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 REPLY BRIEF

ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
BREEDEN & ASSOCIATES, PLLC
376 E. Warm Springs Rd., Suite 120
Las Vegas, NV 89119
Ph. (702) 819-7770
Fax (702) 819-7771
Adam@breedenandassociates.com
Attorney for Appellant Taylor

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

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

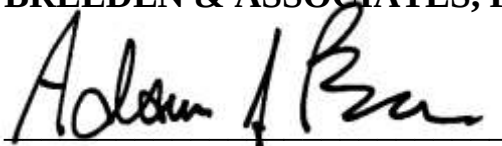
There are no corporations or business entities involved in this appeal for the Appellant and, therefore, there are no related or parent companies for the Appellant to disclose.

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 22nd day of May, 2022.

BREEDEN & ASSOCIATES, PLLC



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376 E. Warm Springs Rd., Suite 120
Las Vegas, NV 89119
Ph. (702) 819-7770
Fax (702) 819-7771
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Attorney for Appellant Taylor

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REPLY ARGUMENT, POINTS AND AUTHORITIES

A. Opening General Remarks

Taylor begins her reply by addressing two tangent points raised in the Answering Brief. First, Dr. Brill notes in his Answering Brief that Taylor did not move for a new trial *prior* to filing her Notice of Appeal. However, this fact is irrelevant because a motion for new trial is not a predicate for filing an appeal. *Rives v. Farris*, Nos. 80271, 81052, 2022 Nev. LEXIS 17, at *1, 138 Nev. Adv. Rep. 17 (Mar. 31, 2022) ("A party is not required to file a motion for a new trial to preserve the party's ability to request such a remedy on appeal for harmful error to which the party objected."). Why Dr. Brill suggests there would have been "practical benefits" to Taylor filing a motion for a new trial prior to appealing or why harmful errors could have been cured by such a motion is unclear.

Second, the Answering Brief discloses that Defense counsel for Dr. Brill had thrown a campaign fundraiser for the presiding District Court Judge, Hon. Monica Trujillo, within roughly a year of a trial. Taylor and her counsel learned this *for the first time* from the Answering Brief, it was never disclosed pre-trial. Also, Judge Trujillo did not disclose she was a former patient of Defendant Women's Health Clinic until after jury selection had already began.[1] VI Appx. 001182 These facts

[1] The disclosure was originally made off the record and only a very brief statement

could easily cause a reasonable person to question the impartiality of the District Court. Nev. Code of Judicial Conduct, Cannons 1 & 2 (promoting a judiciary free of even the *perception* of impropriety). Why Judge Trujillo held numerous pre-trial hearings in the case and never once chose to disclose either of these facts prior to trial is unknown. Counsel for Taylor has not accused Judge Trujillo of bias, he has merely stated facts. After losing the trial, Taylor can accurately tell members of the public she had a trial against a local doctor, that she lost the trial, but the presiding judge did not disclose to her prior to trial that the judge was a patient of the doctor's clinic or that the judge had accepted thousands of dollars in donations from defense counsel who had also thrown a campaign fundraiser for the judge to help get her elected. If these facts sound bothersome as if they might cause a reasonable member of the public to doubt the impartiality of the District Court, perhaps the disclosures should have occurred pre-trial so Taylor could have assessed them and moved to disqualify the judge or request recusal. However, this appeal stands submitted on the errors made at trial and thoroughly briefed below.

B. <u>The District Court erred in Excluding Taylor's Special Damages</u>

At trial, this case was about whether Dr. Brill exercised reasonable care and

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was put on the record about this issue. Since the District Court did not disclose its relationship to the Defendant clinic until jury selection had already begun, Taylor was given a Hobson's choice of proceeding with a judge who was a patient of the Defendant clinic or asking for a mistrial. Her counsel felt compelled to begrudgingly proceed at that point.

skill in performing the procedure when he burnt or pushed a medical instrument through two different organs of Taylor for no medical reason. The extent of Taylor's injuries is directly related to this question of liability. Minor perforations during the blind portions of the procedure may be unavoidable but Taylor's perforations were made while the camera was being used and were anything but minor—Dr. Brill burnt or jammed his way through two organs and caused perforations measured in *centi*meters, not *milli*meters. The extent of the damage and amount of Taylor's special damages directly reflected on Dr. Brill's asserted lack of reasonable care and skill. However, the District Court refused to admit over $200,000 in special damages, which minimized the severity of Dr. Brill's conduct and medical error. The issues of liability and damages were closely intertwined in this case.

Dr. Brill is correct that a personal injury claimant must present evidence that the treatment the claimant received post-incident was reasonable and necessary. However, this was not an issue in this trial since Taylor's retained medical expert, Dr. Berke, testified her treatment was reasonable and necessary. (X Appx. 2000-2002) Instead, Taylor's appeal arises from the requirement that evidence be put forward that her medical charges were usual and customary, often also called usual, customary and *reasonable* or UCR. The Defense often conflated these two different requirements of reasonability (reasonableness of the treatment versus reasonableness of the charges), asking witnesses who testified to the usual and

customary nature of the billing charges whether they were doctors who could testify the *treatment* (as opposed to the billing amount) was reasonable, which was not the purpose of why those witnesses were called. (*E.g.*, IX Appx. 1892-1893)

The Defense argument at trial was that any witness testifying to the usual and customary nature of medical charges would have to have conducted some sort of research of what every other provider in the community charged, which is an impossible standard for a personal injury claimant to meet because most providers will not publish or freely share their chargemasters. (IX Appx. 1893-1895) Literally no doctor or administrator of a facility could satisfy that standard. The most evidence that is ever available on this issue in a typical case is that the provider charged the general public price which is set by the market and is usual and customary in their experience. This is the exact evidence Taylor sought to present at trial regarding her medical expenses but the District Court excluded them. Even the most minimal of evidence on this issue should have been enough to go to the jury for a decision, especially given that the Defense had no witness to contest the usual and customary nature of the charges. The District Court erred when it excluded all special damages by holding that insufficient evidence of the usual and customary nature of the charges existed and a new trial is warranted.

C. The District Court erred by Repeatedly Allowing Dr. Brill and his Counsel to Make Assumption of Risk Arguments

Taylor sought to bar all evidence and argument at trial of so-called "risks" and

"complications" because "risks" and assumption of risk is irrelevant to the issue of standard of care set forth in NRS § 41A.015. Neither word even appears in the statute. The assertion by the Defense that a result of surgery is a "risk" or that the patient knew of risks and consented to the surgery regardless is not a defense to a medical malpractice action. Therefore such arguments are highly misleading to the jury and prejudicial to the injured patient. This is a universal principle in medical malpractice law and the exact phrases and arguments used by Dr. Brill's counsel at trial are textbook examples of the types of evidence and argument which are barred. These errors would warrant a new trial in every other state whose cases were cited by Taylor in her brief in support of this issue. The question this appeal presents is whether Nevada will follow this law.

Dr. Brill seems to realize he will surely lose this appeal if he admits that what he really presented at trial was an assumption of risk defense so he tries to re-characterize what occurred at trial. As an aside, it is a bit difficult to describe defense counsel's comments as anything other than an assumption of risk argument. Take for example these remarks during closing argument:[2]

[2] As explained in Taylor's Opening Brief, prior to closing argument it was understood that these risk/assumption of risk arguments would be made by Defense counsel in closing. The District Court had overruled all objections to this evidence during trial so Taylor's counsel was granted a continuous objection on this issue since requiring contemporaneous objections would have meant an inordinate number of interruptions. (XIII Appx. 2553) That is why there was no contemporaneous objection to this from Taylor's counsel.

> 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)

However, Dr. Brill tries to re-characterize statements such as this and his overall defense as a sort of "unavoidable accident" argument, which is a tough sell. This is but one example, Taylor's Opening Brief thoroughly recounted that the assumption of risk arguments pervaded the entire trial.

Taylor's counsel knew how highly improper this evidence and argument was and made sure that no medical witness testified that the perforations were actually unavoidable or unpreventable by Dr. Brill. (Dr. Berke at X Appx. 1957-1958, Dr. McCarus at XI Appx. 2254-2255, Dr. Brill at XII Appx.002317-2318). Not a single medical witness testified the perforations were out of Dr. Brill's control or unavoidable. Taylor's counsel insisted on getting this testimony clear on the record because he knew that this case was likely going to have to be appealed based on the improper assumption of risk evidence and knew he would have to show the Supreme Court plain testimony where all medical witnesses testified that what happened to Taylor was <u>not</u> unavoidable due to her anatomy and hysteroscopy could be safely performed on her. In fact, the testimony was that about one out of five woman have a retroverted uterus, so this was hardly an unusual condition at all. Every medical witness testified they had safely performed the hysteroscopy procedure on a woman

with this anatomy. (X Appx. 1956-1957) Dr. Brill is only trying at this stage to re-characterize his defense as an unavoidable or unpreventable accident because he knows an assumption of risk defense (which is what he actually presented at trial) is clearly improper.

Dr. Brill tries to argue that in fact the District Court excluded some paperwork about risks at trial, but as Taylor noted in detail in her Opening Brief, the District Court initially did this and then reversed itself and allowed a full discussion of paperwork provided to Taylor regarding risks of the procedure—some provided to her *after* her botched surgery so they could not have possibly been relevant to her pre-surgery understanding of risks even if that were a defense. The District Court erred in allowing the evidence and argument of so-called "risks" and assumption of risk because that is a faux defense that is highly misleading to the jury and prejudicial to Taylor. This error warrants a new trial.

D. The District Court erred in Applying NRS § 42.021 Regarding Collateral Sources

Taylor asserts that collateral source evidence under NRS § 42.021 was improperly admitted in a few different ways. During the pendency of this appeal, the Nevada Supreme Court made clear in *Harper v. Copperpoint Mut. Ins. Holding Co.*, 138 Nev. Adv. Rep. 33 (2022) that NRS § 42.021 will be strictly and literally construed from its plain language only. Since NRS § 42.021 allows only evidence of *payments* made by a collateral source and not write-downs or write-offs of the

balance, the District Court clearly erred in allowing evidence of write-offs.

Dr. Brill argues that because the jury did not find liability, any error as to damages is harmless error. Taylor disagrees. Issues of liability and damages are often intertwined and it prejudices the victim's case for the jury to hear collateral source evidence suggesting she sustained no damages. This is why incorrect admission of collateral source evidence is always considered reversible error. *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."). Additionally, Dr. Brill does not clearly respond to Taylor's argument that if a Defendant lacks expert testimony to establish that the collateral source payments are the usual and customary amount of medical expenses, NRS § 42.021 should not be used at all. Dr. Brill offers no valid reason he admitted this evidence other than to wrongly suggest to the jury that Taylor was already compensated or that the payments were the usual and customary billed amounts, in other words improper nullification reasons. Surely NRS § 42.021 offers no blanket relief from ethical rules that defense counsel shall not make nullification arguments. However, that is exactly what defense counsel are doing when they seek to introduce collateral source payments under NRS § 42.021 but have no other evidence that the payments represent the usual and customary amount of charges (position already rejected by the Nevada Supreme Court in the *Khoury* decision). The Nevada Supreme Court has never

addressed this nullification argument and the seeming attempt of NRS § 42.021 to usurp the judiciary's role in determining what is admissible evidence violates separation of powers principles. Incorrect admission of this collateral source evidence by the District Court warrants a new trial on its own or when considered cumulatively with other asserted errors.

E. The District Court erred in not Admitting the Sample Resectoscope into Evidence or Allowing the Jury to Handle it

The Symphion resectoscope itself (the medical instrument which caused the perforations) was a crucial piece of evidence during trial. The actual resectoscope used during Taylor's procedure was discarded by Dr. Brill after surgery because it is a disposable medical device. However, both sides at trial brought a sample resectoscope of the same model to refer to during trial. Taylor sought to introduce that sample or exemplar resectoscope into evidence so the jury could touch it for themselves. The resectoscope is incredibly blunt and unlikely to cause injury with the tip as Dr. Brill maintained and greatly supported Taylor's theory of the case that the most likely way the perforations occurred was by burning.

Dr. Brill argues that "a demonstrative exhibit by definition is not evidence" or that demonstrative evidence should never be admitted into evidence, but no court has ever taken this position. Demonstrative evidence such as computer animations, autopsy photos, surgery illustrations, charts, summaries and all sorts of demonstrative evidence is admitted in courts every day. *Ramsey Cty. v. Stewart*, 643

N.W.2d 281, 293 (Minn. 2002) ("The standard for the admissibility of demonstrative evidence and visual aids is whether the evidence is relevant and accurate and assists the jury in understanding the testimony of a witness."); *Pascale v. Hechinger Co. of Pa.*, 426 Pa. Super. 426, 437, 627 A.2d 750, 755 (1993) ("demonstrative evidence is admissible if its probative value outweighs the likelihood of improperly influencing the jury"). The Nevada Supreme Court's jurisprudence discussing admission of demonstrative evidence has focused mostly on photographs of wounds or autopsies but does exist. *E.g.*, *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997) (discussing admission of demonstrative victim photos). However, whether the resectoscope is classified as demonstrative or substantive/direct evidence is debatable to begin and exemplars or samples of goods are routinely admitted into evidence.

Regardless, Dr. Brill's argument that demonstrative evidence is not real evidence was not even the basis for the District Court's decision to refuse to admit this evidence. Instead, the crucial evidence was excluded due to an alleged COVID concern, despite the facts that (a) by serving all jurors indicated vaccination, (b) the medical instrument could have easily been wiped sterile before handing it to the jury, and (c) the jury was allowed to receive all other admitted exhibits in binders which had also been touched by multiple persons and thus carried the exact same COVID risks. This was yet another example of Taylor wanting to provide important evidence

to support her case to the jury and the District Court seemingly straining to justify or favor whatever the defense position happened to be. The defense certainly didn't want the jury to touch the blunt tip of the instrument after arguing the whole trial that it was unavoidable by Dr. Brill that the instrument be pushed through the uterus and into the small bowel. Failure to allow the jury to physically touch one of the most important pieces of evidence in the case which Taylor asserts heavily supported her expert's main theory of the case warrants a new trial on its own or when considered cumulatively with other asserted errors.

F. The District Court Erred in Denying Taylor's Counsel the Ability to Cross-Examine Dr. Brill's Expert on Conflicting Testimony he gave in Other Similar Cases

Given that Dr. McCarus was Dr. Brill's sole standard of care expert, his testimony was critical to the trial and Taylor's counsel should be allowed all reasonable leeway to impeach his opinions and expose bias. Here, Taylor's resourceful counsel found not one, not two, but *three* similar cases where the expert had been retained by the claimant instead of the doctor and in those matters testified that bowel perforations during similar procedures *were* below the standard of care.

Dr. Brill defends the District Court's decision to deny this avenue of cross-examination by saying it was in the District Court's discretion to bar the evidence and this was not "manifestly wrong." Taylor emphatically disagrees. Cross-examination is the heart of litigation and exposes bias and credibility. Here, had the

jury heard the full evidence and argument that Dr. Brill's own expert had testified against his position in three similar cases, it would have been incredibly powerful evidence against Dr. Brill's expert. Further, Taylor's counsel could not use this compelling evidence in closing argument either. The District Court's ruling was essentially that the jury was incapable of weighing and understanding that the procedures were similar but slightly different. However, it is *the jury* and not the judge that should be left to weigh the evidence and how it applies to the case at hand. Failure to allow fair and compelling cross-examination of Dr. Brill's expert by the District Court warrants a new trial on its own or when considered cumulatively with other asserted errors.

G. The District Court Erred by Denying the Phrase "Send a Message" During Closing Arguments

The District Court entered a blanket order that Taylor's counsel could not use the phrase "send a message" in closing argument. (V Appx. 963, 1098-1099) Dr. Brill's first argument at the trial court level to bar this phrase was that "send a message" can only be used in punitive damages cases. (IV Appx. 742) After Taylor noted that neither *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 78, 319 P.3d 606, 613-14 (2014) nor *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 269, 396 P.3d 783, 790 (2017) (both allowing "send a message arguments") were punitive damages cases and the Nevada Supreme Court approved send a message arguments in both, Dr. Brill fell back to an argument in his Answering Brief now that Taylor wished to

inappropriately use the phrase to "encourage jurors to put the law of professional negligence aside to cure some social issue." However, Taylor stated she wished to ask the jury to "send a message" to Defendants that "safety is important, that he [Dr. Brill] must answer for the injury he caused to his patient [Taylor], and that he [Dr. Brill] cannot be careless toward his patient [Taylor]." (I Appx. 112) None of this seems like an appeal to cure social ills or to decide the case on something other than the facts and evidence. Instead, per Nevada Supreme Court cases, it is specific to the dispute between Taylor and Dr. Brill only. Absolutely nothing in those examples asks jurors to disregard the law, although the examples were not meant to be the only way the phrase might be used.

The District Court's disallowance of the phrase "send a message" in any manner is perhaps the best example of the District Court simply chipping away at effective trial techniques for plaintiff attorneys that have been approved by the Nevada Supreme Court in other cases. While the District Court does have discretion, the Nevada Supreme Court's decisions should not be reserved for some attorneys and cases but not available for use by all attorneys. Moreover, when judicial discretion is always exercised against one party and to the favor of another party, it is hardly fair discretion. Failure to allow "send a message" arguments by the District Court warrants a new trial on its own or when considered cumulatively with other asserted errors.

H. "Conscience of the Community" arguments were improperly barred

Next, Taylor argued that the District Court erred in barring her from referring to the jury as the "conscious of the community." Notably, in arguing against this Dr. Brill cites not a single example of written court opinion in the United States in support of his argument that Taylor's counsel cannot tell the jury it is the conscience of the community. Instead, Dr. Brill merely argues that Taylor must establish a breach of the standard of care for a physician through expert testimony. Indeed, Taylor called her own expert, Dr. Berke, to do this who testified at length as to why Dr. Brill failed to use reasonable care and skill when he put the resectoscope through two organs (the uterus and the small bowel) when in a proper procedure the instrument would never breach the wall of the uterus. (X Appx. 1990-1995) However, every case has medical experts who disagree and it is *the jury* acting as the conscious of the community that determines which experts are correct and what conduct will be deemed reasonable care and skill by a physician.

What Taylor wanted to argue is that *the jury* decides what is reasonable care and skill for the medical community—the medical community does not get to label some injuries risks to avoid liability for them. The entire theme of Dr. Brill's defense was that surgeries have risks so he should not be liable, which is not an accurate statement of the law. Failure to allow "conscience of the community" arguments by the District Court warrants a new trial on its own or when considered cumulatively

with other asserted errors.

I. The District Court Erred During Voir Dire by not Allowing Taylor's Counsel to Question Jurors regarding Attitudes and Bias toward Tort Reform and Medical Malpractice cases

Taylor argues it was error for the District Court to refuse her counsel's requests to ask jurors questions about attitudes and perceptions of tort reform, KODIN and medical malpractice cases in general given the extreme amount of public discourse and news stories regarding these topics. Taylor's Opening Brief submitted a long and detailed citation to authority from across the country as to why virtually every court considering the issue has found that it is reversible error per se in a medical malpractice trial for the trial court not to allow voir dire into subjects regarding tort reform. Dr. Brill offered no authority which directly countered this.

Prior to trial, Taylor's counsel was well aware of this Court's decision in *Thomas v. Hardwick*, 126 Nev. 142, 149, 231 P.3d 1111, 1116 (2010) where, in a medical malpractice trial, the Nevada Supreme Court acknowledged that tort reform and medical malpractice "crisis" voir dire may be appropriate. In *Thomas*, the Supreme Court denied the appeal in that particular case on the basis that (a) plaintiff's counsel in *Thomas* had actually agreed to some of the limitations, (b) plaintiff's counsel in *Thomas* failed to make a record of voir dire he wished to ask but was denied, and (c) plaintiff's counsel in *Thomas* failed to lay a foundation for such voir dire. As a result, Taylor's counsel made certain to (1) indicate on the

record they did not agree to the restricted voir dire, (2) provided a specific but non-exclusive[3] list of voir dire they wished to ask, and documented counsel wanted to ask jurors questions regarding tort reform (whether they agreed with caps, thoughts on frivolous lawsuits, etc.) but were unable to, and (3) laid a firm foundation for this voir dire by briefing the KODIN campaign and recently expressed juror attitudes from another case decided by the Nevada Supreme Court which detailed how some jurors still have negative attitudes toward medical malpractice cases formed by KODIN and other tort reform messages from media. (II Appx. 392, IV Appx. 625-627). Indeed, as Taylor's counsel often argues KODIN has never ended--one can find it still lobbies, solicits donations, and maintains a website to this day.[4]

Dr. Brill's brief does not respond with any actual counter-authority. Instead, he tries to characterize the proposed voir dire as trying to "indoctrinate" jurors, which is inaccurate. If questions about tort reform were to unfairly "indoctrinate" jurors, the Nevada Supreme Court (and all the other state courts cited by Taylor) would have simply adopted a bright-line rule barring that line of questioning. Instead, most have adopted the opposite bright-line rule that it is reversible error to

[3] Taylor wishes to make clear that the specific questions barred by the District Court were *examples* only of proposed voir dire. The District Court plainly ruled that all questions about tort reform of any kind were off limits, so none whatsoever were asked to comply with that ruling, over the objection of Taylor's counsel.

[4] *See* https://nvdoctors.org/kodin/ ("With this in mind, Keep Our Doctors In Nevada's (KODIN's) challenge will be significant to protect Nevada's tort laws.).

deny Taylor's counsel the ability to address those topics in voir dire. The voir dire, some of which is specifically listed and some of which is referred to only by topic, does not ask jurors to return a certain verdict nor does it argue Taylor's case to the juror. Dr. Brill further argues that Taylor "points to no evidence of any recent or ongoing medical campaigns regarding medical malpractice and tort reform" despite the fact that KODIN still exists as a lobbying entity today and Taylor extensively laid the foundation for what occurred in the recent *Capanna* case where many jurors had pre-existing opinions of tort reform as if they were reading from a KODIN commercial. Failure to allow the voir dire by the District Court warrants a new trial on its own or when considered cumulatively with other asserted errors.

J. The District Court Erred in Failing to Give the Pattern Instruction to the Jury to Disregard any Insurance when reaching its Verdict

As previously stated, Taylor desired a standard, pattern jury instruction that the jury is to disregard any consideration of insurance in reaching its verdict. The Nevada Supreme Court expressly found this was a proper instruction in a medical malpractice trial in *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). As Taylor explained in her opening brief, many jurors speculate that there are "astronomical" prices on medical malpractice insurance based on the KODIN campaign and as a result the

defendant may lack coverage. Many jurors, if counsel is allowed to ask these questions, will indicate a hesitancy to make awards if they feel the doctor is personally responsible. These juror attitudes are the reason the standard jury instruction is given in virtually every civil trial, whether the defendant has coverage or not.

Dr. Brill argues that giving the instruction unfairly draws attention to the potential for insurance coverage. This argument was (1) apparently rejected by every committee drafting the standard jury instructions since it appears in the 1986, 2011 and 2018 versions of the Nevada pattern jury instructions, and (2) the argument was actually considered by the Nevada Supreme Court and rejected in the *Capanna* case. Dr. Brill's quoted language in his argument that the instruction is "incredibly improper" is actually from the district court judge in the *Capanna* case who apparently abandoned the position and actually gave the instruction. The quote is not from the Nevada Supreme Court opinion on this issue, which found no error in giving the instruction or how plaintiff's counsel referred to the instruction.

What Taylor's counsel would also like to stress here is that if this state has a two-tiered system of justice where certain plaintiff attorneys get routine, pattern jury instructions while others do not, we have a pecking order of counsel instead of a fair judiciary. Taylor's counsel asked for the *exact same* jury instruction—a pattern instruction—and to make the *exact same* remarks in closing argument as made by

counsel in the *Capanna* case and approved by the Nevada Supreme Court in *Capanna*. However, this was denied by the District Court. It was error for the District Court to disallow this for the reasons stated.

K. The District Court erred in giving a modified *Gunlock* "mere happening" instruction

Taylor's next assertion of error is that the District Court erred in giving a modified *Gunlock* "mere happening" instruction. The Nevada Supreme Court has previously found that incorrectly giving this instruction is grounds for reversal and a new trial in a medical malpractice case. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1005, 194 P.3d 1214, 1219 (2008) ("mere happening" instruction contained a misstatement of the law based on the facts of that case and warranted reversal).

Frankly, the Nevada Supreme Court should revisit *Gunlock* entirely as the case has caused nothing but misunderstanding amongst jurors, unequal application from case to case, and spawned many appeals. *Argument* by defense counsel in closing that a "mere happening" by itself does not establish negligence is one thing; however, when the District Court goes further and gives this as an *instruction* to the jury it serves only to emphasize the defense and confuse jurors. The *Gunlock* instruction merely takes defense argument and gives it to the District Court to speak to the jury, which is incredibly prejudicial and encourages the jury to disregard the actual standard of care instruction(s). Worse yet, as recent case law shows the

Gunlock rule really seems to be that certain judges will refuse a *Gunlock* instruction and this is not error, *see Spilsbury v. Rynders*, 132 Nev. 1031 (2016) (unpublished) and *D & D Tire, Inc. v. Ouellette*, 131 Nev. 462, 471, 352 P.3d 32, 38 (2015) (both affirming denial of a *Gunlock* instruction) but for those claimants unfortunate enough to draw a more defense-minded judge, they get saddled with this instruction. The fact that there is so much disparity among judges in giving this instruction should bother the Nevada Supreme Court, since every claimant in this state deserves the same justice.

In Taylor's case in particular, the District Court modified the *Gunlock* instruction as defense counsel's request to specifically add the term "complication" to the instruction, which fed directly into the defense's faux defense that a mere risk or complication is not enough to establish liability. Indeed, the instruction as given directly told jurors that what occurred to Taylor was simply a "complication" which was highly disputed during trial and not a valid defense regardless. Seizing on this, Dr. Brill's counsel heavily argued the *Gunlock* instruction to the jury rather than the actual standard of care instruction. Defense counsel told the jury the *Gunlock* instruction was "probably the most important instruction" (XIII Appx. 2539) and only mentioned in passing the actual standard of care instruction (compare Taylor's counsel arguing the actual negligence instruction at XIII Appx. 2540 with Brill's counsel barely mentioning it at XIII Appx. 2580). Both the *Gunlock* instruction in

general and the manner in which it was given in Taylor's particular case were error and warrants a new trial.

L. The District Court Erred During Closing Arguments

Taylor next argues that the District Court erred by preventing her counsel from arguing to the jury that the Defense failed to call the pathologist and that the jury could infer the pathologist did not have testimony favorable to the Defense. Notably, discussion of the pathologist's slides was a trial surprise by the Defense and none of the medical experts who testified stated pre-trial that the results were germane to their opinions at all. Indeed, the Defense expert Dr. McCarus was uncertain whether the sample even contained cells from the resectoscope (XI Appx. 2276-2277) and Taylor's expert Dr. Berke never testified all cells were read or examined by the pathologist (neither expert was a pathologist regardless).

Despite decades of case law that a party may comment on the other party's failure to call an allegedly important witness and the fact that the Supreme Court's binding precedent on this issue was a medical malpractice case, *Jain v. McFarland*, 109 Nev. 465, 475, 851 P.2d 450, 457 (1993) (plaintiff's counsel may comment on the defense's failure to call certain witnesses), the District Court invented a new objection called "burden shifting" which will handicap the plaintiff but never the defense in closing arguments. This was extreme error and prevented effective closing argument to counter a surprise argument by Defense counsel heard for the

first time at trial and warrants a new trial.

M. The District Court Erred by Allowing Defense Counsel's Improper use of Habit Evidence and Personal Vouching Warrant a new Trial

Taylor next argues that the District Court erred by allowing evidence of habit to contradict Dr. Brill's actual testimony as to what he told Taylor as well as Defense counsel's personal guarantee that Dr. Brill told Taylor of her perforations when there is no actual evidence this occurred.

In response to this, first the Dr. Brill tries to argue that the statement of his counsel that "I can guarantee you…" was di minimis or "isolated, improper comments" and therefore do not warrant a new trial. Taylor disagrees and the guarantee statement and the appeal to the jury to focus on "What would McBride [defense counsel] say?" (XIII Appx. 2586) rather than the evidence presented is the precise type of defense argument that runs afoul of *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008) (new trials warranted based on improper arguments of defense counsel). Frankly, whenever defense counsel guarantees evidence or urges the jury to focus on what he said rather than the actual evidence it should be a clear sign of prejudicial misconduct.

Second, Dr. Brill argues that "[i]t is also not misconduct to reference Dr. Brill's custom and practice" despite his actual testimony that he could not recall what he told Taylor. Again, however, the Nevada Supreme Court has already decided this issue in favor of Taylor. In *Thomas v. Hardwick*, 126 Nev. 142, 231

P.3d 1111 (2010), another medical malpractice case, the Nevada Supreme Court warned that courts must be "'cautious in permitting the admission of habit or pattern-of-conduct evidence under [NRS 48.059 or its federal analogue] Rule 406 because it necessarily engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character,' in violation of NRS § 48.045." There was no evidence that Dr. Brill recalled what he actually told Taylor in the post-op recovery room, nor was there any evidence that he routinely perforated the bowels of patients, nor was there any circumstantial evidence from her later treatment that Taylor had any idea she sustained perforations until two emergency room visits later. Instead, Defense counsel did exactly what is not supposed to happen: He offered the habit evidence to contradict the actual evidence and testimony in the case and then personally vouched that the habit evidence was true. This error by the District Court warrants a new trial on its own or when considered cumulatively with other asserted errors.

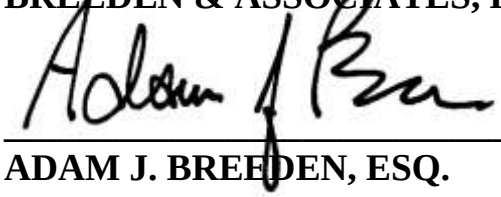
CONCLUSION

There were numerous errors during this trial, not the least of which was a full-blown assumption of risk argument which Dr. Brill and his clinic were allowed to present at every phase of trial. Some asserted errors may seem isolated or forgivable deviances from Nevada Supreme Court precedent, but cumulatively the errors severely limited the ability to Taylor's counsel to effectively present her case.

In closing, Taylor's counsel would like to comment on one last issue. Taylor's counsel does something radical in his practice. He studies what other successful trial attorneys in the state do, he reads what the Nevada Supreme Court has held in written, binding opinions which state what counsel may do and argue at trial, and then he seeks to use that direct, binding authority in his practice to his client's advantage at trial. It might surprise the Nevada Supreme Court to learn that this is an amazingly ineffective strategy. At times in his career, Taylor's counsel has even sought to literally read word-for-word passages from closing arguments approved by the Nevada Supreme Court in binding decisions, only to have the district court forbid the argument. Taylor's counsel requests that the Nevada Supreme Court clarify the importance of a consistent judiciary and adherence to its binding precedent by the District Courts. Opinions of the Nevada Supreme Court should not be optional or freely disregarded as occurred in Taylor's trial.

Respectfully submitted this 22nd day of May, 2022.

BREEDEN & ASSOCIATES, PLLC



ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
376 E. Warm Springs Rd., Suite 120
Las Vegas, NV 89119
Ph. (702) 819-7770
Fax (702) 819-7771
Adam@breedenandassociates.com
Attorney for Appellant Taylor

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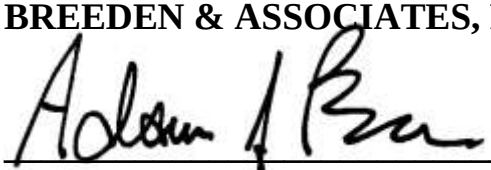
Dated this 22nd day of May, 2022.

BREEDEN & ASSOCIATES, PLLC



ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
376 E. Warm Springs Rd., Suite 120
Las Vegas, NV 89119
Ph. (702) 819-7770
Fax (702) 819-7771
Adam@breedenandassociates.com
Attorney for Appellant Taylor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of May 2022, I served a copy of the foregoing legal document entitled **APPELLANT'S REPLY BRIEF** via the method indicated below:

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