IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMBERLY TAYLOR,

Appellant,

v.

KEITH BRILL, M.D. and WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC,

Respondents.

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SUPREME COURT CASE NO. 83847

Dist. Court Case No. A-18-773472-C

On Appeal from the Eighth Judicial District Court
Clark County, Nevada, Department III, Hon. Monica Trujillo, Presiding

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

Pursuant to NRAP 26.1, Appellant's counsel Adam J. Breeden, Esq. hereby discloses the following:

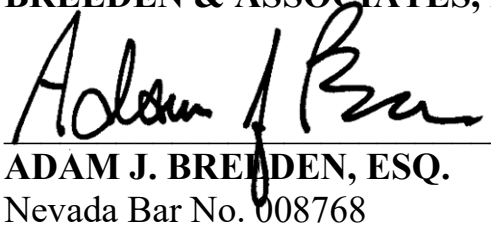
There are no corporations or business entities involved in this appeal for the Appellant and, therefore, there are no related or parent companies for the Appellant to disclose.

The only counsel appearing or expected to appear for the Appellant is Adam J. Breeden, Esq. and Anna Albertson, Esq. of the Breeden & Associates, PLLC law firm. Appellant was also represented at the District Court level by Breeden & Associates, PLLC and the Law Office of James Kent/James Kent, Esq.

The Appellant is not using a pseudonym.

Dated this 9th day of March, 2022.

BREEDEN & ASSOCIATES, PLLC



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JURISDICTIONAL STATEMENT

The basis of this Court's appellate jurisdiction is NRAP 3A(b)(1). This appeal follows a District Court Judgment on Jury Verdict entered on November 19, 2021 with Notice of Entry of Order served on the same date. (XIII Appx. 2660-2669) The Notice of Appeal was filed and served on November 22, 2021, within 30 days of Notice of Entry of Order. (XIII Appx. 2674) The order appealed from was a final, appealable order entering a defense judgment after a jury verdict which disposed of all issues against all remaining parties.

ROUTING STATEMENT

This appeal presents several important legal issues regarding medical malpractice personal injury law, the lead issue being whether the Nevada Supreme Court will adopt the reasoning of other state high courts throughout the United States and affirm that (a) because there is no assumption of risk defense in a medical malpractice case (b) evidence and argument by the defendant physician or defense counsel that the patient's injury was a so-called "risk" or "complication" that was disclosed to her in advance is inadmissible, prejudicial and requires a new trial if admitted. *E.g., Wilson v. Patel*, 517 S.W.3d 520 (Mo. 2017) (evidence that the patient "was aware" of a risk of a tear as a "known complication" and yet "agreed" to the procedure as a defense was held to be improper); *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004) ("discussion of risk is not probative upon the issue of causation: whether [the doctor] negligently performed the procedure."). Numerous other states have recognized this principle because whether a physician deems something a "risk" to a procedure has no bearing on whether the procedure was correctly performed within the standard of care. The Nevada Supreme Court has never issued a published decision on this issue of medical malpractice law. Therefore, Taylor believes that this appeal concerns a question of first impression under Nevada law and a question of statewide public importance under NRAP 17(a)(13) and (14) and this appeal should be retained by the Nevada Supreme Court.

I. STATEMENT OF ISSUES IN APPEAL

Did the District Court commit reversible error warranting a new trial in this medical malpractice action by:

1. Improperly admitting evidence and argument supporting an assumption of risk defense for the physician;
2. Barring Taylor's counsel from conducting any voir dire as to prospective juror feelings on tort reform, KODIN, or a perceived medical malpractice crisis;
3. During presentation of evidence, excluding over $200,000 of Taylor's special damages, improperly allowing collateral source evidence, refusing to admit a demonstrative exhibit of the medical instrument involved, and refusing to allow impeachment of the defense expert as to bias;
4. Barring Taylor's counsel from using the phrases "send a message" or that the jury is the "conscience of the community" in closing argument contrary to precedent;
5. Refusing to give applicable pattern jury instructions while giving a non-pattern instruction on "mere happening" tailored to fit the Defendant's arguments;
6. Refusing to allow permitted closing argument to refute the Defendant's case and allowing Defense counsel to invite the jury to disregard the actual testimony and assume alternate facts to which he personally vouched for.

II. STATEMENT OF THE CASE

Appellant Kimberly Taylor filed a medical malpractice action against her OB/GYN physician, Dr. Keith Brill, after a hysteroscopy procedure. It is undisputed that during the procedure Dr. Brill perforated *both* Taylor's uterus and the small bowel with a resectoscope, leading to serious illness, infection, a hospital stay of nine days, and hundreds of thousands of dollars in medical expenses for Taylor. Dr. Brill's "defense" at trial was that uterine and bowel perforation is a known risk of which he advised Taylor in advance, an assumption of risk defense.

After a jury verdict for the defense entered on November 19, 2021, Taylor appealed and now asserts several novel issues under Nevada law as to assumption of risk in a medical malpractice claim as well as numerous evidentiary issues.

III. STATEMENT OF FACTS

This is a medical malpractice action by Plaintiff Kimberly Taylor against her OB/GYN physician, Defendant Dr. Keith Brill. (I Appx. 1-25) On April 26, 2017, Dr. Brill performed an intended dilation and curettage with hysteroscopy combined with fibroid tumor removal and hydrothermal ablation procedure on Ms. Taylor. (X Appx. 2070-2072) In layman's terms, this meant that during part of the procedure a small camera and cutting device called a resectoscope would be inserted into the uterus and a fibroid tumor previously identified via ultrasound in the uterus would be removed. This procedure was done with the use of a Symphion system

resectoscope. (XI Appx. 2247) This is a small, 6.3 mm tube-like device with a tip 3.6 mm in diameter that is inserted vaginally into the uterus. (XI Appx. 2267, XIII Appx. 2676-2677) The tip of the instrument is blunt but has a resecting window near the tip which, when activated by the physician with a foot pedal, cuts with heat from electricity. (XI Appx. 2248-2250, XIII Appx. 2676-2677) The patient is under complete anesthesia for the procedure. (X Appx. 1966, 2072) If the procedure is properly performed, the medical instruments never leave the uterus.

It is undisputed that during the procedure, Dr. Brill perforated both the uterus and small bowel with the resectoscope. (XII Appx. 2304) However, the parties disagreed on whether he did this by either (a) burning or (b) mechanically pushing the tip of the device through the organs, although Taylor's expert testified that either way was beneath the standard of care. (Compare X Appx. 1988-1989 with XII Appx. 2328-2332).

Prior to and during trial, Taylor's counsel became concerned regarding the presiding judge, the newly-elected Hon. Monica Trujillo. Taylor's counsel learned that (a) prior to being elected Judge Trujillo was a public defender with little to no personal injury law experience, (b) Taylor's trial would be one of the first if not *the* first medical malpractice for the Judge, and (c) it was learned that Defense counsel made large financial donations to Judge Trujillo's campaign. As trial proceeded, virtually every contested issue of any significance was decided in favor of the

defense.

Trial of the case began on October 7, 2021 and lasted eight trial days, two of which were jury selection. (VI Appx. 1103 – XIII Appx. 2492) The primary witnesses were (1) Plaintiff Kimberly Taylor, (2) Taylor's retained medical expert, Dr. David Berke, (3) Defendant Dr. Keith Brill, and (4) Dr. Brill's retained medical expert, Dr. Steven McCarus.

Taylor testified (X Appx. 2058 – XI Appx. 2181) that she was forty-five years old when the hysteroscopy occurred. (X Appx. 2058) She had a medical issue with abnormal menstrual cycles and Dr. Brill, her OB/GYN, recommended hysteroscopy with resection of a fibroid tumor in the uterus with hydrothermal ablation. (X Appx. 2064-2066) Taylor reported for the outpatient procedure at Henderson Hospital expecting a one hour procedure. (X Appx. 2071-2075) She had been told the procedure was generally safe and she'd be running in a 5k race by the weekend. (X Appx. 2073) When she awoke from anesthesia, Dr. Brill only told her the procedure was "too complicated" and had been terminated (X Appx. 2079), but never told her there was any perforation of any kind that he caused. (X Appx. 2079-2080) Taylor then described going home in extreme pain, not being able to reach Dr. Brill, and returning to the emergency room twice before another physician correctly diagnosed her with a perforated uterus and small intestine, resulting in sepsis. (X Appx. 2081-2087, XI Appx. 2097-2119) Taylor explained how she had to have an emergency

bowel resection surgery and a nine day hospitalization with post-hospital IV antibiotics to recover. (X Appx. 2081-2087, XI Appx. 2097-2119) She only learned that Dr. Brill had caused the perforations *after* the emergency surgery from her infectious diseases physician, Dr. Lipman. (XI Appx. 2116-2117) She had incurred over $200,000 in medical bills but, as explained *infra*, the District Court would not allow the medical special damages into evidence. (XI Appx. 2130, 2134-2135) Because the Defense did not highly contest anything that occurred factually, Taylor's cross-examination focused on the fact that Taylor had been told that the surgery had risks, including risk of perforation, but she still agreed to undergo it (an assumption of risk defense). (XI Appx. 2153 – 2155, 2159, 2161-62, XI Appx. 2181-2182).

Taylor's retained standard of care medical expert was an OB/GYN, Dr. Berke. (X Appx. 1948-2055). Dr. Berke testified that has performed 500-600 hysteroscopies in his career and never caused a bowel perforation. (X Appx. 1955, 1995) He explained Taylor's uterine anatomy and testified that it is not highly unusual and it was possible to safely perform a hysteroscopy Taylor. (X Appx. 1956-1958) He stated that according to the operative report Dr. Brill was having trouble visualizing the interior of the uterus during the surgery. Dr. Brill initially could not locate the fibroid tumor so he activated the thermal cutting tip of the resectoscope to resect what Dr. Brill believed was white septum tissue obscuring his

view. (X Appx. 1970-1971) Immediately thereafter, Dr. Brill observed a uterine perforation in the anterior of the uterus where he had been cutting. (X Appx. 1970-1972) Dr. Brill inspected the area but failed to find any bowel injury and did not perform laparoscopy to rule out such an injury, per the standard of care. (X Appx. 1973-1975) Dr. Brill performed a separate curettage afterward and then ceased the remainder of the procedure. (X Appx. 1973-1975) It was Dr. Berke's medical opinion that the uterine and bowel perforations were caused at the same time while Dr. Brill was using the yellow foot pedal to resect with thermal injury and Dr. Brill negligently cut all the way through the uterus and into the small bowel because he dangerously chose to cut without having good visualization. (X Appx. 1988-1989, 1991) He testified that Dr. Brill's treatment fell below the standard of care in a number of ways, including cutting without visualization, failing to identify the bowel injury intraoperatively and failing to advise Taylor of at least her uterine perforation which Dr. Brill admitted he observed. (X Appx. 1990-1995) On cross-examination, to develop their improper assumption of risk defense Dr. Berke was cross-examined by the defense as to so-called risks of the procedure, including perforation. (X Appx. 2004-2005, 2006-2007)

Dr. Brill's retained standard of care expert was an OB/GYN, Dr. McCarus. (XI Appx. 2185-2286). During the direct examination of Dr. Brill's retained expert Dr. McCarus, the Defense continued its faux defense that what happened to Taylor

was just a risk to which she consented. (XI Appx. 2211-2213) Dr. McCarus simply testified in a summary manner that Dr. Brill did everything he was supposed to have done but the risk just happened. On cross-examination by Taylor's counsel (XI Appx. 2247-2281) Dr. McCarus made a number of admissions damaging to Dr. Brill, including that: The resectoscope is designed with a blunt tip to reduce or eliminate the risk of perforations as well as other design features for that purpose, (XI Appx. 2248-2250) that Dr. McCarus has performed "thousands" of hysteroscopies correctly and never perforated a patient's bowel, (XI Appx. 2250) that at least some bowel perforations are due to physician negligence, (XI Appx. 2252, 2254) that it was possible in his opinion to safely perform hysteroscopy on Taylor *without* causing the perforations, (XI Appx. at 2254-2255) that he felt the perforations were caused by Dr. Brill at the same time by mechanically pushing or jamming the blunt tipped resectoscope through two (!) organs, (XI Appx. 2255-2258) that a surgeon must use his/her "skill, training, and experience to avoid" uterine and bowel perforation to the extent possible, (XI Appx. 2259) that spontaneous perforation not caused by the surgical instruments does not occur, (XI Appx. 2259-2260) that the standard of care requires the surgeon to visually see where they are in the uterus at all times and stop working if they can't see (even though Dr. Brill pushed an instrument all the way through the uterus and small bowel), (XI Appx. 2260, 2262) that the incident of bowel perforation for the

procedure is "extremely low," (XI Appx. 2264) that although his theory was mechanical perforation the 3.6 *mm* tip caused a much larger 1.6 *cm* hole in the small bowel (strongly suggesting a larger burn injury), (XI Appx. 2267-2268) that the standard of care requires Dr. Brill to advise the patient of perforation (which Dr. Brill admitted he could not recall doing), (XI Appx. at 2269-2270) that although Dr. Brill took a number of intraoperative photos he intentionally took none of the perforation he caused which might have shown a thermal injury, (XI Appx. 2279-2280) and that perforation of the lungs, kidneys or even a perforation through both sides of the small bowel would all be below the standard of care in his opinion. (XI Appx. 2269)

Dr. Brill testified in his own defense and admitted essentially every fact in the case. (XII Appx. 2304-2446) He admitted he perforated Taylor's uterus and small bowel during the procedure. (XII Appx. 2304-2305) He admitted he failed to find the small bowel perforation intraoperatively. (XII Appx. 2306) He admitted that upon beginning the operation he could not locate the tumor to resect it so he began cutting at white tissue he "believed to be the uterine septum." (XII Appx. 2306-2307) He admitted the perforation was at the anterior of the uterus, the same area where seconds earlier he had been cutting with the resectoscope. (XII Appx. 2308-2309) He admitted that the standard of care requires him to have good visualization and to be sure of what he is cutting. (XII Appx. 2309) He admitted he could not recall telling Taylor or the attending nurse a perforation had occurred when he spoke

to them her after the surgery. (XII Appx. 2309-2310) He admitted that under the "complications" section of the surgery records "none per surgeon" was indicated, even though there had been a serious perforation. (XII Appx. 2311) He admitted he ordered no radiology to check for a more serious perforation and did not try to contact Taylor later that day after her hospital release to check up on her. (XII Appx. 2313-2314) He admitted the standard of care requires him to avoid excessive cutting and force with the uterus when using the resectoscope. (XII Appx. 2314-2315) He admitted he is required to use his skill, training and experience to *avoid* perforation to the extent he is able. (XII Appx. 2315) He admitted he chose to take no photographs of the injury he caused. (XII Appx. 2315-2316) He admitted that although Taylor had unusual anatomy of the uterus, this was known pre-surgery and he felt the procedure could still be safely performed. (XII Appx. 2317-2318) He admitted that "in at least some instances" uterine and bowel perforation are below the standard of care. (XII Appx. Appx. 2318-2319) He testified he had never before caused a bowel perforation during hysteroscopy but denied making any errors despite putting the medical instrument through two (!) organs without medical cause. (XII Appx. 2318-2319) He admitted that while at trial his testimony matched that of his retained expert that the perforations occurred at the same time via mechanical force from the blunt tip, he had earlier testified at deposition that he did not know exactly when or how the bowel injury occurred and that at deposition he had testified

in accordance with the thermal injury theory of the bowel perforation (which he had to avoid at all costs during trial as even his own expert testified if the injury occurred thermally it is below the standard of care). (XII Appx. 2328-2332) Dr. Brill continued his assumption of his defense all through his testimony, saying of perforations "that can occur. That's why we counsel patients on risks and complications that can occur" (XII Appx. 2334 as well as 2344-2346), even though his actual testimony was that he could not recall any actual conversation he had with Taylor about risks. (XII Appx. 2319)

Despite repeated objections by Taylor that it was improper, the Defense was allowed during trial to present a full assumption of the risk defense (that Taylor was advised of the risk of intestinal perforation prior to the procedure but consented knowing the risks and therefore the doctor was not liable). Although the District Court recognized that Taylor's position on the law was correct and gave an accurate jury instruction on the law (XIII Appx. 2631) this only highlights the unfairness of what occurred—the District Court *knew* the assumption of risk evidence was improper but its solution was to allow all the improper evidence and argument to be heard by the jury regardless.

The jury returned a defense verdict. (XIII Appx. 2666-2669, 2678) In post-verdict juror interviews, Jurors # 342 and 585 stated they voted for a defense verdict in part because they didn't think Dr. Brill *intentionally* caused the injury which (they

incorrectly believed) was needed in order to return a verdict for Taylor, which shows the improper risk and complications arguments of the Defense helped carry the day. The astounding verdict highlights the very reason why assumption of risk evidence is considered irrelevant, prejudicial, improper and misleading to the jury in a medical malpractice action and should be barred at trial. Nevertheless, the Defense achieved their defense verdict through this improper, faux defense.

IV. SUMMARY OF THE ARGUMENT

The District Court made numerous errors in virtually every phase of trial, including voir dire, direct and cross-examination and closing argument, which were all one-sidedly made in favor of the Defense.

V. ARGUMENT

A. The District Court Erred in Allowing a Full Assumption of Risk Defense for a Medical Malpractice Action

1. Assumption of Risk is *not* a defense in a Medical Malpractice action

Nevada's appellate courts have never in a reported decision commented on the improper defense of assumption of risk in a medical malpractice case.[1] Taylor asks the Supreme Court to do so now and make clear to the District Courts that there is no assumption of risk defense in a medical malpractice case and such evidence

[1] One *un*reported panel decision from this Court, *Busick v. Trainor*, 437 P.3d 1050 (Nev. 2019) (unpublished) briefly discussed the *lack* of an informed consent defense in a medical malpractice action, but the opinion (which upheld a defense verdict) fails to detail how the evidence was presented or argued at the trial court level.

and argument must be barred as irrelevant and prejudicial.

Courts all over the United States have recognized that in a medical malpractice case where lack of informed consent is *not* alleged, evidence of informed consent of the patient to risks or argument of counsel as to known risks and complications is irrelevant, prejudicial and must be excluded at trial. The Missouri Supreme Court recently addressed this issue in *Wilson v. Patel*, 517 S.W.3d 520 (Mo. 2017). In that case, the patient sustained an esophageal tear during an endoscopy, an alleged risk or complication of the procedure. *Id*. at 521-522. The doctor sought to defend the case by referring to the patient's consent form that disclosed such a risk and by arguing the tear was a "known complication." *Id*. at 522, 523. Further, the doctor's counsel argued that the patient "was aware" of a risk of a tear as a "known complication" and yet "agreed" to the procedure as a defense. *Id*. at 523, 525. All of this was held to be improper and warranted a new trial. The Missouri Supreme Court reviewed numerous other court decisions around the country and correctly determined that evidence of informed consent should have been excluded at trial. The court found that **"evidence of alleged informed consent is irrelevant and can only mislead the jury in a medical malpractice case based on negligent performance of care and treatment."** *Id*. at 526. This is because the real task of the jury is to determine whether the physician used reasonable care and skill when conducting the procedure. Therefore, the Missouri Supreme Court reversed and

remanded the case because the admitted evidence and argument as to informed consent and a known complication "could only confuse the jury in its determination of the facts" as to the real issue which is standard of care. *Id*. at 521.

Another leading case on this legal issue is from the Virginia Supreme Court, *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004). In that case, a doctor was sued after he performed a urachal cystoscopy and, in the process, injured the adjacent bladder with staples, an alleged risk or complication of the procedure. The patient moved to exclude informed consent and risk evidence from the malpractice trial. The trial court declined to do this, a defense verdict resulted, and the Virginia Supreme Court reversed and ordered a new trial. The Virginia Supreme Court correctly recognized that where the patient does not plead lack of informed consent, evidence of the informed consent discussions or consent form "is neither relevant nor material to the issue of the standard of care" and "pre-operative discussion of risk is not probative upon the issue of causation: whether [the doctor] negligently performed the procedure." *Id*. at 528-529. The court made clear that it is not a defense that something is or is not a "risk" of surgery and evidence or argument to that effect merely serves to confuse the jury:

> awareness of the general risks of surgery is not a defense available to Dr. Kaye against the claim of a deviation from the standard of care. While Wright or any other patient may consent to risks, she does not consent to negligence. Knowledge by the trier of fact of informed consent to risk, where lack of conformed consent is not an issue, does not help the plaintiff

> prove negligence. Nor does it help the defendant show he was not negligent. In such a case, the admission of evidence concerning a plaintiff's consent could only serve to confuse the jury because the jury could conclude, contrary to the law and the evidence, that consent to the surgery was tantamount to consent to the injury which resulted from that surgery. In effect, the jury could conclude that consent amounted to a waiver, which is plainly wrong. *Id*.

This legal principal, i.e. that a doctor may not argue informed consent or that a result is merely a known risk or complication as a "defense," has been repeatedly recognized in many states.[2] These cases unanimously discuss and agree that in a

[2] *Waller v. Aggarwal*, 116 Ohio App. 3d 355, 357-358, 688 N.E.2d 274, 275 (Ohio App. 1996) (trial court erred by allowing evidence of informed consent when malpractice action was based on negligence); *Warren v. Imperia*, 252 Ore. App. 272, 287 P.3d 1128, 1132 (Ore. Ct. App. 2012) ("Evidence of plaintiff's awareness of [information about the nature of the procedure, its inherent risks, or available alternatives] would neither have assisted plaintiff in proving negligence nor have assisted defendant in showing that he was not negligent."); *Brady v. Urbas*, 631 Pa. 329, 340-41, 111 A.3d 1155, 1162 (2015) ("there is no assumption-of-the-risk defense available to a defendant physician which would vitiate his duty to provide treatment according to the ordinary standard of care. The patient's actual, affirmative consent, therefore, is irrelevant to the question of negligence."); *Hayes v. Camel*, 283 Conn. 475, 486, 927 A.2d 880, 889 (2007) ("evidence of informed consent, such as consent forms, is both irrelevant and unduly prejudicial in medical malpractice cases without claims of lack of informed consent"); *Ehrlich v. Sorokin*, 451 N.J. Super. 119, 131, 165 A.3d 812, 819 (Super. Ct. App. Div. 2017) ("Plaintiff's acknowledgment of the risk for perforation had no bearing on this determination [of negligence]…although negligent treatment and informed consent fall under the umbrella of medical negligence, our law clearly distinguishes the two claims…"); *Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696, 705-06 (Cal. 1992) (stating that a patient "by voluntarily encountering" a risk of injury does not "'impliedly consent' to negligently inflicted injury or 'impliedly agree' to excuse the surgeon from a normal duty of care"); *Schwartz v. Johnson*, 206 Md. App. 458, 483, 49 A.3d 359, 373 (2012) (explaining jurors should not hear evidence of informed consent and risk of surgery in a negligence case).

medical malpractice case not premised on lack of informed consent, evidence of informed consent, consent forms and discussion of risks and complications of the procedure is: (1) irrelevant to the ultimate issue of whether the physician exercised reasonable care, (2) not probative of an assumption of risk defense, which the law does not recognize for medical malpractice actions, and (3) introduction of such evidence is highly prejudicial, creates juror confusion and warrants a new trial.

Conceptually, it is the *jury* not the *medical community* that gets to decide what acceptable risks and conduct for the medical community will be. If this were not so, doctors would call *everything* a "risk" to surgery, even if it were not a true unavoidable risk that can occur without negligence. Allowing doctors to argue informed consent to a "risk" is a defense thus confuses the jury. In fact, the acknowledgement that an injury is a "risk" of surgery, if anything, means that the surgeon must use care to avoid that result. Not only is the concept of assumption of risk misleading to the jury, but it creates an incentive for the medical community to simply try to escape all liability for medical errors by calling negligent care a mere "risk."

2. <u>The District Court correctly bars assumption of risk evidence and argument, then reverses itself</u>

Taylor's counsel is not inexperienced and quickly realized during discovery that the only defense Dr. Brill intended to present at trial was that what happened to Taylor was merely a "risk" that she consented to, i.e. an assumption of risk defense.

Neither Dr. Brill nor his retained expert were actually talking about the standard of care, only "risks." Taylor filed a Motion in Limine (I Appx. 116-189, IV Appx. 747-775, IV Appx. 834-838) which meticulously set forth a dozen or more times that Dr. Brill and his retained expert based their denial of liability solely on an improper assumption of risk defense. (I Appx. 121-122) Absent this improper defense, Dr. Brill and his expert were doing nothing to explain how it was actually within the standard of care for Dr. Brill to burn or jam the resectoscope through the uterus and into the small bowel during a procedure where he should have had full visualization and the instrument should never breach the uterus at all. The Defense simply wanted to advance the legal fallacy that if the medical community deemed something a "risk" the surgeon is not responsible for it because the patient chose to proceed.

The District Court heard argument on the motion to exclude this evidence (V Appx. 964-972) and initially correctly ruled in Taylor's favor, barring both the signed informed consent form and all other testimonial evidence or argument of informed consent/assumption of risk from trial. (V Appx. 1099).

As if by magic, days after the ruling a dreaded Motion for Reconsideration from the Defense appeared. (V Appx. 1009-1061, V Appx. 1079-1087) The Motion for "reconsideration" actually raised no new points of law or fact and was made only a week after the original motion was heard. Incredibly, the Motion was well-received and the District Court completely reversed itself. (VI Appx. 1111-1116)

Now, the District Court ruled that while the informed consent form was inadmissible, all other evidence and argument of informed consent/assumption of risk would be fair game for the defense. Taylor's counsel instantly recognized that admission of this improper evidence would now taint the entire trial and confuse the jury since assumption of risk was Dr. Brill's only asserted "defense" in the action. The District Court chose a conscious path of allowing all the improper evidence and argument.

3. Assumption of Risk Evidence and Argument Pervades the Entire Trial

Predictably, Dr. Brill and his counsel focused their entire defense on their improper assumption of risk defense. During Taylor's testimony, she was extensively cross-examined on the points that Dr. Brill had told her there were risks to the surgery which she knew about. (XI Appx. 2153 – 2155, 2159, 2161-62, XI Appx. 2181-2182) The District Court even allowed the Defense to introduce *post*-surgery hospital discharge paperwork mentioning risk of perforation which is doubly improper because (a) evidence that the perforation is considered a risk is irrelevant to standard of care and (b) the form was provided to Taylor *after* her surgery, so it had no bearing on what she knew of risks *before* the surgery. (XI Appx. 2152-2153, 2181-2182, XIII Appx. 2680) Reference to "educational materials" which mentioned perforation and were essentially an informed consent form were also allowed. (XII Appx. 2297-2298, 2403-2404, 2449-2250, XIII Appx. 2565, 2681-

2685) These documents provided the defense with the written documents that Taylor had known of and consented to risks of surgery which the defense so desperately wanted to put in front of the jury to support its assumption of risk defense. Dr. Berke was cross-examined on the fact that uterine and bowel perforation is a risk of the procedure. (X Appx. 2007). Both Dr. Brill and Dr. McCarus also liberally testified to known risks and complications of the procedure and that these had been discussed with Taylor to build the assumption of risk defense. (XI Appx. 2211-2212, XII Appx. 2334 as well as 2344-2346) Notably, absolutely nothing about all of this defense evidence and argument is relevant to standard of care, in other words what Dr. Brill has to do to assure the surgery is safely performed and how to avoid such disastrous perforations for the patient. All of the defense case was geared solely toward an improper assumption of risk defense. At no point did either Dr. Brill or Dr. McCarus testify the perforations were unavoidable, only that they were a "risk" or "complication."

4. Assumption of Risk is the Defense's Main Argument During Closing Argument

Defense counsel's closing argument (XIII Appx. 2555-2586) heavily argued that Taylor knew there were risks of surgery to which she consented.[3] The

[3] Taylor's counsel would like to note that it was agreed in advance on the record that the risk arguments would be permitted by the Court so a continuing objection was granted and Taylor's counsel did not need to make a contemporaneous objection. (XIII Appx. 2553)

centerpiece of the defense closing argument was to display written portions of Taylor's testimony on a PowerPoint slide and read from them to stress to the jury that Taylor had been told there were risks to the procedure to which she consented. Defense counsel read the following admissions from Taylor to continue to stress the improper assumption of risk defense:

> A: I know there's risks of surgery. I know there are.
>
> Q: And in fact –
>
> A: You go in. you know that anything could happen. Absolutely. Everybody does. You know that there's a potential that something could happen, yes…(XIII Appx. 2575)

Defense counsel then improperly called Taylor "combative" when answering these questions and developed his assumption of risk defense further:

> Q: Did you also – were you also aware that perforation of the uterus or uterine wall that was also a potential risk and complication of that surgery?
>
> A: Yes. And, also, a potential risk and complication prior to Dr. Brill's surgery that you were aware of including damage to other organs. It's a risk, but a minimal risk is what I was told. (XIII Appx. 2575)

Squarely turning back to his assumption of risk defense, Defense counsel then argued to the jury that "She [Taylor] acknowledges she was told this information. She acknowledges that most individuals in her position are aware of the risks and complications…He [Dr. Brill] didn't hide that from her. He didn't fail to disclose that before surgery. He adequately and thoroughly explained that to her." (XIII

Appx. 2575-2276). This is a textbook assumption of risk argument. Defense counsel followed this shortly after by stating "truer words were never spoken" to comment on Taylor's testimony and her memory of what Dr. Brill told her. (XIII Appx. 2576) A few minutes later Defense counsel continued to improperly argue that Taylor's expert "acknowledges that both a uterine perforation and bowel perforations are known risks and complications of hysteroscopy," (XIII Appx. 2577-2578) which again is irrelevant to the standard of care and only develops the assumption of risk defense. Curiously, Defense counsel never argued the *actual* issue of standard of care as to how, if Dr. Brill was using reasonable care and skill during the surgery, he managed to put a medical instrument so far into the patient's body that it perforated two organs. Defense counsel instead was laser-focused on the assumption of risk evidence. All of this is improper assumption of risk argument and improperly argues to the jury that they should not hold Dr. Brill liable because he advised the patient of risks to which she consented, even though there was no trial testimony that the perforations could not have been avoided by Dr. Brill by practicing within reasonable care and skill. A defense verdict followed.

5. <u>The District Court erred in allowing the Assumption of Risk Defense</u>

Taylor asks that the Supreme Court reverse and remand to the District Court with instructions to conduct a new trial and exclude all evidence and argument of informed consent or assumption of risk at trial or terms such as "risk" or

"complication" at all. The law cited by Taylor is clear, although the Nevada Supreme Court should use this case to clearly announce to the District Courts that there is no assumption of risk defense in a medical malpractice action.

B. The District Court improperly refused to allow Taylor's counsel voir dire of prospective jurors on tort reform and perceived medical malpractice crises

"The purpose of jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006). The District Court may not unreasonably restrict attorney-conducted voir dire and unreasonable restrictions are reversible error *by themselves* requiring a new trial. NRS § 16.030(6) (judge may not unreasonably restrict voir dire); *Whitlock v. Salmon*, 104 Nev. 24, 28, 752 P.2d 210, 213 (1988) (unreasonable voir dire restriction was reversible error).

Standard practice during a personal injury trial is to allow counsel to explore potential juror biases and attitudes toward tort reform, damage caps and similar subjects as jurors often express preconceived notions of bias during such examination. As briefed to the District Court (IV Appx. 625-627) this is even more important in a medical malpractice action where the jury pool in 2004 was exposed to the KODIN political campaign which groomed jurors to think that "astronomical" insurance rates for doctors were driving up medical costs and frivolous lawsuits were

forcing doctors to leave Nevada. These issues were well-briefed to the District Court, particularly what had occurred only three years earlier in the case of *Capanna v. Orth*, 134 Nev. 888, 890, 432 P.3d 726, 730 (2018) where the briefs plainly showed that even 15 years after KODIN, jurors *still* had impressions of a medical malpractice insurance crisis and strong feelings on tort reform in cases filed against doctors. (IV Appx. 625-627); *e.g., Thomas v. Hardwick*, 126 Nev. 142, 149, 231 P.3d 1111, 1116 (2010) (permitting voir dire on jury attitudes tort medical malpractice tort reform). Taylor's counsel made a clear record not only of what the KODIN media campaign told voters but also the exact voir dire Taylor's counsel wished to use. (II Appx. 392, IV Appx. 625-627) Nevertheless, in a ruling that left Taylor's counsel stunned, the District Court universally barred Taylor's counsel from inquiring during voir dire as to juror attitudes toward tort reform, KODIN, caps on pain and suffering damages, or any juror-perceived malpractice insurance crisis. Taylor's counsel was barred from even asking the common voir dire question of whether a juror thinks they would be more or less likely to make an award if they felt the defendant had or lacked insurance. (V Appx. 985-997, VI Appx. 1111) The Court's order actually states "no questions regarding KODIN or tort reform will be permitted" and contains specific examples of barred voir dire. Taylor's counsel made clear on the record that he would be asking tort reform, KODIN and insurance-crisis type voir dire if not for the District Court's ruling. (VI Appx. 1111)

In surveying decisions from other states, we find unanimous support for Taylor's position that preventing a claimant in a medical malpractice case from voir dire regarding juror beliefs and exposure to media publicity regarding tort reform and an alleged medical malpractice crisis is reversible error by itself. *Barrett v. Peterson*, 868 P.2d 96, 99-102 (Utah App. 1993) (remanding for a new trial and holding that jurors should have been allowed to be questioned "whether any of the prospective jurors had been exposed to tort reform and medical negligence propaganda" and stating that "in light of the pervasive dissemination of tort reform information, and the corresponding potential for general exposure to such information by potential jurors, a plaintiff is entitled to know which potential jurors, if any, have been so exposed."); *Borkoski v. Yost*, 182 Mont. 28, 594 P.2d 688 (1979) (permitting voir dire into insurer media campaigns on tort reform); *Capoferri v. Children's Hosp.*, 893 A.2d 133, 142 (2006) (directing a new trial due to the fact that the plaintiff's counsel "should have been allowed to question prospective jurors about their attitudes regarding medical malpractice and tort reform in order to determine whether each individual juror could serve in a fair and impartial manner."); *Lopez-Stayer v. Pitts*, 122 Wn. App. 45, 93 P. 3d 904, 908 (Wash. App. 2004) (plaintiff's counsel in a medical malpractice action could "voir dire on the topics of claims, 'frivolous lawsuits,' and the medical malpractice 'crisis' generally" since 'the jury panel (as part of the general public) had been inundated with publicity

about the medical malpractice crisis and its effect on the health care industry, including recent comments by the President of the United States…"); *Tighe v. Crosthwait*, 665 So.2d 1337, 1341 (Miss. 1995) (trial court erred by refusing to allow medical malpractice plaintiff to conduct voir dire to determine if prospective jurors had been exposed to and affected by a media campaign on "medical malpractice crisis" and "tort reform," since that line of questioning "may have exposed juror biases affecting their ability to render a fair and impartial verdict."); *Kozlowski v. Rush*, 121 Idaho 825, 833-34, 828 P.2d 854, 862-63 (1992) (concluding that "a party may inquire whether jurors have been exposed to media accounts of a medical malpractice crisis" if the plaintiffs first "demonstrate to the court that potential jury members may have been exposed to such advertisements."); *Sutherlin v. Fenenga*, 111 N.M. 767, 776, 810 P.2d 353, 362 (N.M. Ct. App. 1991) (malpractice plaintiff may conduct a good faith voir dire inquiry into malpractice crisis issues "upon a proper showing that members of the prospective jury panel may have been exposed to media accounts concerning allegations about the effect of jury awards on insurance costs."); *Kelman v. Motta*, 564 So.2d 147, 148-49 (Fla. App. 1990) (malpractice plaintiff questioned jurors about impending vote on ballot proposition relating to malpractice insurance crisis); *Babcock v. Northwest Memorial Hospital*, 767 S.W.2d 705, 709, 32 Tex. Sup. Ct. J. 294 (Tex. 1989) (patient should have been permitted to question venire panel about alleged "lawsuit crisis" or "liability crisis"

in order to discover any "bias or prejudice resulting from the controversy over tort reform …."). [4]

By barring voir dire on juror exposure to or attitudes towards KODIN, tort reform, attitudes about any perceived "medical malpractice" crisis and attitudes about malpractice insurance rates, the District Court made certain that Taylor's counsel could not uncover potential biases that jurors may have toward medical malpractice cases and tort reform in general. Indeed, Taylor's counsel was barred from asking prospective jurors if they had even *heard of* KODIN, tort reform or an alleged medical malpractice/doctor crisis in Clark County. Frustratingly, these questions are standard fare in the Eighth District and often give counsel their clearest basis for cause challenges and good ideas as to peremptory challenges of jurors, but these questions were completely barred in Taylor's case. The District Court yet again erred heavily in favor of the defense and handicapped Taylor from uncovering potential juror biases against her case during voir dire on one of the most important potential bias issues in the case. While the District Court does have discretion as to voir dire, this error is so blatant and contrary to existing law and practice that it warrants reversal and a new trial for an unreasonable limitation of voir dire.

[4] The Nevada Supreme Court addressed this issue once in *Thomas v. Hardwick*, 126 Nev. 142, 149, 231 P.3d 1111, 1116 (2010), but this case is inapposite to the present dispute because in *Thomas* the plaintiff actually consented to limit the voir dire and "did not submit any specific voir dire questions or have voir dire transcribed" or otherwise lay a foundation to enable the court to assess the asserted errors.

C. The District Court made numerous evidentiary errors during presentation of the evidence and cross-examination

1. The District Court Improperly Prevented Taylor from Presenting more than $200,000 in Special Medical Damages

Going into trial, neither Dr. Brill nor his retained expert, nor any other witness had been disclosed for the defense that would testify that either (1) the treatment Taylor received to repair her bowel injury was not reasonable or necessary or that (2) the amount of the charges of the medical expenses was for some reason not usual, customary and reasonable. (XI Appx. 2273, XII Appx. 2322-2325, 2365) Therefore, trial should have been a damages cake-walk for Taylor to present over $200,000 in uncontested hospital and other expenses for subsequent care. (IX Appx. 1851-1864) Instead, the District Court seemed obsessed with assuring that Taylor be barred from introducing this evidence to show the severity of her damages. While this issue is a damages issue and the jury found no liability, damages and liability are inextricably intertwined in the case because the extent of the perforations and damages bears on the care and skill used by the physician. *Verner v. Nev. Power Co.*, 101 Nev. 551, 554, 706 P.2d 147, 150 (1985) (recognizing the intertwined nature of damages relating to liability in a personal injury action); *Canterino v. Mirage Casino-Hotel*, 118 Nev. 191, 42 P.3d 808 (2002) (finding that instruction errors on damages warranted a new trial on liability as well).

A personal injury claimant must produce evidence that the amount of her

medical bills is usual, customary and reasonable. *Curti v. Franceschi*, 60 Nev. 422, 428, 111 P.2d 53, 56 (1941). In *Curti*, the evidence required of this was held to be minimal, the treating physician testified that he had no usual and customary fee but felt his charges were reasonable. While the physician testified to the reasonable nature of the expenses in *Curti*, decided 80 years ago, any savvy modern practitioner knows that today's doctors have practice managers and billing companies that handle the setting of rates and billing issues. Most physicians today, if asked what a usual and customary amount for a charge is, will testify that they aren't sure or that they have billing companies that decide those rates. Because of this, in many cases the actual front office or billing personnel are called to justify the bill's amount.

There is very little guidance in Nevada law regarding what degree of evidence is required to show the usual and customary amount of a medical bill, although what law exists shows that it is a low, low threshold. The Nevada legislature stated in NRS § 439B.670(4), a bill pertaining to prescription drug prices, that the "usual and customary" price of a prescription drug simply "means the usual and customary charges that a pharmacy charges to the general public…" In other words, the general public price is the usual and customary amount, those two concepts are one and the same. Additionally, many states have recognized that the bill itself from the medical care provider is prima facie evidence of the usual and customary amount of the billing in a case such as Taylor's case where no witness for the defense was disputing

the usual and customary nature of the amounts. *Wagner v. McDaniels*, 9 Ohio St. 3d 184, 184, 459 N.E.2d 561, 563 (1984) ("Proof of the amount paid or the amount of the bill rendered and of the nature of the services performed constitutes prima facie evidence of the necessity and reasonableness of the charges for medical and hospital services."); *accord* 22 Am Jur 2d Damages § 734 ("Ordinarily, testimony by the patient or by a physician or health care provider on amounts charged or paid for medical services is sufficient evidence of the reasonable value of the services in the absence of some showing to the contrary."); *Arthur v. Catour*, 216 Ill. 2d 72, 88, 833 N.E.2d 847, 857 (2005) (evidence a medical bill was presented and paid is prima facie evidence of reasonableness as to the amount). The usual, customary and reasonable amount of the charges can be established by expert testimony or other means, such as by affidavit or even the plaintiff's own testimony. *State Farm Mut. Auto. Ins. Co. v. Bowling*, 81 So. 3d 538, 540 (Fla. Dist. Ct. App. 2d Dist. 2012) ("To meet this burden, the [plaintiff] used a one-page summary of [plaintiff's] medical bills and [plaintiff] testified that the charges were reasonable").

While Taylor asks this court to recognize that a medical bill itself is prima facie evidence of the usual and customary charges if uncontested by the Defense, Taylor sought to present far more evidence than just the medical bill itself in her case. On the fourth day of trial, she sought to call representatives from the office of Dr. Brian Lipman ($20,805) (IX Appx. at 1866-1873), Henderson Hospital

($40,465) (IX Appx. at 1874-1881), and Dignity Health/St. Rose Hospital ($144,994.12) (IX Appx. 1881-1893, XII Appx. 2300) to testify to the usual and customary nature of their charges for Taylor's medical expenses. For every one of these witnesses the District Court seemed to have pre-determined that no matter their testimony was it would be insufficient and the District Court ordered the testimony to occur outside the presence of the jury. (IX Appx. 1851-1864, 1866-1893)

While testimony of the disputed witnesses varied, the best example of error by the District Court is with the representative of St. Rose hospital, Brian Kleven. (IX Appx. 1881-1893) Mr. Kleven testified that he was the chief financial officer of Dignity Health in Nevada, which includes three major hospitals in Las Vegas including St. Rose Hospital. He supervises over 200 people and had been a CFO for thirteen years in the health care industry. His job duties included all financial aspects of the company, including setting and determining amounts charged for medical services. He testified that all patients are charged the same across all their Las Vegas hospitals based on a chargemaster "that for each service or procedure or item, it's a set, level charge that is uniformly applied to all patients." This chargemaster is periodically adjusted and determined by industry standard billing codes for services. He testified that the total billing amount for services provided to Taylor was $144,994.12. He testified that these charges were no more or no less than what other patients receiving the same services on the same day would be charged (the general

public price). He stated that the hospital considered its own charges to be reasonable and he had no reason to believe the charges were not usual and customary in amount. This would appear to be overwhelming evidence of the usual and customary nature of the charges and certainly would meet the low threshold of admissibility to allow the jury to make the determination. However, the jury never got to hear any of the witnesses. Defense counsel argued that a witness testifying to usual and customary nature of charges must have conducted some sort of global study of all providers and hospitals in the market, an impossible standard to meet especially considering the confidential and proprietary nature of billing schedules. (IX Appx. 1896)

This District Court excluded all of this testimony and the bills themselves, thus the jury never heard the true severity of the special damages as including a total of $206,264.12 in medical expenses incurred. (IX Appx. 1893-1900, XII Appx. 2301) The severity of the injury and conduct went directly to standard of care and the liability issue. By concealing the extent of the damages, the District Court undermined the severity of the conduct and the lack of skill to the jury.

Additionally, Taylor was also qualified to testify to the usual and customary nature of *her own* medical expenses. Although the District Court excluded her from testifying so, (XI Appx. 2130, 2134-2135) Taylor made an offer of proof that she would testify that she actually had to pay from her own pocket $6,337.19 (relevant because every known state allows evidence of amounts actually paid as to usual and

customary nature of charges), that she received various bills for medical services totaling $210,155.29, that Taylor has an extensive history and knowledge of medical billing in the community working in the medical billing industry for 27 years overseeing certain billing practices for hospitals and doctors, that in that time she has seen thousands of medical bills, and that in her experience the amount of the bills provided to her were usual, customary and reasonable. (X Appx. 2061-2063, XI Appx. 2130, 2134-2135) Again, this just wasn't enough in the District Court's opinion to even present to the jury to let the jury decide the issue.

The District Court decided it would not allow Taylor or the staff of medical providers to testify as to the usual and customary nature of the bills she received. The evidence Taylor was going to present on the usual, customary and reasonable nature of charges probably exceeded what is presented in 99% of all other injury trials, yet to the District Court it was insufficient to even present to the jury. It became clear that no matter how overwhelming the evidence was and despite the fact that the bills are prima facie evidence, that payments were made and that all witnesses called were prepared to testify that the bills amounts were usual, customary and prepared from a set schedule of charges that any member of the general public would be charged for the same services that the District Court simply did not want the jury to hear how severe the damages were in the case.

2. The District Court Improperly Allowed Collateral Source Evidence of Insurance Related Provider Write-Downs

In a typical personal injury case, a defendant cannot introduce evidence of collateral source payments toward the plaintiff's medical expenses by a health insurer. *Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996) (explaining the collateral source rule). The Nevada Supreme Court has recognized that Nevada's collateral source rule encompasses both (1) payments of a collateral source *and* (2) contractual write-offs of a bill due to insurance payments. *Khoury v. Seastrand*, 132 Nev. 520, 538, 377 P.3d 81, 93 (2016) ("[e]vidence of payments showing medical provider discounts, or write-downs, to third-party insurance providers" is irrelevant to a jury's determination of the reasonable value of the medical services and will "likely lead to jury confusion."). For a medical malpractice action, NRS § 42.021 alters this general rule by allowing evidence of "any amount payable as a benefit to the plaintiff" at trial. At trial, the District Court allowed two smaller medical bills to be introduced into evidence, including the amounts paid, and contractual write-offs of the remaining balance despite the fact that no witness for the defense testified that the amount of the payments was the usual, customary and reasonable charge for the services provided. (IX Appx. 1794-1798, X Appx. 1916-1918, 1933-1935) Taylor maintains this was error and filed a motion in limine to stop this. (II Appx. 336)

Taylor seeks to present two separate issues of law regarding application of

NRS § 42.021 which have not previously been considered by the Supreme Court. First, by its plain terms NRS § 42.021 allows introduction of collateral source *payments*, but does not allow introduction of evidence regarding contractual *write-downs*. While these are perhaps related concepts, the collateral source rule covers them both. *Khoury*, 132 Nev. at 538, 377 P.3d at 93 ("[e]vidence of payments showing medical provider discounts, or write-downs, to third-party insurance providers" is irrelevant to a jury's determination of the reasonable value of the medical services and will "likely lead to jury confusion."). NRS § 42.021 is in derogation of the common law and thus is narrowly or strictly construed. The statute plainly does not allow introduction of write-downs or write-offs, only *payments* from a collateral source. Thus, the District Court erred when it introduced evidence of write-offs or write-downs over Taylor's objection. (X Appx. 1916-1918, 1933-1935) Further, any improper introduction of collateral source evidence is reversible error affecting liability and damages because it wrongly suggests the plaintiff is already compensated and requires a new trial. *Bass-Davis v. Davis*, 122 Nev. 442, 454, 134 P.3d 103, 111 (2006) ("The admission of collateral source evidence can only be cured by a new trial.").

Second, Taylor asserts that in cases where the defense lacks evidence that the amount of the collateral source payments are the usual and customary amounts, NRS § 42.021 cannot be applied because it would allow introduction of irrelevant and

prejudicial evidence. NRS § 42.021 would unconstitutionally violate separation of powers if it sought to remove the judiciary's ability to assess whether evidence is relevant or more prejudicial or probative under NRS § 48.015-35. (II Appx. 337). Even if NRS § 42.021 states that the defendant "may" introduce collateral source evidence in some cases, a defendant may never argue for nullification or request that the jury ignore the law. In Taylor's case, she argued that the defense had no witness who were able to testify that the amount of the collateral source payments represented the usual, customary and reasonable amount of the medical charges. (II Appx. 336-338) Under such circumstances, the only reason for admission of such evidence would be to invite nullification from the jury to ignore the law that the usual, customary and reasonable amount of the expenses must be awarded.

Taylor asks the Court to find that if a defendant seeks to introduce evidence of collateral source payments under NRS § 42.021, it must also have some evidence that the amount of those payments are the usual, customary and reasonable amount. Otherwise, a defendant should not be allowed to introduce such payments into evidence since it would not be probative of any relevant fact and would simply be a nullification argument to the jury that the jury should ignore the usual and customary amounts and award the paid amounts instead.

3. The District Court erred in not Allowing the Exemplar Resectoscope to be Admitted into Evidence

The District Court may admit demonstrative evidence such as models and

exemplars and allow jurors to handle the same. The most important piece of physical evidence in this case was the Symphion resectoscope which indisputably caused Taylor's injuries. However, Dr. Brill disposed of the actual resectoscope after the procedure (it is designed for one use and is disposable) so it was not available. At trial, Taylor's counsel instead sought to introduce an exemplar resectoscope—which both sides used repeatedly during trial and agreed was accurate—into evidence so jurors could handle it during deliberations. (XII Appx. 2300-2303) Taylor considered this crucial to her case because if jurors could personally handle and touch the resectoscope they would see the tip is incredibly blunt and it would be nearly impossible to mechanically perforate the uterus and small intestine with it, thus greatly supporting Taylor's theory that the perforations were thermal in nature or that in any event Dr. Brill was extremely careless in conducting the procedure. The District Court denied this request saying that COVID presented too large a risk to the jurors (who had all just sat next to each other for the better part of two weeks and earlier indicated they did not have to quarantine due to vaccinated status). (VIII Appx. 1585-1607, XII Appx. 2302-2303) This prevented the jurors from touching the resectoscope for themselves and removed one of Taylor's strongest pieces of evidence from the jury's up-close consideration. It was error for the District Court to deny this request as to one of the most important pieces of evidence in the case and any COVID concerns were minimal, if any, and could have been cured by a

sterile wipe of the instrument. The reality is that yet again the District Court did not want to facilitate the jury touching any evidence that would greatly support Taylor's theory of the case and this was error.

4. The District Court Erred in Excluding Impeachment Evidence of Dr. Brill's Retained Expert, Dr. McCarus

Dr. Brill's sole retained medical expert as to standard of care was Dr. McCarus. Dr. McCarus testified that he felt Taylor's injury was not caused by a thermal burn but instead by mechanically pushing or jamming the resectoscope through the uterus and into the small bowel and that such perforations of the bowel during a uterine procedure were (incredibly) within the standard of care. (XI Appx. 2242, 2255-2258) During discovery, Taylor's counsel found that Dr. McCarus frequently testified for patients *against* doctors, the opposite of what he was doing in Taylor's case. Further, it was discovered that in *three other matters* where Dr. McCarus had testified in hysterectomy cases for the patient he represented that bowel perforation was *below* the standard of care, which was inconsistent with his testimony on behalf of Dr. Brill. When Taylor's counsel began to cross-examine Dr. McCarus about the expert's shifting testimony depending on whether he represented the plaintiff or defendant, the District Court sustained an objection and excluded this evidence. (XI Appx. 2253, 2288-2289)

The law of Nevada is that when it comes to exposing bias and credibility of a witness, the cross-examiner should be given wide latitude and "must be permitted to

elicit any facts which might color a witness's testimony." *Bushnell v. State*, 95 Nev. 570, 572, 599 P.2d 1038, 1040 (1979). The District Court erred in excluding this critical cross-examination of Dr. McCarus. Counsel should be given great latitude on cross-examination of an opposing expert and sought to criticize both Dr. McCarus' general credibility (for testifying bowel perforation is negligent in other matters) but also his bias (since his opinion on the subject changed depending on who hired him in a given case). The District Court's stated reason for denying this impeachment was that Dr. McCarus' other testimony had concerned hyster*ectomy* (removal of the uterus) as opposed to hyster*oscopy* (visualization of the interior of the uterus). (XI Appx. 2288-2289) Taylor disagrees. First, the difference is for the finder of fact jury to weigh and assess. By denying this cross-examination, the District Court simply made sure that the jury never fully heard that in three other matters Dr. McCarus had testified differently as to whether a bowel perforation was beneath the standard of care for the surgeon when operating on the uterus. Second, if anything a hysterectomy is *more invasive* than a hysteroscopy (where the instruments should never leave the uterus) and thus the fact that Dr. McCarus had testified perforation was still below the standard of care in an even more invasive procedure would only have made the impeachment more convincing. However, the jury was not allowed to hear this cross-examination and impeachment of Defense's most important standard of care expert.

D. The District Court erred by not allowing permitted, persuasive phrases in Taylor's closing argument

1. The District Court Erred in Barring the Phrase "Send a Message" During Taylor's Closing Argument

In a pre-trial motion in limine ruling, Taylor notified the Court that her counsel intended to use the phrase "send a message" in closing arguments as expressly permitted by the Nevada Supreme Court. *E.g., Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 78, 319 P.3d 606, 613-14 (2014) (permitting "send a message" arguments); *Pizarro-Ortega v. Cervantes-Lopez,* 133 Nev. 261, 269, 396 P.3d 783, 790 (2017) ("although this court did not expressly approve of 'send a message' arguments, we concluded that such arguments are not prohibited so long as the attorney is not asking the jury to ignore the evidence."). (I Appx. 111-112, 830-831) The motion gave clear, permissible examples of how the phrase was going to be used that focused specifically on Dr. Brill and the case at hand. The motion was opposed on the incorrect argument that "send a message" was only permissible in punitive damages cases (IV Appx. 742-743) and the District Court—in direct contradiction to the Supreme Court's precedent allowing the phrase—barred Taylor's counsel from using the phrase "send a message" in any manner at trial. (V Appx. 963, 1098-1099) In the same hearing and order the Court also found that Taylor may not use per diem arguments in direct contradiction to the Nevada Supreme Court's ruling in *Johnson v. Brown*, 75 Nev. 437, 447, 345 P.2d 754, 759 (1959) and ruled that Taylor's

counsel may not argue violation of safety rules and the importance of safety rules to the jury or potential media coverage of the verdict, in direct contradiction to the Nevada Supreme Court's ruling in *Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 790 (Nev. 2017).

2. *The District Court Erred in Barring Taylor's Counsel from Referring to the Jury as the "Conscience of the Community" During Closing Argument*

Seeking to further handicap Taylor's counsel during closing argument, Dr. Brill's counsel moved to bar Taylor's counsel from referring to the jury as the "conscience of the community" and similar argument during closing. (V Appx. 961) Over Taylor's opposition (I Appx. 112-113), the District Court granted this request (Appx. V Appx. 1099).

The Nevada Supreme Court and numerous other courts have used the exact language "conscious of the community" to describe the jury. Referring to the jury as the conscious of the community is expressly permitted. *See*, *e.g., El Dorado Hotel, Inc. v. Brown*, 100 Nev. 622, 629, 691 P.2d 436, 442 (1984); *Johnson v. State*, 118 Nev. 787, 805, 59 P.3d 450, 462 (2002) ("A jury must 'express the conscience of the community...'" in a criminal trial); *Pulsipher v. Clark Cty.*, 2011 WL 1792705, at *1 (D. Nev. May 11, 2011) ("True controversies of fact under our system must be submitted to the conscience of the community—a jury—for determination."); *see also Wicks v. Wal-Mart Stores, Inc.*, 199 F.3d 1324, 1324 (2d Cir. 1999) (rejecting a motion for new trial where counsel suggested in closing that

the jury should act as the "conscience of the community"); *United States v. Grauer*, 701 F.3d 318, 323 (8th Cir. 2012) ("Unless calculated to inflame, an appeal to the jury to act as the conscience of the community is not impermissible.").

Referring to the jury as the "conscience of the community" is a technique espoused by a well-known plaintiff trial advocacy system. While it should be permitted in the closing argument of *any* case as it is not improper at all, in Taylor's case in particular arguing to the jury that it is the conscience of the community was particularly important. Psychologically, the jury needed to understand that it, the *jury*, decides what is safe for the community and is reasonable and skillful care by the physician. Instead, Dr. Brill's entire defense rested on his incorrect assertion that the *medical community*, not the jury, got to deem intestinal perforation as an acceptable risk of surgery for which he cannot be liable merely because it is a "risk" or "complication." Thus, by barring Taylor's counsel from explaining the opposite is true to the jury, the District Court only further played into the hands of the incorrect assumption of risk defense argument that Dr. Brill developed.

E. The District Court erred in giving and refusing certain jury instructions

1. The District Court Erred in not Giving a Jury Instruction to Disregard Insurance Coverage or Lack Thereof

Taylor requested that the District Court give the jury the standard Nevada jury instruction, Nev. J.I. 1.07, that the jury is to ignore any potential insurance coverage

or lack thereof when arriving at their verdict. (IV Appx. 628-629, XIII Appx. 2648) Again, this is standard fare for personal injury trials in this state. Taylor's counsel has never seen a personal injury case where this standard instruction was *not* given. Indeed, only three years earlier, the Nevada Supreme Court upheld the giving of the instruction in a medical malpractice case and accurate comment by plaintiff's counsel to the jury that insurance must not factor in their decision. *Capanna v. Orth*, 134 Nev. 888, 890 n.3, 432 P.3d 726, 730 (2018) (finding no error in a medical malpractice case where Nev. J.I. 1.07 was given and plaintiff's counsel reminded the jurors that they were not to consider the presence or absence of insurance in rendering their verdict). (IV Appx. 628-629) The Defense opposed the instruction with the argument that giving the instruction may draw attention to the fact that the doctor may have insurance. (V Appx. 863-864) Notably, this was the exact argument *rejected* by the Nevada Supreme court in the *Capanna* case. (IV Appx. 628-629, 689-691). Nevertheless, for Taylor's case the District Court disregarded the direct authority of the Supreme Court and refused to give the insurance instruction. (XII Appx. 2465-2466).

Taylor's counsel felt the pattern, standard jury instruction was particularly important in Taylor's case because he has experienced that some jurors actually speculate that a doctor defendant cannot afford the "astronomical" insurance rates KODIN told jurors existed and, thus some jurors assume the doctor must *lack*

insurance otherwise insurance would have settled the case. Indeed, during voir dire Juror # 2 expressed great hesitancy if he felt his verdict would be personally affecting the doctor.[5] (VI Appx. 12921293, XII Appx. 2465-2466). Taylor's counsel had actually moved to remove this juror #342 (who later became the foreperson) for cause, but the District Court refused, despite the juror's obvious pre-existing hesitancy to return a verdict that would financially harm the Defendant, which was also error. (VII Appx. 1317-1319) This is the exact type of juror that may well speculate as to whether the doctor did or did not have insurance and might adjust his verdict accordingly, something Taylor's counsel was not allowed to ask about in voir dire or correctly recite the law in jury instructions and closing argument.

2. The District Court improperly Allowed a Defense "Mere Happening" Instruction

At the same time the District Court was barring a routine pattern instruction Taylor requested, the Court was providing the defense whatever it wished for instructions. Over Plaintiff's objection, the District Court gave a customized "mere happening" instruction to the jury, also called a *Gunlock* instruction in Nevada. (XII Appx. 2471-2472, XIII Appx. 2495-2496, 2624). *See*, *Gunlock v. Frontier Hotel Corp.*, 78 Nev. 182, 370 P.2d 782 (1962). Per this instruction, the District Court told

[5] Despite the juror literally stating "perhaps there is some bias there [in his mind] just—yeah…that's a little tough" when asked if he would be hesitant to make a large financial award, but the Judge would not remove him for cause.

the jury that "The mere fact that a complication occurred to the patient involved in this action is not, in and of itself, sufficient to establish predicate liability. Negligence is never presumed, but must be established by substantial evidence." (XIII Appx. 2624) Notably, the instruction was altered to directly instruct the jury that all that happened to Taylor was a "complication" per the defense theory. Taylor believes this was erroneous for several reasons.

The Supreme Court has shied away from the prejudicial *Gunlock* instruction in recent years and found that giving the instruction is either error when given or upheld decisions not to give the instruction. In *Spilsbury v. Rynders*, 132 Nev. 1031 (2016) (unpublished) the Supreme Court affirmed the District Court's denial of a physician's proposed "mere happening" instruction. In *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1005, 194 P.3d 1214, 1219 (2008), the Nevada Supreme Court found the "mere happening" instruction contained a misstatement of the law based on the facts of that case and reversed the District Court decision. *See also D & D Tire, Inc. v. Ouellette*, 131 Nev. 462, 471, 352 P.3d 32, 38 (2015) (District court did not err in refusing to give a *Gunlock* instruction because it was repetitive of other, accurate instructions on the law). The "mere happening" instruction is confusing to a jury and abused by the defense in virtually every case where it is given but was particularly abused in Taylor's case. This is because it promotes the false defense that a mere happening, i.e. a mere "risk" or

"complication" cannot establish liability and because it essentially conflicts with the correct jury instruction that standard of care is the actual issue in the case, thus confusing the jury through conflicting instructions. In other words, in this case the instruction conflates with the jury a "mere happening" with a "complication" so they feel the occurrence of a risk or complication is never sufficient to find liability. Indeed, the instruction played directly into Defense counsel's improper argument by boldly telling the jury that "a complication occurred to the patient involved in this action" while Taylor's very argument was that her injury was not a mere uncontrollable risk or complication but rather occurred from conduct below the standard of care. Further, the instruction told the jury that Taylor's case had to be established with "substantial" evidence which the jury may well have felt was a higher level of proof than a preponderance of the evidence.

Predictably, the "mere happening" instruction was one of the few jury instructions defense counsel argued specifically during closing since it was literally telling the jury that all that happened to Taylor was a "complication" insufficient to establish liability. Defense counsel directly pointed to the *Gunlock* instruction and told the jury "[l]adies and gentlemen…[t]he mere fact, and this instruction is very clear, the mere fact that a complication occurred to a patient involved in the action is not in and of itself to establish predicate liability…" (XIII Appx. 2557) This instruction simply adopted the defense theory and told the jury that all that happened

to Taylor was a mere "complication" which was insufficient to establish liability. In post-verdict juror interviews, Jurors # 342 and 585 stated they voted for a defense verdict in part because they didn't think Dr. Brill *intentionally* caused the injury which (they incorrectly believed) was needed in order to return a verdict for Taylor, which shows the improper risk and complications arguments of the Defense helped carry the day. The mere happening instruction was not only an incorrect statement of the law but fully adopted the Defense's "mere complication" theory and conflicted with the accurate instruction, # 28, that told the jury that the fact the physician considered something to be a risk or complication is irrelevant. (XIII Appx. 2631) The giving of the confusing, legally incorrect and conflicting "mere happening" instruction was highly prejudicial and continued the long line of errors by the District Court in favor of the Defense.

F. The District Court erred in allowing improper argument and statements of Defense counsel and limiting Taylor's counsel in closing argument

1. Defense Counsel Misconduct-Pathology Reports

During closing argument, Defense counsel argued contrary to all evidence that pathology reports showed that bowel cells were not in the pathology sample and, therefore, the perforations could not have been caused by thermal burning from the resectoscope (XIII Appx. 2562-2563, 2567-2568) even though there was no foundation for this and the Defense's own expert, Dr. McCarus stated he could not

say whether any of the cells tested came from the resectoscope. (XI Appx. 2276-2277) This misrepresented the pathology report, which plainly states the cells were taken during the separate, later curettage portion of the procedure, not the resection portion. (XIII App. 2387-2388) Plaintiff's counsel noted this incorrect characterization of the pathology report in closing argument. (XIII Appx. at 2593)

Plaintiff's counsel then began to argue in rebuttal that if the pathology reports said what Defense counsel argued, the Defense should have called the pathologist and, further, that the jury is allowed to infer from the failure of the defense to call that witness that the evidence would not have been favorable to the defense. (XIII Appx. 2592) Taylor's counsel was stopped mid-sentence with a frivolous objection to this argument, which the District Court sustained. (XIII Appx. 2592) Outside the presence of the jury, Defense counsel explained that he was asserting an objection called "burden shifting." (XIII Appx. 2596-2597) This objection won't be found in any legal opinions or textbooks because it does not exist, but the District Court was again happy to oblige the Defense and spoke as if an objection for "burden shifting" was well-established and easily applied to the argument Taylor's counsel was about to present.

Contrary to the District Court's newly-invented "burden shifting" objection, the Nevada Supreme Court has repeatedly held that in both criminal and civil cases a party may comment on the opposing party's failure to call an allegedly important

witness and a negative inference that the party failed to call that witness because the testimony would have been adverse. *Lamb v. State*, 127 Nev. 26, 42, 251 P.3d 700, 710-11 (2011) ("a prosecutor may comment on the defense's failure to call a witness where, as here, the defendant 'injected [the person] into the testimony as an alibi witness.'"); *Rimer v. State*, 131 Nev. 307, 329, 351 P.3d 697, 713 (2015) ("A defense attorney is permitted to argue all reasonable inferences that arise from the evidence presented at trial, including negative inferences that may arise when the State fails to call important witnesses or present relevant evidence."). Indeed, there is direct authority from the Nevada Supreme Court on this issue in a civil medical malpractice case as well. *Jain v. McFarland*, 109 Nev. 465, 475, 851 P.2d 450, 457 (1993) (a patient's attorney could argue in closing arguments as to the defense doctor's failure to testify and failure to call two witnesses that were allegedly in the doctor's favor).

After the objection was sustained, outside the presence of the jury the District Court explained that a new objection was being applied called "burden shifting." (XIII Appx. 2596-2598) Under this new "burden shifting" objection, the plaintiff (who bears the burden of proof at trial) is prohibited from commenting on the Defense's failure to call an allegedly important witness because "actually talking about a failure to call witnesses shifts the burden…" However, the new objection only worked one-way and would not hamper the defense from making such an argument since the Defense would not have the burden of proof. (XIII Appx. 2596-

2598)

The District Court clearly erred and prevented important argument to rebut the Defense theory that the pathology reports supported its case. Notably, this issue turned out to be crucial to the jury, whose sole question during deliberations was where the pathology reports could be located. (XIII Appx. 2656-2657, 2691) Taylor actually suspects that Judge Trujillo (who was a public defender prior to taking the bench and had no known civil trial experience in practice) confused this legal issue with the criminal law rule that the prosecutor may not comment on *the accused's* failure to take the stand in a criminal trial. *Taylor v. State*, 132 Nev. 309, 325, 371 P.3d 1036, 1046 (2016) ("The Fifth Amendment requires that the State refrain from directly commenting on the defendant's decision not to testify."). It appears the District Court was just unaware that the Nevada Supreme Court has repeatedly found differently for all other types of witnesses. The District Court's new "burden shifting" objection was error and prevented crucial argument in opposition to the Defense's unique characterization of the pathology report.

2. Defense Counsel Misconduct-Vouching and Nullification

Defense counsel also made inappropriate vouching and nullification appeals to the jury to disregard the actual evidence in the case and assume different facts. During closing argument, Defense counsel addressed the rather bad fact for his client that Dr. Brill had <u>not</u> advised his patient of either perforation. The only two parties

to that conversation, Ms. Taylor (X Appx. 2079-2080) and Dr. Brill (XII Appx. 2309-2310) gave no testimony that Taylor was advised of her perforations post-op with Taylor adamantly denying the same and Dr. Brill saying he could not recall doing so. In focus groups done by Taylor's counsel, this was a strong factor for potential jurors in Taylor's favor. To deflect this at trial, Defense counsel simply made up new facts and vouched that those were true, contrary to the evidence. He told jurors—based on no actual evidence—that in fact it was Dr. Brill's "custom and practice" to advise patients of such complications personally post-op (Dr. Brill actually testified he did not recall what was said) and, in fact, that contrary to the actual case testimony, Dr. Brill likely actually did tell Taylor of the uterine perforation in post-op (contrary to Dr. Brill's own actual testimony that he did not recall doing so). He then personally vouched for these new facts, telling the jury "I can guarantee you…" that Dr. Brill (apparently despite Dr. Brill's own testimony) told Taylor of her perforation. (XIII Appx. 2569-2570)

Essentially, what Defense counsel did was take an awful fact for his client (Dr. Brill did not tell the patient of a serious perforation she sustained), made up new facts that were contrary to all the testimony but favorable to his client, and then personally guaranteed that counsel's imaginary facts were the real evidence.

Objection to this argument and the improper personal vouching of Defense counsel was overruled by the District Court. (XIII Appx. 2569-2570, 2596). Shortly

after the District Court allowed Defense counsel to personally vouch for his client, he took full advantage and closed his argument by asking jurors not to focus on the actual evidence in the case but instead to ask themselves (invoking a religious phrase) "What would McBride [defense counsel] say?" (XIII Appx. 2586) All of this is clearly improper and simply amounted to Defense counsel fabricating evidence to explain away the actual evidence and then personally vouching to the jury that his evidence was true. Although objection was made, it was overruled. (XIII Appx. 2569-2570, 2596). Outside the presence of the jury, Judge Trujillo seemed to not understand there are prohibitions against arguing against the actual testimony, that habit evidence cannot overcome the actual testimony, or that counsel cannot personally vouch for a case or client.

VI. CONCLUSION

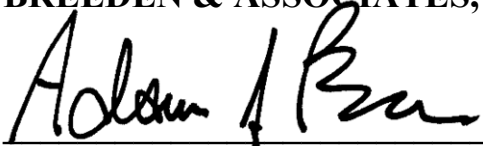
In this case, a malpractice verdict in favor of Taylor seemed inescapable as her physician used a cutting instrument so wrongly through her body that it perforated two organs it was not supposed to, causing her severe pain, infection and hundreds of thousands of dollars in undisputed medical treatment. Yet what Taylor encountered during trial was a District Court Judge who had little to no civil law experience who was trying one of her first (if not the first) medical malpractice cases. The Judge had received overwhelming financial support from the Defense bar during her campaign, including multiple, larger donations from Defense counsel. Then, the

District Court proceeded to violate clear law that would allow Taylor to make certain arguments and present certain evidence while allowing the Defense to do anything it wished.

Taylor's counsel strongly urges the Supreme Court to closely examine this case. There is a long pattern of the District Court ignoring well-established law in order to rule against Taylor but permitting Defense counsel to do anything it wanted. There was a long pattern of handicapping Taylor's counsel and forbidding him from conducting effective voir dire, cross-examination and closing argument. Taylor asks the Supreme Court to correct the numerous errors which occurred and remand this matter for a new trial where the assumption of risk defense is barred and the other errors outlined herein are corrected.

Respectfully submitted this 9th day of March, 2022.

BREEDEN & ASSOCIATES, PLLC



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[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word, 2020 edition in 14-point Times New Roman font; or

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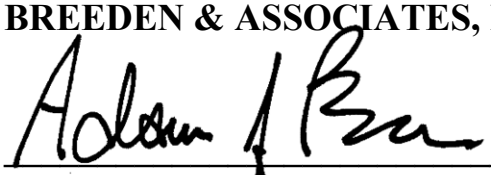
Dated this 10th day of March, 2022.

BREEDEN & ASSOCIATES, PLLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of March 2022, I served a copy of the foregoing legal document entitled **APPELLANT TAYLOR'S OPENING BRIEF** via the method indicated below:

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