice disputes in complete disregard of long standing public policy.

Pre-*Piroozi*, one could settle with one defendant (as occurred in this case), comfortable in the belief that the jury's only focus would be on the conduct of the remaining defendant(s).[8] By allowing the settled defendant's name on the verdict enables the non-settling defendant(s) to blame freely the settling defendant, who is no longer present to defend herself. It leaves open the potential of the settling defendant collusively accepting fault to the complete exclusion of the non-settling defendant(s), for she can do so with absolute impunity! NRS 17.245. Under these circumstances, a plaintiff can never settle with one of several defendants unless the settling defendant pays an amount sufficient to compensate the plaintiff for her entire loss. ***In effect, Piroozi has become the biggest chill to settlement ever faced by***

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[8] Appellants acknowledge that this Court has concluded that "[n]othing in NRS 41.141 prohibits a party defendant from attempting to establish that either no negligence occurred or that the *entire responsibility* for a plaintiff's injuries rests with nonparties, including those who have separately settled their liabilities with the plaintiff." *Banks v. Sunrise Hosp.,* 120 Nev. 822, 845, 102 P.3d 52, 67 (2004) (emphasis added). Appellants' position is that "NRS 41.141 only prevents admission of evidence in support of a 'comparative fault' or apportionment analysis of the case as to nonparties." *Id.*, 102 P.3d at 67.

personally injured plaintiffs! Neither those injured by medical errors[9] nor the medical providers who make them deserve such an antagonistic and expensive environment.

2. The inclusion of Hayes on the verdict form was extremely prejudicial given the district court's (1) holding that ostensible agency did not apply and (2) decision to inform the jury of Hayes' settlement with Appellants.

At pretrial oral arguments, the district court insisted that the jury would be instructed on Hayes' settlement with Appellants. 4AA594-595 To that end, the district court instructed the jury with:

> Dr. Amy Sue Hayes was previously a defendant in this case and has been dismissed based upon a settlement with Plaintiffs. You are not to speculate on the amount of that settlement. A settlement is not an admission of fault. In order to establish a claim of negligence as to Dr. Amy Sue Hayes, the following elements must be proved by a preponderance of evidence by the Defendant: that Dr. Hayes was negligent and that the negligence of Dr. Hayes was the proximate cause of the damages to Plaintiffs.
>
> Defendant Carson Tahoe Regional Medical Center is not liable for the actions of Amy Sue Hayes, M.D. . .

Appellants' Supplemental Appendix Volume 16 at AA3230.

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[9] Martin A. Makary & Michael Daniel, *Medical Error – The Third Leading Cause of Death in the U.S.*, BRITISH MEDICAL JOURNAL 353 (May 2016).

As a result, the jury was free to believe that Ms. McCrosky was fully compensated and was seeking double recovery. In the absence of ostensible agency, CTRMC was given a free pass to blame the doctor without fear of vicarious responsibility. And since the jury was not allowed to understand the settlement, they were not only left to believe that Ms. McCrosky was fully compensated and that the doctor must have been at fault. Why settle otherwise? With Hayes on the verdict form, it was no challenge for CTRMC to convince the jury that the doctor was the sole proximate cause of the tragedy.

Lastly, the district court's insistence that the jury be informed of the fact that Hayes was a former defendant who had settled with Appellants dispels CTRMC's contention that Appellants created any claimed error regarding Hayes' settlement. It was this Court's decision in *Piroozi* and the district court's insistence that invited any errors.

3. CTRMC failed to address the proposed and rejected amendments to NRS 41A.045.

CTRMC did not refute Ms. McCrosky's argument that the Legislature ***never*** intended to allow non-parties to be named on the verdict form regardless of whether the person was named as a party to the action.

2AA248-263 In *Piroozi,* this Court has legislated where the Legislature refused to do so. CTRMC offered no arguments to the contrary.

D. NRS 42.021(2) Cannot Be Severed from NRS 42.021(1) and the Admission of the Collateral Source Was Not Harmless Error.

1. The severance doctrine is inapplicable to NRS 42.021(1) and (2).

CTRMC did not dispute that the doctrine of preemption applies. In dispute is whether NRS 42.021(2) can be severed from NRS 42.021(1) and whether NRS 42.021(1) is also preempted.

When this Court views the statute in its entirety, the only reasonable conclusion this Court can reach is that NRS 42.021(1) and NRS 42.021(2) are interdependent. Otherwise, if subsection 2 were severable as asserted by CTRMC, such as to give effect to subsection 1, then a plaintiff suffers a *double deduction.* First, her damages are reduced because the jury that has learned of her benefits may reduce her tort award by virtue of such benefits. Next, because 42.021(2) is clearly preempted and of no effect, the plaintiff must reimburse the collateral source payor from an already reduced award. In other words, subsection 2 is supposed to assure that the plaintiff will suffer no double deduction. It is clear that both prongs must be met before collateral source benefits are admissible.

CTRMC argued that because the ballot initiative leading to the enactment of NRS 42.021 allows for severability, subsection 2 can be severed from subsection 1. This argument ignores the obvious fact that NRS 42.021 has eight subsections. Where it is clear that subsections 1 and 2 are interdependent, any intent for severability was meant for the remaining six subsections.

In their *Opening Brief,* Appellants argued that a holding by this Court that preemption applies to both subsections 1 and 2 would be consistent with the holdings by the California Court of Appeals who have addressed an identical provision. *Compare* NRS 42.021 *with* California Civil Code § 3333.1.[10] CTRMC failed to address these arguments in its *Answering Brief.* This Court should follow the holdings of the California courts interpreting the exact same language and hold that that payments made on behalf of Appellants through Medicaid fall outside the scope of NRS 42.021(1) with regard to medical malpractice cases. *Garcia v. County of Sacramento*, 103 Cal.App. 4th 67 (Cal. Ct. App. 2002); *Hernandez v. California Hosp. Med. Ctr.,* 78 Cal.App.4th 498 (Cal. Ct. App. 2000); *Brown v. Stewart,* 129 Cal.

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[10] "California's precedent is highly persuasive because it pertains to a statutory scheme that is substantially similar to Nevada's . . ." *St. Mary v. Damon,* 129 Nev. __, __, 309 P.3d 1027, 1034 (2013).

App.3d 331 (Cal. Ct. App. 1982), *superseded on other grounds by statute.* CTRMC offered no reasons as to why this Court should not do so. Consistent with California courts, any contrary ruling would violate federal supremacy principles.

Even assuming that NRS 42.021(1) could be severed from NRS 42.021(2), NRS 42.021(1) is nevertheless subject to the doctrine of preemption. 42 U.S.C. § 1396k(a)(1)(A) provides that Medicaid's lien rights are limited to the recovery designated as payments for medical care. Where subsection 1 allows for the introduction of Medicaid's payments and therefore the jury does not have to award the bills paid for by Medicaid as past or future medical expenses, a plaintiff will not recover payments for medical care paid for by Medicaid. As such, NRS 42.021(1) also extinguishes Medicaid's lien rights against the plaintiff's recovery and conflicts with the federally mandated Medicaid lien and subrogation rights. *Wos v. E.M.A.,* __ U.S. __, 133 S. Ct. 1391, 1395 (2013) (recognizing that Medicaid's lien limited to medical bills actually awarded to plaintiff so if no medical bills awarded because of introduction of collateral source then Medicaid's lien rights terminated and this creates conflict between federal

and state law). The district court's contention that subsection 1 is not preempted is contrary to *Wos*.

2. The admission of the collateral source was not harmless error.

CTRMC incorrectly argued that even if NRS 42.021(1) and (2) are preempted, the admission of the collateral source was harmless error. The admission of inadmissible collateral source evidence is *never* harmless error.

CTRMC reasoned that the admission of the collateral source was harmless error because the jury did not reach the issue of damages. The jury did not reach the issue of damages because CTRMC seized every opportunity to remind the jury that Lyam's past and future medical needs have been and will be paid by Medicaid. 9AA1865-1866; 11AA2307, 2378; 12AA2634-2635, 2682, 2722-2725 In closing argument, CTRMC made a theme of this subject. 15AA3093-3094

It is because of this very conduct that this Court has steadfastly held that the improper admission of collateral source evidence *mandates* a new trial. *Bass-Davis v. Davis*, 122 Nev. 442, 454, 134 P.3d 103 (2006)) ("The admission of collateral source evidence can only be cured by a new trial."); *Proctor v. Costelletti,* 112 Nev. 88, 91, 911 P.2d 853 (1996) (admission of

collateral source evidence affects the substantial rights of the plaintiff including "her right to a fair trial . . ."). This Court should therefore conclude that the improper admission of collateral source evidence in this case can only be cured by a new trial.

E. There Was Insufficient Evidence Adduced at Trial to Support the Jury's Verdict.

CTRMC incorrectly contended that this Court is precluded from reviewing the sufficiency of the evidence because Appellants failed to make a motion for judgment as a matter of law and did not move for a new trial. This Court has consistently held that a party may challenge the sufficiency of evidence on appeal if "there is plain error in the record or if there is a showing of manifest injustice." *Avery v. Gilliam*, 97 Nev. 181, 183, 625 P.2d 1166, 1168 (1981).

Manifest injustice is present where "the verdict or decision strikes the mind, at first blush, as manifestly and palpably contrary to the evidence . . ." *Price v. Sinnott,* 85 Nev. 600, 608, 460 P.2d 837, 842 (1969). What is most significant about CTRMC's *Answering Brief* is its failure to address a number of salient unrefuted facts:

1. When CTRMC admitted Ms. McCrosky April 24, 2012, she carried a full term healthy and normal baby. 7AA1388; 11AA2461-2462

2. Instead of delivering a healthy baby, Ms. McCrosky delivered a dead baby who was resuscitated and is now profoundly disabled. 8AA1625; 9AA1769, 1829

3. Ms. McCrosky had a normal and uncomplicated pregnancy and attended all of her prenatal classes. 9AA1805, 1807

4. Following her admission to CTRMC, Ms. McCrosky's labor was without complication until her bag of water spontaneously ruptured at 6:30 a.m. 6AA1262-1264; 7AA1280

5. Hayes knew that Ms. McCrosky was at risk for a prolapsed cord or cord compression before it even occurred. 11AA2401, 2403-2404

6. With the spontaneous rupture of Ms. McCrosky's bag of water, Lyam's fetal heart rate ("FHR") plummeted to a dangerously low level of 50 beats per minute by 6:34 a.m. and his FHR was a flat line with no variability. 7AA1287; 8AA1577-1579; 1581-1582, 1760-1761; 11AA2405

7. By 6:40/6:41 a.m. and despite the interventions, ten minutes had passed and Lyam's FHR remained dangerously below 90 beats per minute. 8AA1587

8. By 6:40/6:41 a.m., Lyam had been deprived of oxygen for ten minutes. *Id.*

9. CTRMC's nursing expert agreed that by 6:40/6:41 a.m. there was an obstetrics emergency. 14AA2895

10. By 6:50 a.m., CTRMC's nursing expert agreed that none of the interventions was effective. 14AA2895-2896

11. CTRMC's nursing expert agreed that by 6:50 to 6:55 a.m. Lyam's fetal monitoring strip ("FMS") was a Category 3 strip. 14AA2869

12. Nurse Parkhurst testified that by 6:46 a.m. there was no variability and Lyam's FMS was a Category 3 strip. 7AA1299

13. When Nurse Lusich started her shift at 7:00 a.m. and saw Lyam's FMS, she noted that it was a Category 3 strip. 7AA1461-1462

14. When Nurse Sells arrived for work between 6:45 to 6:50 a.m., she noted that Lyam's FMS required immediate action. 12AA2596-2597, 2604-2605

15. Lyam's situation was a classic case of "fetal hypoxia": The lack of variability in Lyam's FHR meant that he was developing acidosis. 8AA1590-1591, 1763

16. Because the overwhelming and undisputed evidence shows that there was a Category 3 emergency within ten minutes of Ms. McCrosky's ruptured membrane and by 6:50 a.m. none of the interventions was effective, someone initiated the chain of command and someone contacted CTRMC's house administrator. 7AA1328-1329[11]

17. The main operating room ("OR") could not be prepared until and unless someone contacted the house administrator to start the process and the undisputed evidence shows that this was done. 7AA1329, 1472-1473, 1506, 1509, 1513

18. This is consistent with CTRMC's expert testimony that by 6:46 to 6:47 a.m., an expeditious delivery should have been considered. 14AA2937

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[11] CTRMC took issue with the fact that Appellants stated in their opening statements that no one initiated the chain of command but now claims for the first time that it was initially initiated but was abandoned during a nursing staff shift change. *Answering Brief* at 3. Where the evidence unequivocally shows that some one initially initiated the chain of command and that it was subsequently abandoned due to a nursing staff shift change, Appellants are entitled to argue what the evidence actually shows. 6AA1255; 7AA1329, 1457, 1472-1473, 1506, 1508-1509, 1513; 8AA1618; 12AA2596 Nothing precludes them from doing so. It would be foolish for Appellants to argue something not supported by the record.

19. By 6:45 a.m., Dr. Arcangeli was prepped and ready to perform a caesarean and waiting for Ms. McCrosky in the main OR . 12AA2597-2598; *see also* 8AA1640-1641

20. By 6:45 a.m., all the necessary arrangements had been made for an emergency caesarean in the main OR. 12AA2597-2598, 2605

21. Because the obstetrics OR was occupied from 6:15 to 7:10 a.m., 12AA2600, 2606-2607, Lyam could not have been delivered in that OR until after 7:10 a.m. and until after it was cleaned and prepped.

22. Despite the fact that CTRMC's expert and nurses all admitted that by no later than 6:50 a.m. there was an obstetrics emergency, an expeditious delivery was necessary, and someone had initiated the chain of command and there was an OR, an anesthesiologist, and obstetrician ready to perform an emergency caesarean by 6:45 a.m., Lyam was not delivered until 7:48 a.m. 11AA2443

23. Lyam was not delivered until close to one hour after CTRMC's expert and nurses all admitted that there was an obstetrics emergency requiring immediate action and an expeditious delivery (whether vaginally or by caesarean). 7AA1477, 1487, 1489; 11AA2443; 12AA2559;

13AA2597, 2604-2605; 14AA2937 Lyam's delivery at 7:48 a.m. was not an expeditious delivery and did not involve immediate action.

24. Lyam should have been delivered by 7:00 to 7:05 a.m. and at the absolute latest by 7:12 a.m. 8AA1757, 1764; 9AA1789

25. There was a change in shifts during the most critical minutes of Lyam's life during which time he fell through the cracks. 6AA1255; 7AA1457, 1508; 8AA1618; 12AA2596

26. According to CTRMC, all its nurses are competent and qualified and trained to recognize that a Category 3 FMS demands an expeditious delivery. 11AA2497; 12AA2559

27. Hayes did not decide to deliver Lyam by caesarean until after 7:30 a.m. 14AA2875

The unrefuted and substantial evidence does not support the jury's verdict that Hayes was the sole proximate cause of Lyam's injuries. This is the only conclusion that can be reached even if the evidence is viewed in the light most favorable to CTRMC.

If in fact CTRMC nurses are competent and trained to recognize that a Category 3 FMS demands an expeditious delivery and all of them recognized that after ten minutes of Ms. McCrosky's ruptured membrane

Lyam's FMS was a Category 3 strip that required an expeditious delivery, it was unreasonable and unconscionable for the nurses to rely upon Hayes' decision to deliver Lyam vaginally for 40 minutes between 6:50 a.m. to after 7:30 a.m. It was unreasonable and unconscionable for the nurses to allow Lyam to be deprived of oxygen from approximately 6:30 a.m. to 7:48 a.m. Where there was an obstetrics emergency requiring an expeditious delivery by 6:50 a.m. and Lyam was not delivered until 7:48 a.m. by caesarean, it is unclear how CTRMC and its nurses can justify that they acted reasonably in relying upon Hayes' decisions in this case.

In recognition of the fact that overwhelming and unrefutted evidence does not support the jury's verdict, CTRMC chose to make up facts. The following factual assertions are made by CTRMC without the required citations to the record:

> Page 3: "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."
>
> Page 5: "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."

> Page 5: "Further, Dr. Hayes called one of her partners to manage her other laboring patient such that her focus was only Ms. McCrosky."
>
> Page 8: "Only a physician can decided when a cesarean section is performed."

The overwhelming and unrefuted evidence, most of which was from CTRMC's own witnesses, does not support the jury's verdict. The jury's verdict is manifestly and palpably contrary to the evidence presented at trial and shocks the conscience. A new trial is warranted.

III. CONCLUSION

Appellants respectfully request that this Court hold that: (1) the district court erred in granting partial summary judgment in favor of CTRMC on the grounds that Appellants' settlement with Hayes removed the basis for additional recovery from CTRMC; (2) the district court erred in granting partial summary judgment in favor of CTRMC on the factual issue of whether Hayes was an ostensible agent of CTRMC; (3) the district court erred in admitting collateral source evidence based upon a pre-empted NRS 42.021; and (4) there was insufficient evidence at trial to support the jury's verdict. Appellants further respectfully request that this Court grant them a new trial.

IV. VERIFICATION

Under the penalty of perjury, the undersigned declares that he is the attorney for Appellant named in the instant Brief and knows the contents of the Brief. The pleading and facts stated therein are true of his own knowledge, excepts as to those matters stated on information and belief, and that as such matters he believes them to be true. This verification is made by the undersigned attorney pursuant to NRAP 21(a)(5).

V. CERTIFICATE OF COMPLIANCE

1. I 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 it has been prepared in proportionally spaced typeface using Word in 14 point Times New Roman font.

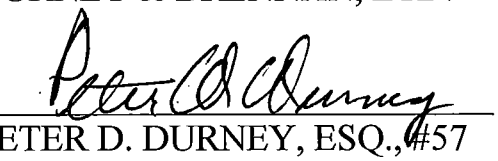
2. I further certify that this Brief complies with the page-or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface font of 14 points or more, and contains 6,888 words.

3. I 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 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 17 day of MARCH, 2017.

DURNEY & BRENNAN, LTD.



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CERTIFICATE OF SERVICE

I certify that I am an employee of Durney & Brennan, Ltd., 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 Reno, Nevada, a true copy of the foregoing document, addressed to:

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DATED this 17th day of MARCH, 2017.

ABBEY WHITFIELD