IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMBERLY TAYLOR, Appellant, vs. KEITH BRILL, M.D. and WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC, Respondents.	Supreme Court Case No.: 83847 District Court Case No.: A773472

RESPONDENTS, KEITH BRILL, M.D. AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC'S ANSWERING BRIEF

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I.

NRAP 26.1 DISCLOSURE

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

RELATED ENTITIES:

None.

LAW FIRMS APPEARING FOR RESPONDENTS IN THE CASE OR EXPECTED TO APPEAR IN THIS COURT:

Robert C. McBride, Esq. and Heather S. Hall, Esq. of McBride Hall represent Respondents Keith Brill, M.D. and Women's Health Associates of Southern Nevada-Martin, PLLC.

DATED: April 25th, 2022.

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/s/ Heather S. Hall

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ISSUES PRESENTED

This appeal presents the following, primary issues:

1. Did the District Court err by allowing the Defense to present evidence that Ms. Taylor's complication is a known risk and complication for hysteroscopy that occurred in the absence of negligence?

2. Did the District Court abuse its discretion in refusing to allow Plaintiff's counsel to conduct voir dire on tort reform and Defendants' insurance?

3. Do any of the alleged evidentiary errors entitle Plaintiff to a new trial?

4. Was it an abuse of discretion for the District Court to preclude statements of "send a message" and the jury as the "conscience of the community"?

5. Did the District Court err in limiting the cross examination of Defendants' retained expert, Steven McCarus, M.D.?

6. Did the settling of jury instructions result in a miscarriage of justice?

7. Were the arguments of Defense counsel in closing argument impermissible?

V.

STATEMENT OF THE FACTS

Kimberly Taylor filed this medical malpractice case against her OB/GYN, Keith Brill, M.D. and his practice group, Women's Health Associates of Southern

Nevada-Martin, PLLC (hereinafter referred to as "WHASN") on April 25, 2018. (A. V.I, APPX000001 – APPX000025).

The surgery Dr. Brill planned to perform on April 26, 2017 was hysteroscopy with fibroid resection, hydrothermal ablation and dilation and curettage (D&C). During the course of the surgery, there was a uterine perforation, and the hydrothermal ablation was not performed due to this recognized and repaired complication. (A. V.V, APPX001032). There was also a bowel perforation during the course of the surgery that was not identified at the time of surgery because there was no evidence of injury to any organs other than the uterus. (A. V.V, APPX001031 – APPX001032). Both uterine and bowel perforation are known risks of the procedure. (A. V.V, APPX001030 – APPX001033).

Motions in limine were filed on August 18, 2021. Of note to this appeal, Plaintiff filed her Motion in Limine #1: Motion to Permit Certain Closing Argument Techniques of Plaintiff's Counsel. Defendants' Opposition to the Motion was filed on September 1, 2021. (A. V.IV., APPX000735 – APPX000746). Plaintiff filed a Reply in Support of the Motion. (A. V.IV, APPX000828 – APPX000833).

After consideration of the briefs and oral argument of counsel, the District Court denied Plaintiff's Motion in Limine #1 and determined that Plaintiff was not permitted to use the phrase "send a message," reference news media, reference the

conscience of the community, use the Want Ad technique or make per diem arguments in closing argument. (A. V.V, APPX001099).

Additionally, Defendants filed their Motion in Limine No. 2 to Allow Defendants to Introduce Collateral Sources Pursuant to NRS 42.021 (A. V.III, APPX000403 – APPX00467). The Motion was fully briefed. (A. V.III, APPX000854 – APPX000858 and A. V.IV, APPX000854 – APPX000858).

Plaintiff also filed her Motion in Limine #4: Exclusion of Collateral Source Payments. (A. V.II, APPX000330 – APPX000349). Defendants opposed the Motion. (A. V.IV, APPX000804 – APPX000827). Plaintiff filed a Reply in Support of the Motion. (A. V.IV, APPX000844 – APPX000847).

After oral argument, the District Court granted Defendants' Motion in Limine No. 2 to Allow Defendants to Introduce Collateral Sources Pursuant to NRS 42.021 and ruled that Defendants were permitted to introduce evidence of the private insurance payments and contractual write-offs at the time of trial. (A. V.V, APPX001063). Plaintiff's Motion in Limine #4 was Denied. (A. V.V, APPX001099). The District Court found that NRS § 42.021 is constitutional under the rational basis test to keep doctors in Nevada and that evidence of collateral source payments by Plaintiff's health insurer could be admitted at trial. *Id.* The Court specifically reserved ruling on what jury instructions on this issue would be provided to the jury. *Id.*

On August 18, 2021, Plaintiff also filed her Motion in Limine #2: Motion to Exclude Informed Consent Form and Terms or Argument Regarding "Risk" or "Known Complication". (A. V.I, APPX000116 – APPX000189). On September 1, 2021, Defendants opposed this Motion, pointing out that Defendants had no intention of arguing Ms. Taylor consented to negligence. (A. V.IV, APPX000747 – APPX000775). Plaintiff's Reply was filed on September 8, 2021. (A. V.IV, APPX000834 – APPX000838).

The District Court ultimately granted in part, denied in part Plaintiff's Motion in Limine #2. (A. V.V, APPX001099). The ruling was that evidence, argument or reference to the informed consent form the Plaintiff signed or discussions about risks and complications had with the Plaintiff were barred, but the Defense could refer to perforations as known "risks" or "complications" during their defense. *Id.* This ruling also struck all consent form documents from the medical records.

On October 4, 2021, Defendants filed their Motion to Reconsider or Clarify Order Regarding Plaintiff's Motion in Limine No. 2 to Exclude Informed Consent Form and Terms or Argument Regarding "Risk" or "Known Complication", on Order Shortening Time. (A. V.V, APPX001009 – APPX001061). Plaintiff opposed the Motion. (A. V.V, APPX001079 – APPX001087).

The District Court treated the Defense's Motion as one to clarify the prior ruling. (A. V.VI, APPX001112). The District Court stood by the prior ruling barring

the Defense from utilizing all informed consent documents but clarified that there could be questioning of "Ms. Taylor and to Dr. Brill as to whether or not the known risk was disclosed, whether she was aware of it. But again, still no informed consent documents. So that way you can establish whether she knew or not." (A. V.VI, APPX001112).

This matter proceeded to trial on October 7, 2021. (A. V.VI, APPX001103). During trial, Ms. Taylor contended that the uterine and bowel perforation were the result of negligence and that a delay in treating the bowel perforation resulted in avoidable pain and suffering to Ms. Taylor. Plaintiff's position was supported by Riverside, California OB/GYN, David Berke, D.O. (A. V.X, APPX001950 – APPX001951).

Plaintiff's expert, David Berke, D.O. acknowledged at trial that uterine and bowel perforation are known risks of the hysteroscopy procedure Dr. Brill performed that can and do occur in the absence of negligence. (A. V.X, APPX002004 – APPX002005). While Dr. Berke opined that in the case of Ms. Taylor the uterine and bowel perforation were the result of negligence, that opinion was refuted by the Defense. The Defense's position was supported by expert Steven McCarus, M.D., who has been in private practice as an OB/GYN since 1986. (A. V.V, APPX001027). Dr. McCarus is the current Chief of the Division of Gynecologic Surgery at Advent Health Celebration and Winter Park Hospitals in Florida. (A. V.V, APPX001027).

Dr. McCarus has performed thousands of hysteroscopies during his over 30 years in practice. (A. V.XI, APPX002250).

At trial, consistent with his report, Dr. McCarus testified that uterine perforation is a known risk and complication of the hysteroscopy Ms. Taylor had. (A. V.XI, APPX002211 – APPX002212). Dr. McCarus further testified that uterine complication is one of the most common surgical complications that occurs from hysteroscopy. (A. V.XI, APPX002212). He explained that bowel perforation is also a known risk of the procedure, but much more rare than uterine perforation. *Id.* Per Dr. McCarus, a known risk and complication can be the result of negligence. (A. V.XI, APPX002212 – APPX002213).

In the case of Ms. Taylor, she suffered a uterine and bowel perforation during hysteroscopy that was not the result of negligence. (A. V.XI, APPX002219). Ms. Taylor's uterus is bicornuate in shape meaning it was heart-shaped with a large indention at the top of her uterus, making hysteroscopy more challenging. (A. V.XI, APPX002217 - APPX002219). Ms. Taylor's unusual anatomy is the reason she experienced uterine perforation and the rare complication of bowel perforation from hysteroscopy and, but for her anatomy, this would not have occurred. (A. V.XI, APPX002245).

On October 19, 2021, the jury returned a unanimous defense verdict. (A. V.XIII, APPX002660 – APPX002665). Judgment was entered in favor of Dr. Brill

and WHASN. *Id.* Taylor did not move for a new trial in front of the District Court following the verdict. This appeal followed.

VI.

SUMMARY OF ARGUMENT

The jury's verdict in this case was supported by substantial evidence and the result of careful consideration by the jury of the evidence presented at trial. Kimberly Taylor underwent surgery with Keith Brill, M.D. on April 26, 2017. During that surgery, she experienced a uterine and bowel perforation, both of which are known risks and complications of the surgery she had. Those complications occurred in the absence of negligence, likely due to Ms. Taylor' abnormal anatomy.

The third-hand comments made about the mind of the jurors cannot be used to challenge the validity of the verdict in this case. A significant portion of Appellant's Opening Brief focuses on re-arguing the facts and ignoring evidence in favor of the Defense's position. As an example, Plaintiff contends that documentation indicated there were no complications from the April 26th surgery, but neglects to mention that the note indicating complications were "none per surgeon" was a note from Ms. Taylor's nurse, Bruce Hutchins, R.N., **not** Dr. Brill. Dr. Brill's Operative Report identifies the complication noted during surgery and documents that is why the ablation portion of the procedure was not performed. (A. V.XII, APPX002354). This Operative Report was available at 10:08 a.m., minutes

after the patient was taken to the recovery area and was available for Nurse Hutchins' immediate review. (A. V.XII, APPX002354).

In another of many examples of Plaintiff ignoring evidence in favor of the Defense, Plaintiff contends that Dr. Brill testified he could not recall telling Ms. Taylor a perforation had occurred when he spoke to her in recovery. *See* Opening Brief, pp. 8 – 9. Dr. Brill's testimony was that he could not recall the exact conversation with Ms. Taylor on April 26, 2017, but it would have been his custom and practice to discuss it, testifying as follows:

> Q Okay. So did you or did you not tell Kim in the PACU that you had perforated her uterus?
>
> A So from what I've seen, the conversation did occur. But I don't recall what was said specifically during that conversation.
>
> Q Okay. So your testimony is you recall there is a conversation, but you cannot specifically recall telling her a perforation occurred; is that your testimony?
>
> A Correct. Sitting here four years plus today, I can't tell you the exact nature of that conversation. Yes.
>
> Q So you are not saying one way or another whether you told Kim in the PACU that her uterus was perforated? You have no recollection? That's what your testimony is?

A I would say it's certainly possible. It would have been my custom and practice. I likely would have said it. But I can't tell you specifically what I said today.

(A. V.XII, APPX002354).

Further, Ms. Taylor acknowledged that Dr. Brill spoke with her in the PACU but believed he said the surgery was too complicated and they would talk more about it at her post-op visit. (A. V.X, APPX002079). In addition to the testimony, the independent documentation supported that Ms. Taylor was advised of the uterine perforation before she left Henderson Hospital on April 26, 2017. Approximately 5 hours after she left Henderson Hospital, EMTs transported her to St. Rose Hospital Siena where she was seen and released. EMTs came out to her home a second time to take her to the hospital after she continued to have pain. When Ms. Taylor spoke to EMTs, they document she reported the shape of her uterus caused complications. (A. V.XI, APPX002141 – APPX002146).

Defendants did not present a theory that Dr. Brill was negligent, but Ms. Taylor consented to negligence and assumed the risk of negligence. Defendants' position was that the complications Ms. Taylor experienced were not the result of negligence, because Dr. Brill's treatment met the standard of care. The District Court excluded consent form documentation and those were never shown to the jury. Although there was not a specific claim for lack of informed consent, Defense

counsel was appropriately allowed to inquire as to what risks and potential complications were known to Ms. Taylor prior to her April 26th hysteroscopy. The Defense did not argue that Ms. Taylor assumed the risk of negligence. Markedly different, it was the well-supported position of the Defense that Ms. Taylor's perforations occurred in the absence of negligence, and her unusual anatomy increased the chance of perforation and was a contributing factor in what occurred.

The extraneous arguments raised on appeal are not meritorious. Plaintiff has not demonstrated that, but for the alleged errors that occurred, a different outcome would have resulted. The judgment in favor of the Defense should be affirmed because there is substantial evidence to support it.

VII.

LEGAL ARGUMENT

A. THE JURY VERDICT SHOULD NOT BE OVERTURNED ON APPEAL.

When a jury's verdict is supported by substantial evidence, it should not be overturned on appeal. *See Allstate Ins. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318 (2009). Here, Ms. Taylor did not move for a new trial with the District Court. This Court has indicated that a party is not required to move for a new trial prior to bringing an appeal, but there are practical benefits to doing so, including allowing the District Court to correct alleged errors. *Rives v. Farris*, 2022 Nev. LEXIS 17, *10, fn.3, 138 Nev. Adv. Rep. 17 (2022).

Many of the arguments raised are not articulated cogently. Ms. Taylor's failure to present cogent arguments should lead this Court to disregard them. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not address claims that are not cogently argued or supported by relevant authority).

Plaintiff fails to demonstrate unfair prejudice, reversible error or abuse of discretion in the District Court's pretrial and trial rulings. On appeal, Ms. Taylor simply reiterates her position at trial and flawed arguments with citation to very little information in the record in support of the arguments raised. The District Court considered extensive motion practice on the challenged evidentiary rulings, heard testimony from all witnesses over the course of this trial and ruled appropriately on objections made during trial. Ms. Taylor fails to demonstrate that Defense counsel engaged in any attorney misconduct. *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). The objections made by Ms. Taylor's counsel during closing argument were appropriately overruled and no admonishment was needed because there was no misconduct on the part of Defense counsel. Because Ms. Taylor has failed to show with probability that, had the alleged errors not occurred, the jury would have reached a different result, judgment in favor of Defendants should be affirmed. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 194 P.3d 1214 (2008).

B. HON. MONICA TRUJILLO DID NOT EXHIBIT BIAS TOWARD DEFENSE COUNSEL AND TO SUGGEST OTHERWISE IS A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT.

Ms. Taylor's Opening Brief makes the inflammatory, unsupported allegation that Hon. Monica Trujillo was somehow influenced by "large financial donations to Judge Trujillo's campaign" made by Defense counsel. *See* Opening Brief, page 3.

This baseless accusation is clear attorney misconduct. *See* RPC 3.3 and RPC 8.4(c) and (d). There is no basis in fact for Taylor's counsel to suggest that the presiding judge over this trial was biased in favor of Defense counsel, nor were any large financial donations made.

On September 30, 2020, a judicial campaign fundraiser was held by various defense firms, including McBride Hall. Each firm invited candidates of their choosing. A different law firm invited Monica Trujillo, not McBride Hall. Another judicial candidate in attendance at that campaign event was Taylor's co-counsel at trial, Yianna Albertson, who was running in Department 17, Clark County. As a result of that fundraiser, the law office made two donations to Monica Trujillo's campaign for a total of $2,000 plus a portion of the in-kind contribution from the event itself. *See* Appendix (APPX 000001), Documents of Donations made to Monica Trujillo. As is evident, the law office of McBride Hall made donations to various judicial campaigns, including that of Yianna Albertson, but none very substantial.

There is no support for the accusation that Hon. Monica Trujillo was influenced by Defense counsel's campaign donations from 2020, nor any evidence that the presiding judge exhibited any bias for Defense counsel or against Taylor's counsel. Apparently unsatisfied with personally accusing a sitting judge of bias with no support for such an outrageous claim, Taylor's counsel doubles down and states that statements during closing argument amounted to ". . . Defense counsel fabricating evidence to explain away the actual evidence . . ." *See* Opening Brief, p. 50. Such baseless insinuations, lacking in any evidentiary support whatsoever, should not be tolerated.

C. THE DISTRICT COURT EXERCISED ITS DISCRETION AND STRUCK THE CONSENT FORM AND PATIENT EDUCATION LITERATURE, AS REQUESTED BY MS. TAYLOR.

It is illogical for Ms. Taylor to argue that the presiding judge exhibited bias in favor of Defense counsel, when the ruling on the pretrial motion was in favor of Taylor, **not** the defense.

The District Court granted in part, denied in part Plaintiff's Motion in Limine #2: Motion to Exclude Informed Consent Form and Terms or Argument Regarding "Risk" or "Known Complication". (A. V.V, APPX001099). The initial ruling was that "Evidence, argument or reference to the informed consent form that Plaintiff signed or discussions about risks and complications had with Plaintiff are barred. However, the Defense may refer to perforations as known "risks" or "complications"

during their defense." (A. V.V, APPX001099). Because this ruling allowed Defendants to introduce evidence of a known risk and complication but made it impossible to establish was what known to the **patient**, Defendants sought reconsideration and clarification of the Court's Order.

On October 4, 2021, Defendants filed their Motion to Reconsider or Clarify Order Regarding Plaintiff's Motion in Limine No. 2 to Exclude Informed Consent Form and Terms or Argument Regarding "Risk" or "Known Complication", on Order Shortening Time. (A. V.V, APPX001009 – APPX001061). The Motion to Reconsider or Clarify was heard by the District Court on day 1 of trial, October 7, 2021. (A. V.VI, APPX001103 – APPX001115).

As indicated, the District Court treated the Defense's Motion as one to clarify the prior ruling. (A. V.VI, APPX001112). The District Court stood by the ruling barring the Defense from utilizing all informed consent documents but clarified that there could be questioning of "Ms. Taylor and to Dr. Brill as to whether or not the known risk was disclosed, whether she was aware of it. But again, still no informed consent documents. So that way you can establish whether she knew or not." (A. V.VI, APPX001112).

The consent form and related patient education materials were not admitted during trial and Defense counsel was not permitted to question Ms. Taylor using the consent form. Further, Defense counsel was not permitted to show these documents

to the jury. The District Court exercised its discretion in allowing questioning on what was known to the patient before surgery.

This Court has not addressed the admissibility of patient consent evidence in a medical malpractice case that does not involve lack of informed consent and the facts of this case do not present a basis to order strict exclusion when informed consent evidence is relevant to the question of negligence. *Brady v. Urbas*, 111 A.3d 1155, 1162-1164 (Pa. 2015) (declining to hold that all aspects of informed-consent information are always "irrelevant in a medical malpractice case"); *Viera v. Cohen*, 283 Conn. 412, 927 A.2d 843, 868-69 (Conn. 2007) (reasonable to admit evidence of informed consent where the applicable standard of care obligated the doctor to discuss particular risks); *Liscio v. Pinson*, 83 P. 3d 1149, 1156 (Colo. Ct. App. 2003) (evidence of a patient's informed consent admissible when plaintiffs' inquiries open the door). Furthermore, **the records were excluded** at the request of Ms. Taylor.

D. DEFENDANTS NEVER PRESENTED A DEFENSE THAT MS. TAYLOR ASSUMED THE RISK OF NEGLIGENCE.

The Defense's theory at trial was never that Ms. Taylor assumed the risk of negligence or consented to negligence. As was argued in the District Court, the Defense maintained, with substantial evidentiary support, that Ms. Taylor experienced a known risk and complication, the risk of which was increased due to her abnormal uterus.

It is undisputed that the consent forms maintained as part of the WHASN and Henderson Hospital medical records in this case contain the signature of the patient, Kimberly Taylor. Defendants had no intention of arguing that a consent form for surgery is a "waiver of negligence", as suggested by Plaintiff. However, a signed consent form is relevant evidence that a medical complication can and do occur in the absence of negligence. Over the Defense's objection, the District Court excluded the records demonstrating the detailed information that was provided to Ms. Taylor regarding the risk of uterine perforation and injury to other organs.

Plaintiff has not cited to any Nevada case law to support the contention that evidence that a patient discussed known risks and complications of a surgery with her surgeon prior to the procedure is irrelevant, confusing, or should otherwise have been excluded by the District Court. Further, any perceived prejudice to Plaintiff was cured by means of the limiting instruction advising the jury that they are not to consider that the Plaintiff consented to a negligently performed surgery. *Busick v. Trainor*, 2019 Nev. Unpub. LEXIS 378, at *4-5, 437 P.3d 1050 (Nev. 2019).

Unlike *Busick v. Trainor*, the District Court did not admit the consent form and patient education materials during this trial. Even though the District Court did not allow Defense counsel to show the consent form and patient education materials during trial (which differs from *Busick*), the jury was still given the following jury instruction:

> The mere fact that a provider of health care considers an injury to a patient to be a "risk" or a known "complication" of a procedure does not mean that the defendant is not liable or did not breach the standard of care.
>
> The mere fact that a patient was advised of a potential "risk" or "complication" also does not mean that the defendant is not liable or did not breach the standard of care.
>
> Assumption of the risk is not a defense to negligence by the physician.
>
> Instead, a physician must use reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care to avoid known "risks" or "complications" to the extent possible and this is the issue you must resolve in this case.

(A. V.XIII, APPX002631).

Any prejudice Plaintiff claims fro9m discussion of consent and known risks and complications was cured by means of the limiting instruction advising the jury that they are not to consider that the Plaintiff consented to a negligently performed surgery. The complication Ms. Taylor experienced is a known risk and complication that she was expressly told might occur, prior to her decision to proceed with

surgery. The reason that patients are advised of known risks and complications in the consent process in advance of surgery is to advise that complications can occur even if the surgery is performed correctly. Consent itself does not mean that the surgery was performed correctly, but that is a decision for the jury and the trier of fact found in favor of the Defense.

E. THE DISTRICT COURT PROPERLY REFUSED TO ALLOW MS. TAYLOR'S COUNSEL TO CONDUCT VOIR DIRE ON TORT REFORM.

Ms. Taylor relies on *Whitlock v. Salmon*, 104 Nev. 24, 25, 752 P.2d 210, 211 (1988), wherein this Court held it was reversible error to deny attorneys for both plaintiff and defendant an opportunity to conduct ***any*** voir dire examination of jury in medical malpractice action. *See Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (1988). In *Whitlock*, the trial judge presented the attorneys' questions to the prospective jurors on voir dire, but refused to allow counsel to directly participate in the process. Voir dire was conducted ***exclusively*** by the judge. *Id.* at 25, 211. That case is inapplicable here, where both Taylor's counsel and Defense counsel were permitted to conduct extensive voir dire examination of potential jurors over the course of 2 days.

Voir dire is not a platform from which counsel may educate prospective jurors about the case or compel them to commit themselves to a particular disposition of the matter, to prejudice them for or against a party, or to "indoctrinate" them. *People*

v. Visciotte, 2 Cal. 4th 1, 48, 825 P.2d 388, 412 (1992). Nevada law is clear that questions that are repetitive and aimed at indoctrination rather than the acquisition of information regarding bias or the ability to apply the law are inappropriate. *See Hogan v. State*, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987); *See also Oliver v. State*, 85 Nev. 418, 456 P.2d 431 (1969).

In briefing this issue to the District Court, Taylor's counsel indicated he intends to ask potential jurors the following questions:

- Do you know what KODIN is?
- If you lived in Clark County in 2004, do you remember how you voted on KODIN?
- Do you think there is a crisis for medical malpractice insurance rates for doctors?
- If you felt a doctor would have to personally pay a large judgment instead of having it covered through insurance, would that affect your verdict?
- Do you feel that if you rule against the Defendant in this case, his malpractice insurance premiums might increase? Would that affect your verdict in this case?

• If the judge instructed you in this case not to consider whether the doctor defendant had medical malpractice insurance, do you think you could follow that instruction?

(A. V.IV, APPX000627).

The proposed voir dire was a thinly veiled attempt to find out how a prospective juror may rule in this case by asking specific questions on tort reform and insurance to bias the jury in favor of Plaintiff. Responses to these questions were not necessary to empanel a fair and impartial jury in this professional negligence case. Had these questions been permitted, it would likely have resulted in severe prejudice to Defendants due to repeated reference to and emphasis of tort reform and Defendants' liability insurance. Tort reform has existed in this state since 2004. Plaintiff points to no evidence of any recent or ongoing media campaigns regarding medical malpractice and tort reform to justify asking potential jurors questions which sought opinions on political issues.

Taylor's counsel was also properly precluded from questioning potential jurors about Defendants' liability insurance. Taylor argued then and now that she wanted to prevent jurors from considering the existence of Defendants' liability insurance, but the precluded voir dire questions emphasized the existence of Defendants' insurance. Considering proposed instruction 1.07 and these questions together, it is clear that the intent was to repeatedly reference Defendants'

malpractice insurance in an effort to emphasize that any verdict would not be paid directly by Dr. Brill or WHASN. As recognized by the trial court in *Capanna v. Orth*, to allow Plaintiff's counsel to emphasize and mention Defendants' liability insurance would be "incredibly improper." (A. V.V, APPX000927). The District Court properly excluded the questioning Plaintiff's counsel sought to do of potential jurors and later rejected a jury instruction that would have emphasized the existence of Defendants' liability insurance.

Even when voir dire questioning on insurance is permitted in non-medical malpractice cases, this Court has made clear that "the proper approach in *voir dire* involving **personal injury cases** is to allow 'good faith' questioning of the *venire* concerning interests in, or connections with, casualty insurance companies." *Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 312-13, 774 P.2d 1044, 1046-47 (1989) (Emphasis added). The questioning must be "for the purpose of ascertaining the qualifications of prospective jurors and for ferreting out bias and prejudice, and **not for the purpose of informing them that there is insurance in the case**." *Id*. at 313, 1047 (Emphasis added). The proposed voir dire was not 'good faith questioning'.

Because these questions were aimed more at indoctrination than for the determination of bias or inability to apply the law, Taylor's counsel was not

permitted to conduct voir dire on these topics. The District Court did not abuse its discretion in precluding this improper voir dire.

F. THERE WERE NO EVIDENTIARY ERRORS ENTITLING MS. TAYLOR TO A NEW TRIAL.

Appellant contends there were various evidentiary errors committed by the District Court. No evidentiary errors were committed. Evidentiary rulings are generally reviewed for abuse of discretion. *McLellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008).

1. Medical Bills were Properly Excluded as an Element of Taylor's Damages.

The admission of medical bills goes to damages. Because the jury unanimously found in favor of the defense, the jury never reached the issue of damages. Thus, Taylor was not aggrieved by the exclusion of her medical bills and this Court need not even consider this argument.

Should this Court consider the issue, medical bills were properly excluded. Per Nevada pattern jury instruction 5PID.1, a plaintiff is only entitled to seek past medical bills which are reasonable and necessarily incurred as a result of the alleged negligence of Defendant. The phrase "reasonable and necessary" means that the cost of the care was reasonable and that the care was caused by the negligence of the Defendant. Care that was received by a plaintiff but **not** necessitated by alleged negligence is **not** compensable:

> "A person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and **attributable to the tort**…" (*Hanif v. Housing Authority of Yolo County*, 200 Ca App 3d 635 (Ca. 1988). (Emphasis added).

To recover medical expenses as an element of damages, Nevada requires medical expenses to be supported by sufficient and competent evidence. *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1196, 866 P.2d 274 (1993) overruled on other grounds. Expert testimony is required to establish that medical treatment, and the costs associated with the same, were caused by Defendant's negligence. *Banks v. Sunrise Hospital*, 120 Nev. 822, 834, 102 P. 3d 52 (2004). In order to recover for past medical expenses at trial, Ms. Taylor was required to present evidence that the charges were the reasonable value of the services and that those expenses were necessarily incurred as a result of the alleged negligence.

In Nevada, the law is well settled that medical causation (as well as liability) must be proven within a reasonable degree of medical probability based on competent expert testimony. *See Prabhu v. Levine*, 930 P 2d 103 (Nev 1996). *See* also *Maxwell v. Powers* 22 Cal App 4th 1596 (Ca App 1994) and *Perez v. Las Vegas Medical Center*, 107 Nev 1, 805 P 2d 859 (Nev. 1991) and *Orcutt v. Miller*, 95 Nev 408, 595 P 2d 1191 (Nev 1979).

At trial, Ms. Taylor intended to seek compensation for medical bills totaling $225,620.07, but never provided a single expert to offer an opinion that the past medical bills were reasonable, necessary and incurred by the alleged negligence of Dr. Brill. Taylor attempted to remedy the failure to provide a medical expert opinion by calling non-physician billing custodians of records. Voir dire of these witnesses, outside the presence of the jury, demonstrated they lacked the necessary expertise and knowledge to opine as to the reasonableness and necessity of Ms. Taylor's past medical bills and relate it to the alleged negligence.

Because Ms. Taylor failed to set forth admissible evidence demonstrating that her past medical expenses were reasonable and necessarily incurred as a result of Dr. Brill's alleged negligence, her medical bills were properly excluded.

2. The District Court's Ruling on Private Collateral Source Evidence was Correct.

"Evidence of collateral source payments goes to the issue of damages." *Busick v. Trainor*, 2019 Nev. Unpub. LEXIS 378, 437 P.3d 1050 (Nev. 2019). For Taylor to challenge the admission of collateral source payments, she would first need standing to do so. Because the jury unanimously found in favor of the Defense, the jury never reached the issue of damages. Thus, Taylor was not aggrieved by the introduction of evidence of Ms. Taylor's ***private*** health insurance payments and this Court need not even consider the issue of collateral source payments.

Should this Court decide to review this issue, the defense was allowed, pursuant to the clear language of NRS 42.2021, to introduce evidence of collateral source payments which necessarily included the amounts that were contractually written off pursuant to that private insurance.

The district court's decision to admit collateral source evidence is reviewed for abuse of discretion. *Frei v. Goodsell*, 129 Nev. Adv. Rep. 43, 305 P.3d 70, 73 (2013) (noting that the appellate court will not interfere "absent a showing of palpable abuse). This Court has previously found that challenges to admission of collateral source payments in a medical malpractice case concluded in favor of the defense could not be maintained. *Busick v. Trainor*, 2019 Nev. Unpub. LEXIS 378, 437 P.3d 1050 (Nev. 2019); *Capanna v. Orth*, 134 Nev. 888, 432 P.3d 726 (2018).

Even if this Court agrees with Taylor that the District Court erred in allowing collateral source evidence, it did not affect Taylor's substantial rights. Ms. Taylor has not demonstrated that "but for the alleged error, a different result might reasonably have been reached." *Wyeth v. Rowatt*, 120 Nev. 446, 465, 244 P.3d 765, 778 (2010); *see also Khoury v. Seastrand*, 132 Nev. 520, 377 P.3d 81, 94 (2016) (finding the exclusion of evidence of Medicaid liens was an abuse of discretion, but the error was harmless because appellant failed to show that admission of the subject evidence would have resulted in a different verdict). The jury determined that Dr. Brill and WHASN did not breach the standard of care. Evidence of collateral source

benefits are irrelevant to this determination. The jury never reached the issues of causation and damages, making it unlikely that had collateral source evidence been excluded, the verdict would have resulted in a finding that Dr. Brill and WHASN breached the standard of care, negligence caused Taylor's injuries, and an award of damages.

In *Proctor v. Castelletti*, defendant was permitted to introduce evidence of collateral source benefits to show plaintiff's malingering. *Proctor v. Castelletti*, 112 Nev. 88, 89, 911 P.2d 853 (1996). The jury awarded plaintiff $7,000.00. *Id*. This Court held that admission of collateral source benefits was prejudicial when the jury's verdict was compared to defendant's $150,000.00 offer of judgment and plaintiff's requested damages. *Id*. at 91; *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1009, 194 P.3d 1214, 1222 (2008) (finding a jury instruction that misstated the law on liability was prejudicial where the jury returned a verdict of no liability).

Unlike *Proctor* and *Cook*, the jury in this case did not reach the issue (damages) that may have arguably been affected by collateral source evidence. Defendants' liability defense was unaffected by the admission or preclusion of collateral source evidence. Ms. Taylor does not cite to the record to support a finding that the collateral source evidence influenced the jury's determination of liability.

Accordingly, a new trial is not warranted due to the admission of collateral source benefits.

3. A Demonstrative Exhibit By Definition is Not Evidence.

A demonstrative aid is used for illustrative purposes and differs from substantive evidence. *See Cisarik v. Palos Community Hosp.*, 144 Ill. 2d 339, 579 N.E.2d 873 (1991) ("Demonstrative evidence has no probative value in itself. It serves, rather, as a visual aid to the jury in comprehending the verbal testimony of a witness.")

In this case, a medical device was shown to the jury for illustrative purposes only. The jury was shown a Symphion resectoscope device to illustrate how the subject procedure was performed for Ms. Taylor. Taylor then moved for admission of the Symphion device into evidence. The District Court appropriately denied the request and the Symphion was not formally admitted into evidence.

Taylor never articulates how providing this demonstrative aid to the jury would have impacted the outcome of the trial. Taylor is essentially advocating for allowing the jury to use the medical device shown during the trial. This would be in direct violation of the District Court's instruction that jurors, during deliberations, are not to "make any investigation, test a theory of the case, recreate an aspect of the case, or in any other way investigate or learn about the case on your own." (A. V.XIII, APPX002617).

4. Ms. Taylor was Not Permitted to Confuse the Jury by Introducing Evidence of Other Matters Where Defense Expert, Dr. McCarus, testified involving Hysterectomy Which is Dramatically Different than the *Hysteroscopy* Performed for Ms. Taylor.

"Even if evidence is otherwise admissible, a trial court may exclude evidence after striking a proper balance between the probative value of the evidence and its prejudicial dangers," and this decision will only be reversed if it is manifestly wrong. State, Dep't of Transp. v. Cowan, 120 Nev. 851, 858-59, 103 P.3d 1, 6 (2004). Here, the District Court excluded questions of Defense expert Dr. McCarus on prior cases he testified in involving hysterectomies because of the danger of confusion to the jury, given that a hysteroscopy is a very different procedure.

The issue was discussed outside the presence of the jury as follows:

> THE COURT: Okay. I sustained it, and you just rephrased and asked a similar question to what Ms. Hall asked on her direct.
>
> Then there was an objection with regard to me questioning him about bowel perforations during hysterectomies. And the objection Ms. Hall.
>
> MS. HALL: It's irrelevant. There's no relevance. It's not a hysterectomy that was performed here. It's an entirely different surgery. Much more complicated.
>
> THE COURT: Any response Mr. Breeden?

MR. BREEDEN: So this is the Defense retained expert on standard of care. He has testified in similar gynecological surgeries that thermal injury to the bowel, which is the same injury that happened in this case, allegedly, is below the standard of care. I understand that this was a hysteroscopy and the other cases, and there were three of them where he had testified, were hysterectomies. Both are procedures to the uterus. They are obviously different procedures. However, I believe that's similar enough. I think I have broad rights to cross-examine experts. The difference between hysteroscopy and hysterectomy, that certainly would be appropriate for redirect by Ms. Hall, and I thought that was a fair question and avenue of cross-examination I should be allowed to explore.

THE COURT: Okay. And I sustained the objection simply because it was a different surgery, and I thought it would be misleading and confusing to the jury, especially -- I mean medical terminology, hysterectomy, hysteroscopy, I just -- I think it would be confusing and therefore it wasn't relevant.

(A. V.XI, APPX002288 – APPX002289).

Comments made in the Opening Brief support that the purpose of seeking to ask these questions of Dr. McCarus was to confuse the jury. The Opening Brief

actually argues that the jury should decide whether a hysterectomy is different than a hysteroscopy. Plaintiff's counsel was allowed wide latitude in cross-examining Dr. McCarus and there was no error committed by the District Court in excluding this information to avoid the high likelihood of confusion to the jury.

For an error in exclusion of evidence to justify a new trial, the appellant must show that but for the alleged legal error, a different result might have reasonably been achieved. *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). Ms. Taylor makes no such showing here.

G. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING STATEMENTS OF "SEND A MESSAGE" AND THE JURY AS THE "CONSCIENCE OF THE COMMUNITY".

Juries are not the "conscience of the community". *Schoels v. State*, 114 Nev. 981, 987, 966 P.2d 735, 739 (1998). In the District Court and on appeal, Plaintiff conflates general negligence with medical malpractice, but these claims vary in many respects which Plaintiff ignores. First, pursuant to NRS 41A.100, liability for personal injury can only be imposed on a provider of medical care if, among other things, "evidence . . . is presented to demonstrate the alleged deviation from the accepted standard of care in the **specific circumstances of the case** and to prove causation…" (Emphasis added). Second, unlike a general negligence claim, medical malpractice requires expert testimony. It is well-established throughout the country that a Plaintiff's arguments in a medical malpractice case must be focused on the

specific facts of the case and not alternative possibilities that may be unrelated to Plaintiff's injuries.

In South Carolina, "[a] physician commits malpractice by not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing acting in the same or similar circumstances." *David v. McLeod Regional Medical Center*, 367 S.C. 242 (2006) (*citing Durham v. Vinson*, 360 S.C. 639, 650-51, 602 S.E.2d 760, 766 (2004)). Similarly, in Washington D.C., Florida, and New Jersey, the central issue in medical practice cases is whether, in the specific circumstances before the physician, he or she deviated from the standard of care. *See generally, Hawes v. Chua*, 769 A.2d 797 (2001); *Morlino v. Medical Center of Ocean County*, 295 N.J. Super. 113 (1996) (expert must testify regarding the standard of care "under the specific circumstances of the case"); *Granicz v. Chirillo*, 147 So.3d 544 (2014) ("the prevailing standard of care . . . is that the level of care, skill, and treatment, which, in light of all relevant surrounding circumstances, is recognized as acceptable").

The tactics Taylor sought to employ directly violated established Nevada law, which requires that a plaintiff must "demonstrate that [Defendant's] conduct departed from the accepted standard of medical practice, that [Defendant's] conduct was both the actual and proximate cause of [Plaintiff's] injury and that [Plaintiff]

suffered damages." *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 840, 102 P.3d 52, 64 (2004); *See also* NRS 41A.100.

Plaintiff's counsel confuses the standards in a basic negligence cause of action and a professional negligence claim governed by NRS 41A.015. Under NRS 41A.100, "[l]iability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony . . . is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation." Only a medical expert can testify regarding the accepted standard of care and whether a medical provider deviated from that standard of care. Whereas the community may define reasonable care in a standard negligence claim, an expert is required to establish the "standard of care" in medical malpractice claims. The standard of care is a nationwide standard, not a community-based standard. Accordingly, any "community" arguments are irrelevant to this medical malpractice claim and were properly prohibited.

1. Arguments of "Send a Message" were not Supported by the Evidence in this Case.

In Nevada, punitive damages may only be awarded under strict circumstances, "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by

way of punishing the defendant." NRS 42.005. The only claim at issue during the trial was for professional negligence. Requesting the jury "send a message" is just an alternative way of improperly seeking punitive damages and jury nullification. The District Court agreed and, in light of there being no claim for punitive damages or intentional conduct in this case, barred such statements.

Taylor convolutes this Court's findings in *Gunderson v. D.R. Horton Inc.*, 319 P.3d 606 (2014) and *Lioce v. Cohen*, 124 Nev. 1, 11 (2008), claiming this Court has recently approved of the use of the phrase "send a message." That is not the case at all.

In *Lioce*, this Court found counsel's argument, similar to those espoused by Taylor on appeal, inappropriate. This Court defined "jury nullification" as follows: "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Lioce*, 124 Nev. at 20. This Court specifically found that counsel's arguments to the jurors to send a message about frivolous lawsuits suggested that "regardless of the evidence, if the jury found in the defendant's favors, the jury could remedy the social ills of frivolous lawsuits." *Id.* These arguments were not based on the law and evidence presented. Accordingly,

any statements or arguments from counsel encouraging the jurors to "send a message" was improper in a court of law.

Similarly, in *Gunderson*, this Court stated that "[a]n attorney making an attempt at jury nullification violated Nevada Rules of Professional Conduct 3.4(e) in two ways: (1) the attorney is either alluding to a matter that is irrelevant given the law or unsupported by admissible evidence given the facts; and (2) whether explicit or implicit, the attorney is inherently asserting his or her opinion as to the justness of a case." *Id.* at 613. This Court examined counsel's statement during closing argument that "[i]f you want to send a message to the homeowners that their houses are safe, tell them 'I sat for 12 weeks; I listened to everything; your house is safe.'" *Id.* at 613. Ultimately, this Court found that since the attorney was referring to the specific evidence in the case and law as it applied to the homeowners' claim, the use of the term "send a message" "did not urge the jury to reject the evidence or law when he made the statement." *Id.* at 614.

However, in the instant case Ms. Taylor wanted to inappropriately use "send a message" to encourage jurors to put the law of professional negligence aside to cure some social issue, in reference to irrelevant matters, unsupported by admissible evidence. This argument is very similar to that made in *Lioce*, wherein the attorney's "arguments suggested to the jurors that, regardless of the evidence, if the jury found

in the defendants' favors, the jury could remedy the social ills of frivolous lawsuits." *Lioce*, 124 Nev. at 21.

In the briefing on this issue, Taylor ignored the elements of professional negligence, which requires expert support for violations in the standard of care. From her argument, it was apparent that Taylor did not intend to apply the phrase "send a message" to the actual facts of this case. Instead, Plaintiff wished to use the phrase in an attempt to get the jury to make a decision based upon their feelings or other irrelevant matters not based on the evidence or law to be presented at trial.

The jury in this professional negligence case reached a verdict based upon the evidence specific to Taylor and her medical care, as opposed to evidence related to the effect of an award upon the public at large, or how others would feel if placed in the Plaintiff's position. *See Boyd v. Pernicano*, 79 Nev. 356, 358 (1963) [Internal citation omitted] ("As a general proposition appellate courts declare error when, during summation, trial counsel has urged the jurors to place themselves in the position of one of the litigants, or to allow such recovery as they would wish if in the same position. Jurors should consider cases objectively.")

Similar to *Lioce*, Taylor was attempting to encourage the jurors to send a message without evidence of bad conduct, which is improper. The District Court's decision to preclude this argument was not an abuse of discretion and ensures that the jury take into consideration the facts and circumstances relevant to the treatment

of Ms. Taylor in determining whether any of the Defendants deviated from the standard of care.

2. The Standard of Care Must be Established by a Qualified Expert, Not the Community at Large.

In Nevada, "to prevail in a medical malpractice action, the plaintiff must establish the following: (1) that the doctor's conduct departed from the accepted standard of medical care or practice; (2) that the doctor's conduct was both the actual and proximate cause of the plaintiff's injury; and (3) that the plaintiff suffered damages." *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996), *citing Perez v. Las Vegas Medical Center*, 107 Nev. 1, 4, 805 P.2d 589, 590-91 and *Orcutt v. Miller*, 95 Nev. 408, 411, 595, P.2d 1191, 1193 (1979). In a medical malpractice case, Plaintiff has the burden of proof. *See* Medical Malpractice Instruction 9MM.2.

The standard of care in a medical malpractice case is defined by case law and the duty of a Board-certified physician is stated in Nevada pattern jury instructions as "It is the duty of a physician or surgeon who is a Board-certified specialist to have the knowledge and skill ordinarily possessed, and to use the care and skill ordinarily used, by reputable specialists practicing in the same field. A failure to perform such duty is negligence." Nev. J.I. 6.02. Medical malpractice is defined in Nevada as meaning "the failure of a physician, hospital or employee of a hospital, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under the circumstances." NRS 41A.009.

A physician is not held to the highest degree of care, skill, and judgment, nor is he negligent solely because a bad result may have followed his care. *See e.g. Hirahara v. Tanaka*, 959 P. 2d. 830, 835 (1998) (holding that "the relevant standard of care is an objective one... His or her exercise of "best judgment" is superfluous to this determination.") Further, NRS 41A and case law in Nevada establishes that expert testimony is necessary to establish the standard of care. *See* NRS 41A.100; *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 111 P.3d 1112 (2005).

The techniques Plaintiff sought to use at trial are designed to redefine the standard of care in a medical malpractice claim and to turn such a claim into a strict liability case. The District Court did not abuse its discretion in precluding "conscience of the community". Additionally, Plaintiff has not shown that had such comments been permitted, the outcome would have been different.

H. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING CERTAIN JURY INSTRUCTIONS AND GIVING OTHERS.

Generally, the District Court is allowed broad discretion in settling jury instructions. *Skender v. Brunsonbuilt Constr. & Dev. Co., LLC*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (internal quotations omitted). The District Court's decision to give or refuse to give a proposed jury instruction is reviewed for an abuse of discretion or judicial error. *Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 642, 98 P.3d 678, 680 (2004). "An abuse of discretion occurs if the district court's

decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender*, 122 Nev. at 1435, 148 P.3d at 714 (internal quotations omitted).

The Court will not reverse a judgment for an erroneous jury instruction unless, from the totality of the evidence, it appears the "error has resulted in a miscarriage of justice." *Carver v. El-Sabawi*, 121 Nev. 11, 14, 107 P.3d 1283 1285 (2005). An error is prejudicial where the moving party shows "that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached. *Wyeth v. Rowatt*, 126 Nev. 446, 464, 244 P.3d 765, 778 (2010).

Ms. Taylor fails to demonstrate that any of the jury instructions given or refused rise to the level of reversible error.

1. The Decision Not to Allow Ms. Taylor to Improperly Emphasize the Existence of Defendants' Insurance Does Not Entitle Taylor to a New Trial.

The District Court's refusal to give Plaintiff's proposed jury instruction, improperly emphasizing the existence of Defendants' liability insurance was well within the District Court's discretion and did not result in miscarriage of justice. The proposal of this jury instruction, coupled with the proposed voir dire on Defendants' insurance, makes it clear that this instruction would not have been proper.

As recognized in *Capanna*, this instruction was designed to protect the defense. The parties this instruction is purportedly designed to protect (Defendants)

did not want this instruction given. Based upon that objection, the instruction was not given. This was not reversible error.

2. The "Mere Happening" Instruction Given by the District Court is Supported by Nevada Law.

The Nevada Supreme Court has recognized that the mere happening of a bad result, by itself, is insufficient to find negligence. See *Gunlock v. New Frontier Hotel Corp.*, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962), abrogated on other grounds by, *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 291 P.3d 150 (2012) ("The mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability."); *See also*, *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 194 P.3d 1214 (2008). The jury was entitled to consider evidence that shows the application of that principle to the facts of this case.

Nevada courts have not disfavored a jury instruction on "mere happening". *Rynders v. Spilsbury* was a dental malpractice case in which the undersigned was trial counsel. 2016 Nev. Unpub. LEXIS 71, 132 Nev. 1031 (2016). In *Rynder*s, the Nevada Supreme Court did not indicate the defense's proposed "mere happening" instruction was improper. Instead, the Court simply determined that the district court did not abuse its discretion or commit judicial error in refusing the proposed instruction. *Id.* at *7. The Court recognized the district court's "broad discretion to settle jury instructions," and concluded that the denial of the mere happening

instruction was not arbitrary or capricious. *Id.* (internal citations omitted). The Court did not disfavor the instruction.

Here, the alleged issues raised regarding jury instructions do not constitute reversal error because there was no prejudice to Plaintiff as a result. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1005, 194 P.3d 1214, 1219 (2008).

I. CLOSING ARGUMENT WAS APPROPRIATE AND DEFENSE COUNSEL DID NOT ENGAGE IN ATTORNEY MISCONDUCT.

Taylor argues that Defense counsel committed two types of attorney misconduct during closing argument: (1) Arguing 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; and (2) vouching and jury nullification.

To determine whether a new trial is warranted when misconduct is asserted, the court first "must determine whether misconduct occurred". *Michaels v. Pentair Water Pool and Spa, Inc*., 131 Nev. 804, 815, 357 P.3d 387, 395 (2015). Even isolated, improper comments, without more, will not warrant a new trial. The record on appeal demonstrates that Defense counsel did not engage in misconduct at any time during the trial.

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1. Defense Counsel's Comments about the Pathology Report were Supported by the Record.

In arguing that Defense counsel made arguments "contrary to all evidence that the pathology reports showed that bowel cells were not in the pathology sample . . ." Taylor seems to mistakenly believe that Defense counsel must rely solely on the trial testimony of retained expert, Steven McCarus, M.D. and not comment on other evidence elicited during the trial. Taylor misunderstands (whether intentionally or unintentionally) the medical issues involved in the trial

It is Taylor's counsel who made arguments during closing on the issue of the pathology report interpreting the pathology from Ms. Taylor's April 26, 2017 surgery. During trial, as well as closing argument, Taylor's counsel tried to persuade the jury that the report stating: "Material Submitted: ENDOMETRIUM, CURETTAGE" meant that the entire specimen from the Symphion device was not submitted. (A. V.XIII, APPX002687 and APPX002538). The misinformation that the report's reference to curettage means that the only specimen submitted was the piece of tissue Dr. Brill removed with a curette during his procedure was cleared up with the trial testimony of Plaintiff's own expert, David Berke, D.O.

Dr. Berke testified as follows:

Q Now are you aware -- you saw the surgical pathology that Plaintiff's counsel showed you a second ago. And using the Symphion

device, are you aware that the Symphion device has a canister attached to it, of which also contains all of the collection of surgical specimen that are cut and taken during the procedure?

A Uh-huh.

Q Is that a yes?

A Yes. Yes. It – there's a -- it's designed for that. Yes.

Q Okay. And you would agree that that surgical canister then gets transferred -- the entirety of that canister then gets transferred to surgical pathology for an evaluation examination, true?

A Yes.

Q Okay. So that would include any and all portion of the resectoscope, when the resectoscope was actually actively cutting any material, correct?

A Yes.

Q And in fact, this is the HH156. It mentions an aggregate mucoid material mixed with blood clot and red-tan tissue aggregated in 4.25 -- 4.2 times 2.5 times .5 cm. **That's the entirety of the specimen that was collected from the Symphion, correct**?

A **Yes**.

Q And in this report from the materials submitted at **both** the

microscopic examination and gross examination, **there's no evidence of any bowel material**?

A **True. True**.

In addition to the testimony of Dr. Berke, Dr. Brill testified that

Both the testimony of Plaintiff's expert, David Berke, D.O. and the testimony of Dr. Brill

This testimony from Plaintiff's own expert is the evidence that supports the following statements of Defense counsel, which were unobjected to by Plaintiff during closing argument:

> You saw this picture which Dr. Brill explained how the device is used, the fact that there are those separate tubes that are attached to the device, and that's important, because I heard reference in Plaintiff's closing that the pathology specimen, the only pathology specimen that was sent to pathology was just the curettage.
>
> Ladies and gentlemen, you know that's not true, and you heard Dr. Berke testify to that. That that material, the resected material goes into a canister, and all of that material, including the endometrial curettage gets sent to pathology, not just the endometrial curettage. And in fact, we went through in detail the information contained in that

report, and the fact that there was no bowel found in that pathology specimen.

(A. V.XIII, APPX002562).

Contrary to the argument stated, *Jain v. McFarland*, 109 Nev. 465, 851 P.2d 450 (1993) did not hold that it is appropriate to shift the burden of proof to the defense in a medical malpractice case. In *Jain*, the patient's counsel was permitted to comment on one doctor's failure to testify and to call scheduled witnesses because the doctor had stated in open court that he would call witnesses. That is very different than the conduct of Plaintiff's counsel during closing argument in this case.

During closing argument, Plaintiff's counsel attempted to shift the burden of proof (in this non-res ipsa loquitur case) to the Defense and argue that the Defense had a duty to call the pathologist as a witness. The District Court correctly precluded this improper argument.

2. Defense Counsel Did Not Encourage Jury Nullification or Engage in Witness Vouching.

Ms. Taylor next contends that Defense counsel engaged in attorney misconduct during closing argument by "inappropriately vouching and nullification". This Court defined "jury nullification" as follows: "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than

the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Lioce*, 124 Nev. at 20.

In making the claim there was attorney misconduct, Appellant ignores the testimony of Taylor during trial and the evidence in support of the statement made by Defense counsel during closing argument and takes the statement out of context. During closing argument, Defense counsel made the following:

> You heard Ms. Taylor testify, however, that she recalls him coming in and talking to her, and it was one to two minutes. One to two minutes. You heard Dr. Brill testify here, ladies and gentlemen. He talks quicker than I do. In one to two minutes, if he would have spent that much time with this patient, I can guarantee you that he would have provided, as he testified to, his custom and practice, what happened --
>
> MR. BREEDEN: Object, Your Honor.
>
> THE COURT: Overruled.
>
> MR. MCBRIDE: -- what happened during the procedure.
>
> And he also recalls speaking to a family member. He doesn't recall specifically where that conversation occurred, whether it was on the phone, whether it was in person, but he recalls speaking to a Barbara. Again, this is years later. That's all he can recall about that. And he was very honest about that. But, nonetheless, a uterine perforation was clearly

documented. And his custom and practice, as he testified to, he wouldn't have advised her of the uterine perforation. And then advised to follow her up in two weeks.

(A. V.XIII, APPX002569 – APPX002570).

This isolated comment was not misconduct and the objection was properly overruled. To warrant a new trial based on alleged misconduct to which the District Court overruled an objection, Plaintiff must first demonstrate that the district court erred by overruling the party's objection. *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). If the Court concludes the District Court erred by overruling the objection, the next question the Court must decide is whether a jury admonition would likely have affected the verdict in Taylor's favor. *Id.* at 20, 982.

Even if this Court were to disagree there was no misconduct, an admonishment would not have affected the verdict. This isolated comment does not rise to the level where it is so extreme that a new trial is warranted.

Similarly, Plaintiff's argument that Defense counsel invoked religious themes by arguing that he would have a response to any comments made by Plaintiff's counsel during rebuttal is not misconduct. It is also not misconduct to reference Dr. Brill's custom and practice. This evidence was properly admitted under NRS 48.059. None of the alleged errors cited by Plaintiff are sufficient to overturn the jury's verdict which was supported by substantial evidence.

VIII.

CONCLUSION

For the reasons stated herein, the Judgment in favor of Keith Brill, M.D. and his practice, Women's Health Associates of Southern Nevada-Martin, PLLC should be affirmed.

IX.

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I, Heather S. Hall, Esq., hereby certify that this Answering Brief Under NRAP 27(e) complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6).

2. I further certify that this Answering Brief complies with the page or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 11,858 words.

3. Finally, I hereby certify that I have read the Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions for failure to comply with the Nevada Rules of Appellate Procedure.

DATED: April 25th, 2022.

McBRIDE HALL

/s/ Heather S. Hall

_____

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Nevada Bar No. 7082
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Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of April 2022, service of the foregoing **RESPONDENTS KEITH BRILL, M.D. AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC'S ANSWERING BRIEF** was made this date by the Supreme Court's electronic service addressed as follows:

X VIA ELECTRONIC SERVICE: by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

X VIA U.S. MAIL: By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

/s/Candace Cullina_____
An employee of
McBRIDE HALL